

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00537-CV

THE CITY OF BEAUMONT, Appellant

V.

J.E.M., Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. X-1045

MEMORANDUM OPINION

The City of Beaumont appeals from an order granting J.E.M.'s request to expunge records related to his arrest on the charge of aggravated assault. We reverse and render judgment denying expunction.

Background

This is the second proceeding in which we have considered orders issued by the trial court following expunction proceedings initiated by J.E.M. *See In re Beaumont City Attorneys*, No. 09-10-00210-CV, 2010 Tex. App. LEXIS 5334 (Tex. App.—Beaumont June 8, 2010, orig. proceeding [mand. conditionally granted]) (mem. op.). The motions to

expunge in both matters arise from J.E.M. having received an acquittal on a charge that alleged he committed an aggravated assault.

In 2009, after being acquitted of aggravated assault, J.E.M. filed a petition seeking an order to expunge all records related to the charge, naming as the entities that might have these records a federal agency, two offices of a Texas state agency, three Jefferson County agencies, and one City of Beaumont agency.¹ After sending notices of the 2009 expunction hearing and conducting a hearing, the trial court signed an order requiring that each of the offices named in J.E.M.'s 2009 motion be notified of its order expunging J.E.M.'s records; however, J.E.M.'s 2009 petition did not request that the trial court notify the mayor of the City of Beaumont of the hearing.² When the trial court

¹The city, county, and state agencies that J.E.M. identified in his 2009 petition were the Beaumont Police Department, Jefferson County Sherriff's Department, Jefferson County District Attorney's Office, Jefferson County Clerk's Office, and the Texas Department of Public Safety, and a division of the Texas Department of Public Safety. With respect to these agencies, we note that J.E.M.'s 2009 petition did not request that the trial court notify the head administrative officer of each of these offices, *i.e.* the Chief of Police, the Jefferson County Sherriff, the Jefferson County District Attorney, the Jefferson County Clerk, or the Director of the Texas Department of Public Safety. *See* Tex. Gov't Code Ann. §§ 552.002, 552.201 (West 2004) (Designating certain persons to be the officer for public information for information created or received by that office, and designating each department head to be an agent of the officer for public information). In addition, J.E.M.'s 2009 petition designated the Federal Bureau of Investigation as an agency that might have records or files relating to his arrest.

²The court's August 2009 expunction order required certain agencies to return all records and files subject to the order to the court, or if that was not practical, to obliterate the references in the records related to the arrest that identified J.E.M. The agencies named in the 2009 order are the "Beaumont Police Department," the "Jefferson County Sherriff's Department," the "Jefferson County District Attorney's Office," the "Jefferson County Clerk's Office," the "Texas Department of Public Safety," the "Texas Department of Public Safety, Crime Records Service," and the "Federal Bureau of Investigation[]."

disqualified the City's attorneys due to an alleged conflict of interest from their efforts to represent the City in connection with J.E.M.'s motion to enforce the 2009 expunction order, the City's attorneys sought relief by filing a writ of mandamus. *Id.* at **1, 5. In resolving that dispute, we concluded that the trial court could not enforce its expunction order because the trial court had failed to give notice of the 2009 expunction hearing to the City of Beaumont. *Id.* at *13.

In August 2010, J.E.M. filed another petition for expunction, and the trial court's order from the 2010 proceeding is the subject of this appeal. In his 2010 petition, J.E.M. alleged that fourteen city agencies,³ four department heads,⁴ and the mayor of Beaumont⁵ might have records or files that pertained to J.E.M.'s arrest. However, in his 2010 petition, J.E.M. did not ask the trial court to notify the County Judge of Jefferson County, any Jefferson County law enforcement agencies, any federal law enforcement agencies, or any State of Texas law enforcement agencies of the hearing to expunge his arrest records. The record reflects that the trial court gave notice of the 2010 hearing only to the

³The agencies J.E.M. asked to be notified in his August 2010 petition were the "Beaumont City Clerk," the "City Attorney's Office," the "Beaumont Community Development," the "Beaumont Convention and Visitors Bureau," the "Finance Department," the "Fire Department," "Human Resources," the "Parks and Recreation Department," the "Police Department," the "Public Health Department," the "Public Works Department," "Information Technology," "Water Utilities," and "Dispatch."

⁴The department heads that J.E.M.'s petition identified were "Beaumont City Clerk," "Kyle Hayes[,] Beaumont City Manager," "Tyrone E. Cooper, Beaumont City Attorney," and "Anne Huff, Fire Chief."

⁵"Mayor Becky Ames."

agencies identified in J.E.M.'s 2010 petition. After receiving notice of the 2010 hearing, the City answered J.E.M.'s 2010 petition and alleged that the documents sought to be expunged were needed in connection with pending litigation.

