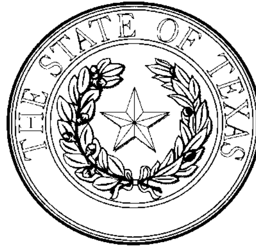
Opinion issued August 16, 2022.



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00399-CV

EX PARTE R.C.

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2019-72454

MEMORANDUM OPINION

Appellant, the Texas Department of Public Safety ("Department"), appeals the trial court's order granting Appellee R.C.'s petition for expunction of all records

of his 2018 arrest for the Class A misdemeanor offense of driving while intoxicated, second offense.[1] We affirm the trial court's order of expunction.

Background

On March 12, 1993, Appellee R.C. was arrested for driving while intoxicated, a Class B misdemeanor ("DWI-1st"). He pleaded guilty and was convicted and sentenced to two years' probation.

On May 5, 2018, Appellee was arrested a second time for driving while intoxicated ("DWI–2nd"). *See* TEX. PENAL CODE §§ 49.04(a), (d). Appellee pleaded not guilty, and his case proceeded to a jury trial. The jury acquitted Appellee of the 2018 DWI–2nd charge on August 28, 2019.

On October 3, 2019, Appellee filed a petition to expunge the records of his 2018 DWI–2nd arrest based on the acquittal. He attached a copy of the judgment of acquittal which identifies the charged offense as "DWI 2ND." The Department filed an original answer and general denial in which it asserted that Appellee was barred from expunging records relating to his arrest for the 2018 DWI-2nd because he was previously convicted of DWI in 1993, and both offenses arose out of the same

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[1] *See* TEX. PENAL CODE § 49.04(b) (stating driving while intoxicated is punishable as Class B misdemeanor "[e]xcept as provided by Subsections (c) and (d) and Section 49.09"); *id.* § 49.09(a) (stating DWI is punished as Class A misdemeanor "if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated. . .").

criminal episode. The Department attached copies of the 1993 judgment, the complaint and information in the 2018 DWI–2nd case identifying Appellee's 1993 DWI in an enhancement paragraph, and the judgment of acquittal for the 2018 DWI–2nd.

After a hearing, the trial court ordered the expunction of all records and files relating to Appellee's 2018 arrest for the DWI–2nd charge. The Department filed a timely appeal.[2]

The Expunction Statute

A defendant does not have a constitutional right to expunction. *Ex parte K.T.*, 645 S.W.3d 198, 201 (Tex. 2022). Expunction is a "statutory privilege." *In re State Bar of Tex.*, 440 S.W.3d 621, 624 (Tex. 2014) (orig. proceeding); *In re Expunction of M.T.*, 495 S.W.3d 617, 620 (Tex. App.—El Paso 2016, no pet.) (holding expunction is "a statutory privilege," not constitutional or common-law right).

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[2] In his expunction petition, Appellee identified the following agencies as respondents who may be in possession of records and files related to his 2018 DWI-2nd: the Houston Police Department, the Texas Department of Public Safety, the Harris County District Attorney's Office, the Harris County Pretrial Services, the Federal Bureau of Investigation, and the Department. In addition to the Department, the Harris County District Attorney's Office also filed an original answer and general denial. The District Attorney's Office, however, is not appealing the order granting expunction and is not a party to this appeal. Nonetheless, the expunction order applies equally to all agencies subject to the order, regardless of whether they made an appearance in the trial court or filed an appeal.

The statutory requirements for expunction are set forth in Article 55.01 of the Texas Code of Criminal Procedure. Article 55.01 allows a person who has been arrested for commission of either a felony or misdemeanor to have all records and files relating to the arrest expunged if the person is tried for the offense for which he was arrested and acquitted, "except as provided by Subsection (c)." TEX. CODE CRIM. PROC. art. 55.01(a)(1)(A). Subsection (c) of Article 55.01 states:

> A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted . . . if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

Id. art. 55.01(c).

Section 3.01 of the Texas Penal Code defines "criminal episode" as the "commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE § 3.01. The only role Penal Code Section 3.01 plays in a civil expunction proceeding is "to delineate whether a 'criminal episode' exists." *Ex parte K.T.*, 645 S.W.3d at 204; *see also Ex parte R.P.G.P.*, 623 S.W.3d 313, 316

(Tex. 2021) ("Expunction is a civil remedy governed by Article 55.01 of the Texas Code of Criminal Procedure.").

