Opinion issued July 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00075-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant

V.

A.R.P., Appellee

On Appeal from the 335th District Court
Washington County, Texas
Trial Court Case No. 37499

MEMORANDUM OPINION

Appellee A.R.P. filed a petition to expunge records associated with his arrest and conviction for theft in 1994. After a hearing, at which appellant, the Texas Department of Public Safety (DPS), did not appear and at which a record was not taken, the trial court granted the expunction. DPS now appeals, arguing in its sole

issue that the trial court erroneously granted an expunction because A.R.P. "failed to meet the statutory requirements" for obtaining an expunction pursuant to Texas Code of Criminal Procedure chapter 55.[1] DPS asserts that the statute does not permit expunction of arrest records following conviction for the offense. We reverse and remand for further proceedings consistent with this opinion.

Background

A.R.P. petitioned for expunction of his criminal records pursuant to Texas Code of Criminal Procedure article 55 using a form from TexasLawHelp.org. A.R.P. provided basic information regarding the arrest for which he sought the expunction—an arrest that occurred on February 9, 1994, in Washington County for theft by check in an amount of $200 or more but less than $750. A.R.P. further indicated that the offense allegedly occurred on September 15, 1993, but he did not fill in any of the remaining blanks on the form. He did not indicate the statute of limitation for the offense or otherwise provide the information required by statute. For example, a section of the petition asks the petitioner to mark whether he was seeking the expunction because the "charge was dismissed or quashed" and "the statute of limitation for this offense had passed before the filing of this petition" or "the charge was dismissed or quashed . . . because of mistake or fraud," "because it was void," or "because [the petitioner] completed a pretrial intervention program."

[1] *See* TEX. CODE CRIM. PROC. arts. 55.01–.06 (providing for expunction of criminal records).

Another section of the petition asked the petitioner to provide information about the court where the "charge was *finally* dismissed." A.R.P. did not mark any boxes in these sections or otherwise provide the exact statutory grounds on which he sought expunction.

A.R.P. filed with his petition a copy of his criminal history obtained from DPS. The criminal history contained information regarding A.R.P.'s February 9, 1994 arrest for Class A misdemeanor theft, consistent with the information A.R.P. included in his petition. Under "Court Status," the criminal history provided "convicted" for "court disposition" and identified July 13, 1994, as the "court disposition date." The criminal history further provided that the "final pleading" was "guilty"; the "court confinement" period was "3D[ays]"; and the "court fine" was "[$]50."

The record contains notice of a hearing that was sent by certified mail to the Texas Department of Criminal Justice, the Texas Secretary of State, and DPS's Crime Records Service. DPS filed an answer and general denial, asserting that A.R.P. was barred from expunging records of his 1994 theft arrest because he had been convicted of the charge following that arrest. DPS asserted that "[s]uffering a final conviction is a bar to later expunging records of the arrest," citing Code of Criminal Procedure article 55.01(a)(2); that A.R.P. "was convicted as a result of this arrest" and, thus, "is not entitled to an expunction of these records"; and that

"there is no equitable power to grant an expunction" if the petitioner fails to meet his burden to prove all statutory requirements. DPS requested that the petition for expunction be denied.

Although the record contained a notice for the hearing, there is no record of the hearing itself. There is no record of who appeared at the hearing, but DPS subsequently filed a letter indicating that it did not participate in the hearing. On the date that the hearing was noticed, the trial court signed an order granting expunction of criminal records. The court found that A.R.P. was entitled to expunction of the February 9, 1994 arrest for theft by check that "allegedly occurred" on September 15, 1993. The form order further stated, "The Court finds that no charges arising from this arrest have been filed and the statutory waiting period or statute of limitation expired before Petitioner filed its Petition for Expunction of Criminal Records." DPS filed a notice of appeal.

Expunction

In its sole issue on appeal, DPS argues that the trial court erred in granting the expunction because A.R.P. failed to meet the statutory requirements.

We review a trial court's expunction order under an abuse of discretion standard. *State v. T.S.N.*, 547 S.W.3d 617, 620 (Tex. 2018); *Heine v. Tex. Dep't of Pub. Safety*, 92 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied). Under this standard, we afford no deference to the trial court's legal determinations,

recognizing that the trial court has no discretion in deciding what the law is or in applying it to the facts. *T.S.N.*, 547 S.W.3d at 620. Thus, a trial court's legal conclusions are reviewed de novo. *Id.* When conducting our review, however, we may not substitute our judgment for that of the trial court with respect to resolution of factual issues committed to the trial court's discretion. *In re A.G.*, 388 S.W.3d 759, 761 (Tex. App.—El Paso 2012, no pet.) (holding that trial court abuses its discretion if it acts arbitrarily or unreasonably without reference to guiding rules and principles of law); *see also State v. Echeverry*, 267 S.W.3d 423, 425 (Tex. App.—Corpus Christi–Edinburg 2008, pet. denied) (holding that trial court commits reversible error if it does not strictly comply with statutory procedures for expunction).

