STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1511

State of Minnesota,
Respondent,

vs.

A.S.J.,
Appellant.

Filed March 9, 2010
Affirmed
Collins, Judge*
Concurring specially, Judge Shumaker

Washington County District Court
File No. 82-CR-08-2695

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Doug Johnson, Washington County Attorney, James C. Zuleger, Assistant County Attorney, Stillwater, Minnesota (for respondent)

A.S.J., Oakdale, Minnesota (pro se appellant)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Appellant challenges the district court's denial of her petition to expunge the Bureau of Criminal Apprehension's record of her domestic-assault charge. We affirm.

FACTS

On March 30, 2008, appellant A.S.J. was charged with misdemeanor domestic assault. Appellant appeared in court on April 23, 2008. According to appellant, she intended to plead not guilty because she felt that the prosecutor had been "overzealous" in charging her with domestic assault. Appellant stated that the prosecutor offered her the alternative of pleading guilty to the charge of disorderly conduct. According to appellant, she was told that if she pleaded to the charge of disorderly conduct, paid a fine, and successfully completed probation, the original charge of domestic assault would be "dropped off" of her record. Appellant pleaded guilty to disorderly conduct and successfully completed probation.

Thereafter, while seeking employment, appellant discovered that her Bureau of Criminal Apprehension (BCA) record still shows that she was arrested for and charged with domestic assault on March 30, 2008. The BCA record goes on to show that appellant appeared in court on April 23, 2008, and pleaded guilty to disorderly conduct, and adjudication was withheld. The record states: "Disposition On: 2008-04-23; Plea Amended: Plea agreement Probation 1: starting 2008-04-23."

On April 30, 2009, appellant filed a standard form of petition for expungement of a criminal record. Appellant's petition states that she has been refused two jobs and one

volunteer position because of the domestic-assault charge on her BCA record. According to appellant "the charge looks worse than the incident actually was—it was a fight with my mom, and she was not physically injured in the incident." At the hearing, appellant stated: "I am not seeking an expungement on the disorderly conduct charge." Rather, appellant requested an order from the district court directing the BCA to amend her record by deleting the references to "domestic assault." The petition asserts appellant qualified for relief because she has rehabilitated herself and that, since the offense, she has received "lots of therapy." After reviewing the file and confirming the accuracy of the BCA record, the district court concluded that it lacked authority to order the alteration of an executive-branch record and denied appellant's petition. This appeal followed.

D E C I S I O N

I.

The first issue is whether the district court erred in concluding it did not have authority to alter an executive-branch record. The district court may exercise its discretion and expunge criminal records (1) under the authority granted in Minn. Stat. § 609A.02 (2008) and (2) under the district court's inherent authority. *State v. S.L.H.*, 755 N.W.2d 271, 274 (Minn. 2008).

We first examine whether the district court had statutory authority to grant expungement. In Minn. Stat. § 609A.02, the legislature provided for expungement for certain controlled substance crimes, convictions of juveniles who were prosecuted as adults, and certain criminal proceedings not resulting in a conviction. Here, the only arguably applicable provision is subdivision three, which reads:

> A petition may be filed under section 609A.03 to seal all records relating to an arrest, indictment or information, trial, or verdict if the records are not subject to section 299C.11, subdivision 1, paragraph (b), and if all pending actions or proceedings were resolved in favor of the petitioner.

Minn. Stat. § 609A.02, subd. 3. But appellant pleaded guilty, albeit to the amended charge of disorderly conduct, and therefore "all pending actions or proceedings" were not resolved in her favor. *See State v. L.W.J*, 717 N.W.2d 451, 455 (Minn. App. 2006) (stating that appellant's plea to an amended charge precluded expungement); *State v. Davisson*, 624 N.W.2d 292, 295 (Minn. App. 2001) (holding a stay of adjudication is not a resolution in the defendant's favor). Because the proceedings were not resolved in appellant's favor, the district court correctly concluded that it was without statutory authority to grant appellant's requested relief.

We next examine whether the district court could have granted appellant's request under its inherent authority as a matter of equity. The judiciary possesses inherent authority to expunge criminal records where expungement is "necessary to prevent serious infringement of constitutional rights," *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981), or under other "appropriate circumstances," *State v. S.L.H.*, 755 N.W.2d 271, 276 (Minn. 2008). But a district court may not order expungement or the sealing of records held by executive agencies unless there has been a constitutional violation or "an injustice resulting from an abuse of discretion in the performance of a governmental function." *State v. Schultz*, 676 N.W.2d 337, 345 (Minn. App 2004). Whether the district court has the authority to "issue an expungement order affecting the executive branch is a question of law, which is subject to a de novo standard of review." *State v.*

N.G.K., 770 N.W.2d 177, 181 (Minn. App. 2009). But, even if the district court has the authority to issue an expungement order affecting an executive-branch agency, we review the district court's decision whether to exercise its inherent power to expunge for abuse of discretion. *State v. Ambaye*, 616 N.W.2d 256, 261 (Minn. 2000).

