

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-16-00091-CV**

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**DAVID TODD BURKE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 252nd District Court**  
**Jefferson County, Texas**  
**Trial Cause No. X-1592**

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**MEMORANDUM OPINION**

In this appeal, we are asked to decide whether David Todd Burke, who filed a petition seeking to expunge all of the records in his underlying criminal case bearing Cause Number 09-7066, waived his right to seek to expunge the records in Cause Number 09-7066 by agreeing to an order in that cause that enjoined Burke “from being employed as or working as a peace officer in the State of Texas” until December 10, 2024. *See* Tex. Code Crim. Proc. Ann. arts. 55.01-.06 (West 2006 &

Supp. 2016) (Expunction of Criminal Records). Because Burke waived his right to seek to modify or dissolve the injunction rendered in Cause Number 09-7066, we conclude the trial court did not err by denying Burke’s petition to expunge all of the records in that case since expunging them would have resulted in the destruction of the order preventing Burke from returning to his former duties as a peace officer.

### Background

In July 2009, the State indicted Burke in Cause Number 09-7066 for official oppression. The indictment was based on conduct that occurred in August 2007. Ultimately, in 2014, the State and Burke reached an agreement to resolve the charges against him in Cause Number 09-7066. Under Burke’s agreement with the State, the trial court in Cause Number 09-7066 signed an Agreed Order enjoining Burke from working as a peace officer in the State of Texas until December 2024. In return, the State agreed to dismiss the case in which Burke had been charged with official oppression. The Agreed Order provides that Burke “waives all rights to file any motion to modify or dissolve this injunction.” In a separate order, which the trial court rendered on the same date, the court dismissed Cause Number 09-7066. In its motion to dismiss, the State alleged that it no longer wished to prosecute Burke because he had “agreed to [the] Permanent Injunction.”

Approximately six months after Burke agreed to the permanent injunction, he filed a petition seeking to expunge “any and all records arising out of” the charges in Cause Number 09-7066. The district clerk assigned Cause Number X-1592 to Burke’s petition, and then assigned the petition to the 252nd District Court, the court that handled Burke’s criminal case.<sup>1</sup> *See* Tex. Code Crim. Proc. Ann. art. 55.02 § 1 (West Supp. 2016) (authorizing the district court that presided over the defendant’s criminal case to consider a petition to expunge the records in the underlying criminal case).

Generally, the rules that apply to expunction proceedings require the clerk of the court, within sixty days, to destroy all court files and records on a person if the person’s petition seeking to expunge the records is granted. *Id.* art. 55.02 § 5(d) (West Supp. 2016). The City of Beaumont and Jefferson County answered Burke’s petition; although Jefferson County’s first response indicated that it did not oppose Burke’s petition, it later amended its petition, and it joined the response the City had filed in opposition to Burke’s request. In its response, the City asserted that Burke had waived any right he might have to expunge the records on file in Cause Number

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<sup>1</sup> Although assigned to the same district court, the judge who signed the Agreed Order and who dismissed Cause Number 09-7066 was not the same judge that denied Burke’s petition. The judge who denied Burke’s petition to expunge the records in Cause Number 09-7066 took office in January 2015.

09-7066 because he agreed that he would not seek to modify or dissolve the injunction in Cause Number 09-7066 in consideration for the State's agreement to dismiss that same case. Because the Agreed Order that reflects the parties' agreement is one of the records being maintained by the District Clerk in Cause Number 09-7066, granting Burke's petition would have resulted in the destruction of the Agreed Order, which prohibits Burke from returning to his duties as a peace officer.

In January 2016, the district court conducted a hearing on Burke's petition. No witnesses testified in the expunction hearing; instead, the parties relied on exhibits that the parties had attached to their pleadings. At the conclusion of the hearing, the trial court advised the parties that the court was "going to deny the petition for expunction primarily based on the fact that the Agreed Order specifically says that Mr. Burke waives all rights to file any motion to modify or dissolve this injunction." During the hearing, the trial court found that an order expunging the records in Cause Number 09-7066 would destroy the Agreed Order.

Subsequently, Burke appealed from the trial court's decision denying his petition. In one issue, Burke asserts the trial court erred by denying his petition. Burke presents two arguments supporting his issue, claiming that legally sufficient evidence was introduced in the hearing to prove that he qualified to have the records

in Cause Number 09-7066 expunged, and that the Agreed Order the trial court signed in Cause Number 09-7066 cannot legally be enforced.

### 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 all records that are related to the arrest. *City of Beaumont v. J.E.M.*, No. 09-10-00537-CV, 2011 Tex. App. LEXIS 7057 (Tex. App.—Beaumont, Aug. 31, 2011). A statutory expunction proceeding is a civil proceeding, and parties seeking to expunge records have the burden of proving that they complied with the requirements of the expunction statute. *Collin Cty. Dist. Attorney's 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 to expunge records relevant to a criminal case using 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).

## Applicable Law and Analysis

Based on the arguments presented by the parties in the trial court, the trial court's order denying Burke's petition, and the comments that the judge made at the conclusion of the hearing, it is apparent that the judge concluded that by agreeing to the injunction, Burke had waived all rights that he might have otherwise had to attack the Agreed Order. Under Texas law, a "defendant in a criminal prosecution for any offense may waive any rights secured him by law[.]" Tex. Code Crim. Proc. Ann. art. 1.14(a) (West 2005). However, a defendant's waiver must be knowingly and intelligently made before it will be enforced. *In re M.C.*, 412 S.W.3d 48, 52 (Tex. App.—El Paso 2013, pet. denied).

