



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

	§	No. 08-19-00164-CV
	§	Appeal from the
IN THE MATTER OF THE	§	441st District Court
EXPUNCTION OF T.D.N.	§	of Midland County, Texas
	§	(TC#CV55360)

DISSENTING OPINION ON MOTION FOR REHEARING

Appellee, T.D.N., has filed a motion for rehearing of our opinion dated September 21, 2020, in which we sustained the two issues advanced by Appellant, the Texas Department of Public Safety (the “DPS”), and reversed the trial court’s order granting an expunction for T.D.N. *See Matter of T.D.N.*, No. 08-19-00164-CV, 2020 WL 5627222, at *6 (Tex.App.—El Paso Sep. 21, 2020, no pet. h.). I would grant T.D.N.’s motion, withdraw our opinion and judgment dated September 21, 2020, and reinstate this appeal.

To support one ground of his motion, T.D.N. points our attention to an *en banc* opinion, *Ex parte Ferris*, issued by the Fifth Court of Appeals on October 2, 2020 – less than two weeks after our own – that squarely addressed one of the issues with which we were faced in this case. *See Ex parte Ferris*, 613 S.W.3d 276, 281-85 (Tex.App.—Dallas 2020, no pet. h.). As in our case,

the petitioner in *Ferris* sought an expunction of records relating to a criminal offense for which he had been acquitted at trial, pursuant to Texas Code of Criminal Procedure article 55.01(a)(1)(A). *See Ferris*, 613 S.W.3d at 279; *T.D.N.*, 2020 WL 5627222, at *1. However, as also in our case, the petitioner had previously been convicted of an offense, and the DPS argued on appeal that the petitioner was not entitled to an expunction on their acquitted offense because the two criminal offenses in tandem, though separated in time by multiple years and lacking any factual nexus, constituted a “criminal episode” that precluded expunction of the more-recent acquitted offense under Texas Code of Criminal Procedure article 55.01(c). *See Ferris*, 613 S.W.3d at 281-82; *T.D.N.*, 2020 WL 5627222, at *2. Thus, the court in *Ferris* faced the crucial task of providing a proper interpretation of what constitutes an “offense” under the provision of the expunction statute that precludes expunction of an acquitted offense if it was part of a “criminal episode.” *Ferris*, 613 S.W.3d at 281-83. Our sister court held that two disparate offenses, untethered by timing or a factual nexus, could not be part of the same criminal episode “because they could not be consolidated or joined for trial or sentencing under Penal Code §§ 3.02-3.03.” *Ferris*, 613 S.W.3d at 283-84. However, this Court reached an opposite conclusion that “there is no requirement that the two offenses have a factual nexus or relationship . . . the legislature has imposed no requirement in Section 3.01(2) that the two ‘repeated’ offenses must involve the same victim, be close in temporal or geographic proximity, or were committed in the same or similar fashion.” *See T.D.N.*, 2020 WL 5627222, at *2. As a result, an apparent split in authority between this Court and our sister court was created.

The DPS has filed a response to T.D.N.’s motion for rehearing in which it contends that no rehearing is necessary because our opinion in this case was properly decided. Furthermore, the DPS points out that our sister court’s *en banc* opinion in *Ferris* was narrowly decided by a 7-to-6

majority with four Justices issuing a dissenting opinion. *See Ferris*, 613 S.W.3d at 284-85. Nonetheless, both parties acknowledge *Ferris* addressed the same crucial issue as in this case. And as such, I find it beneficial to the development of Texas jurisprudence on the interpretation of a “criminal episode” under Article 55.01(c) – especially, in light of a potential split of opinion across the intermediate courts on the matter – to reconsider our prior opinion with the benefit of our sister court’s recently announced and thoughtful reasoning.

Therefore, I would grant T.D.N.’s motion to reconsider and reinstate this appeal. Respectfully, I dissent from the denial of the motion for rehearing.

March 12, 2021

YVONNE T. RODRIGUEZ, Chief Justice

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