Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00210-CV

Ezra **PLEASANT**,
Appellant

v.

TRAVIS COUNTY DISTRICT ATTORNEY,
Appellee

From the 331st Judicial District Court, Travis County, Texas
Trial Court No. D-1-EX-11-000068
Honorable David Crain, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: September 7, 2016

AFFIRMED

INTRODUCTION

Ezra Pleasant appeals the trial court's order denying his petition for expunction of criminal record. On appeal, Pleasant contends the trial court erred by denying his petition because he qualified for expunction under article 55.01 of the Texas Code of Criminal Procedure. Pleasant also raises due process challenges arguing the trial court failed to appoint counsel and failed to hold a hearing on his petition. In addition, Pleasant challenges to the basis for his original

conviction and his confinement. We affirm the trial court's order denying Pleasant's petition for expunction.

BACKGROUND

It is undisputed that in January 2002, a grand jury indicted Pleasant on three counts: aggravated sexual assault of a child, indecency with a child by contact and indecency with a child by exposure (hereinafter referred to as "the first indictment"). The first indictment alleged all three counts were committed against Pleasant's minor child, D.P., on or about September 1, 1995. The supporting affidavit stated D.P. alleged Pleasant sexually assaulted her from the time she was 9 years old to 13 years old, or between the years 1991 and 1995. This first indictment supported criminal action number 3-02-0220.

In January 2003, a grand jury indicted Pleasant on six counts: the same three counts included in the first indictment alleged to have been committed against D.P. and three additional counts alleging the same three offenses, but against J.G., D.P.'s minor friend. The second indictment alleged the six offenses occurred on or about November 1, 1992.[1] The second indictment supported a new criminal action, number 3-02-2249.

In August 2004, Pleasant was tried under criminal action number 3-02-0220 and convicted of the three offenses contained in the first indictment alleged to have been committed against D.P. Pleasant was sentenced to twenty years' confinement. On September 9, 2008, the Travis County District Attorney (the "D.A.") moved to dismiss criminal action number 3-02-2249 supported by the second indictment, "in which the defendant is charged with aggravated sexual assault of child, for the reason: The defendant was convicted in another case; and pending further info + defendant

[1] Although the dates of the offenses against D.P. listed in the two indictments are different, the two indictments refer to the same criminal activity due to the difficulty of establishing certain dates of the alleged offenses and the extensive period during which the alleged continuous offenses occurred.

was convicted in another case." That criminal action supported by the second indictment was dismissed the same day.

Proceeding *pro se*, on January 11, 2011, Pleasant filed a petition for expunction of all records and files arising out of criminal action number 3-02-2249 supported by the second indictment. Pleasant alleged he was entitled to expunction because he "was tried for the aforementioned offense on September 8, 2008 and the case was dismissed by the trial court pursuant to the Defendant convicted in another case." Pleasant requested a hearing on his petition and requested appointment of counsel. Appointment of counsel was denied. The D.A. intervened in the expunction action and filed a trial memorandum, to which Pleasant filed a *pro se* response. Upon submission of the briefs, a magistrate judge for the criminal district courts entered findings and recommendation on January 22, 2016, recommending Pleasant's petition be denied. The magistrate judge also stated an evidentiary hearing was not necessary because the supporting facts could be determined from the pleadings and sworn response. The trial court adopted the findings and recommendations of the magistrate judge on January 22, 2016. Pleasant perfected this appeal, in which he proceeds *pro se*.

ANALYSIS

Standard of Review

We review a trial court's ruling on a petition for expunction under an abuse of discretion standard. *Tex. Dep't of Pub. Safety v. Dicken*, 415 S.W.3d 476, 478 (Tex. App.—San Antonio 2013, no pet.); *Heine v. Tex. Dep't of Pub. Safety*, 92 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). However, "[t]o the extent a ruling on expunction turns on a question of law, we review the ruling *de novo* because '[a] trial court has no "discretion" in

determining what the law is or applying the law to the facts.'" *Ex Parte Green*, 373 S.W.3d 111, 113 (Tex. App.—San Antonio 2012, no pet.) (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

Burden of Proof

Article 55.01 of the Code of Criminal Procedure provides an opportunity to expunge an arrest record for those who believe they were wrongfully arrested. *Heine*, 92 S.W.3d at 646; *see Ex parte Brummett*, 04-05-00916-CV, 2006 WL 1814361, at *1–2 (Tex. App.—San Antonio July 5, 2006, pet. denied). Although section 55.01 is included in the Code of Criminal Procedure, an expunction proceeding is a civil proceeding; thus, the petitioner carries the burden of proving compliance with the statutory requirements. *Heine*, 92 S.W.3d at 646.

