IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF THE APPLICATION OF EDWARD TARROBAGO FINLEY, FOR AN ORDER TO SEAL RECORDS.

EDWARD TARROBAGO FINLEY,
Appellant,
vs.
CITY OF HENDERSON; AND THE STATE OF NEVADA,
Respondents.

No. 76715-COA

FILED
JUL 25 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Edward Tarrobago Finley appeals from a district court order denying a petition to seal criminal records. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Finley petitioned the district court to seal records associated with multiple different crimes he was convicted of in multiple different courts throughout Clark County.[1] The State of Nevada and the City of Henderson opposed the petition. The district court ultimately denied Finley's petition with respect to some but not all of the convictions he sought to have sealed, concluding that he had not satisfied the statutory waiting periods for those offenses, during which time he must not have been convicted for any other offense (aside from minor moving or traffic violations) in order to invoke the district court's discretion to seal his records.

[1]We do not recount the facts except as necessary to our disposition.

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On appeal, Finley argues that the district court's interpretation of the governing statutes[2] produced an absurd result and rendered a particular statute (NRS 179.2595) meaningless. He also argues that the district court miscalculated a statutory waiting period and relied upon the wrong version of the primary statute at issue (NRS 179.245). Finally, he argues that the district court failed to apply the rule of lenity in his favor or consider the public policy underlying the criminal record sealing statutes.

As an initial matter, and as the State agrees in its answering brief, we note that the district court applied the incorrect version of NRS 179.245 when considering Finley's petition. It applied the 2015 version of NRS 179.245 even though the Legislature amended the statute in 2017 in a manner that impacts whether Finley was eligible to petition to have certain records sealed, *see* 2017 Nev. Stat., ch. 378, § 7, at 2413 (decreasing the waiting period for crimes of violence from 15 years to 10 years), and Finley filed his petition in 2018. The district court concluded that, because Finley was not discharged from probation for his December 2004 felonies until December 2007, he was not entitled to petition to have those records sealed until December 2022 (15 years later). However, Finley filed his petition following the requisite 10-year period, and thus, the district court should have—and must on remand—consider whether to seal Finley's December 2004 felonies.

We now address Finley's primary argument on appeal, which relates to the district court's interpretation of the governing statutes, NRS

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[2]Some of the relevant statutes in this case—NRS 179.245, .2595, .285, and .295—were recently amended in ways that do not affect the issues in this appeal. *See* 2019 Nev. Stat., ch. 77, § 2, at ___; 2019 Nev. Stat., ch. 256, §§ 1.5, 1.7, at ___; 2019 Nev. Stat., ch. 633, §§ 37, 40-41, at ___. Accordingly, we cite the current versions herein.

179.245, NRS 179.2595, and NRS 179.285. Specifically, Finley argues that the district court should have considered whether he was eligible to have his records sealed by considering each of his records individually in reverse chronological order (i.e., it should have started with his most recent conviction, determined whether to seal that record, and if so, proceeded to evaluate the next most recent conviction). Finley argues that this is so because NRS 179.285 provides that, once a record is sealed, all proceedings recounted in that record are deemed never to have occurred, meaning that a district court working in reverse chronological order could not consider those proceedings (if sealed) when determining whether a petitioner is eligible to have an earlier record sealed. Finley argues that he could have achieved this result by incrementally filing multiple petitions in each separate court in which he was convicted in reverse chronological order, and that the district court's failure to consider his past convictions in reverse chronological order defeated the purpose of NRS 179.2595, which allows petitioners to file one petition for all of the records they want sealed in one district court. To answer the question Finley presents on appeal, a detailed explanation of the statutory record-sealing scheme is required, and we must interpret the relevant statutes.