In October 2010, the trial court conducted a hearing on J.E.M.'s 2010 petition; two weeks later, the trial court signed an order requiring that all eighteen of the City agencies and the department heads named in J.E.M.'s 2010 petition return their records and files of J.E.M.'s arrest, or, if that proved impractical, to obliterate information relating to J.E.M.'s arrest in their respective files. In November 2010, the trial court entered an amended order adding language to make its expunction order final. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191 (Tex. 2001). The City of Beaumont timely perfected its appeal from the trial court's amended order.

Issues

In eight issues, the City of Beaumont argues the trial court erred in granting J.E.M.'s petition for expunction. Issues one and two concern records in the City's files created by a Jefferson County constable.⁶ Issues three and four address the 2010 order's requirement to expunge the affidavits of witnesses gathered by City police officers, and

⁶The report of the deputy constable does not appear to be the original, although the original was possibly destroyed in connection with the expunction proceedings conducted after J.E.M. filed his initial petition in 2009. Nevertheless, whether the report in the records before us is the original or a copy, the items the trial court expunged extended to records created by a law enforcement agency associated with Jefferson County, an agency that is not associated with the City. Additionally, the deputy constable made a video-recording of some parts of J.E.M.'s altercation which led to his being charged with aggravated assault. Although the videotape is not in the record, the City contends the trial court expunged it "in absentia."

to expunge reports made by City of Beaumont policemen. In issues five and six, the City contends that J.E.M.'s acquittal is not a defense to a suspension proceeding, and concludes that as J.E.M.'s employer, it is entitled to maintain reports and records that relate to J.E.M.'s criminal investigation files as part of J.E.M.'s personnel files. The City also argues that the trial court erred by requiring it to redact information from records related to the City's suspension proceedings, such as the notice J.E.M. received listing the reasons for his suspension. In issue seven, the City argues that the trial court should not have granted J.E.M.'s request to expunge his arrest records when at the same time he was pursuing civil cases in which the facts of the altercation were relevant. In issue eight, the City argues it established that it needed the records related to J.E.M.'s arrest during the 2010 expunction hearing. *See* Tex. Code. Crim. Proc. Ann. art. 55.02 § 4(a)(2)(B) (West Supp. 2010) (allowing the law enforcement agency and the prosecuting attorney to retain records and files if the State establishes that the records and files are necessary for use in a civil case). The City asks that we render judgment in the City's favor.

Although J.E.M.'s brief contains argument, he did not respond to the issues raised in the City's brief in the order the appellant presented those issues or points, although it would have been practical for him to do so. *See* Tex. R. App. P. 38.2(a)(2). In his brief, J.E.M. acknowledges that he is now involved in litigation that makes "the materials contained in the expunged records subject to discovery proceedings." With respect to the expunged records, J.E.M. now argues that he needs the records the City obtained from the Beaumont Police Department in connection with proving his claims against the City. Additionally, during oral argument, J.E.M.'s attorney agreed that the records the trial

court expunged included records that J.E.M. needs in his litigation against the City. J.E.M. also acknowledges in his brief that, without being requested to do so, the trial court expunged records that were not located in the files of any law enforcement agencies.

With respect to the records J.E.M. characterizes as unrelated to law enforcement, J.E.M. contends that we should remand the matter to the trial court to allow the trial court to conduct further proceedings, to separate law enforcement records from those that are unrelated to law enforcement, and to permit the trial court to decide whether the non-law enforcement records were properly or improperly expunged. Finally, J.E.M. argues that after the trial court's ruling, he settled the personal injury claim he brought against the person that he was accused of assaulting; J.E.M. concludes that because his personal injury suit was settled, the fact that it was pending when the trial court expunged his records would not now justify a decision overturning the trial court's order.⁷

Standard of Review

Chapter 55 of the Texas Code of Criminal Procedure allows a person arrested, but later acquitted, or who has had the charges dropped, to obtain an order from a trial court expunging records related to the arrest. A statutory expunction proceeding is a civil proceeding, and the petitioner has the burden of proving that he has complied with the requirements that are particular to the expunction statute. *Collin Cnty. Dist. Attorney's*

⁷The City contends that the facts regarding the status of J.E.M.'s suit for personal injuries should not be considered in this appeal, as the settlement arose after the trial court ruled on the 2010 expunction petition. We further note that at the time the trial court conducted the 2010 hearing, the City demonstrated that it was involved in litigation arising from J.E.M.'s suspension as a City employee.

Office v. Dobson, 167 S.W.3d 625, 626 (Tex. App.—Dallas 2005, no pet.); *Houston Police Dep't v. Berkowitz*, 95 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

We review a trial court's ruling on a petition for expunction under an abuse of discretion standard. *Tex. Dep't of Pub. Safety v. J.H.J.* 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Heine v. Tex. Dep't of Pub. Safety*, 92 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004).

