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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0893**

State of Minnesota,
Respondent,

vs.

M. M. S.,
Appellant.

**Filed March 5, 2018
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-00-013532

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Andrew Carballo (certified student attorney), Minneapolis, Minnesota (for respondent)

John Arechigo, Arechigo & Stokka, P.A., St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from the denial of his petition for expungement of records of executive-branch agencies, appellant argues that the interests of justice require this court to grant his request for expungement. We affirm.

FACTS

Appellant M.M.S. arranged to purchase hundreds of cartons of stolen cigarettes from an employee of a tobacco-products wholesaler. M.M.S. then resold the cigarettes at his St. Paul tobacco store. The offenses occurred from June 1999 to February 9, 2000. M.M.S. was charged with eleven counts of felony theft, receiving stolen goods, purchasing more than 20,000 cigarettes or \$500 or more worth of tobacco products from an unlicensed seller, and related offenses.

On July 26, 2001, pursuant to a plea agreement, M.M.S. entered a petition to plead guilty to one count of purchasing more than 20,000 cigarettes or \$500 or more worth of tobacco products¹ from an unlicensed seller in violation of Minn. Stat. § 297F.20, subd. 9(c) (1998), and one count of conspiracy to commit that offense in violation of Minn. Stat. §§ 297F.20, subd. 9(c), 609.05, subd. 1 (1998). The district court accepted the plea, stayed imposition of sentence,² and placed M.M.S. on probation. One condition of probation was that M.M.S. “[p]ay restitution in the amount of \$20,000 for damages caused by this offense.” M.M.S. completed probation and was discharged in 2005, and his felony convictions were deemed to be for misdemeanors. See Minn. Stat. § 609.13, subd. 1(2) (2004).

¹ Cigarettes are not included in the statutory definition of “tobacco products.” Minn. Stat. § 297F.01, subd. 19 (1998).

² The district court stated that “[i]f sentence is imposed, the presumptive sentence for this offense is one (1) year and one (1) day,” which was a felony sentence. See Minn. Stat. § 609.02, subd. 2 (1998 & Supp. 1999); see also Minn. Sent. Guidelines II.A & cmts. II.A.03.8, II.A.05.

On October 6, 2016, M.M.S. petitioned for judicial and statutory expungement of his two convictions on the grounds that he was sentenced to a stay of imposition, it had been more than ten years since his discharge from probation, and he had committed no further crimes. Following a hearing, a referee recommended granting the petition as to judicial-branch records and denying the petition as to the records of executive-branch agencies, and the district court confirmed the referee's order.

M.M.S. sought review of the referee's order, and, while that motion was pending before the district court, also sought review in this court. This court stayed briefing in the appeal pending the district court's review of the referee's decision. Following a hearing, the district court granted M.M.S.'s request to seal judicial-branch records and denied his request to seal records of executive-branch agencies. This court then issued an order lifting the stay in briefing.

D E C I S I O N

This court reviews a district court's expungement decision for abuse of discretion, *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013), giving de novo review to issues of statutory interpretation. *See State v. S.A.M.*, 891 N.W.2d 602, 604 (Minn. 2017). "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *State v. Johnson*, 743 N.W.2d 622, 625 (Minn. App. 2008).

Statutory expungement is available under prescribed circumstances set forth in Minn. Stat. § 609A.02 (2016). Under that section, a person may seek expungement if the person "was convicted of or received a stayed sentence for a felony violation of *an offense*

listed in paragraph (b), and has not been convicted of a new crime for at least five years since discharge of the sentence for the crime.” *Id.*, subd. 3(a)(5) (emphasis added). Paragraph (b) lists 50 felony offenses to which subdivision 3(a)(5) applies. *Id.*, subd. 3(b). M.M.S. concedes that the list of 50 felony offenses does not include the felony offenses for which he received stayed sentences in 2001. Thus, because M.M.S.’s offenses are not listed in Minn. Stat. § 609A.02, subd. 3(b), the unambiguous language of Minn. Stat. § 609A.02, subd. 3(a)(5), does not permit M.M.S. to file a petition for expungement of records relating to those offenses, and the district court did not abuse its discretion in denying M.M.S.’s petition for expungement as to the records of executive-branch agencies. See Minn. Stat. § 645.16 (2016) (stating that “[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit”).

