



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

§ No. 08-21-00159-CV
§ Appeal from the
IN THE MATTER OF THE EXPUNCTION § 210th Judicial District Court
OF P.S. § of El Paso County, Texas
§ (TC# 2021DVC1651)

OPINION

Appellant, P.S., appeals from a judgment denying her petition for expunction. For the reasons that follow, we affirm.

BACKGROUND

Factual & Procedural Background

P.S. was arrested and charged by information for assault, causes bodily injury of a family member (“assault family violence”), in Cause No. 20170C09122 on October 27, 2017. The information charged P.S. with intentionally, knowingly, or recklessly causing bodily injury to N.M., her then-boyfriend, by striking him or scratching about the head with her hand. A few months later, on March 14, 2018, P.S. was arrested again for assault family violence against A.S., P.S.’s mother. On May 2, 2018, P.S. was indicted for continuous violence against the family

(“continuous family violence”).¹ The felony indictment, Cause No. 20180D02176, alleged P.S. intentionally, knowingly, or recklessly caused bodily injury to A.S. on March 14, 2018 by striking her about the body with her hand, and on or about October 27, 2017, P.S. intentionally, knowingly, or recklessly caused bodily injury to N.M., and said conduct by P.S. occurred during a period of twelve months or less.

On May 8, 2018, Cause No. 20170C09122, the original assault family violence charge, was dismissed. The motion stated the reason for dismissal as, “[t]he case has been refiled: as a continuous family violence[.]” In sum, Cause No. 20170C09122 was dismissed and refiled as a felony indictment, Cause No. 20180D02176. On August 24, 2018, P.S. entered a guilty plea in Cause No. 20180D02176 to the lesser included offense, assault causes bodily injury to a family member or person with whom she had a dating relationship. On August 24, 2018, P.S.’s adjudication in Cause No. 20180D02176 was deferred, and P.S. was placed on community supervision for two years. P.S. completed the community supervision and the proceedings for Cause No. 20180D02176 were thereby dismissed on June 3, 2021.

P.S. filed a petition for the expunction of records pertaining to her arrest for assault family violence in Cause No. 20170C09122.² P.S. did not attach exhibits to her petition; however, in the County’s response to the petition, it did attach the 2017 information (Cause No. 20170C09122), the motion dismissing Cause No. 20170C09122, the 2017 felony indictment (Cause No.

¹ A person commits continuous violence against the family if, during a period of twelve months or less in duration, the person two or more times engages in conduct that constitutes an offense under Section 22.01(a)(1) against another person or persons whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005 of the Family Code. TEX.PENAL CODE ANN. § 25.11(a).

² P.S. also requested the expunction of all records and files arising out of an unrelated arrest that occurred on or about October 8, 2005, which the trial court granted. The expunction of all records and files arising out of the 2005 arrest is not at issue in this appeal.

20180D02176), the order of deferred adjudication, and the order discharging P.S. from community supervision.

After holding a hearing on the matter, the trial court denied P.S.'s petition for expunction on August 18, 2021, because that misdemeanor offense formed the basis of Cause No. 20180D02176. At the request of P.S., the trial court entered written findings of fact and conclusions of law consistent with its judgment on the petition for expunction for Cause No. 20170C09122. The findings of fact and conclusions of law are as follow:

Findings of Fact

1. On or about the 27th day of October, 2017, Petitioner P.S. was arrested by officers of the El Paso Police Department for an Assault Causing Bodily Injury Family Violence offense allegedly occurring on the same date and against a victim with the initials N.M. The police report for that incident was numbered 05-281218.
2. On or about the 27th day of October, 2017, an information was filed in the County Court at Law No. Two charging Petitioner P.S. with Assault Family Violence for the alleged assault against N.M. The Cause Number assigned to the case was 20170C09122.
3. On or about the 2nd day of May, 2018, an indictment filed in the 205th District Court accused Petitioner P.S. of Continuous Violence against the Family based on 1) an alleged assault against A.S. on the 14th day of March, 2018, and 2) the alleged assault against N.M. on the 27th day of October 2017. The Cause Number assigned to the case was 20180D02176.
4. On or about the 8th day of May, 2018, the Presiding Judge of County Court at Law No. Two signed a Motion to Dismiss in Cause Number 20170C09122. The reason for the dismissal was that the case had been refiled as 'continuous family violence.'
5. On or about the 24th day of August, 2018, Petitioner P.S. entered a plea in cause number 20180D02176 to an offense of Assault Causes Bodily Injury/Date/Family/House; A Lesser Included Offense. The Degree of Offense is a Class A Misdemeanor. The Adjudication of Guilt was deferred, and Petitioner P.S. was placed on Two (2) years of Community Supervision.
6. On or about the 3rd day of June 2021, Petitioner P.S. was discharged from Community Supervision under Tex. Code.[sic] Crim. Proc. Art. 42A.111 (Deferred

Adjudication) after having completed thirty-three months of Community Supervision.

