AFFIRMED; Opinion Filed May 23, 2016.

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-14-01261-CV

EX PARTE MICHEAL GEROD MCGREGOR

On Appeal from the 363rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. X-13-1459-W

MEMORANDUM OPINION

Before Justices Myers, Stoddart, and Whitehill
Opinion by Justice Myers

Micheal Gerod McGregor appeals the trial court's judgment denying his petition for expunction. *See* TEX. CODE CRIM. PROC. ANN. art. 55.02, § 3(a) (West Supp. 2015) ("The person who is the subject of the expunction order . . . may appeal the court's decision in the same manner as in other civil cases."). Appellant brings one issue on appeal contending the trial court erred by granting the State's motion for summary judgment and denying his petition for expunction. We affirm the trial court's judgment.

BACKGROUND

In 1999, appellant was indicted for aggravated sexual assault of a child younger than fourteen years of age. The case was reindicted in January 2001. A jury found appellant guilty under the reindictment and assessed his punishment at life imprisonment and a $10,000 fine. This Court affirmed appellant's conviction. *See McGregor v. State*, No. 05-01-00237-CR, 2004 WL 792647 (Tex. App.—Dallas Apr. 14, 2004, pet. ref'd). After appellant was convicted under

the 2001 indictment, the State moved for dismissal of the 1999 indictment, stating the case had been reindicted under the 2001 indictment. The trial court dismissed the 1999 indictment.

In 2013, appellant filed a petition for expunction of records related to the 1999 indictment. Appellant alleged he was entitled to expunction because the 1999 indictment was dismissed. Dallas County filed a motion for summary judgment asserting the 1999 indictment was not subject to expunction because appellant's conviction under the 2001 indictment was a result of the arrest for the same offense alleged in the 1999 indictment. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2) (West Supp. 2015) (requirements for expunction include that the person has been released and the charge has not resulted in a final conviction). Appellant filed a response to the State's motion for summary judgment. The trial court granted the State's motion for summary judgment and denied appellant's petition for expunction.

PRO SE PARTIES

Appellant is pro se before this Court. We liberally construe pro se pleadings and briefs. *Washington v. Bank of N.Y.*, 362 S.W.3d 853, 854 (Tex. App.—Dallas 2012, no pet.). However, we hold pro se litigants to the same standards as licensed attorneys and require them to comply with applicable laws and rules of procedure. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978); *Washington*, 362 S.W.3d at 854. To do otherwise would give a pro se litigant an unfair advantage over a litigant who is represented by counsel. *Shull v. United Parcel Serv.*, 4 S.W.3d 46, 53 (Tex. App.—San Antonio 1999, pet. denied).

SUMMARY JUDGMENT

The standard for reviewing a traditional summary judgment is well established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter

of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in its favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party's right to prevail is established as a matter of law. *Dickey v. Club Corp.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

EXPUNCTION

Expunction is a statutory remedy, and a person is not entitled to expunction unless all the statutory requirements have been satisfied. *Collin Cty. Dist. Attorney's Office v. Fourrier*, 453 S.W.3d 536, 539 (Tex. App.—Dallas 2014, no pet.). Article 55.01 of the Texas Code of Criminal Procedure provides for expunction of records relating to an arrest for "[a] person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor" and who meets the remaining requirements of the statute. CRIM. PROC. art. 55.01(a). Although the expunction statute appears in the code of criminal procedure, an expunction proceeding is civil in nature, and the petitioner has the burden of proving compliance with the statutory requirements. *Fourrier*, 453 S.W.3d at 539

A person is entitled to expunction following a dismissal of an indictment if the person proves (1) he has been released; (2) the charge has not resulted in a final conviction; (3) the charge is no longer pending; (4) there was no court-ordered community supervision under article 42.12 of the code of criminal procedure, and (5) the indictment was dismissed or quashed (a) because the person completed a pretrial intervention program under section 76.011 of the Government Code or (b) because the indictment's presentment was due to "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 (c) because the indictment was void. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2)(A)(ii).

Appellant's petition for expunction alleged he was "entitled to have all records and files concerning the charge in this case expunged for the following reason: The Honorable Cliff Stricklin dismissed Cause No. F99-22740-I [the 1999 indictment] on February 5, 2001, in Criminal District Court #2."

The State's motion for summary judgment established appellant was indicted in 1999; he was arrested no later than February 7, 2000;[1] the offense was reindicted in January 2001; appellant was convicted of the offense and sentenced to life imprisonment on February 2, 2001, and the 1999 indictment was dismissed on February 5, 2001 because the case had been reindicted. The State asserted, "Because Petitioner was convicted as a result of the arrest identified in his petition, he is not entitled, as a matter of law, to expunction of the related arrest records."