On appeal, appellant argues that she is entitled to limited expungement based on a violation of her plea agreement. According to appellant, the state agreed to drop the original charge from her record in exchange for her plea of guilty to disorderly conduct. Appellant did not make this assertion in her petition, and this purported plea-agreement violation was not developed as a constitutional issue in her argument before the district court. We generally do not consider arguments on appeal from a district court order that were not presented to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (declining to hear on appeal issues not raised below). Moreover, there is nothing in the record to support appellant's unsworn contention that there was a breach of a plea agreement implicating BCA records. In sum, appellant has not presented any evidence, nor is there anything in the record, which would support expungement of her BCA record as a remedy for a constitutional violation. *See State v. H.A.*, 716 N.W.2d 360, 363 (Minn. App. 2006) (reversing an expungement order where the record was devoid of any evidence to support an alleged plea agreement and thus an alleged violation of that agreement).

Appellant's petition requested relief solely on the grounds that she had rehabilitated herself and because references to the original charge of domestic assault remaining on her BCA record has resulted in the denial of two jobs and a volunteer

position. The supreme court has recently held that achieving a petitioner's employment goals is not "essential to the existence, dignity, and function of a court because it is a court," and expungement is therefore not "necessary to the performance of the judicial function as contemplated in our state constitution." *S.L.H.*, 755 N.W.2d at 277-78 (citations and quotations omitted). The court noted that "courts must proceed cautiously when invoking inherent authority" because of the separation of powers concerns present when a court "use[s] judicial authority to enforce or restrain acts which lie within the executive and legislative jurisdictions of another department of the state." *Id.* (citation omitted).

In reviewing the BCA report produced by appellant, the district court noted that the BCA record reflected with accuracy both appellant's arrest and eventual plea of guilty to the amended charge of disorderly conduct. The district court then attempted to view the BCA record through the eyes of someone unfamiliar with such reports and concluded that a reader would determine that appellant was charged with domestic assault but only pleaded guilty to disorderly conduct. The district court stated that it agreed with the state's characterization of the BCA report as "one hundred percent accurate." The court concluded that it did not have authority in this situation to order alteration of the BCA record, and therefore denied appellant's petition. Because appellant's only equitable argument is based on employment opportunities, and because the district court's findings regarding the accuracy of the BCA report are supported by the record, the district court's denial of appellant's petition is not an abuse of the district court's discretion.

II.

Appellant did not move the district court under Minnesota Rule of Criminal Procedure 15.05 for leave to withdraw her plea to disorderly conduct. For the first time on appeal, appellant argues that she should be allowed to withdraw her plea due to the alleged violation of the plea agreement. Because the issue was not raised or addressed before the district court, we will not address this argument for the first time on appeal. *Roby*, 547 N.W.2d at 357 (declining to hear on appeal issues not raised below).

Affirmed.

SHUMAKER, Judge (concurring specially)

I concur, but I write separately to emphasize the need to address a potentially significant injustice relating to the expungement of criminal records.

In *State v. S.L.H.*, 755 N.W.2d 271 (Minn. 2008), the supreme court acknowledged the inherent authority of the judiciary to expunge criminal records in appropriate circumstances, but then, recognizing the doctrine of separation of powers, held that a judicial expungement under the court's inherent authority could not reach the records of the executive branch.

Thus, despite a judicial expungement, the record continues to exist at the Bureau of Criminal Apprehension (BCA) and to be accessible to the public. Furthermore, as here, the BCA record can imply a worse crime than that of which the defendant was convicted. The record, of course, would accurately show the pertinent history, but it is the conviction—and not the charge—that is significant. A person could be *charged* with a very serious crime but be convicted for a relatively minor crime. The BCA records will show the charge and the conviction. Charges are easy to make, and occasionally can be made recklessly, but convictions are difficult to obtain. I believe the defendant continues to carry the stigma of the charge as well as that of the conviction because of the BCA record.

When the court grants an expungement petition, presumably the convicted individual may then honestly state on employment, housing, and school applications, or the like, that he or she has no conviction. But, if the BCA record continues to show a conviction, the person appears not only to be a criminal but a liar as well.

It is critical to recognize that the court does not grant an expungement without a strong affirmative showing of rehabilitation. And rehabilitation is the grandest goal of the criminal justice system. It is more than slightly cynical for the law to permit an expungement upon a showing of rehabilitation but then to allow the public record to appear to contradict that showing. We are left with the proposition of, "Once a criminal, always a criminal."

Because of the holding in *S.L.H.*, only the legislature can address this problem and remedy the serious injustice that results to some people. Having already shown through the statutes cited in the majority opinion that it recognizes the propriety of expungements, the legislature should broaden the reach of the court's inherent authority to expunge executive branch records. The legislature could craft a statute that provides for procedures the court must follow in order to have the authority to expunge records beyond those held by the judiciary.

The fact is that some people do work diligently and honestly to put their past behind them and to become law-abiding, productive citizens. We ought to encourage and applaud, rather than forever stigmatize, such people.

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