The relevant portion of article 55.01 (as it existed at the time the petition was filed) provides:[2]

> (a) a petitioner who was placed under custodial or noncustodial arrest . . . is entitled to have all records and files *relating to the arrest* expunged if: . . .
> (2) each of the following conditions exist:
> (A) . . . an indictment or information charging the person with commission of a felony was presented, the indictment or information has been dismissed or quashed, *and*:
> . . .
> (B) 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 under Article 42.12 for any offense other than a Class C misdemeanor; *and* . . . .

TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2009) (emphasis added).

[2] Article 55.01 has been amended several times since Pleasant filed his petition for expunction. *See* Acts 2009, 81st Leg., R.S., ch. 690, § 5, eff. June 19, 2009; Acts 2009, 81st Leg., ch. 1103, § 17(b), eff. Sept. 1, 2009 (TEX. CODE CRIM. PROC. ANN. art. 55.01, since amended). We will apply the article as it existed at the time of filing and before the subsequent amendments became effective. Therefore, all cites to Article 55.01 refer to the statute as it existed on January 11, 2011, the date Pleasant filed his petition for expunction.

ANALYSIS

Issue One: Denial of Petition for Expunction

On appeal, Pleasant does not provide specific basis for his assertion that the trial court abused its discretion. In his petition for expunction, Pleasant contends he is entitled to expunction of all of his arrest records because the second indictment was presented based upon mistake and false information.

In his petition for expunction, Pleasant seeks to have all records and files related to his arrest under the second indictment expunged. To be entitled to such expunction, Pleasant was required to prove he "has been released and the charge, if any, has not resulted in a final conviction." TEX. CODE CRIM. PROC. ANN. art. § 55.01. The record reflects criminal action number 3-02-2449 was dismissed because Pleasant "was convicted in another case." Further, review of the two indictments and supporting affidavits reveals the second indictment which supported this dismissed action included the same three charges of offense resulting from the alleged continuous sexual assaults committed against D.P. and for which Pleasant was convicted in criminal action 3-02-0220. Although the second indictment in criminal action 3-02-2449 was dismissed, Pleasant was convicted of the same substantive charges made in both criminal actions. Consequently, these dismissals do not provide a basis for expunction. *See Ex parte Cephus*, 410 S.W.3d 416, 419 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding that to be entitled to expunction of dismissed charges, petitioner must prove that *all* charges in multiple indictments which also contained the dismissed charges resulted in an acquittal, pardon or dismissal to be entitled to expunction).

Thus, the appellate record reflects Pleasant was convicted of some of the charges included in the second indictment. Because he was convicted of charges contained in the second indictment, Pleasant cannot prove, as a matter of law, his entitlement to expunction under Article 55.01.

Because Pleasant failed to satisfy his burden of proof under the statute, the trial court did not err by denying Pleasant's petition for expunction.

For these reasons, the record does not establish the trial court erred by denying Pleasant's petition for expunction.

Issue Two: Denial of Appointment of Counsel

In his second issue on appeal, Pleasant contends the trial court abused its discretion by denying his request for appointment of counsel. Pleasant asserts he was disadvantaged by the lack of legal representation and presented necessary documentation to show his inability to afford adequate representation.

As stated, an expunction proceeding is a civil proceeding. *Heine*, 92 S.W.3d at 646. We review a trial court's failure to appoint counsel in a civil proceeding for an abuse of discretion under Texas Government Code Section 24.016. *Gibson v. Tolbert*, 102 S.W.3d 710, 712 (Tex. 2003). Under Texas law, in certain civil proceedings designated by statute, a trial court must appoint counsel to represent indigent litigants.[3] *Id*. Otherwise, a trial court may, in its discretion, appoint counsel for an indigent party in a civil case. *Id.*; TEX. GOV'T CODE ANN. § 24.016 (West 2004). "[I]n some exceptional cases, the public and private interests at stake [may be] such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant." *Pitts v. State*, 113 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (quoting *Travelers Indem. Co. v. Mayfield*, 923 S.W.2d 590, 594 (Tex. 1996)). No automatic or statutory right to appointed counsel exists for an expunction hearing. *See Pitts*, 113 S.W.3d at 393.

[3] *See, e.g.*, TEX. FAM. CODE ANN. § 51.10 (West Supp. 2016) (regarding juvenile delinquency cases); *id.* § 107.013 (West Supp. 2016) (regarding parental termination cases); TEX. HEALTH & SAFETY CODE ANN. § 574.003 (West 2010) (regarding applications for involuntary mental health treatment and commitment).

"[E]xpunction proceedings are not 'exceptional cases' requiring trial courts to appoint counsel for indigent litigants." *Id*.

Review of the record reveals Pleasant failed to present reason or otherwise show that this case presents exceptional circumstances that would establish basis for the trial court to appoint counsel for his expunction proceeding. Thus, upon review of the record, we conclude the trial court did not abuse its discretion by denying Pleasant's motion for appointment of counsel.