Appellant asserts the offense for which he was convicted under the 2001 indictment did not arise out of the arrest because it was for a different offense. The 1999 indictment, before it was amended, alleged appellant sexually assaulted To. on or about July 2, 1998, and that To. was then younger than fourteen. The copy of the 1999 indictment in the record shows the indictment was amended by hand, changing the name of the complainant to Ta. and the offense date to on or about June 3, 1997. The 2001 indictment is identical to the 1999 indictment as amended, naming Ta. as the complainant and stating the offense date was on or about June 3, 1997. This shows the 1999 indictment and the 2001 indictment were for the same offense. Similarly, several of appellant's arguments concern the spelling of the complainant's name and the offense date

[1] The judgment of conviction states appellant was credited with time served from February 7, 2000 through the date of the judgment. The State asserted in its motion for summary judgment that appellant was arrested on March 16, 1999, but no evidence in the record shows appellant was arrested before February 7, 2000.

alleged in the original form of the 1999 indictment. However, those matters were amended by interlineation, so the original spelling of the complainant's name and the original alleged offense date had no further legal relevance. *See Fahrni v. State*, 473 S.W.3d 486, 503 (Tex. App.—Texarkana 2015, pet. ref'd) ("An interlineated copy of the original indictment showing the amendments approved by the trial court is an effective amendment.").

Appellant further asserts the indictments were presented against his corporation, "Michael Gerard McGregor," and not against him, "Micheal Gerod Mc Gregor." However, as appellant states in his brief, he was arrested, tried, and sentenced to life imprisonment. To the extent appellant may be arguing the misspelling of his name made the indictment or his conviction void, he is incorrect. The misspelling of appellant's name may have been a defect, error, or irregularity in the indictment, but appellant had to object to the defect before trial. The failure to object waives any defect, error, or irregularity in the indictment or information, and the defect, error, or irregularity may not be raised on appeal or in any subsequent proceeding. CRIM. PROC. art. 1.14(b) (West 2005); *Ramirez v. State*, 105 S.W.3d 628, 630 (Tex. Crim. App. 2003). Nothing in the record shows appellant objected to the spelling of his name in the indictment; therefore, he has waived any complaint concerning the spelling of his name in the indictments.

Appellant also asserts the trial court did not make findings of fact and conclusions of law explaining the reasons for the dismissal of the 1999 indictment. Appellant argues the trial court's dismissal of the 1999 indictment was for undetermined reasons and may have been due to the indictment's being void or presented based on mistake, false information, or other reason indicating absence of probable cause. We disagree. The summary judgment evidence shows the trial court's order granting dismissal of the 1999 original indictment was not a stand-alone order with no apparent reason for the order. Instead, the order is a copy of the State's motion to dismiss on which the trial court had written, "Dismissed on Motion of Dist. Atty. Felicia

Moncrief Asst. Dist. Atty." and the trial court signed and dated the statement. The motion to dismiss stated,

> Now comes the District Attorney of Dallas County, Texas and asks the Court to dismiss the above entitled and numbered cause, for the following reasons, to-wit:
>
> The above case has been reindicted as Cause Number F01-00036.
>
> WHEREFORE PREMISES CONSIDERED, the State respectfully requests that this case be dismissed.

Thus, the record established that the trial court dismissed the 1999 indictment for the reason set forth in the District Attorney's motion, which was that the case had been reindicted. Attached to appellant's petition was another order dismissing the 1999 indictment. This order was separate from the motion to dismiss, but it stated, "IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the above styled and numbered cause be and hereby is DISMISSED for the reasons stated in said Motion." The trial court's basis for dismissal under this order is clear, "the reasons stated in said Motion," which was that "[t]he above case has been reindicted as Cause Number F01-00036."

Appellant makes numerous arguments that the 1999 indictment was void or based on mistake, false information, or other reasons indicating absence of probable cause. These reasons could support expunction under article 55.01(a)(2)(A)(ii) only if the record showed the trial court dismissed the 1999 indictment due to it being void or presented based on mistake, false information, or other reason indicating absence of probable cause. However, the record established that the trial court dismissed the 1999 indictment because the case was reindicted in the 2001 indictment. The record contains no evidence that the trial court dismissed the 1999 indictment because it was void or presented based on mistake, false information, or other reason indicating absence of probable cause.

Appellant also asserts he "is incarcerated under a void indictment." However, if appellant has not been released, and his statement that he "is incarcerated" establishes he has not been released, then he is not entitled to expunction. *See* CRIM. PROC. art. 55.01(a)(2) (person entitled to expunction if "the person has been released"). Moreover, appellant did not plead that he was incarcerated under a void indictment but only that the 1999 indictment was dismissed. The State was not required to move for summary judgment on claims that were not pleaded. *See Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) ("Defendants are not required to guess what unpleaded claims might apply and negate them."); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995) (defendant need not show that plaintiff cannot succeed on any theory conceivable in order to obtain summary judgment but is only required to "meet the plaintiff's case as pleaded"); *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 729 (Tex. App.—Dallas 2015, no pet.) (defendant was not required to move for summary judgment on claims that were not pleaded).

We conclude appellant has failed to show the trial court erred by granting the State's motion for summary judgment and by denying appellant's petition for expunction. We overrule appellant's issue on appeal.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE MICHEAL GEROD MCGREGOR

No. 05-14-01261-CV

On Appeal from the 363rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. X-13-1459-W.
Opinion delivered by Justice Myers. Justices Stoddart and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee The State of Texas recover its costs of this appeal from appellant Micheal Gerod McGregor.

Judgment entered this 23rd day of May, 2016.