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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Appeal from Certificates of Rehabilitation and
Orders Sealing Criminal Records
entered December 9, 2019
East Central Judicial District in Cass County, North Dakota
The Honorable Tristan J. Van de Streek, Presiding

APPELLANT'S REPLY BRIEF

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[¶3] **ARGUMENT**

[¶4] Under N.D.C.C. § 12-60.1-02(1)(a), a person who pled guilty to a misdemeanor may petition to seal the criminal record if "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." Replying to M.J.W.'s arguments, the State emphasizes two points: (1) this Court's review is authorized because the case turns upon the district court's interpretation of the sealing process required under N.D.C.C. § 12-60.1-02(1)(a), and alternatively, because the disclosure of records is important to the public prosecutor and constituents, and (2) the legislature's use of the present perfect tense ("has not been charged") does not suspend the definition of "from" to create a waiting period occurring any time before petitioning instead of the expressly designated starting point of the three years from release from incarceration, parole, or probation.

[¶5] I. Review is appropriate because the case turns upon the district court's determination of the process required for petitioning to seal criminal records and alternatively, because the disclosure of records is important to the public prosecutor and constituents.

[¶6] M.J.W. challenges the "procedure is at issue" ground for appealability. A post-judgment order is appealable when it is one "affecting any substantial right of the state." N.D.C.C. § 29-28-07(4). M.J.W. specifically asserts that district court judges have "discretionary authority" in deciding whether to grant a petition to seal under N.D.C.C. § 12-60.1-04. (Appellee's Brief ¶ 2.) It is true that a district court judge would have discretion when assessing the merits of a properly

filed petition. But M.J.W.'s assertion ignores the initial determination the judge must make under N.D.C.C. § 12-60.1-02(1). The judge must first determine whether the petitioner seeking to seal his misdemeanor conviction "has not been charged with a new crime for at least three years from the date of release from incarceration, parole, or probation[.]" N.D.C.C. § 12-60.1-02(1). Regardless of whether the three-year charge-free period is computed "from the date of release" or (under M.J.W.'s suggestion) any time after the date of release, the answer is mathematical. The judge has no discretion in the computation. In other words, the judge's initial determination regards the procedure for properly filing a petition. Because the procedure is at issue, not the individual judgment of the district court, it implicates a substantial right of the State and is appealable. See State v. Vavrosky, 442 N.W.2d 433, 434–35 (N.D. 1989) ("Because it is the procedure we are concerned with, as distinguished from the individual judgment of the trial judge, we hold that Section 29-28-07(4), N.D.C.C., authorizes this appeal.").

[¶7] M.J.W. also challenges the importance of disclosure of public records as an alternative ground for appealability. (Appellee's Brief ¶ 5.) The presumed openness of records is a principle this Court has recognized. Under N.D. Sup. Ct. Admin. R. 41 § 5(f)(1)(B), a court encountering a request to prohibit public access to court documents must determine "whether there are sufficient grounds to overcome the presumption of openness of case records[.]" Similarly, N.D.C.C. § 44-04-18(1) establishes that unless a specific exception applies, "all records of a

public entity are public records, open and accessible for inspection during reasonable office hours." The state's attorney's duty to represent the public is unquestionable: "The state's attorney is the public prosecutor, and … shall [a]ttend the district court and conduct on behalf of the state all prosecutions for public offenses." N.D.C.C. § 11-16-01(1). Openness of public records provides for accountability of the public prosecutor. See generally Forum Pub. Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) (recognizing in the context of financial expenditures the purpose of open-record law "to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest"); Adams Cty. Record v. Greater N. Dakota Ass'n, 529 N.W.2d 830, 836 (N.D. 1995) ("The policy underlying our open records law is to allow taxpayers to see how state funds are used."). Because of the importance of public accountability, an order granting the sealing of criminal records impacts a substantial right of the State and should be appealable.

[¶8] If the Court concludes that neither the procedure nor the importance of accountability supports appealability, M.J.W. argues against issuance of a supervisory writ. If unappealable, this matter would be extraordinary and involve an "issue[] of vital concern regarding matters of important public interest[.]" See State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 6, 782 N.W.2d 626. M.J.W.'s assertion that the matter does not encompass the public interest is not supportable. As noted, ensuring a means of accountability of the "public prosecutor" is at issue. So too is public safety. Indeed, an order granting a petition requires a finding that

"the petitioner is sufficiently rehabilitated" and results in prohibition of disclosure of not just the contents, but the existence of court and prosecution records, which are otherwise public. N.D.C.C. § 12-60.1-04(9); N.D.C.C. § 12-60.1-01(6). Thus, for instance, an employer looking for a bookkeeper would have no access to the records of a successful petitioner who applied for the position and whose prior theft conviction (based on swindling his previous employer) was sealed.

