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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1237**

State of Minnesota,
Respondent,

vs.

J. W. L.,
Appellant.

**Filed April 24, 2017
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-00-100078

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Scott J. Strouts, Scott J. Strouts, LLC, Minneapolis, Minnesota; and

Lawrence G. Rapoport, Larry Rapoport, Ltd., Minnetonka, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

ROSS, Judge

J.W.L., drunk, started a fistfight after a football game at the Metrodome in October 2000. Police arrested J.W.L., and he eventually pleaded guilty to felony third-degree

assault. He successfully completed the terms of his probation, and his felony conviction became a misdemeanor by operation of statute. He filed an expungement petition, which the district court denied as not authorized by statute. On appeal, J.W.L. asks us to overrule our recent holding that statutorily unlisted felonies that are converted to misdemeanors may not be treated as misdemeanor convictions under the misdemeanor expungement statute. But we follow our published decisions and, in any event, the supreme court has now upheld the decision. J.W.L. argues that he is nonetheless eligible for “permissive” expungement. But we find no basis for J.W.L.’s “permissive” expungement in the statute. We therefore affirm.

FACTS

Appellant J.W.L. pleaded guilty to felony third-degree assault in March 2001 for initiating a brawl after a Minnesota Vikings football game. The district court sentenced him to a stay of imposition, and he successfully completed probation. The district court recognized that his conviction reduced to a misdemeanor by operation of Minnesota Statutes section 609.13, subdivision 1(2) (2000).

J.W.L. petitioned the district court to expunge the records of his conviction in 2013. The district court denied the petition in part, holding that J.W.L. is not entitled to statutory expungement in all branches of the government. But it granted the petition in part under its inherent power to expunge criminal records held by the judicial branch. J.W.L. asked the Bureau of Criminal Apprehension to seal his criminal record, but it opposed his request.

J.W.L. again petitioned the district court in February 2016 to order the expungement of any executive branch records of his conviction, this time under amended Minnesota

Statutes sections 609A.02, 609A.025, and 609A.03 (2014). The district court denied the petition. It relied on our holding in *State v. S.A.M.*, 877 N.W.2d 205 (Minn. App. 2016), *review granted* (Minn. May 31, 2016), and held that J.W.L. does not qualify for statutory expungement of misdemeanor records because he pleaded guilty to an unlisted felony.

J.W.L. appealed the district court’s denial of his expungement petition. After the parties briefed and argued the issue, the supreme court affirmed our *S.A.M.* decision, holding that “a felony conviction that has been deemed a misdemeanor by Minn. Stat. § 609.13, subd. 1(2), is not eligible for expungement under Minn. Stat. § 609A.02, subd. 3(a)(3).” *State v. S.A.M.*, ___ N.W.2d ___, ___, 2017 WL 999559, at *5 (Minn. Mar. 15, 2017).

D E C I S I O N

J.W.L. challenges the district court’s expungement decision, which we review for an abuse of discretion. *See State v. K.M.M.*, 721 N.W.2d 330, 332–33 (Minn. App. 2006). He argues that his conviction is now an expungable misdemeanor, and, alternatively, that the expungement statute authorizes “permissive” expungement of felonies that are not listed in the statute. Both arguments require us to interpret statutes, which we do *de novo*. *State v. L.W.J.*, 717 N.W.2d 451, 455 (Minn. App. 2006).

I

J.W.L. argues that the district court erred by holding that his felony-turned-misdemeanor conviction is ineligible for statutory expungement. Our recent decision, affirmed by the supreme court after the parties submitted this appeal, established that felony convictions deemed misdemeanors by Minnesota Statutes section 609.13 are

ineligible for statutory misdemeanor expungement. *See S.A.M.*, 877 N.W.2d at 209–10; *S.A.M.*, ___ N.W.2d at ___, 2017 WL 999559, at *5. The *S.A.M.* holding defeats J.W.L.’s argument.

II

J.W.L. argues that the district court should have granted his petition because section 609A.03, subdivision 5, establishes a “second ‘permissive’ method under which the trial court is statutorily authorized to grant an expungement request.” We infer that he reads subdivision 5(a)’s statement that “expungement of a criminal record is an extraordinary remedy *to be granted* only upon clear and convincing evidence” (emphasis added) as authorizing a district court to grant statutory expungement of any crime by applying the 12 factors listed in subdivision 5(c). He also points to section 609A.03, subdivision 5a, as evidence that the legislature intended to permit expungement of felonies not listed in section 609A.02, subdivision 3(b).¹ The argument is not compelling.

