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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1925**

State of Minnesota,
Respondent,

vs.

D. K. Z.,
Appellant.

**Filed June 24, 2019
Reversed and remanded
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-15-3143

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Minnesota (for appellant)

Considered and decided by Cleary, Presiding Chief Judge; Florey, Judge; and
Cochran, Judge.

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

COCHRAN, Judge

Appellant D.K.Z. challenges the district court's denial of his expungement petition. Because the district court based its decision on clearly erroneous factual findings and misapplied the law, we reverse and remand for proceedings consistent with this opinion.

FACTS

In January 2015, appellant D.K.Z. was pulled over by an Eden Prairie police officer when the tires of the vehicle he was driving “touched both white lines.” The officer arrested D.K.Z., and D.K.Z. was tab-charged with two counts of fourth-degree driving while impaired (DWI) and with misdemeanor careless driving. D.K.Z. pleaded guilty to misdemeanor careless driving, and the two DWI counts were dismissed. The district court placed D.K.Z. on probation for one year, and he was discharged from probation in April 2016.

In July 2018, D.K.Z. petitioned for expungement of the records relating to this case under the expungement statute. The statute allows the district court to seal all records relating to an arrest, trial, or verdict if “the petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years since discharge of the sentence for the crime.” Minn. Stat. § 609A.02, subd. 3(a)(3) (2018).

D.K.Z. submitted a memorandum explaining why he believed he should be granted an expungement and briefly testified during an expungement hearing before a referee. No state or local agency opposed D.K.Z.’s petition, and no evidence or argument was introduced against the petition. Following the hearing, the referee denied D.K.Z.’s petition, and the district court approved the referee’s order. This appeal follows.

D E C I S I O N

We review a district court’s denial of an expungement petition for an abuse of discretion. *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013). Under this standard, we

will not overturn the district court’s decision unless it was arbitrary or capricious, based on an erroneous interpretation of the law, or contrary to the facts in the record. *State v. R.H.B.*, 821 N.W.2d 817, 822 (Minn. 2012). This court reviews the district court’s findings of fact for clear error. *State v. A.S.E.*, 835 N.W.2d 513, 517 (Minn. App. 2013). We review legal conclusions de novo. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

Under Minnesota law, “expungement of a criminal record is an extraordinary remedy.” Minn. Stat. § 609A.03, subd. 5(a) (2018). A petition for expungement is “to be granted only upon clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to issue, enforce, and monitor an expungement order.” *Id.* The statute provides a 12-factor test for deciding whether expungement should be granted. *Id.*, subd. 5(c) (2018). D.K.Z. argues that the district court made clearly erroneous factual findings when considering several of the 12 factors and erred in applying the law. We address each issue in turn.

1. The district court based its decision on clearly erroneous factual findings.

D.K.Z. argues that the district court made clearly erroneous factual findings in considering several of the 12 factors under Minn. Stat. § 609A.03 subd. 5(c) and that the district court improperly equated his careless driving offense to a DWI offense. We focus our analysis on the district court’s treatment of the underlying crime as a DWI and the first two factors—namely, the nature and severity of the underlying crime and the risk, if any, that D.K.Z. poses to individuals or society.

The district court found that D.K.Z.’s conviction was for an “alcohol-related incident,” that D.K.Z. “produced an alcohol concentration test result of .08%,” and that D.K.Z. “drove with an alcohol level at or very near the point which is prohibited by law.” These findings are not supported by the expungement record. Although D.K.Z. was charged with driving with an alcohol concentration of 0.08, this charge was never proven in court. As we stated in *State v. A.S.R.*, 906 N.W.2d 526, 532 (Minn. App. 2017), a district court errs when it characterizes an “unproven allegation” as fact.

No evidence or testimony was introduced during the expungement hearing to support a finding regarding D.K.Z.’s alcohol concentration. The officer who conducted the breath test did not testify during the hearing, and there is no information in the record as to the circumstances of the test or whether there were any irregularities with the test. During the hearing, D.K.Z. testified that he did not feel that he was impaired and that his careless driving was the result of bending down to do something with the radio. Because the record does not support a finding that D.K.Z. “drove with an alcohol level at or very near the point which is prohibited by law,” the district court’s analysis of D.K.Z.’s conviction for careless driving as equivalent to a DWI conviction was clearly erroneous.

D.K.Z. further argues that the district court erred in relying entirely on generic statistics about DWIs, rather than the specific conduct at issue in D.K.Z.’s conviction in analyzing the first two factors. We agree. We have previously addressed this issue in an unpublished opinion. *State v. J.E.H.*, No. A15-1948, 2016 WL 3659290 (Minn. App. July 11, 2016). Although our unpublished opinions are not precedential, we find the reasoning of *J.E.H.* persuasive. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01

(Minn. App. 1993) (noting that unpublished opinions of the court of appeals are not precedential but may be persuasive). When considering J.E.H.’s expungement petition, the district court noted that J.E.H.’s alcohol concentration was .16, twice the legal limit. *J.E.H.*, 2016 WL 3659290, at *1, 5. But the district court then focused its analysis on the dangers of DWIs in general, rather than the specific conduct at issue in J.E.H.’s case. *Id.* We stated that “district courts must carefully consider the facts of each petitioner’s case and not rely on generalizations regarding expungement or certain categories of crimes.” *Id.* at *8. We also concluded that the district court clearly erred in its analysis because “[m]ost of the district court’s findings . . . concern DWIs generally and would disqualify any petitioner seeking to expunge a DWI record.” *Id.* at *5.

