Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-18-00455-CV

EX PARTE V.T.C.

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CI06739
Honorable Solomon Casseb III, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

OPINION ON MOTION FOR REHEARING

Delivered and Filed: November 27, 2019

AFFIRMED

Appellant's motion for rehearing is denied. However, we withdraw our prior opinion and judgment in this case, and substitute this opinion and judgment in their stead.

The Department of Public Safety (DPS) appeals an order granting V.T.C.'s petition for expunction. DPS argues the order is not supported by sufficient evidence, contends the trial court misconstrued the applicable statute, and complains about the lack of a reporter's record. We affirm the expunction order.

BACKGROUND

V.T.C. filed a petition for expunction, requesting an expunction under Texas Code of Criminal Procedure article 55.01(b)(2) based on the prosecutor's recommendation. DPS filed an

answer, alleging V.T.C. was not entitled to an expunction under article 55.01(a) because V.T.C. had been placed on community supervision. DPS's answer did not specifically address article 55.01(b)(2), but generally denied V.T.C.'s allegations. The case was set for a June 7, 2018 hearing.

On June 7, 2018, the trial court signed the expunction order, finding V.T.C. was entitled to an expunction under article 55.01(b)(2) based on the prosecutor's recommendation. The trial court made other findings under article 55.01(b), specifically that V.T.C. had been arrested, and the charge was dismissed after he completed deferred adjudication community supervision. DPS filed a notice of appeal on July 6, 2018.

At the time DPS filed its docketing statement in this appeal, it represented to this court a reporter's record was taken and a copy was requested.[1] After the court reporter filed a notice stating she was not present at work on June 7, 2018, this court gave DPS an opportunity to respond with proof showing a record was taken. DPS did not provide such proof, and stated it was likely that no record was taken. After two attempts to obtain clarification from DPS about the status of the reporter's record, we issued an order stating we would consider only those issues that did not require a reporter's record for a decision. DPS had represented to this court it would contact "trial counsel" about the reporter's record. An Assistant District Attorney then filed a statement with this court swearing a record was not requested at the expunction hearing and therefore one was not taken. DPS then filed its appellant's brief challenging the expunction order.

ARTICLE 55.01(a)

DPS argues the trial court erred by rendering the expunction order under article 55.01(a) because V.T.C. was placed on deferred adjudication community supervision. However, article 55.01(a) and article 55.01(b)(2) are alternative provisions under which a petitioner may obtain an

[1] In its motion for rehearing, DPS acknowledges it assumed a reporter's record had been taken and ultimately, it was mistaken.

expunction. *See* TEX. CODE CRIM. PROC. art. 55.01(a), (b); *Heine v. Tex. Dep't of Pub. Safety*, 92 S.W.3d 642, 648 (Tex. App.—Austin 2002, pet. denied). Because the trial court granted V.T.C. an expunction under article 55.01(b)(2), we need not consider whether appellant was entitled to an expunction under article 55.01(a). *See* TEX. R. APP. P. 47.1 (requiring that we address only those issues raised and necessary to the appeal's disposition). We therefore only consider DPS's issues relating to article 55.01(b).

ARTICLE 55.01(b)

In its remaining issues, DPS argues (1) V.T.C. was not entitled to an expunction under article 55.01(b) because the expunction order is not supported by sufficient evidence, and the trial court could not base its decision on V.T.C.'s pleadings alone because they were controverted; and (2) it is entitled to a reversal because there is no reporter's record.

A. Sufficiency of the Evidence

DPS argues there is no evidence showing V.T.C. had the recommendation of the prosecutor. In the expunction order, the trial court found the prosecutor recommended the expunction. We cannot assess the sufficiency of the evidence admitted at a hearing without a record of the hearing. *See Ex parte Munoz*, 139 S.W.3d 349, 352 (Tex. App.—San Antonio 2004, no pet.). And, without a reporter's record of the trial, we must presume sufficient evidence supports the trial court's findings. *See In re L.C.H.*, 80 S.W.3d 689, 691 (Tex. App.—Fort Worth 2002, no pet.). DPS was also notified before filing its brief that we would consider only those issues that do not require a reporter's record for a decision. *See* TEX. R. APP. P. 37.3(c). We overrule this issue.