Nothing in the statutory text expressly supports J.W.L.’s position. He argues that the supreme court recognized “permissive” expungement in *State v. R.H.B.*, 821 N.W.2d 817, 821 n.2 (Minn. 2012), even though no case has relied on *R.H.B.* for that proposition. The *R.H.B.* court stated, “An individual . . . may petition for expungement of criminal records under Minn. Stat. § 609A.03, subd. 5(a).” *Id.* J.W.L. misconstrues that statement

¹ J.W.L. attempted to reposition this issue during oral argument on appeal, maintaining that subdivision 5a establishes its own independent basis for “permissive” expungement. Because we do not consider arguments raised after the appellant’s opening brief, *see Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009), we do not address the later variation.

to mean essentially that *any individual is permitted to petition for expungement of any criminal record and have it reviewed under section 609A.03, subdivision 5(a)*. J.W.L.’s reading elevates the footnote beyond its purpose as dicta clarifying that subdivision 5(a) was not at issue in R.H.B.’s case. R.H.B. was eligible for relief under subdivision 5(b) only, because he met the threshold eligibility requirements of section 609A.02, subdivision 3. See Minn. Stat. §§ 609A.02, subd. 3, 609A.03, subd. 5(b) (2010). And J.W.L.’s reading effectively omits section 609A.02 and its threshold eligibility requirements from the expungement procedure. The more reasonable and complete reading of the supreme court’s statement is, therefore, *an individual eligible under section 609A.02, subdivisions 1 or 2, may petition for the expungement of criminal records under section 609A.03, subdivision 5(a)*.

Our reading comports with caselaw and the expungement statute’s structure. Under the previous version of the expungement statute, we held that “subdivision 5 does not provide a separate ground for expungement.” *L.W.J.*, 717 N.W.2d at 455. We observed that section 609A.02, which was captioned, “Grounds for Order,” established the statutory grounds for expungement. *Id.* We reasoned that, if the legislature had wanted to create additional grounds, it likely would have included them in that section. *Id.* In other words, subdivision 5 (as well as the rest of section 609A.03) is subject to the threshold eligibility requirements in section 609A.02.

The 2014 amendment does not appear to affect *L.W.J.*’s holding. The amendment expanded eligibility criteria and added more detail to the standard of review, but it did not alter the statute’s structure. We recognize that the substance of a statute, and not its caption,

controls our interpretation. See Minn. Stat. § 645.49 (2016); *see also Minnesota Exp., Inc. v. Travelers Ins. Co.*, 333 N.W.2d 871, 873 (Minn. 1983). But we observe that, consistent with our reading of the statute’s substance, section 609A.02 continues after the amendment to carry the heading, “Grounds for Order,” and section 609A.03 is captioned, “Petition to Expunge Criminal Records.” More important, section 609A.02 still establishes the legal bases for an expungement order. And section 609A.03, subdivision 5, still establishes the standard that district courts should apply when considering expungement petitions. A petitioner’s eligibility under section 609A.02 leads to the content requirements and legal standard in section 609A.03. J.W.L.’s argument misses this, essentially mistaking the legal standard as an independent ground for relief. And as we intimated, if the legislature wanted to add grounds for expungement, it likely would have declared so in section 609A.02, not 609A.03. See *L.W.J.*, 717 N.W.2d at 455. Nothing in section 609A.03, subdivision 5, creates a separate class of “permissive” expungements.

J.W.L. also points to section 609A.03, subdivision 5a, as evidence that his conviction may be expunged. That subdivision, in relevant part, states as follows:

An order expunging the record of a conviction *for a crime of violence as defined in section 624.712, subdivision 5*, must provide that the person is not entitled to ship, transport, possess, or receive a firearm for the remainder of the person’s lifetime.

Minn. Stat. § 609A.03, subd. 5a (emphasis added). J.W.L. premises his argument on his notion that this subdivision is unnecessary because none of the expungable felonies in section 609A.02, subdivision 3(b), are crimes of violence. On this theory, he reasons that subdivision 5a’s coexistence with the list of expungable felonies that are not crimes of

violence suggests that a conviction for an unlisted felony crime of violence (like his) could be expunged.

J.W.L.'s elaborate argument fails because, among other things, its premise is flawed. Felony violations of sections 152.025 and 152.097 are indeed expungable. *See* Minn. Stat. § 609A.02, subd. 3(b)(4). And felony violations of chapter 152 constitute “crime[s] of violence.” Minn. Stat. § 624.712, subd. 5 (2014). Contrary to J.W.L.’s position, therefore, subdivision 5a *is* necessary because there remain crimes of violence that can be expunged, and the expungement order would include the firearm restriction.

Affirmed.