M.M.S., nevertheless, argues that “the interests of justice require this Court to grant [his] request for statutory expungement of law enforcement records.” M.M.S. does not, however, cite any authority that permits this court to disregard a requirement of Minn. Stat. § 609A.02, subd. 3(a)(5), “in the interests of justice.” And even if this court had such authority, M.M.S. has not established the claimed factual basis for his request for expungement in the interests of justice.

M.M.S. claims that, when he pleaded guilty in 2001, a violation of Minn. Stat. § 297F.20, subd. 9(c) (2000), was a felony, but, following an amendment of that statute in 2003, a violation of Minn. Stat. § 297F.20, subd. 9(c), became a gross misdemeanor. See 2003 Minn. Laws ch. 127, art. 7, § 11, at 853 (eff. July 1, 2003). M.M.S. contends that the

legislature could not have properly considered whether his convictions should be included in the list of 50 felonies in Minn. Stat. § 609A.02, subd. 3(b), because, when the legislature enacted the list in 2014, his offenses had become gross misdemeanors. *See* 2014 Minn. Laws ch. 246, § 6, at 811-14 (eff. Jan 1, 2015).

M.M.S.'s argument mischaracterizes the 2003 amendment to Minn. Stat. § 297F.20, subd. 9. Before the amendment, that subdivision contained three paragraphs, which defined offenses for purchasing cigarettes or tobacco products from an unlicensed seller. *See* 2003 Minn. Laws ch. 127, art. 7, § 11, at 853. Paragraph (a) defined a misdemeanor offense as purchasing more than 200 but fewer than 5,000 cigarettes or up to \$100 worth of tobacco products. *Id.* Paragraph (b) defined a gross-misdemeanor offense as purchasing 5,000 or more, but fewer than 20,001 cigarettes or up to \$500 worth of tobacco products. *Id.* And paragraph (c) defined a felony offense as purchasing more than 20,000 cigarettes or \$500 or more worth of tobacco products. *Id.*

The 2003 amendment added a new paragraph at the beginning of subdivision 9 and designated the new paragraph as paragraph (a). *Id.* Because the new paragraph at the beginning of subdivision 9 was designated as paragraph (a), the previous paragraph (a) became paragraph (b), the previous paragraph (b) became paragraph (c), and the previous paragraph (c) became paragraph (d). *Id.* The 2003 amendment also made one substantive change in the definition of a felony offense. Before the amendment, purchasing tobacco

products worth \$500 or more was a felony. *Id.* The amendment increased this amount to require a purchase of tobacco products worth \$1,400 or more for a felony offense.³ *Id.*

This substantive change, however, provides no support for M.M.S.'s claim that the felony offenses to which he pleaded guilty in 2001 became gross-misdemeanor offenses after the 2003 amendment. Although the factual basis for M.M.S.'s guilty plea is not clearly established in the record,⁴ it appears that the plea was solely based on purchasing more than 20,000 cigarettes, and, therefore, the change regarding tobacco products had no effect on M.M.S.'s offenses. And, even if the plea was based on purchasing tobacco products, nothing in the record suggests that M.M.S. purchased tobacco products worth more than \$500 but less than \$1,400. Instead, the record shows that, when M.M.S. was sentenced in 2001, the district court required him to pay \$20,000 in restitution for damages caused by his offenses, which suggests that he purchased products worth more than the amount required for a felony offense either before or after the 2003 amendment.

Thus, although M.M.S. is correct that, before the amendment, an offense under paragraph (c) was a felony, and, after the amendment, an offense under paragraph (c) was a gross misdemeanor, the felony offense to which he pleaded guilty was simply moved from paragraph (c) to paragraph (d), and his conduct would have been a felony offense both before and after the amendment. Consequently, because Minn. Stat. § 297F.20,

³ The amendment did not change the provision that made purchasing more than 20,000 cigarettes from an unlicensed seller a felony offense. Both before and after the amendment, purchasing more than 20,000 cigarettes from an unlicensed seller was a felony. 2003 Minn. Laws ch. 127, art. 7, § 11, at 853.

⁴ The record does not include a transcript of the 2001 plea hearing.

subd. 9(d), is not included in the list of offenses in Minn. Stat. § 609A.02, subd. 3(b), expungement has never been available to M.M.S. under Minn. Stat. § 609A.02, subd. 3(a)(5).

Affirmed.