The circumstances that led Burke to agree to the order enjoining him from working as a peace officer in the State of Texas until late 2024 were not disputed. Before Burke and the State reached the agreement that is reflected by the Agreed Order, two juries had been convened in Burke's criminal case. In the first trial, a mistrial occurred. In the second trial, Burke was convicted but his conviction was later reversed due to an error in jury selection. *Burke v. State*, 2012 Tex. Crim. App. Unpub. LEXIS 683, at \*15-16 (Tex. Crim. App. 2012) (not designated for publication). After the Court of Criminal Appeals awarded Burke a new trial, he was facing a third trial and the prospect that he might be convicted. Instead, with the

benefit of counsel, Burke agreed with the State that he would no longer work in Texas as a peace officer, and that he would waive his rights to challenge the injunction designed to insure that he lived up to his part of the agreement, in return for the State's agreement to dismiss the case that would have otherwise gone to trial. Burke received an important benefit by waiving his rights to challenge the Agreed Order, as he avoided the possibility that upon retrial, a jury might find that he was guilty of official oppression. *See* Tex. Penal Code Ann. § 39.03 (West Supp. 2016).<sup>2</sup>

In our opinion, the Agreed Order functions like a pre-trial diversion agreement or a negotiated plea agreement. Agreements like these are considered similar to contracts. *See In re M.C.*, 412 S.W.3d at 53; *In re D.R.R.*, 322 S.W.3d 771, 773 (Tex. App.—El Paso 2010, no writ); *see also Ex parte Williams*, 637 S.W.2d 943, 948 (Tex. Crim. App. 1982). In Burke's underlying criminal case, both the State and Burke agreed to "give up some consequence in exchange for a benefit." *In re D.R.R.*, 322 S.W.3d at 773 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978))

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<sup>2</sup> We cite to the current version of the Penal Code, as any amendments made do not affect the outcome of this opinion. Official oppression is punishable as a Class A misdemeanor, it subjects a defendant to a potential fine not to exceed \$4,000, and a potential jail sentence to a term not to exceed one year. Tex. Penal Code Ann. § 39.03(d) (West Supp. 2016), § 12.21 (West 2011).

(explaining that a plea bargain “flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial”). A defendant who accepts the benefits of a plea agreement is estopped from later questioning the existence, validity, or effect of the agreement. *See In re M.C.*, 412 S.W.3d at 53 (citing *In re D.R.R.*, 322 S.W.3d at 774).

Burke agreed to the injunction and agreed to waive any right that he had to modify or dissolve it. Because Burke’s petition in Cause Number X-1592 seeking to expunge the records in Cause Number 09-7066 would necessarily result in the destruction of the Agreed Order, we conclude the trial court was authorized to deny the petition.

In his appeal, Burke also argues that the injunction in Cause Number 09-7066 is legally unenforceable because the trial court that presided over Cause Number 09-7066 no longer has plenary power over the orders it entered in that cause. However, in our opinion, the trial court’s plenary power in Cause Number 09-7066 is not at issue in this appeal because this matter is a separate and distinct proceeding. In Cause Number X-1592, which is the proceeding that is before us in this appeal, the City and the County relied on waiver as an affirmative defense to Burke’s claim that he was entitled to have his petition granted. The appeal does not concern post-judgment



motions filed in Cause Number 09-7066 in which the City was presenting a request to enforce the terms of the Agreed Order.

Should the State seek to enforce the injunction in Cause Number 09-7066, the trial court would then be required to decide whether the Agreed Order functions as a final judgment in order to determine whether it has jurisdiction to decide the State's post-judgment motion. *See In re Vaishangi, Inc.*, 442 S.W.3d 256 (Tex. 2014) (concluding that the court did not have jurisdiction to enforce the terms of a Rule 11 agreement that did not function as an agreement judgment when the party seeking to enforce it filed a post-judgment motion in the same cause but after the case was dismissed). However, even if the trial court determined that the Agreed Order could not function as a final judgment, an issue we expressly do not decide, the agreement that Burke made to induce the State to dismiss Cause Number 09-7066 is nevertheless still enforceable through a new suit alleging that Burke was in violation of his agreement with the State. *See id.* at 260. We conclude that Burke's agreement not to work as a peace officer could be enforced by some court, even if the action to enforce the agreement is required to be filed in a separate suit and if it cannot be enforced through post-judgment motions filed in Cause Number 09-7066.

The 252nd District Court also possesses the power to grant injunctions. As a district court in the State of Texas, the 252nd District Court has jurisdiction over

both criminal and civil matters. *See* Tex. Const. art. V, § 8 (general grant of original jurisdiction in all actions to district courts with exceptions that are not relevant here); Tex. Gov't Code Ann. § 24.429 (West 2004) (creating the 252nd District Court, and requiring that it give criminal cases a preference). We conclude that Burke's claim that his agreement in Cause Number 09-7066 is unenforceable is without merit. Having considered Burke's arguments, we overrule Burke's sole issue on appeal.

We hold that the trial court did not abuse its discretion by concluding that Burke waived his right to file a petition seeking to expunge the records in Cause Number 09-7066. *See Cire*, 134 S.W.3d at 838-39. We affirm the trial court's order.

AFFIRMED.

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HOLLIS HORTON  
Justice

Submitted on September 11, 2017  
Opinion Delivered November 9, 2017

Before McKeithen, C.J., Horton and Johnson, JJ.