7. On or about the 17th day of May, 2021, Petitioner P.S. filed a Petition for Expunction Records in the above-captioned cause seeking to expunge records related to the 27th day of October, 2017 arrest for misdemeanor assault and the associated court documents in cause number 20170C09122.

Conclusions of Law

1. Chapter 55, Tex. Code Crim. Proc. allows a person who has been arrested to expunge ‘all records and files relating to the arrest’ if the person was released, the charge did not result in a final conviction, and there was no court ordered community supervision.
2. The right to expunction is a statutory privilege; all provisions are mandatory and exclusive, and a person is entitled to expunction only when all of the conditions have been met.
3. Tex. Code Crim. Proc. art. 55.01(a)(2)(A) proscribes an ‘arrest-based’ analysis of eligibility to expunction where a felony arose ‘out of the same transaction for which the person was arrested.’
4. The Court concludes that two distinct charges arose from the same incident and alleged conduct that led to Petitioner P.S.’s arrest on the 27th day of October 2017, specifically the alleged assault on that same date against N.M., a person with whom Petitioner P.S. had a dating relationship.
5. The Court further concludes that a felony charge thus arose out of the same transaction as the misdemeanor offense for which Petitioner P.S. was arrested, and thus both causes must be eligible for expunction or neither cause nor the underlying arrest records qualify for expunction.
6. The Court further concludes that Petitioner P.S.’s plea of guilty to a lesser included offense in the felony cause was an admission that the underlying arrest was not unlawful.
7. The Court further concludes that as a result of Petitioner P.S.’s plea of guilty, the presiding Court deferred adjudication of guilt for the lesser included offense and placed Petitioner P.S. on two years of community supervision.
8. The Court thus concludes that a plea of guilty and a term of community supervision was entered in a felony offense that arose from the same transaction as the misdemeanor offense for which expunction was sought.

9. The Court thus rules that Petitioner P.S. has not met the statutory requirements for expunction of any records or files related to the 27th day of October, 2017 incident or arrest to include the records and files related to cause number 20170C09122, and as such, the Petition for Expunction should be DENIED as to the incident that formed the basis of that cause.

This appeal followed.

DISCUSSION

In a single issue, P.S. argues the trial court erred when it denied her petition for expunction in Cause No. 20170C09122. She asserts the offense arising out of that arrest met all of the elements of Article 55.01(a)(2) of the Texas Code of Criminal Procedure as interpreted by *Ex parte R.P.G.P.*, 623 S.W.3d 313 (Tex. 2021). We disagree.

Standard of Review

A trial court's expunction order is reviewed for abuse of discretion, while the meaning of a statute is a question of law reviewed *de novo*. *Id.* at 317 (citing *State v. T.S.N.*, 547 S.W.3d 617, 620 (Tex. 2018)). "Statutes are to be analyzed 'as a cohesive, contextual whole' with the goal of effectuating the Legislature's intent and employing the presumption that the Legislature intended a just and reasonable result." *T.S.N.*, 547 S.W.3d at 620. Under the abuse of discretion standard, reviewing courts afford no deference to the trial court's legal determinations; thus, a trial court's legal conclusions are reviewed *de novo*. *Id.* (citing *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996)).

Applicable Law

Article 55.01 of the Texas Code of Criminal Procedure governs expunction, which is a civil remedy. *Ex parte R.P.G.P.*, 623 S.W.3d at 316. Expunction allows the individual arrested to "deny the occurrence of the arrest and [deny] the existence of the expunction order [except in a criminal proceeding]" and prohibits governmental and private entities named in the order from releasing, maintaining, disseminating, or using the expunged records and files "for any purpose."