This court reviews a district court's interpretation of a statute de novo. *State, Dep't of Motor Vehicles & Pub. Safety v. Frangul*, 110 Nev. 46, 48-51, 867 P.2d 397, 398-400 (1994) (interpreting criminal record sealing statutes). "[T]his court will not go beyond the statute's plain language" if it is "clear on its face." *Pawlik v. Deng*, 134 Nev. ___, ___, 412 P.3d 68, 71 (2018) (quotation marks omitted). Moreover, when possible, this court must interpret a statute in harmony with other statutes "to avoid unreasonable or absurd results." *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d

1166, 1171 (2008). But "[i]f a statute is ambiguous, meaning that it is susceptible to differing reasonable interpretations, [it] should be construed consistently with what reason and public policy would indicate the Legislature intended." *Star Ins. Co. v. Neighbors*, 122 Nev. 773, 776, 138 P.3d 507, 510 (2006) (quotation marks omitted). By statute, the Legislature has expressly "declare[d] that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons in accordance with NRS 179.2405 to 179.301, inclusive." NRS 179.2405.

Generally, "a person may petition the court in which the person was convicted for the sealing of all records relating to a conviction of [specific enumerated crimes]" after a certain number of years has passed from the date of his or her release from actual custody, the date of his or her discharge from parole or probation, or the date when he or she is no longer under a suspended sentence, whichever occurs latest. NRS 179.245(1)(a)-(g). The statute specifies different waiting periods of time depending upon the class or severity of the crime, with category A felonies and certain violent crimes being assigned the longest period, and certain non-violent misdemeanors being assigned the shortest period. *Id.* As relevant here, the longest possible range of years one would have to wait to petition the court to seal eligible records is ten years (for category A felonies, crimes of violence as defined by statute, and residential burglary), and an individual convicted of non-felony battery constituting domestic violence must wait seven years. NRS 179.245(1)(a), (e). NRS 179.245(6) also identifies certain types of crimes which are never eligible for sealing no matter how much time has passed, including such crimes as sexual assault, DUI involving death, and crimes against children. "If a person wishes to have more than one record sealed

and would otherwise need to file a petition in more than one court," that person may instead "file a petition in district court for the sealing of all such records."[3] NRS 179.2595(1).

The Nevada Supreme Court has recognized that NRS 179.245 presents a two-tiered analysis whereby a petitioner must first satisfy the relevant statutory waiting periods before he or she may invoke a court's discretionary power to order a record sealed. *See State v. Cavaricci*, 108 Nev. 411, 412, 834 P.2d 406, 407 (1992) (concluding that a petitioner had "failed to invoke the district court's discretionary power [to order a record sealed]" where he failed to satisfy the relevant waiting period in a prior version of NRS 179.245). However, the supreme court has not specifically addressed whether satisfying a waiting period is also a prerequisite to filing a petition in the first place (i.e., whether a petitioner has statutory standing to request sealing[4]) or merely to invoking the district court's discretion to order a record sealed.

An individual's statutory eligibility to file a petition to seal is determined by NRS 179.245(1), which states that a person may file a petition only if the requisite time has elapsed since the person's release from custody or expiration of his or her sentence for a particular crime. NRS

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[3]This includes "records in the justice or municipal courts." NRS 179.2595(2).

[4]An individual's right to file a petition to have his or her records sealed is statutory, and thus, where a petitioner is ineligible to file a petition under the relevant statutes, no right to file such a petition exists. *See State Taxicab Auth. v. Greenspun*, 109 Nev. 1022, 1024-25, 862 P.2d 423, 424-25 (1993) (dismissing appeal and noting that "[t]he right to appeal is statutory; where no statute or court rule provides for an appeal, no right to appeal exists").

179.245(1)(a)-(g). Thus, a district court first evaluates the question of whether enough time has elapsed since the relevant date of release, depending upon the class or type of crime involved. If not enough time has elapsed, then the person is not eligible to request that the conviction be sealed, and the inquiry ends there.

If, however, enough time has elapsed, then NRS 179.245(2) sets forth the contents that a petitioner must include in the petition. The petitioner must include his or her "current, verified records received from the Central Repository for Nevada Records of Criminal History." NRS 179.245(2)(a). The petitioner must also include a list of entities or other custodians of records that he or she reasonably knows to possess records of the conviction he or she is seeking to have sealed, as well as information that "accurately and completely identifies the records to be sealed, including, without limitation," the petitioner's date of birth, the specific conviction to which the records sought to be sealed pertain, and the date of arrest for that specific conviction. NRS 179.245(2)(c)-(d).

