20200008

FILED
IN THE OFFICE OF THE
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MAY 27, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20200008
	)	20200009
vs.	)	20200010
	)	
	)	Case No: 09-00-K-01151
	)	09-01-K-00169
	)	09-03-K-00305
	)	
	)	
M.J.W,	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendant and Appellee.	)	

ON APPEAL FROM THE DECEMBER 9, 2019 ORDER SEALING DEFENDANT'S CRIMINAL RECORDS AND ENTERING CERTIFICATES OF REHABILITATION

EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY, NORTH DAKOTA
THE HONORABLE TRISTAN J. VAN DE STREEK, PRESIDING.

BRIEF OF APPELLEE M.J.W.

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JURISDICTION STATEMENT

[¶ 1] As a threshold matter, this Court must determine whether the State is authorized to appeal the district court's order. State v. Powley, 2019 ND 51, ¶ 7, 923 N.W.2d 123. Section 29-28-07(4), N.D.C.C. allows the State to appeal from "an order made after judgment affecting any substantial right of the state." In a criminal action, the State's right to appeal is limited by statute. State v. Counts, 472 N.W.2d 756, 757 (N.D. 1991). "The State's right to appeal in a criminal action is governed by Section 29-28-07, N.D.C.C., and is a jurisdictional matter." State v. Simon, 510 N.W.2d 635, 636 (N.D. 1994).

[¶ 2] The State seeks to appeal the district court's order because each order "affected a substantial right of the State" by prohibiting "the State from disclosing its own records." Appellant's Brief at ¶ 4. The State further argues each order implicated an issue involving compliance with procedure rather than the individual judgment of the trial judge, thereby triggering appealability by the State. Id. at ¶ 6. These arguments fail to recognize the discretionary authority vested with trial judges under the statute in deciding whether to grant or deny a petition to seal. See N.D.C.C. § 12-60.1-04. A "substantial right" is defined as "An important or essential right that merits enforcement or protection by the law." Merriam-Webster Online Dictionary, (May 1, 2020) <https://www.merriam-webster.com/legal/substantial%20right>.

[¶ 3] The State contends its substantial right stems from the inability to disclose its own records yet does not expound on why disclosure of records is an important or essential right that must be protected after a district court has ordered the records sealed.

M.J.W. posits it is not a substantial right. Because the order does not affect a substantial right, the State's appeal is not authorized by statute and must be dismissed.

[¶ 4] The State argues that because the statute did not expressly preclude an appeal by the state as it did for an individual, that the state must have the right to appeal an order granting a petition to seal. See Appellant's Brief at ¶ 7. The history of the ambiguous statute clearly shows the legislature wanted finality in decisions and a quick and easy process by which an individual could petition the court without using excessive judicial resources to accomplish that goal. See Hearing on H.B. 1265 Before the Senate Judiciary Committee, 66th Legis. Sess. (March 20, 2019) (remarks of Rep. Roers Jones). Allowing the State to appeal destroys the intent of the law.

[¶ 5] Assuming the State's appeal is not authorized by statute, this Court should exercise restraint and avoid issuing a supervisory writ. This Court's authority to issue supervisory writs derives from Art. VI, § 2, of the North Dakota Constitution and section 27-02-04 of the North Dakota Century Code. Roe v. Rothe-Seeger, 2000 ND 63, ¶ 5, 608 N.W.2d 289. "We exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." Id. (citing State ex rel. v. Hagerty, 1998 ND 122, ¶ 6, 580 N.W.2d 139). This Court has stated the exercise of supervisory jurisdiction may be warranted when issues of vital concern regarding matters of important public interest are presented. State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 6, 782 N.W.2d 626.

[¶ 6] The State contends this matter is one in which important public interests are presented because the statute implicates defendants' opportunities to preclude disclosure

of their criminal records and prosecutors' ability to disclose their own records. The statute does not encompass "public interest" as it is generally understood, that is, the welfare or well-being of the general public—rather the statute encompasses two categories, defendants and prosecutors, and one concern, the disclosure of criminal records. Because this issue is not one of public interest this Court should decline to exercise its supervisory authority and dismiss the appeal.

STATEMENT OF THE ISSUES

I. Whether the District Court correctly interpreted N.D.C.C. § 12-60.1-02(1)(a) by finding the three-year period is a waiting period before an individual may petition to seal criminal records?

STATEMENT OF THE CASE

[¶ 7] The district court granted the Defendant's petitions to seal criminal records in three cases. The State opposed each petition. In each case, M.J.W. had been charged with a new crime prior to three years elapsing form the date of release from incarceration, parole, or probation. M.J.W. had not been charged with a new offense for fifteen years prior to the filing of the petition. The State appealed and now seeks reversal of each order.

REQUEST FOR ORAL ARGUMENT

[¶ 8] Appellee, M.J.W., respectfully requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves a case appearing to be a case of first impression regarding statutory interpretation of N.D.C.C. § 12-60.1-02. Oral argument would be helpful in the Court's review of the District Court's orders granting M.J.W.'s petitions to seal.