Similarly, in this case, the district court did not put any consideration into the specific nature of D.K.Z.’s conduct but only into DWIs generally. The district court relied on a report from the department of public safety and generic statistics about DWIs to conclude that D.K.Z.’s underlying crime was severe and that it was likely he would commit a DWI in the future. The district court did not discuss the careless driving conduct that forms the basis of D.K.Z.’s conviction.

When considering the nature and severity of the underlying crime, the district court made generic findings such as, “No other crimes are responsible for the amount of death, injury and destruction that results from mixing alcohol with driving.” The district court did not discuss the nature and severity of D.K.Z.’s conviction for careless driving, or distinguish D.K.Z.’s conduct from DWIs generally. Rather, its analysis treated D.K.Z.’s offense as identical to all DWIs.

When considering the risk, if any, that D.K.Z. poses to society, the district court relied entirely on generic statistics about recidivism for individuals convicted of DWI. The district court acknowledged D.K.Z.'s arguments regarding his age and lack of criminal history, but found that the argument was "belied by the statistics." As an initial matter, we note that the statistics reflect only people who were in fact convicted of DWI, and as such are inapplicable to D.K.Z., who was convicted of careless driving. The statistics do not track individuals who were charged with DWI and had their charges dismissed. Accordingly, applying the statistics regarding individuals convicted of DWIs to D.K.Z. was clearly erroneous. But even if the statistics included information applicable to D.K.Z., relying on such statistics to the exclusion of any other consideration of D.K.Z. as an individual was clearly erroneous.

The legislature has provided that expungement is available to DWI offenders. As we noted in *J.E.H.*, it would contravene the expungement statute to effectively create a per se rule against expungements for DWIs. *J.E.H.*, 2016 WL 3659290, at *5. The district court's analysis would not only effectively create a per se rule against expungements for DWIs, it would create a per se rule against expungements for individuals who pleaded guilty to a different crime and had DWI charges dismissed. Because this would contravene the expungement statute, the district court clearly erred in its analysis of the nature and severity of the underlying crime and the risk, if any, that D.K.Z. poses to society.¹

¹ Because we conclude that the district court clearly erred in its analysis of the first two factors and remand for further consideration, we do not address D.K.Z.'s arguments regarding the other factors.

2. The district court applied the wrong legal standard in considering D.K.Z.’s expungement petition.

Pursuant to Minn. Stat. § 609A.03, subd. 5(a), expungement of a criminal record is to be granted only upon a showing “that it would yield a benefit to the petitioner *commensurate* with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to issue, enforce, and monitor an expungement order.” (Emphasis added.)

Here, the district court accurately quoted the statutory language. But the district court then concluded that D.K.Z. “has not established by clear and convincing evidence that expungement of the record of this conviction would yield a benefit to him that would *exceed* the disadvantages to the public and public safety.” (Emphasis added.) Requiring D.K.Z. to prove that the benefit to him would exceed the disadvantages to the public goes beyond the burden that the statute requires. The district court applied the wrong legal standard in its analysis.² On remand, the district court must apply the correct legal standard under Minn. Stat. § 609A.03, subd. 5(a), to determine whether granting D.K.Z.’s expungement petition would yield a benefit to him commensurate with the disadvantages to the public and public safety.

² We note that the district court also considered whether to expunge the records of D.K.Z.’s conviction pursuant to the court’s inherent authority. The district court balanced the five factors relevant to granting an expungement pursuant to the court’s inherent authority. The district court then applied the correct standard for expungements pursuant to the court’s inherent authority, finding that D.K.Z. “did not prove by clear and convincing evidence that the benefits Petitioner would receive are *commensurate* with the disadvantages to the public from the elimination of the record and the burden on the court in issuing and enforcing an expungement order.” (Emphasis added.)

3. The proper remedy is to remand to the district court for further proceedings.

D.K.Z. urges this court to consider the merits of his petition and order expungement. We decline to do so because factual findings are the province of the district court. *See In re Welfare of J.T.L.*, 875 N.W.2d 334, 338 n.3 (Minn. App. 2015) (remanding petitioner’s juvenile-records expungement request in the absence of findings on each factor); *see also Lumpkin v. N. Cent. Airlines, Inc.*, 209 N.W.2d 397, 401 (Minn. 1973) (“[A]n appellate court is not empowered to make or modify findings of fact and is thereby limited in its scope of review.”). In a footnote, D.K.Z. alternatively urges this court to instruct the district court not to include any comparison of D.K.Z.’s crime to DWI cases. We decline to adopt any absolute instruction regarding how D.K.Z.’s alcohol consumption might be relevant to his crime of careless driving. The district court clearly erred in treating D.K.Z.’s careless driving conviction as a DWI because the expungement record does not support a finding that D.K.Z. was driving while impaired. But to the extent that D.K.Z.’s alcohol consumption is supported by the record and relevant to the 12 factors enumerated in Minn. Stat. § 609A.03, subd. 5(c), the district court may consider facts proven regarding D.K.Z.’s alcohol consumption in its analysis. We reverse and remand for further findings and analysis consistent with this opinion.

Reversed and remanded.