Id. [Internal quotation marks omitted]; TEX.CODE CRIM.PROC.ANN. art. 55.03. The remedy is a privilege defined by the Legislature, not a constitutional or common-law right. *Ex parte R.P.G.P.*, 623 S.W.3d at 316. Accordingly, the statutory requirements of Article 55.01 are mandatory, exclusive, and cannot be equitably expanded by the courts. *Id.*

At issue in this appeal is Article 55.01(a)(2), which allows a person who has been arrested to expunge all records and files related to an arrest where the person was released, the charge did not result in a final conviction and is no longer pending, and there was no court-ordered community supervision for the offense. TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2). Texas courts are not aligned in their approach to expunction of arrest records involving multiple offenses. *Ex parte R.P.G.P.*, 623 S.W.3d at 317. Under the prevailing view, Article 55.01(a)(2) mandates an arrest-based approach, whereby expunction is denied unless the petitioner establishes that multiple offenses comprising an arrest are eligible for expunction. *Id.* at 318. “Under this all-or-nothing approach, the facts and circumstances of the offenses and their relatedness to one another are irrelevant.” *Id.* Prior to *Ex parte R.P.G.P.*, the Texas Supreme Court had not yet addressed whether Article 55.01(a)(2) is categorically arrest-based. *Id.* At last, in *Ex parte R.P.G.P.*, the Court held that the prerequisites to expunction in Article 55.01(a)(2), (a)(2)(A) are offense-based provisions with regard to misdemeanors, but arrest-based with respect to felonies.³ *Id.* at 325.

Analysis

P. S. does not satisfy the statutory requirements of Article 55.01(a)(2).

³ Under this rubric, P.S. relies heavily on the Texas Supreme Court’s recent holding in *Ex parte R.P.G.P.* and maintains Cause No. 20170C09122 is a single charge that must be examined in isolation. 623 S.W.3d at 313. However, aside from *Ex parte R.P.G.P.* being materially distinguishable, for the reasons that follow, we do not reach this analysis. *Id.*

P.S. requests that we carve out an interpretation of Article 55.01(a)(2) that allows expunction of a first arrest when there are multiple arrests for the same offense when charges are aggregated to result in a felony indictment. P.S. argues that because she was arrested for a misdemeanor that was later made part of a felony indictment due to subsequent, separate arrests, she is entitled to an expunction of the misdemeanor arrest records. We disagree.

On October 27, 2017, P.S. was charged by information for assault family violence in Cause No. 20170C09122. On March 14, 2018, P.S. was arrested again for assault family violence. Using the 2017 assault family violence charge as a predicate, P.S. was indicted for the felony offense of continuous family violence in Cause No. 20180D02176. Cause No. 20170C09122, the original assault family violence charge, was thereafter dismissed and refiled as a continuous family violence charge by indictment. As to the 2017 assault family violence charge, the information alleged P.S.:

Did then and there intentionally, knowingly, or recklessly cause bodily injury to [N.M.] by striking [N.M.] about the head with the defendant's hand or by scratching [N.M.] about the head with the defendant's hand[.]

As to the 2018 arrest, the indictment alleged P.S.:

[D]id then and there intentionally, knowingly, or recklessly cause bodily injury to [A.S.], a member of the defendant's family or member of the defendant's household or person with whom the defendant has or has had a dating relationship . . . by striking [A.S.] about the body with the defendant's hand, *and* on or about the 27th day of October, 2017, the defendant did then and there intentionally, knowingly, or recklessly cause bodily injury to [N.M.], a member of the defendant's family or member of the defendant's household or person with whom the defendant has or has had a dating relationship . . . *and* said conduct by the defendant occurred during a period that was 12 months or less in duration[.] [Emphasis added].

The order dismissing the 2017 assault family violence charge states the offense of assault family violence, Cause No. 20170C09122, was dismissed "for the reason that: . . . [t]he case has been refiled: as a continuous family violence[.]" P.S. requested the expunction of all records and files

arising out of her 2017 arrest. However, we find P.S. does not meet the requirements for expunction.

Article 55.01(a)(2) allows a person who has been arrested to expunge all records and files related to an arrest where the person was (1) released, (2) the charge did not result in a final conviction and is no longer pending, and (3) there was no court-ordered community supervision for the offense. TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2). After P.S.'s 2017 assault family violence charge was dismissed and refiled as the felony offense of continuous family violence, P.S. entered a guilty plea of the lesser included offense—assault family violence—and was placed on community supervision for two years in Cause No. 20180D02176.