"Expunction is not a right; it is a statutory privilege." *In re State Bar of Tex.*, 440 S.W.3d 621, 624 (Tex. 2014); *In re M.T.R.*, 606 S.W.3d 288, 291 (Tex. App.—Houston [1st Dist.] 2020, no pet.). Thus, an expunction cannot be granted unless the statutory requirements are satisfied. *In re M.T.R.*, 606 S.W.3d at 291. An expunction proceeding is civil in nature, and, accordingly, the petitioner bears the burden of proving that all statutory requirements have been met. *Id.* (citing *T.S.N.*, 547 S.W.3d at 620).

Here, A.R.P. sought expunction pursuant to Code of Criminal Procedure article 55.01. That article, however, does not permit expunction of arrest records

when the arrest ultimately resulted in a final conviction. *See* TEX. CODE CRIM. PROC. art. 55.01(a) (providing that person is entitled to expunction of arrest records if he is tried and acquitted or pardoned after conviction, or if "the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court-ordered community supervision").

DPS argues that A.R.P. did not meet the statutory requirements for expunction under article 55.01 because he was convicted of the offense for which he was arrested. We have no record of the hearing on the petition for expunction, and, thus, no record of the evidence presented at the hearing in support of the petition for expunction. Generally, in the absence of a record demonstrating what evidence, if any, was presented to the trial court, we cannot apply the appropriate sufficiency standards. *See Sareen v. Sareen*, 350 S.W.3d 314, 317 (Tex. App.—San Antonio 2011, no pet.) (holding that court could not review sufficiency of evidence in absence of complete record or agreed statement of facts); *see also, e.g.*, *Huston v. United Parcel Serv., Inc.*, 434 S.W.3d 630, 636 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (appellant bears burden to bring forward on appeal sufficient record to show error committed by trial court). "[W]hen an appellant fails to bring a reporter's record, an appellate court must presume the evidence presented was sufficient to support the trial court's order." *Willms v. Am. Tire Co.*, 190 S.W.3d 796, 803 (Tex. App.—Dallas 2006, pet. denied).

Despite the lack of a hearing record, DPS points to the criminal history filed with the petition for expunction, indicating that A.R.P. was convicted of theft following his 1994 arrest. Because we afford no deference to the trial court's legal determinations, *see T.S.N.*, 547 S.W.3d at 620, and because an expunction can only be granted if the statutory requirements are satisfied, *see M.T.R.*, 606 S.W.3d at 291, we conclude that the information contained in the criminal history report is sufficient to overcome the presumption that the evidence presented at the hearing supported the trial court's order and to demonstrate error by the trial court. *See Huston*, 434 S.W.3d at 636; *Willms*, 190 S.W.3d at 803.

Accordingly, we reverse the expunction order. However, we do not grant DPS's requested relief of rendering judgment denying A.R.P.'s expunction petition. *See Ex parte C.G.B.*, No. 12-20-00169-CV, 2021 WL 4202724, at *6 (Tex. App.—Tyler Sept. 15, 2021, no pet.) (mem. op.) (denying DPS's request to render judgment on expunction petition and remanding instead). Because of the lack of record, we cannot say that there was no evidence supporting the trial court's decision; rather, we can only conclude, given the evidence of A.R.P.'s theft conviction, that the trial court's ruling was against the great weight and preponderance of the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 807, 810 (Tex. 2005) (providing standard for legal sufficiency review); *Windrum v. Kareh*, 581 S.W.3d 761, 781 (Tex. 2019) (providing standard for factual

sufficiency review). If that conviction was valid and final, with no subsequent pardon or other action that could satisfy one of the statutory elements, then A.R.P. is not entitled to expunction under article 55.01. We therefore remand for further proceedings consistent with this opinion. *See City of Keller*, 168 S.W.3d at 810; *see also* TEX. R. APP. P. 43.3 (providing that, when reversing trial court's judgment, we must render judgment trial court should have rendered except when (a) remand is necessary for further proceedings or (b) interest of justice requires remand for another trial).

We sustain DPS's sole issue.

Conclusion

We reverse the order of expunction and remand for further proceedings consistent with this opinion.

Richard Hightower
Justice

Panel consists of Justices Hightower, Countiss, and Guerra.