Analysis

Although the Code of Criminal Procedure provides a procedure for persons under defined circumstances to obtain a court order expunging records that relate to the person's arrest, the expunction statute also allows the trial court to refuse to expunge records that are necessary for use in a civil case. *See* Tex. Code Crim. Proc. Ann. art. 55.02 § 4(a)(2)(B). While J.E.M. now concedes that at least some of the records the trial court expunged are necessary in civil litigation, we conclude that the City sufficiently demonstrated in the trial court that the records at issue were needed in the City's defense against J.E.M.'s suit for reinstatement. The expunged records tend to support the City's claim that its decision to discharge J.E.M. centers on the altercation which led to J.E.M.'s arrest; thus, the eyewitness and police accounts regarding what happened, as well as the police reports, are directly relevant in resolving whether J.E.M.'s termination was justified.

Because the City demonstrated that J.E.M.'s wrongful discharge case and personal injury case made the records at issue necessary for use in civil litigation involving J.E.M., we conclude that the trial court erred in granting J.E.M.'s 2010 expunction petition. We hold the trial court abused its discretion in granting J.E.M.'s 2010 expunction petition after the City made the trial court aware of the need to retain the records at issue for use in civil litigation. We sustain issue eight. In light of our disposition of this issue, we need not reach the City's other issues. *See* Tex. R. App. P. 47.1.

Although we have determined the trial court erred in granting J.E.M.'s request to expunge the records at issue, the parties disagree about the remedy necessary to cure the trial court's error. The City asks that we render judgment in its favor, and J.E.M. suggests that we allow the trial court to hold further hearings to determine which of the documents should remain protected by the trial court's order.

In this case, the City's appeal concerns thirty five documents, but does not include all documents addressed in the 2010 expunction order. In determining the remedy to apply in this case, we begin by recognizing the rule that there can be no partial expunctions. *See Ex parte Elliot*, 815 S.W.2d 251 (Tex. 1991) (rendering judgment denying expunction even though only one entity affected by the trial court's expunction order was a party to the appeal); *Tex. Dep't of Pub. Safety v. C.K.H.*, No. 09-08-00414-CV, 2009 Tex. App. LEXIS 3311, at *3 (Tex. App.—Beaumont May 14, 2009, no pet.)

(mem. op.) (“The reversal of an expunction order is not limited to the appealing governmental entity but affects all agencies in possession of records and files.”).⁸

In this case, the trial court’s amended expunction order references a central state depository of criminal records, although the State was not notified of the 2010 proceedings. Additionally, the 2010 order references the ruling the trial court made during the hearing, and those rulings extend to a report and a videotape made by a Jefferson County Constable. With respect to the records created by the Jefferson County Constable, we note that he would be the custodian of those records. *See* Tex. Gov’t Code Ann. § 552.201. However, the record does not reflect that the Jefferson County Constable was served with a notice of the 2010 hearing.

According to the Texas Supreme Court, the proceedings under the expunction statute contemplate a uniform proceeding involving all of the agencies with an interest in the former defendant’s criminal records, as these agencies “share not only interwoven but identical interests[]” with respect to uniform management of records. *Id.* at 251-52. “Expunction by only some, and not all, agencies would undermine these goals.” *Id.* at 252. The effect of a decision to invalidate the expunction of some records invalidates the order as to all of the records expunged. *See Ex parte Elliot*, 815 S.W.2d at 252.

⁸*See also Ex parte J.F.G.*, No. 04-09-00772-CV, 2010 Tex. App. LEXIS 9409, at *4 n.1 (Tex. App.—San Antonio Nov. 24, 2010, no pet.) (mem. op.); *Ex parte Kapp*, No. 04-10-00264-CV, 2010 Tex. App. LEXIS 9365, at **3-4 (Tex. App.—San Antonio Nov. 24, 2010, no pet.) (mem. op.); *Travis Cnty. Dist. Atty. v. M.M.*, No. 03-08-00241-CV, 2010 Tex. App. LEXIS 6346, at **27-28 (Tex. App.—Austin Aug. 6, 2010, no pet.); *Tex. Dep’t of Pub. Safety v. Zuniga*, No. 13-09-00611-CV, 2010 Tex. App. LEXIS 4791, at *5 (Tex. App.—Corpus Christi June 24, 2010, no pet.) (mem. op.).

Because we have determined that the trial court erred by granting J.E.M.'s petition, we conclude that the proper remedy is to reverse and render judgment denying J.E.M.'s 2010 petition seeking expunction.⁹ We reverse and render judgment denying expunction, and we order that any documents surrendered to the trial court are to be returned to the submitting agencies.

REVERSED AND RENDERED.

HOLLIS HORTON
Justice

Submitted on June 30, 2011
Opinion Delivered August 31, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.

⁹During the hearings conducted on the 2010 petition, the trial court correctly observed that the effect of our opinion regarding J.E.M.'s 2009 petition was to invalidate the 2009 order. *In re Beaumont City Attorneys*, No. 09-10-00210-CV, 2010 Tex. App. LEXIS 5334, at **12-13 (Tex. App.—Beaumont June 8, 2010, orig. proceeding [mand. conditionally granted]) (mem. op.) (holding that J.E.M. failed to notify all of the agencies that held records related to his arrest).