When the State invokes the statutory exception to expunction set forth in Subsection (c) of Article 55.01, the State must establish that a "criminal episode" has been formed pursuant to Penal Code Section 3.01, and that the acquittal at issue "arose out of" that "criminal episode." *Ex parte K.T.*, 645 S.W.3d at 202. Thus, "[t]o block the expunction of [an applicant's] arrest records, the State must show the 'commission' of *at least* two offenses to establish a criminal episode." *Id.* at 206 (emphasis in original); *see also* TEX. PENAL CODE § 3.01.

Discussion

While this appeal was pending, the Texas Supreme Court issued its opinion in *Ex parte K.T.*, 645 S.W.3d 198 (Tex. 2022), which is dispositive of the current appeal. In that case, K.T. and C.F. had both been convicted of one charge of driving while intoxicated ("DWI") and then acquitted of a second DWI charge several years later.[3] *Id.* at 201. Following acquittal of the second charge, both K.T. and C.F. filed petitions to expunge all records relating to the arrests for their acquitted charges. *Id.*

[3] *Ex parte K.T.* and *Ex parte C.F.* are separate and unrelated appeals that the Texas Supreme Court consolidated for briefing and argument. *Ex parte K.T.*, 645 S.W.3d 198, 201 (Tex. 2022); *see also Ex parte Ferris*, 613 S.W.3d 276 (Tex. App.—Dallas 2020), *aff'd sub nom.*, *Ex parte K.T.*, 645 S.W.3d 198 (Tex. 2022); *Ex parte K.T.*, 612 S.W.3d 111 (Tex. App.—Fort Worth 2020), *aff'd*, 645 S.W.3d 198 (Tex. 2022).

The respective trial courts granted the expunctions and the State appealed arguing K.T. and C.F. were not entitled to expunction because the first DWI conviction and the second DWI acquittal formed a "criminal episode" and the DWI acquittal "arose out of" that criminal episode. *See id.*; *see also Ex parte Ferris*, 613 S.W.3d 276, 282 (Tex. App.—Dallas 2020), *aff'd sub nom.*, *Ex parte K.T.*, 645 S.W.3d 198 (Tex. 2022); *Ex parte K.T.*, 612 S.W.3d 111, 114 (Tex. App.—Fort Worth 2020), *aff'd*, 645 S.W.3d 198 (Tex. 2022).

The question presented in *Ex parte K.T.* was "whether, as a matter of law, a single conviction and a single acquittal are legally sufficient to establish a 'criminal episode' under Penal Code § 3.01." *Id.* at 202. The Supreme Court concluded they are not. The Texas Supreme Court reasoned that an acquittal, by its very nature, means that "the State did not meet its burden to show that K.T. and C.F. committed, did, performed, or perpetrated the offense of driving while intoxicated beyond a reasonable doubt." *Id.* at 203. Applying the ordinary meaning of "commission," the Court held that because K.T. and C.F. were acquitted of the second DWI charges against them, those offenses had not been "committed" for purposes of Penal Code Section 3.01. *See id.* (defining "commission" as "act of committing, doing, or performing; act of perpetrating. . . ."); *id.* at 205 (stating "an acquittal cannot be leveraged into *forming* a criminal episode because an acquittal does not qualify as the "commission" of an "offense."") (emphasis in original). The Court thus held

that because a "criminal episode" requires the "commission of two or more offenses," the combination of one conviction and one acquittal is legally insufficient to establish a "criminal episode" for purposes of expunction. *See id.* at 202; *see also id.* at 206 ("Without the acquitted charges, the State has only one offense for each respondent, which is legally insufficient to form a 'criminal episode.'").

As in *Ex parte K.T.*, the Department in this case presented evidence that R.C. was convicted of a DWI-1st in 1993, and acquitted of a DWI-2nd in 2019. Because the Texas Supreme Court held in *Ex parte K.T.* that an acquittal does not qualify as a committed offense for purposes of Penal Code Section 3.01, the Department did not meet its burden to establish the formation of a "criminal episode." *Id.* at 202. Thus, as a matter of law, the statutory exception to expunction under Article 55.01(c) does not apply and R.C. was entitled to have the records and files relating to his arrest on the DWI-2nd charge expunged.

We overrule the State's challenges to the order of expunction pursuant to *Ex parte K.T.*

Conclusion

We affirm the trial court's order granting expunction.

Justice Rivas-Molloy

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.