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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1243**

Joseph Z. Livingston, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 4, 2020
Reversed and remanded
Ross, Judge**

Wright County District Court
File No. 86-CR-15-6150

John G. Westrick, Samuel A. Savage, Savage Westrick, P.L.L.P, Bloomington, Minnesota
(for appellant)

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

Thomas N. Kelly, Wright County Attorney, Greg T. Kryzer, Assistant County Attorney,
Buffalo, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Segal,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Joseph Livingston pleaded guilty to driving while impaired by a hazardous
substance, admitting that he drove under the influence of Difluoroethane. After the

supreme court concluded that Difluoroethane was not a statutorily defined “hazardous substance,” the district court vacated Livingston’s conviction. Livingston petitioned the district court to determine his eligibility for compensation based on his exoneration, and the district court dismissed the petition by reasoning that it had not vacated Livingston’s conviction on a ground consistent with innocence, which was a prerequisite to Livingston’s eligibility for compensation. We reverse and remand for further proceedings because Livingston’s conduct was not a crime, a ground necessarily “consistent with innocence.”

FACTS

Officers found Joseph Livingston parked in the middle of a road in December 2015, visibly impaired and slumped over his steering wheel with 11 cans of compressed-air dust remover in the car, 10 of which were empty. Livingston’s blood tested positive for 1,1-Difluoroethane, a common propellant in canned-air dust removers. The state charged him with driving, operating, or physically controlling a motor vehicle while “knowingly under the influence of a hazardous substance.” See Minn. Stat. § 169A.20, subd. 1(3) (2014). Livingston pleaded guilty in 2016, and the district court sentenced him to serve 62 months in prison.

In 2017, the Minnesota Supreme Court held that 1,1-Difluoroethane was not a “hazardous substance” under Minnesota’s then-current impaired-driving statute. *State v. Carson*, 902 N.W.2d 441, 445–46 (Minn. 2017). Livingston filed a postconviction petition based on *Carson*, and the district court vacated his conviction. The state filed a notice of dismissal acknowledging that, under *Carson*, the conduct alleged in the criminal complaint did not constitute a violation of the impaired-driving law.

Livingston petitioned for exoneration-based compensation under Minnesota Statutes section 590.11 (2016), arguing that the *Carson* decision, the district court’s conviction vacation, and the state’s dismissal rendered him exonerated and eligible for compensation. At that time, the statute defined “exonerated” in relevant part to mean that a court had either:

- (i) vacated or reversed a judgment of conviction on grounds consistent with innocence and the prosecutor dismissed the charges; or
- (ii) ordered a new trial on grounds consistent with innocence and the prosecutor dismissed the charges or the petitioner was found not guilty at the new trial[.]

Minn. Stat. § 590.11, subd. 1(1). But the supreme court had severed subdivision 1(1)(i) as unconstitutional in *Back v. State*, 902 N.W.2d 23, 24 (Minn. 2017). The state read Livingston’s petition as if it were filed under subdivision 1(1)(i) and asked the district court to dismiss the petition in light of *Back*. But the district court allowed the petition to survive under subdivision 1(1)(ii), reasoning that “a new trial was effectively ordered when Mr. Livingston’s conviction was vacated and the State’s complaint was placed back on the docket.”¹ There being no disputed facts, the parties both asked the district court to decide as a matter of law whether Livingston was “exonerated.”

¹ The state began to challenge this decision in a related appeal, arguing that the district court erred by determining that *Back* did not apply to bar Livingston’s petition. But after we questioned jurisdiction, the state voluntarily dismissed its appeal and does not raise the argument as an alternative basis to defend the district court’s decision on either civil summary-judgment grounds or criminal alternative-theory grounds. See *Doe 76C v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 163 (Minn. 2012) (“[W]e may affirm a grant of summary judgment if it can be sustained on any grounds.”); *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (extending a supreme court rule to require the

The district court denied and dismissed Livingston’s petition. It reasoned that his conviction “was not vacated on grounds consistent with innocence” because the vacation resulted from “a change in interpretation of the law that stated [Difluoroethane] is no longer a hazardous substance under the statute, not because he presented evidence that established that a crime was not committed.” Livingston appeals.