NRS 179.245(3) and (4) then require that the court notify the law enforcement agency that arrested the petitioner for the relevant crime, as well as the attorneys that prosecuted the petitioner (including the Attorney General), and provide them an opportunity to stipulate to the petition. If the prosecuting entity does not stipulate to the petition, then the court "must" conduct a hearing on the matter. NRS 179.245(4).

At the hearing, the court analyzes the contents of the petition and examines the relevant convictions in order to determine whether or not the petitioner was subsequently convicted of another offense within the waiting period that would disqualify the conviction from being sealed. NRS 179.245(5). If the person was convicted of other crimes within the waiting

period, the conviction cannot be sealed. *Id.* But if no such subsequent convictions occurred during the waiting period, then "the court may order sealed all records of the [corresponding] conviction," but is not required to do so. NRS 179.245(5). If the court exercises its discretion to order a record sealed,

> [a]ll proceedings recounted in the record are *deemed never to have occurred*, and the person to whom the order pertains may properly answer accordingly to any inquiry, including, without limitation, an inquiry relating to an application for employment, concerning the arrest, conviction, dismissal or acquittal and the events and proceedings relating to the arrest, conviction, dismissal or acquittal.

NRS 179.285(1)(a) (emphasis added).

The Nevada Supreme Court has held that, once a record is sealed, "all proceedings in the record and all events and proceedings relating to the [conviction] are deemed never to have occurred," but also that this principle applies only to events related to criminal proceedings, not the underlying conduct giving rise to the proceedings or separate civil proceedings[5] stemming from that conduct. *See Frangul*, 110 Nev. at 50-51,

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[5]It is worth noting that NRS 179.245(7) provides that if the court grants a petition to seal records pursuant to that section, it may also seal "all records of the civil proceeding in which the records were sealed." Additionally, because this statute expressly identifies these types of proceedings as being civil in nature (and because they are remedial rather than punitive), we reject Finley's argument that the district court failed to apply the rule of lenity to construe the statutory scheme in Finley's favor. *See State v. Lucero*, 127 Nev. 92, 99, 249 P.3d 1226, 1230 (2011) (noting that "[t]he rule of lenity is a rule of construction that demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor" (alterations and internal quotation marks omitted)); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 525 (1992) (Stevens, J.,

867 P.2d at 399-400 (quotation marks omtted). Moreover, it has held that the purpose of Nevada's record-sealing statutes is "to remove ex-convicts' criminal records from public scrutiny and to allow convicted persons to lawfully advise prospective employers that they have had no criminal arrests and convictions with respect to the sealed events." *Baliotis v. Clark Cty.*, 102 Nev. 568, 570, 729 P.2d 1338, 1340 (1986); *see also Zana v. State*, 125 Nev. 541, 545, 216 P.3d 244, 247 (2009) ("[S]ealing orders are intended to permit individuals previously involved with the criminal justice system to pursue law-abiding citizenship unencumbered by records of past transgressions."). In *Baliotis*, the court went on to note that "[t]here is no indication that the statute was intended to require prospective employers or licensing authorities to disregard information concerning an applicant that is known independently of the sealed records." 102 Nev. at 570, 729 P.2d at 1340. Accordingly, the court held that "persons who are aware of an individual's criminal record" are not required "to disregard independent facts known to them," even if the individual is otherwise authorized to disavow those facts. *Id.* at 571, 729 P.2d at 1340. However, in a later case, the supreme court clarified that where proof of a conviction is required—at least in the context of impeaching a witness at trial with a prior conviction—a sealed conviction is deemed never to have occurred and thus will not suffice, even if the state has independent records of the conviction. *Yllas v. State*, 112 Nev. 863, 866-67, 920 P.2d 1003, 1005 (1996); *cf. Zana*, 125 Nev. at 546, 216 P.3d at 247 ("[The sealing statute] erases an individual's involvement with the criminal justice system of record, not his actual conduct and certainly not his conduct's effect on others.").