LAW AND ARGUMENT

I. The District Court properly interpreted N.D.C.C. § 12-60.1-02.

[¶ 9] The primary purpose of statutory interpretation is to determine legislative intent. Bolinske v. Jaeger, 2008 ND 180, ¶ 6, 756 N.W.2d 336. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of the statute is ambiguous, a court may resort to extrinsic aids, including legislative history, to interpret the statute. Teigen v. State, 2008 ND 88, ¶ 19, 749 N.W.2d 505. The rule of lenity "requires ambiguous criminal statutes to be construed in a defendant's favor." State v. Rath, 2017 ND 213, ¶ 15, 901 N.W.2d 51 (quoting State v. Laib, 2002 ND 95, ¶ 15, 644 N.W.2d 878).

[¶ 10] On August 1, 2019, HB 1265 became effective creating and enacting a new chapter in N.D.C.C. § 12-60.1 relating to sealing criminal records. At the heart of this appeal is N.D.C.C. § 12-60.1-02(1) which states:

> 1. An individual may file a petition to seal a criminal record if:
>
> a. The individual pled guilty to or was found guilty of a misdemeanor offense and the individual has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation; or . . ..

The district court concluded, applying the rule of lenity, "three years" as used in the statute was not meant as a prohibition to prevent an individual from filing a petition for sealing a criminal record if they had a new charge within three years of their release, but rather the three years was a waiting period in which an individual had to be crime-free before filing

a petition for relief. Transcript of Motion Hearing, pp. 16-17. The State argues in order for an individual to be eligible to file a petition, the individual must have been crime-free for three years immediately following the conviction for which sealing is sought. Appellant's Brief at ¶ 44. This Court construes statutes in a way which does not render them meaningless because it presumes the Legislature acts with purpose and does not perform idle acts. See Tillich v. Bruce, 2017 ND 21, ¶ 9, 889 N.W.2d 899. The State's position would render the statute essentially meaningless, providing an individual the opportunity to seal only his or her most recent charge after turning his or her life around. Alternatively, the State's position is one such that an individual charged with multiple crimes may be eligible for sealing so long as each charge was separated by three years (in a misdemeanant's case); yet, an individual such as M.J.W. who had multiple charges within three years but has followed that up with a significant period of crime-free life, is not eligible for sealing. The State's argument doesn't make sense and provides an arbitrary standard for sealing records.

[¶ 11] The State's argument essentially hinges on the use of the word "from" in North Dakota's statute rather than "since" in Minnesota's statute as outlined in State v. C.W.N., 906 N.W.2d 549 (Minn. Ct. App. 2018). The State devotes a significant portion of its argument attempting to establish that "from" is more restrictive than "since" because "from" can only be used as a preposition to establish that a misdemeanant must be charge-free for the three years following incarceration, parole, or probation release. The State's argument is without merit. Contrary to the State's assertion, the key phrase in section 12-60.1-02(1)(a) is "**has not been charged**" rather than "from the date of release", indicating

a present tense criminal charge (emphasis added).

[¶ 12] Had the legislature sought to permanently disqualify individuals from having their records sealed, it would have chosen more restrictive language such as "the individual **was not charged** with a new crime for at least three years from the date of release from incarceration, parole, or probation." The fact the legislature used the term "has not been charged" indicates its intent provide a waiting period before filing as the District Court found rather than a permanent ban on repeat offenders. This argument is bolstered by the fact that the legislature chose specific crimes to exclude from the general sealing scheme. See N.D.C.C. § 12-60.1-02(2). Since the legislature chose not to ban repeat offenders from petitioning for relief under the statute, the District Court properly interpreted the statute.

[¶ 13] The legislature intended the statute to help those who have turned their lives around. To read the statute as the State seeks, would arbitrarily determine which offense an individual may petition to have sealed. For example, an individual is arrested, convicted, and sentenced to probation for a misdemeanor drug crime and completes his probation. Two years later, the same individual is arrested, convicted, and sentenced for a misdemeanor DUS charge. The individual also completes his probation without any problems. Five years later, the individual seeks to seal his charges, but finds he is only eligible to seal his DUS charge because not enough time had elapsed between his drug charge and DUS charge. However, if he had received the DUS charge then the drug charge, he would only be eligible to seal his drug charge. The State's reading creates an arbitrary standard and creates unjust results, contrary to the Legislature's clear intention.

[¶ 14] In this case, M.J.W. had been crime-free for fifteen years prior to filing the petition, longer than the three-year requirement for misdemeanors and the five-year period for felonies. Because the District Court properly interpreted N.D.C.C. § 12-60.1-02 in finding the three year period as used in the statute is a waiting period, rather than a ban for filing, M.J.W. respectfully requests this Court affirm the District Court's order.

CONCLUSION

[¶ 15] The State's appeal is not authorized by statute as it does not affect a substantial right of the State. Additionally, this Court should refrain from exercising its supervisory authority because the issue is not one of important public interest as the legislature certainly wanted finality in the petition process. Finally, if this Court does reach the merits, M.J.W. respectfully requests this Court **AFFIRM** the December 9, 2019 Orders because the district court properly interpreted the statute as written and intended.

Dated this 27th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as the attorney representing Appellee, M.J.W., and the author of the Brief of Appellee, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 11 pages.

[¶ 2] This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 word processing software in Times New Roman 12-point font.

Dated this 27th day of May, 2020.

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/s/Alexander F. Reichert

_____

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	)	
	)	
M.J.W,	)	
	)	
Defendant and Appellee.	)	

[¶ 1] I hereby certify that on May 27, 2020, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court through E-Filing Portal and served on Reid Brady, Attorney for Appellant, at sa-defense-notices@casscountynd.gov.

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