MINNESOTA JUDICIAL TRAINING UPDATE

MINNESOTA'S NEW EXPUNGEMENT LAW – PART TWO:
SIX ADDITIONAL AND IMPORTANT CLARIFICATONS

(Minnesota Judicial Training & Education Blog)

On January 10th, 2015, Judicial Training Update (15-01) summarizing Minnesota's historic new expungement law was distributed. During the next several weeks, the thirst for additional information coming from judges, attorneys, law enforcement and the general public was overwhelming. The purpose for this Part Two Expungement Update is to add 6 additional facts about the new law. These 6 additional facts are intended to supplement and provide clarification to the January 10th training update. Please note: Everything in the first training update is still accurate.

1. When the Court Orders Expungement – Does that Include DNA Samples and DNA Records?

a) **General Rule #1:** In most cases involving expungement of a conviction or charge supported by probable cause, the DNA sample or record will NOT be sealed pursuant to an expungement order.

   i. For example, pursuant to M.S.609.117, subd. 1, the court SHALL order a DNA sample be taken from any defendant convicted of a felony. However, under M.S. 609A.03 subd. 7a (a) "Upon issuance of an expungement order related to a charge supported by probable cause, the DNA sample or DNA record that was collected under any authority, other than M.S.299C.105, shall NOT be sealed, returned to [petitioner], or destroyed."

   ii. M.S.299C.105 subd. 1 requires, even in the absence of a court order, the collection of DNA samples for a long list of serious felony "person crime" offenses *(see statute for full list).* However, if convicted, none of the serious felonies listed in M.S.299C.105 are eligible for statutory expungement (see Attachment "A" to update 15-01 for the entire list of eligible felonies).

b) **General Rule #2:** If any felony is "resolved in favor of the petitioner" (i.e. dismissal, acquittal or resolution with no finding or admission of guilt) then the DNA sample or DNA record (if any) could be sealed pursuant to an expungement order (or destroyed per M.S.299C.105, subd. 3). Any ambiguity in the interpretation of these statutory provisions would be subject to judicial discretion.

2. What About Domestic Violence Convictions – Will the 2015 Legislature Revisit This Issue?

Under the new law, the ability to expunge crimes of domestic violence such as domestic abuse, sexual assault, violations of an order for protection (OFP) or a restraining order, stalking, and violations of a domestic abuse no contact (DANCO) order, was stayed until July 15, 2015.

NOTE: There has been NO indication that this issue will be further discussed during this legislative session. Accordingly, effective July 15th, 2015, crimes of domestic violence (as defined above) will be subject to expungement just like any other misdemeanor or gross misdemeanor.

3. What About DWI Convictions: Use for Enhancement & Implied Consent Records?

Under the new law, misdemeanor and gross misdemeanor DWI convictions are subject to expungement. The 2015 legislature does not appear inclined to revisit this issue. Even if a DWI conviction is ordered expunged, the Department of Public Safety (DPS) will continue to maintain a permanent (non-public) record of all DWI convictions. See M.S. 171.12, subd. 3(4). The expunged record of conviction will remain sealed with the BCA subject to a law enforcement agency's request to open the record.

NOTE: What about implied consent records? In response to an expungement order, the DVS will expunge the criminal portion of a DWI record, but will not remove the civil record (i.e. implied consent records).

NOTE: What about using an expunged DWI for enhancement purposes? An expunged DWI conviction can still be used for enhancement purposes (i.e. for use in charging and sentencing). See § 4 below.

4. Can You Use an Expunged Conviction for Enhancement Purposes (i.e. DWI's Assaults, etc?)

YES – Although not specifically stated in the new law, it is the opinion of this author that pursuant to M.S. 609A.03, subd 7a(b)(1), an expunged conviction for an enhanceable offense, such as DWI's, Assaults, OFP, No Insurance, Possession of Firearm or Controlled Substance Offenses, etc., **can** be opened and used for enhancement purposes. See M.S. 609A.03, subd. 7a (b) (1) which states:

(1) except as provided in clause (2), an expunged record may be opened, used, or exchanged between criminal justice agencies without a court order for the purposes of initiating, furthering, or completing a criminal investigation or prosecution or for sentencing purposes or providing probation or other correctional services *(application of this provision is, of course, subject to judicial interpretation);*

(2) when a criminal justice agency seeks access to a record that was sealed under M..S. 609A.02, subdivision 3 (a) (1) *(i.e. proceedings resolved in favor of petitioner),* after an acquittal or a court order dismissing for lack of probable cause, for purposes of a criminal investigation, prosecution, or sentencing, the requesting agency must obtain an ex parte court order after stating a good-faith basis to believe that opening the record may lead to relevant information.

5. How do Law Enforcement Agencies and Prosecutors Access and Share Expunged Records?

Records expunged under M.S. 609A are maintained as part of the "Computerized Criminal History System (CCH)." Access to CCH is only done via the "Criminal Justice Data Communications Network (CJDN)." See M.S. 299C.46. Connections over the CDJN are secure. Authorized users will see the information in the criminal record and also a notation that the record has been sealed.

6. What Procedure is the BCA Following for Cases Involving "Stays of Imposition"?

According to BCA staff, absent a court order to the contrary (or appellate ruling), when the BCA receives a copy of the expungement petition, they will evaluate the offense based on the plain language of the new law which refers to the offense the "petitioner was convicted of or received a stayed sentence for…." And in most cases involving a "stay of imposition," that would be a felony, not a misdemeanor. For example, if defendant is convicted of a 2nd degree burglary charge but received a "stay of imposition," the BCA would notify the court and petitioner that 2nd degree burglary is not a designated felony eligible for expungement. BCA staff will also ensure that the court has the petitioner's entire criminal history.

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