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dissenting) ("The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes.").

Here, Finley argues that his most recent conviction may be sealed because the requisite amount of time has passed. He then argues that once that conviction is sealed, it is deemed never to have occurred, and thus a district court may not consider that conviction when determining whether another previous conviction may also be sealed. He argues that once the latest conviction is sealed, that makes the preceding conviction eligible to be sealed even if it otherwise would not have been subject to sealing because of the later conviction, and once that later one is sealed, that makes the next preceding one eligible to be sealed, and so on, and so on, backwards in time. Finley argues that he could have effectuated this process by filing a petition to seal in each court in which he was convicted going back in time so that he could one-by-one remove each conviction from the next court's consideration of whether he was eligible to file a petition to seal.

The flaw in Finley's argument lies in a statute that neither he nor the other parties cite. NRS 179.295(4) states that "[t]his section does not prohibit a court from considering a proceeding for which records have been sealed pursuant to NRS . . . 179.245 [or] 179.2595 . . . in determining whether to grant a petition pursuant to NRS . . . 179.245 [or] 179.2595 . . . for a conviction of another offense." NRS 179.295(4). Thus, this statute clarifies that even though a conviction is normally deemed no longer to exist once it is sealed, the court can still consider it in determining whether other previous convictions may be sealed. In order words, the sealing of the latest conviction in time does not necessarily render a previous conviction eligible to be sealed just because the latest conviction has been removed from the record. Because NRS 179.295(4) utilizes discretionary language (i.e., the court is "not prohibit[ed]" from considering a sealed

conviction), a court may use the sealing of a later conviction in order to seal an earlier conviction, but it is not required to.

Consequently, a court possesses discretion to use the sealing of later convictions in order to go backwards in time and seal prior convictions that otherwise could not have been eligible to be sealed, but it may also exercise its discretion in order to refuse to seal prior convictions based upon convictions it just sealed. Indeed, that this is discretionary is emphasized in two different places in the statutory scheme: in NRS 179.295(4), which permits ("does not prohibit") a court to consider a sealed conviction in order to determine whether another conviction is subject to sealing; and also in NRS 179.245(5), under which even "if the court finds" that a conviction is subject to sealing, the court "may" (or may not) order the conviction sealed. Accordingly, a court may do what Finley wants, which is to unroll and seal every conviction in reverse chronological order all the way back to the first conviction, or it may choose not to do so by exercising the discretion granted under either statute, or both.

On remand, we direct the district court to follow the analysis set forth above by first concluding that Finley has satisfied the requisite waiting periods to file a petition to seal with respect to all of the convictions he listed in the petition filed below. The district court must then consider whether to seal Finley's most recent convictions (the December 2004 felonies), as he was not convicted of any offense following his release from probation for those convictions. Then—should the district court determine that sealing is warranted for those convictions—it may exercise its discretion whether or

not to consider those sealed convictions when determining whether Finley has satisfied the requisite waiting periods for other convictions.[6]

Based on the foregoing, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

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[6]We additionally note that the district court appears to have incorrectly concluded that Finley had not invoked its discretion to order records pertaining to his 2004 Henderson conviction for battery domestic violence sealed. He completed his sentence for that offense on December 27, 2004, and he had not been convicted of any other offense during the seven years that followed that date. However, the City states for the first time on appeal that it requested Finley's full criminal history from the FBI and discovered that he was convicted in September 2005 of failure to appear in a domestic assault case in Tennessee and arrested several times in Texas in 2014. In reply, Finley argues that he does not have the same access to records that the City has and that the criminal history he obtained from the Central Repository for Nevada Records of Criminal History did not show the events from Tennessee and Texas. The district court must resolve this factual dispute in the first instance on remand and determine the extent to which the Tennessee and Texas events might affect the disposition of Finley's petition. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299-301, 279 P.3d 166, 172-73 (2012) (noting that "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance" and remanding for an evidentiary hearing before the district court).

cc: Hon. Susan Johnson, District Judge
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