DECISION

Livingston appeals from the district court’s denial of his petition for an order determining him eligible for exoneration-based compensation, arguing that he was exonerated because he never committed a crime. The district court concluded that Livingston’s conviction had been vacated on an interpretative change in the law rather than on the statutory ground of “consistent with innocence.” Whether Livingston was “exonerated” calls for our statutory interpretation, a task we undertake de novo. *See Buhl v. State*, 922 N.W.2d 435, 438 (Minn. App. 2019).

Minnesota Statutes section 590.11 governs the procedure by which an individual may petition the district court for an order declaring his eligibility for compensation under the Minnesota Imprisonment and Exoneration Remedies Act. *See* Minn. Stat. §§ 611.362–.368 (2016). In applying the statute, the district court must first determine whether the petitioner has been “exonerated.” Minn. Stat. § 590.11, subd. 1(1)–(2). At the time of Livingston’s petition, filed after the supreme court’s decision in *Carson*, exoneration required that a court had “ordered a new trial on grounds consistent with

court of appeals to consider an alternative theory when the arguments were supported and would not expand relief). The issue is not before us and we do not consider it.

innocence and the prosecutor dismissed the charges or the petitioner was found not guilty at the new trial.” Minn. Stat. § 590.11, subd. 1(1)(ii); *Back*, 902 N.W.2d at 27. The sole issue we decide is whether Livingston secured postconviction relief on a “ground[] consistent with innocence.” For the following reasons, we conclude that Livingston was exonerated simply because he committed no crime, which is a ground consistent with innocence.

We draw our analysis from earlier versions of statutes that have since been amended. The legislature has replaced the 2014 prohibition against driving under the influence of “hazardous” substances with a prohibition against driving under the influence of “intoxicating” substances. *Compare* Minn. Stat. §§ 169A.20, subd. 1(3), .03, subd. 9 (2014), *with* Minn. Stat. §§ 169A.20, subd. 1(3), .03, subd. 11a (2018). The 2016 exoneration-compensation statute, severed in part and construed by caselaw, was amended in 2019 to effectively restore the provision severed in *Back* and to clearly define “grounds consistent with innocence.” *Compare* Minn. Stat. § 590.11, subd. 1 (2016), *with* Minn. Stat. § 590.11, subd. 1 (Supp. 2019). *See also Back*, 902 N.W.2d at 27; *Buhl*, 922 N.W.2d at 440.

Livingston was convicted under the 2014 version of the law, which prohibited a person from driving, operating, or being in physical control of a motor vehicle while “knowingly under the influence of a hazardous substance.” Minn. Stat. § 169A.20, subd. 1(3) (2014). The statute defined hazardous substances as “any chemical or chemical compound that is listed as a hazardous substance in rules adopted under chapter 182.” Minn. Stat. § 169A.03, subd. 9 (2014). The *Carson* court concluded that Difluoroethane

was *not* a “hazardous substance” under this definition because the commissioner had not listed it as such in rules adopted under chapter 182. 902 N.W.2d at 445–46.

The district court read *Carson* as holding that “[Difluoroethane] is *no longer* a hazardous substance.” (Emphasis added.) The state also contends that Livingston secured postconviction relief “because of a *change* in the classification of [Difluoroethane] by the [s]upreme [c]ourt,” and it declares, “There is no question [that] at the time Mr. Livingston committed this offense and at the time of sentencing that . . . huffing [Difluoroethane] and driving was illegal.” (Emphasis added.) These characterizations rest on a mistaken premise. They presume that Difluoroethane was a hazardous substance until *Carson* decriminalized it by switching its classification. This is just not so.