Pleasant's second issue on appeal is overruled.

Issue Three: Denial of an Evidentiary Hearing

In his third issue on appeal, Pleasant contends the trial court abused its discretion by denying his request for an evidentiary hearing on his petition for expunction.

Article 55.02 states that a trial court "shall set a hearing on" a petition for expunction. *See* TEX. CODE CRIM. PROC. ANN. art. 55.02, § 2(c)(West Supp. 2016). While a prisoner has a constitutional right of access to the courts, prisoners have no absolute right to appear personally at civil proceedings. *In Interest of M.M.*, 980 S.W.2d 699, 701 (Tex. App.—San Antonio 1998, no pet.) (citing *Bounds v. Smith*, 430 U.S. 817, 820 (1977)).

"Not every hearing called for under every rule of civil procedure, however, necessarily requires an oral hearing. . . . Unless required by the express language or the context of the particular rule, therefore, the term 'hearing' does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court." *Gulf Coast Investment Corporation v. Nasa 1 Business Center*, 754 S.W.2d 152, 153 (Tex. 1988). "For example, a trial court may rule on an expunction petition without conducting a formal hearing and without the consideration of live testimony, if it has at its disposal all the information it needs to resolve the issues raised by the petition. Presumably, that information might be available by what is in the pleadings . . . or by judicially noticing court records." *Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana

2007, no pet.) (citing *Ex parte Current*, 877 S.W.2d 833, 839–40 (Tex. App.—Waco 1994, no writ)). Therefore, in the event the matter presented addresses only an issue of law and can be determined by the record, alone, a court may rule without holding an evidentiary hearing provided it gives all parties the opportunity to present argument and evidence through written materials. *See* TEX. R. CIV. EVID. 201; *Current*, 877 S.W.2d 833, 839.

We review a trial court's decision to grant or deny a request for an evidentiary hearing on a petition for expunction for abuse of discretion. *Heine*, 92 S.W.3d at 649–50; *In re B.R.G.*, 48 S.W.3d 812, 820 (Tex. App.—El Paso 2001, no pet.).

In his petition for expunction, Pleasant asserted he was indicted based upon mistake or false information. Upon receipt of the D.A.'s plea in intervention and trial memorandum, the trial court required Pleasant to present sworn response and any supporting evidence he deemed necessary. Pleasant responded as directed. In its findings and recommendations, the magistrate judge stated, "I find that since the necessary facts could be determined from the pleadings, including a sworn response from petitioner setting out the facts he wished to prove, that no evidentiary hearing was necessary." The court also took judicial notice of all records in both criminal actions.

Review of the record reveals all of the facts necessary to determine the issues presented were available to the court in the undisputed facts evident in the record, and the substance of the petition turned on an issue of law. Therefore, the trial court did not abuse its discretion by ruling on Pleasant's petition for expunction without holding a hearing.

Pleasant's third issue on appeal is overruled.

Issue Four: Violation of Due Process Based Upon Actual Innocence

In his fourth issue on appeal Pleasant attacks his criminal conviction under the first indictment by asserting he is actually innocent, and therefore, wrongfully confined.

A collateral attack on a final judgment may not be brought in an expunction proceeding. *Ex parte Cephus*, 410 S.W.3d at 419.

The Third Court of Appeals affirmed Pleasant's conviction on direct appeal, and the conviction is final. *Pleasant v. State*, 03-04-00691-CR, 2005 WL 3330352 (Tex. App.—Austin Dec. 9, 2005, pet. ref'd). This collateral attack on his conviction may not be raised or addressed in this expunction proceeding. *See Ex parte Cephus*, 410 S.W.3d at 419.

Pleasant's fourth issue on appeal is overruled.

Issues Five and Six: Violation of Due Process Due to Wrongful Confinement Following Dismissal of Charges

In his fifth and sixth issues on appeal Pleasant asserts he is wrongfully confined because the charges for which he was convicted were dismissed.

As noted above, to be eligible for expunction, Pleasant had the burden to prove "he has been released and *the charge* ... [did] not result in a final conviction." TEX. CODE CRIM. PROC. art. § 55.01(a)(2).

Review of the record reveals Pleasant's assertion that all the charges for which he was convicted were dismissed is incorrect. The record reveals the second indictment was dismissed; however, Pleasant's conviction for the charges and offenses contained in criminal action number 3-02-0220 supported by the first indictment resulted in final conviction, the conviction was affirmed, and Pleasant's has not been released. Consequently, dismissal of the second indictment did not act to dismiss Pleasant's conviction nor does it provide basis for expunction. *See Ex parte Cephus*, 410 S.W.3d at 419.

Pleasant's fifth and sixth issues on appeal are overruled.

Jason Pulliam, Justice