As a threshold matter, the record before us does not show which qualifying misdemeanor P.S. plead to. Accordingly, it follows that the record fails to demonstrate that the 2017 charge did not result in court-ordered community supervision for the conduct she engaged in that constituted the offense of assault family violence in 2017, which is relevant because Article 55.01(a)(2) explicitly precludes expunction where community supervision was ordered for the offense. TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2); *In re Expunction of O.A.T.*, 618 S.W.3d 767, 774-75 (Tex.App.—El Paso 2020, no pet.) (“[E]ven under a charge-based [offense-based] framework, pleading guilty or obtaining community supervision as to one charge prevents expunction as to other related charges that were otherwise disposed of in a plea deal.” [Internal quotation marks omitted]). We can neither confirm nor deny whether the 2017 assault was considered by the trial court in its assessment of punishment—namely, court-ordered community supervision.

We do have the order of deferred adjudication before us, in which P.S. plead guilty to assault family violence, the lesser included offense of continuous family violence. The order states 20180D02176 as the cause number and lists March 14, 2018—the date of the second assault—as

the date of offense. However, we are in the context of continuous family violence, which requires a person, *two or more times*, to have engaged in conduct that constitutes an offense under Section 22.01(a)(1) of the Texas Penal Code, within a period of twelve months or less. TEX.PENAL CODE ANN. § 22.01(a)(1)(A person commits assault if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse.); *see Casanova v. State*, No. 13-14-00145-CR, 2016 WL 1072620, at *5 (Tex.App.—Corpus Christi Mar. 17, 2016, no pet.)(mem. op., not designated for publication)(“Unlike cases in which the lesser offense is not actually listed in the indictment (e.g. criminally negligent homicide in a murder indictment), *continuous family violence is, by its very definition, the commission of two or more offenses of assault*[.]” [Emphasis added]). Thus, because at least two instances of assaultive conduct are required for the felony offense of continuous family violence, and because we do not know which misdemeanor P.S. pleaded to, the record does not demonstrate, by a preponderance of the evidence, that the conduct she engaged in in 2017 did *not* result in court-ordered community supervision.

The trial court concluded:

The Court thus rules that Petitioner P.S. has not met the statutory requirements for expunction of any records or files related to the 27th day of October, 2017 incident or arrest to include the records and files related to cause number 20170C09122, and as such, the Petition for Expunction should be DENIED as to the incident that formed the basis of that cause.

Aware that we are not to afford deference to the trial court’s legal determinations, which we have reviewed *de novo*, we reach the same conclusion and find that P.S. has not satisfied the statutory requirements of Article 55.01(a)(2). TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2). Accordingly, because P.S. has failed to satisfy the requirements of Article 55.01(a)(2), we need

not reach the statutory construction that Subsections 55.01(a)(2)(A) and 55.01(a)(2)(B) necessarily encompass.⁴

Given the current, unique factual scenario at hand, we are unable to conclusively conclude that the 2017 arrest did not result in court-ordered community supervision in Cause No. 20180D02176. To emphasize, expunction is a civil remedy that functions as a privilege; it is neither a constitutional nor a common-law right. *Ex parte R.P.G.P.*, 623 S.W.3d at 316. Accordingly, the statutory requirements of Article 55.01 are mandatory, exclusive, and cannot be

⁴ (a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:

(2) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court-ordered community supervision under Chapter 42A for the offense, unless the offense is a Class C misdemeanor, provided that:

(A) . . . an indictment or information charging the person with the commission of a misdemeanor offense based on the person's arrest or charging the person with the commission of any felony offense arising out of the same transaction for which the person was arrested:

(i) has not been presented against the person at any time following the arrest . . . [or]

(ii) if presented at any time following the arrest, was dismissed or quashed, and the court finds that the indictment or information was dismissed or quashed because:

(a) the person completed a veterans treatment court program . . . ;

(b) the person completed a mental health court program . . . ;

(c) the person completed a pretrial intervention program . . . ;

(d) the presentment [of the indictment] had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense; or

(e) the indictment or information was void; or

(B) prosecution of the person for the offense for which the person was arrested is no longer possible because the limitations period has expired.

TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2)(A)(i)(ii), 55.01(a)(2)(B).

equitably expanded by the courts. *Id.* Accordingly, the trial court did not abuse its discretion in denying P.S.'s petition to expunge any records and files arising out of the 2017 arrest. We find P.S. did not satisfy the elements of Article 55.01(a)(2) and is not entitled to expunction of all records and files arising out of her October 27, 2017 arrest. TEX.CODE CRIM.PROC.ANN. art. 55.01(a)(2).

CONCLUSION

For these reasons, we affirm.

YVONNE T. RODRIGUEZ, Chief Justice

December 19, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Palafox, J. Would Dissent