Carson actually belies the premise. Its holding clarifies that, at the time of Livingston’s inhaling Difluoroethane and driving under its influence, his conduct was not illegal under the statute. The supreme court held flatly that “[Difluoroethane] is not a hazardous substance under [Minnesota Statutes section 169A.03, subdivision 9 (2016)].” *Carson*, 902 N.W.2d at 442. Supreme court holdings of substantive law generally apply retroactively. See *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002). And in pointing out that “[Difluoroethane] is not a hazardous substance” because the legislature never designated it as such either directly within the statute or indirectly by rule, *Carson* was not altering any prior, final holding. The state is simply in error in asserting that “[Difluoroethane] was a hazardous substance” at the time of Livingston’s conviction and sentencing. The effect of the supreme court’s statutory construction is that any other interpretation was never the law. See *Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 30

(Minn. 1925). Difluoroethane had never been a hazardous substance under the law when Livingston inhaled it and drove.

The state's argument to the contrary fails. The legislature defines what conduct is criminal. "[N]o act or omission is a crime unless made so" by the legislature. Minn. Stat. § 609.015, subd. 1 (2018). And because the legislature had not defined Difluoroethane as a hazardous substance, driving under its influence was not a crime. Having not committed the statutory offense, Livingston was innocent of it.

We are not convinced otherwise by the state's effort to analogize Livingston's circumstances to those of the defendant in *Buhl*, where we held that the erroneous admission of *Spreigl* evidence was not a ground "consistent with innocence." 922 N.W.2d at 441. As we explained in *Buhl*, reversing a conviction on an evidentiary error is not consistent with innocence because being found guilty in a trial infected by unfair evidence is not tantamount to factual innocence. *Id.* at 440. By contrast to *Buhl*, Livingston's reversal did not result from recognizing that unfair evidence may have misled a jury to believe that the charged criminal conduct occurred; it resulted from recognizing that the charged conduct was simply not criminal.

The state directs us to legislative history to persuade us that the legislature intended the phrase "on grounds consistent with innocence" to apply when new evidence establishes a petitioner's factual innocence. But we have already defined the phrase's meaning in *Buhl*, holding that "consistent with innocence" means "agrees with innocence." 922 N.W.2d at 440. And while new, exonerating evidence can establish that a convicted person committed no crime, recognizing that the charged statute does not actually criminalize the conduct

similarly establishes that he committed no crime. Both circumstances are consistent with innocence.

The state essentially asks us to look beyond the specific words of the law to its general purpose, but that is not how we interpret statutes. The legislature urges, “[T]he letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16 (2018). We can suppose that the state correctly assumes that the legislature never wanted people huffing *any* intoxicating chemical propellant and driving under its influence. The assumption finds support in common sense and in the legislature’s decision to amend the impaired-driving law to now broadly prohibit driving while under the influence of “intoxicating substance[s].” *See* Minn. Stat. §§ 169A.20, subd. 1(3), .03, subd. 11a (2018) (criminalizing driving under the influence of drugs or chemicals that impair “the central nervous system or audio, visual, or mental processes”). And we too doubt that the legislature really wanted the state to compensate those who drove while so impaired but whose dangerous conduct the legislature inadvertently failed to render illegal.

But it is now axiomatic that, consistent with the separation of powers and the limited role of the judiciary, “[t]he rules of construction forbid adding words or meaning to a statute that were intentionally or inadvertently left out.” *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001). The legislature used plain English to define “hazardous substance[s]” in a manner that compelled the *Carson* court to recognize that Difluoroethane falls outside the category. 902 N.W.2d at 445. And the legislature failed to define the phrase “grounds consistent with innocence” in earlier versions of the statute, leaving us to determine that it meant “agrees with innocence.” *Buhl*, 922 N.W.2d at 440.

Bound to apply the law strictly as provided, we conclude that Livingston secured postconviction relief because his conduct did not violate the statute and therefore that his conviction was vacated on a ground consistent with innocence. We reverse and remand for the district court to analyze Livingston's petition accordingly.

Reversed and remanded.