B. Absence of a Reporter's Record

DPS complains about the absence of a reporter's record, citing restricted appeal cases. In numerous cases, this court has held that, in a restricted appeal from an expunction order, DPS's inability to obtain a reporter's record due to no fault of its own can constitute reversible error on

the face of the record. *Ex parte Graves*, No. 04-16-00570-CV, 2017 WL 3159459, at *1 (Tex. App.—San Antonio July 26, 2017, pet. denied) (mem. op.) (citing *Ex Parte Garcia*, No. 04-15-00174-CV, 2016 WL 527517, at *2 (Tex. App.—San Antonio Feb. 10, 2016, no pet.) (mem. op.); *Ex parte Ruiz*, No. 04–11–00808–CV, 2012 WL 2834898, at *1 (Tex. App.–San Antonio July 11, 2012, no pet.) (mem. op.)). And, this court has held that in a restricted appeal, error preservation rules do not apply as strictly as in regular appeals. *Texaco, Inc. v. Cent. Power & Light Co.*, 955 S.W.2d 373, 375 (Tex. App.—San Antonio 1997, pet. denied).

However, DPS filed a regular appeal, not a restricted appeal. In *Reyes v. Credit Based Asset Servicing & Securitization*, a regular appeal in which a party was represented at a hearing, this court held, "a party has the burden of objecting to the court reporter's failure to record the proceedings." 190 S.W.3d 736, 740 (Tex. App.—San Antonio 2005, no pet.) (citing TEX. R. APP. P. 33.1). And, without a reporter's record in a regular appeal, we will generally presume the evidence is sufficient to support the trial court's order. *See L.C.H.*, 80 S.W.3d at 691. On original submission, we applied the rules for regular appeals rather than restricted appeals, declined to conclude DPS was absent or not represented by other counsel at the hearing, and held DPS waived its complaint about the absence of a reporter's record by failing to object in the trial court. *See Reyes*, 190 S.W.3d at 740.

C. Motion for Rehearing

In its motion for rehearing, DPS argues: (1) there was no hearing on V.T.C.'s expunction petition; (2) even if there was a hearing, DPS was not present; and (3) if DPS was not present, we should not reach a different outcome in regular appeals than in restricted appeals because this would incentivize DPS to purposefully delay and file a restricted appeal when it could have filed a regular appeal.

1. Whether There Was a Hearing

DPS disputes whether a hearing was held. DPS notes the expunction order does not recite whether a hearing did in fact take place. However, the clerk's record shows V.T.C.'s petition contained a notice of setting for a June 7, 2018 hearing in this case. Also, the trial court clerk's docket sheet states there was a non-jury hearing at 2:00 p.m. on June 7, 2018. At DPS's urging, an Assistant District Attorney filed an affidavit with this court before this case was submitted, suggesting a hearing was held, but stating no record was taken during the hearing because a record was not requested. In light of information before this court, we cannot agree with DPS that a hearing was not held on V.T.C.'s petition for an expunction, especially when the record before us suggests otherwise.

2. Whether DPS Was Present or Represented at the Hearing

DPS acknowledges that nothing in the appellate record indicates whether DPS was present or represented at the hearing. DPS argues the appellate record need not show DPS was absent from the hearing because such a requirement would impose an impossible burden on DPS to prove a negative. DPS also asks that we consider the affidavits attached to its motion and make a fact finding, on rehearing, that DPS was not present at the hearing. DPS alternatively requests that we abate this appeal for the trial court to make a fact-finding as to whether it appeared at the hearing, that the clerk's record be supplemented, and that we reconsider this appeal in light of a new appellate record.

Nothing in the current appellate record affirmatively shows whether DPS was present or represented at the hearing. DPS implicitly argues we should adopt a legal presumption that presumes a party is not present at trial unless the appellate record affirmatively shows otherwise. On this record, we cannot do so. The record indicates DPS had notice of the hearing. A notice of setting for a June 7, 2018 hearing was attached to V.T.C.'s expunction petition, and DPS filed an

answer to V.T.C.'s expunction petition. DPS has not represented to this court or complained that it received insufficient or no notice of the hearing. In this case, we decline to adopt a legal presumption that DPS knowingly fails to appear for properly noticed expunction hearings unless the record shows otherwise. *Cf. Avelo Mortg., LLC v. Infinity Capital, LLC*, 366 S.W.3d 258, 263 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("In the absence of evidence to the contrary, it is presumed that official acts or duties are properly performed . . . .").

We also disagree with DPS's suggestion that there is nothing it could have done in this case to ensure the appellate record showed whether it appeared or was represented at the expunction hearing. If DPS failed to appear for the hearing, it did so despite having notice of the hearing. DPS often fails to appear for expunction hearings and then complains in a restricted appeal about the absence of a reporter's record. *See, e.g.*, *Ex parte K.S.*, No. 04-18-00841-CV, 2019 WL 3805515, at *1 (Tex. App.—San Antonio Aug. 14, 2019, no pet. h.) (mem. op.) (citing other examples). When DPS fails to appear for a hearing, DPS is presumably aware a reporter's record might not be available to show whether DPS was present or represented at the hearing. *See id.* DPS filed its notice of appeal within 30 days of the expunction order in this case, but declined to file a motion to modify or correct any material omissions in the expunction order. *Howe v. Howe*, 551 S.W.3d 236, 260 (Tex. App.—El Paso 2018, no pet.) (stating complaints about recitations in an order may be raised by motion to correct or modify).