[¶9] The fact that there are conflicting opinions on the issue is integral. Based on different interpretations of N.D.C.C. § 12-60.1-02(1), some petitioners have been granted sealing, while others have been denied sealing. One need not look at the records of the fifty-two different district court judges; indeed, the conflict exists within the record of the one district court judge in this case. (Tr. 10:21-25.) The existing disparate treatment of parties and the potential for it to continue in the future is great. Ending such disparate treatment would constitute an "issue[] of vital concern regarding matters of important public interest[.]" See State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 6, 782 N.W.2d 626.

[¶10] **II. The legislature's use of the present perfect tense ("has not been charged") does not suspend the definition of "from" to create a waiting period occurring any time before petitioning instead of the expressly designated starting point of the three years from release.**

[¶11] Under N.D.C.C. § 12-60.1-02(1)(a), a person may file a petition to seal a criminal record if the individual pled guilty to 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." M.J.W. argues that

the phrase "has not been charged" is one "indicating a present tense criminal charge." (Appellee's Brief ¶ 11.) That characterization of the verb tense and its impact is incorrect. "[H]as not been charged" is in present perfect verb tense. It signifies present discussion of an action that was completed (perfected) in the past. Further, the context of the statute and use of passive voice tend to show that the action ("has not been charged") not only was completed in the past but continues in the present. In other words, a petitioner was not charged during the three years from release and still has not been charged. Interpreting the action as continuing gives meaning to the "at least" preceding the " three years from the date of release." See N.D.C.C. § 12-60.1-02(1)(a). Regardless, the present perfect tense cannot change the function or definition of "from." A preposition indicating the specific starting point in time for a process is the only way to describe "from." Merriam-Webster Online Dictionary, (June 2, 2020) <https://www.merriam-webster.com/dictionary/from> (indicating "from" is a preposition and defining it in pertinent part as "used as a function word to indicate a starting point of a physical movement or a starting point in measuring or reckoning or in a statement of limits"). Thus there is only one interpretation, consistent with plain meaning of "from" and rules of grammar. That interpretation is the petitioner must not have been charged with a new offense starting at the point of release from incarceration, parole, or probation and continuing for at least three years.

[¶12] M.J.W.'s reliance on the legislature's exception of certain offenses (Appellee's Brief ¶ 12) from sealing is misplaced. There is nothing inconsistent with excepting certain offenses from sealing and requiring for others a preliminary showing of rehabilitation, i.e., satisfying the three-year period from date of release. Some offenses are so significant that they should not be sealed. For all other offenses, petitioners must show compliance with the correctional process.

[¶13] M.J.W.'s reliance upon the Rule of Lenity is likewise misplaced. This Court has explained that the rule is "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." State v. Rath, 2017 ND 213, ¶ 15, 901 N.W.2d 51 (emphasis added). The sealing statute does not deal with "punishments," so the Rule of Lenity should not apply. But even if the statute dealt with punishments, the rule would not help M.J.W. The rule only enables a statute to be interpreted in a defendant's favor if such interpretation is a reasonable one. See State v. Geiser, 2009 ND 36, ¶ 20, 763 N.W.2d 469; State v. Laib, 2002 ND 95, ¶ 15, 644 N.W.2d 878. And as noted, M.J.W.'s interpretation is not reasonable; it ignores the plain meaning of "from" and rules of grammar.

[¶14] Finally, M.J.W.'s assertion that interpreting "from" as the starting point would render the statute essentially meaningless is not supportable. (Appellee's Brief ¶ 10.) M.J.W. specifically argues that persons would only be able to petition to seal their most recent convictions or at least those charges

separated by three years. (Appellee's Brief ¶ 10.) M.J.W.'s argument is based on an incorrect premise. The statute authorizes petitions by those persons who are not charged with new crimes for at least three years following release from incarceration, parole, or probation. More significantly though, M.J.W.'s argument ignores the reasonable purpose of providing a sealing option for persons who have been convicted of crimes and have demonstrated rehabilitation during the correctional process for those crimes. Reasonableness does not require authorization of sealing petitions for every misdemeanant who has not committed a new crime within three years preceding the petition. The legislature could have chosen to do that. But it did not.

[¶15] **CONCLUSION**

[¶16] This case turns upon the district court's determination about the process required for petitioning to seal criminal records. It also involves the important State and public interest in the openness of records. The district court has issued conflicting decisions on interpretation of N.D.C.C. § 12-60.1-02(1). The case thus should be reviewed. The plain meaning of "from" in N.D.C.C. § 12-60.1-02(1) requires a petitioner to be charge-free from the starting point of release from incarceration, parole, or probation and continuing for at least three years. The State asks this Court to reverse the district court's orders.

Dated this 4th day of June, 2020.

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[¶17] CERTIFICATE OF COMPLIANCE

[¶18] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8)(A). The page count is twelve pages.

Dated this 4th day of June, 2020.

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[¶19] CERTIFICATE OF SERVICE

[¶20] A true and correct copy of the foregoing document was sent by e-mail on the 4th day of June, 2020, to: Alexander Reichert at supportstaff@reichertlaw.com

Reid A. Brady