

**REVERSED; and Opinion Filed September 12, 2017.**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-16-01326-CV**

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**THE TEXAS DEPARTMENT OF PUBLIC SERVICE, APPELLANT  
V.  
FIDEL ARCOS VELAZQUEZ, JR., APPELLEE**

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**On Appeal from the 416th Judicial District Court  
Collin County, Texas  
Trial Court Cause No. 416-01557-2016**

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**MEMORANDUM OPINION**

Before Justices Lang, Evans, and Schenck  
Opinion by Justice Schenck

The Texas Department of Public Safety (“DPS”) perfected this restricted appeal challenging the trial court’s order expunging records relating to Fidel Arcos Velazquez, Jr.’s arrest for the offense of theft. In two issues, DPS asserts Velazquez was not entitled to an expunction of the records because he was convicted of other offenses arising out of the same arrest, and the trial court failed to notify DPS of a hearing on Velazquez’s expunction motion. We reverse the trial court’s judgment and set aside the Order of Expunction. We issue this memorandum opinion because all issues are settled in law. TEX. R. APP. P. 47.4.

**BACKGROUND**

On April 8, 2016, Velazquez filed a verified petition in the district court seeking to expunge his arrest records for the offense of theft, alleged to have occurred on March 21, 2013, and to have involved property valued at \$50 to \$500. In his petition, Velazquez alleged the case

was reduced to a Class C misdemeanor and that he was placed on deferred adjudication probation for a period of six months, which he successfully completed. The petition listed seven entities, including DPS, as respondents, and as entities that may have records or files pertaining to Velazquez in connection with his arrest and/or the alleged theft. The trial court considered and granted the petition on May 13, 2016. The expunction order was signed by Velazquez's counsel and by a Collin County assistant district attorney, who agreed to its form. DPS did not receive a copy of the order until June 2, 2016, and perfected this restricted appeal on November 10, 2016. The clerk's record contains no notation of a hearing on the expunction petition, and the court reporter indicated in a letter to this Court that she had checked her stenographic notes for May 13, 2016, and found no record of any proceedings occurring on that date in this case.

#### **DISCUSSION**

Relief by restricted appeal is proper where the appellant shows it was a party in the underlying suit and did not participate in the hearing that resulted in the judgment complained of, filed its notice of appeal within six months after the order was signed, and establishes error apparent on the face of the record. *See* TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Dolly v. Aethos Commc'ns Sys., Inc.*, 10 S.W.3d 384, 387–88 (Tex. App.—Dallas 2000, no pet.).

DPS was identified as a respondent in Velazquez's petition and as an entity that may have records concerning Velazquez. DPS did not participate in a hearing on the expunction, and filed this restricted appeal within six months after the expunction order was signed. Accordingly, the disposition of this appeal depends on whether error is apparent on the face of the record.

We first address DPS's second issue concerning the lack of notice of a hearing on the petition for expunction because it is dispositive in this case.

Because expunction is a statutory privilege, the petitioner bears the burden of proving all statutory requirements have been met. *Collin Cnty. Criminal Dist. Attorney's Office v. Dobson*, 167 S.W.3d 625, 626 (Tex. App.—Dallas 2005, no pet.). Moreover, the trial court must strictly comply with the statutory procedures for expunction. *See State v. Echeverry*, 267 S.W.3d 423, 425 (Tex. App.—Corpus Christi 2008, pet. denied).

The expunction statute mandates that the trial court (1) set a hearing on the petition for expunction no sooner than thirty days from the filing of the petition, and (2) give to each official or agency or other governmental entity named in the petition reasonable notice of the hearing by certified mail, return receipt requested, or secure electronic mail, electronic transmission, or facsimile transmission. TEX. CODE CRIM. PROC. ANN. art. 55.02, § 2(a)(c) (West Supp. 2016). The procedures listed in article 55.02 are mandatory. *See Texas Dep't of Pub. Safety v. Riley*, 773 S.W.2d 756, 758 (Tex. App.—San Antonio 1989, no writ). If the record does not indicate that an affected agency was notified in accordance with the statute, then the record reflects a proceeding in violation of the statute and the expunction order must be set aside. *See Rodriguez v. T.M.B.*, 812 S.W.2d 449, 450–51 (Tex. App.—San Antonio 1991, no writ) (reversing trial court and setting aside expunction order after finding that hearing took place without notice to any respondent); *Riley*, 773 S.W.2d at 758 (setting aside expunction order because record did not reflect agencies had been notified of hearing and because judge violated 30 day waiting period).

Velazquez asserts that “[a] docket entry on April 19, 2016, shows that notice of hearing on Velazquez’s petition was sent via mail, facsimile, or email,” and that “[s]pecifically, page 12 of the Clerk’s record shows mailing via certified mail[.]” However, contrary to Velazquez’s assertions, the docket sheet only shows that the trial court “mailed/faxed/mailed Petition” on April 19, 2016 and that the petition was sent by certified mail return receipt requested to DPS. The docket sheet does not list among the events and orders of trial court any notice of a hearing

on the petition, and the record before us contains no evidence that any notice of a hearing was given.

As in *Riley*, error is apparent on the face of the record since the record does not reflect that DPS was notified of a hearing held on Velazquez's petition. *See Riley*, 773 S.W.2d at 758. Likewise, nothing in the record reflects that DPS waived the notice requirement. It was error for the trial court to order Velazquez's records expunged without providing notice to DPS of a hearing. *Id.* This violation of mandatory procedures necessitates the setting aside of Velazquez's expunction order. *Id.* We sustain DPS's second issue. Accordingly, we need not address DPS's first issue on the merits of expunction in this case. TEX. R. APP. P. 47.1.

#### CONCLUSION

The judgment of the trial court is reversed and the May 13, 2016 expunction order is set aside.<sup>1</sup>

/David J. Schenck/  
DAVID J. SCHENCK  
JUSTICE

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<sup>1</sup> The reversal of an expunction order encompasses all of the agencies in possession of the petitioner's criminal records, even of those who did not appeal. *Ex parte Elliot*, 815 S.W.2d 251, 252 (Tex. 1991). Our setting aside the expunction order does not prevent Velazquez from refiling another expunction petition. *See Rodriguez*, 812 S.W.2d at 449 n. 2; *Riley*, 773 S.W.2d at 759 (Butts, J., concurring).



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

THE TEXAS DEPARTMENT OF PUBLIC  
SAFETY, Appellant

No. 05-16-01326-CV      V.

FIDEL ARCOS VELAZQUEZ, JR.,  
Appellee

On Appeal from the 416th Judicial District  
Court, Collin County, Texas  
Trial Court Cause No. 416-01557-2016.  
Opinion delivered by Justice Schenck.  
Justices Lang and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and the May 13, 2016 expunction order is set aside.

It is **ORDERED** that appellant THE DEPARTMENT OF PUBLIC SAFETY recover its costs of this appeal from appellee FIDEL ARCOS VELAZQUEZ.

Judgment entered this 12th day of September, 2017.