Additionally, because it waited until its motion for rehearing to raise this issue, we hold DPS waived its requests for this court to find, or abate this appeal for the trial court to find, whether DPS appeared or was represented at the hearing. Texas Rule of Appellate Procedure 10.5(a) also required DPS to file any "motion relating to informalities in the manner of bringing a case into court must be filed within 30 days after the record is filed in the court of appeals." *See* TEX. R. APP. P. 10.5(a); *Waite v. Waite*, 150 S.W.3d 797, 803 (Tex. App.—Houston [14th Dist.] 2004, pet.

denied) ("[I]informalities in an appellate record . . . involve procedural defects in the form of the record."). By failing to timely raise this objection, the objection is deemed waived. *See* TEX. R. APP. P. 10.5(a).

DPS argues we should have accepted as true the representation in its brief that DPS was not present or represented at the hearing. Texas Rule of Appellate Procedure 38.1(g) provides that, for factual allegations presented in a brief's Statement of Facts in civil cases, we "will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references." TEX. R. APP. P. 38.1(g). In its Statement of Facts, DPS's brief did not state it did not appear at the hearing. *See id.* DPS made this assertion near the end of its brief in the Argument section, and the assertion was not supported by a record citation. *See id.* Furthermore, in the Statement of Facts in his brief, V.T.C. objected to DPS's statement that it did not appear at the hearing and presented arguments as to why the court should not accept this representation as true.

After V.T.C. filed his brief objecting to and arguing against DPS's representation, DPS could have filed a reply brief to further clarify this issue. DPS declined to do so. After V.T.C. filed his brief, DPS also could have made the exact same requests, filed with the exact same evidence, that it now files on rehearing. DPS declined to do so. Instead, DPS delayed in making its request until after this court expended judicial resources deciding the merits of this appeal based on the appellate record before the court. We hold DPS waived the requests DPS now makes on appeal by delaying until the motion for rehearing stage. *Cf. Twin Creeks Golf Grp., L.P. v. Sunset Ridge Owners Ass'n, Inc.*, 537 S.W.3d 535, 546 (Tex. App.—Austin 2017, no pet.) (holding, for trial court proceedings, a party waives its right to seek abatement by failing to assert it until after the hearing on the merits of the case).

3. Failures to Appear in Regular Appeals vs. Restricted Appeals

DPS complains that, in cases in which DPS fails to appear for expunction hearings, our decision incentivizes DPS to purposefully delay and file a restricted appeal instead of a regular appeal. Because we decline to say this is a case in which DPS failed to appear, we disagree with DPS's characterization of our opinion. Nevertheless, even if we or the trial court found DPS did not appear and was not represented at the hearing, DPS cites no authority that DPS would be excused from the error preservation requirements that strictly apply in regular appeals. *See* TEX. R. APP. P. 33.1(a)(1).

Furthermore, when a party knowingly fails to appear for a trial, the party will be more limited in seeking further relief. A party who fails to appear can file timely post-judgment motions to develop the record and obtain relief from the trial court, but in doing so opts into a strict application of error preservation requirements in a subsequent appeal. *Compare* TEX. R. APP. P. 30 (permitting restricted appeal if appellant "did not timely file a postjudgment motion"), *with Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Comm'n App. 1939) (noting a party who fails to appear may file a motion for new trial). Alternatively, in pursuing a restricted appeal, formerly the writ of error procedure, a party must forgo pursuing a post-judgment motion, but can take additional time to acquaint itself with the proceedings to show error on the face of the record without a strict application of error preservation requirements. *See* TEX. R. APP. P. 30; *Lawyers Lloyds of Tex. v. Webb*, 152 S.W.2d 1096, 1098 (Tex. 1941) (noting purpose of writ of error was for "those who do not so participate in the actual trial, and are therefore unfamiliar with the record, [and] need additional time . . . to familiarize themselves with the record."). In the narrow context of a reporter's record not having been taken, in some cases, a restricted appeal might be the only way for a party who failed to appear at trial to obtain further relief. *See, e.g.*, *K.S.*, 2019 WL 3805515, at *1 (citing authorities).

CONCLUSION

We deny DPS's motion for rehearing and affirm the order of expunction.

Luz Elena D. Chapa, Justice