# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-18-00464-CV

**EX PARTE** Oseas **VELA**

From the 79th Judicial District Court, Jim Wells County, Texas
Trial Court No. 17-12-57894-CV
Honorable Richard C. Terrell, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: April 3, 2019

REVERSED AND RENDERED

Appellant Texas Department of Public Safety appeals the trial court's order granting an expunction of all records and files related to Appellee Oseas Vela's arrest for burglary of a building. Because the evidence is insufficient to prove the statutory requirements of Texas Code of Criminal Procedure article 55.01, we reverse the trial court's order granting the petition for expunction.

### FACTUAL AND PROCEDURAL BACKGROUND

Vela was arrested and subsequently charged by indictment for burglary of a building on March 14, 1994. On October 5, 1995, pursuant to a plea agreement, Vela entered a plea of guilty to the lesser included offense of criminal trespass and the trial court sentenced Vela to two-years' deferred adjudication probation.

**A. Vela's Petition for Expunction and Department's Answer**

On December 11, 2017, pursuant to article 55.01(a)(2) of the Texas Code of Criminal Procedure, Vela filed a petition for expunction seeking to expunge the records and files related to the March 14, 1994 burglary of a building arrest. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2). The petition alleged Vela was entitled to an expunction:

> 1. Petitioner was released and the charge, if any, ha[d] not resulted in a final conviction and [was] no longer pending, and there was no court-ordered community supervision under Article 42.12 of the Code of Criminal Procedure for [the offense] . . . , and
> 2. Any indictment or information charging Petitioner with the commission of this [offense] has been dismissed or amended to exclude this offense, and the applicable waiting period has expired, however, the attorney representing the State has certified that the offense and/or arrest records are not needed for any criminal investigation or prosecution, including the prosecution of another person.

Attached to the petition was a certificate of the Jim Wells County District Attorney asserting as follows:

> After conducting a review of the records [pertaining to the charges against Oseas Vela for Burglary of a Building on or about March 14, 1994], I certified that the offense and/or arrest records are not needed for use in any criminal investigation or prosecution, including the prosecution of another person.

On January 26, 2018, the Texas Department of Public Safety filed an original answer and general denial asserting that, because Vela was convicted, and served community supervision as a result of the arrest, Vela was barred from expunging records and files of the arrest from March 14, 1994. More specifically, the Department argued Vela was not entitled to an expunction under article 55.01 because (1) the charges stem from the same arrest as the criminal trespass for which he served deferred adjudication probation, and (2) the charges were only dismissed because Vela entered a guilty plea to the criminal trespass.

**B. Hearing before the Trial Court**

The case was called for hearing on February 12, 2018. The Department was served with notice but did not appear for the hearing.

At the outset, trial counsel explained Vela was actually moving for expunction "under [sub]section (b) of 55.01 and—and the order I have prepared was under [sub]section (a)." Trial counsel conceded that because Vela was originally arrested for burglary of a building, but received deferred adjudication probation for the lesser-included charge of criminal trespass, he "probably would have been prohibited from getting the—the expunction [under subsection (a)] on the original or separate charge of the burglary of a [building].[1] . . . So that's why we have to go the way we're going."

Relying on the district attorney's certificate filed with the petition for expunction, trial counsel argued subsection (b) afforded Vela the right to an "expunction regardless of whether he's been indicted or not but based upon the consent or permission of the District Attorney's office." Trial counsel therefore requested permission to prepare a new order for the trial court's signature ordering the expunction pursuant to subsection (b) of article 55.01.

No testimony was offered; and no additional evidence was admitted at the hearing.

**C. Trial Court's Order**

On March 1, 2018, over the Department's written objections in its answer, the trial court granted Vela's petition for expunction of all records and files related to Vela's March 14, 1994 arrest for burglary of a building. The trial court's order initially states as follows:

> The Court finds Petitioner is entitled to an expunction pursuant to Article 55.01(a)(2) of the Texas Code of Criminal Procedure.

[1] Trial counsel inadvertently referred to the offense as burglary of a habitation throughout the hearing.

The order subsequently states as follows:

> The Court finds that although an indictment or information charging Petitioner with the commission of a misdemeanor or felony was presented, the 79th Judicial District Attorney, who is responsible for prosecuting the offense, has recommended the expunction.

The Department filed a restricted appeal and contends the evidence is insufficient to establish Vela met the statutory requirements entitling him to an expunction under sections 55.01(a)(2) or 55.01(b)(2). *See id*. art. 55.01(a)(2), (b)(2).

We first address whether the Department may attack the trial court's expunction order by restricted appeal.

**RESTRICTED APPEAL**

A restricted appeal is limited to cases in which a party can show:

> (1) [the party] filed notice of the restricted appeal within six months after the judgment was signed; (2) [the party] was a party to the underlying lawsuit; (3) [the party] did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.

*Ins. Co. of State of Penn. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009) (per curiam); *see* TEX. R. APP. P. 26.1(c), 30. For purposes of a restricted appeal, "[t]he face of the record . . . consists of all the papers on file in the appeal, including the [reporter's record]." *Norman Commc'ns v. Tex. Eastman Co*., 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); *accord Flores v. Brimex Ltd. P'ship*, 5 S.W.3d 816, 819 (Tex. App.—San Antonio 1999, no pet.).

**A. Filed within Six Months**

Here, the trial court signed the expunction order on March 1, 2018, and the Department filed its notice of restricted appeal on July 10, 2018. *See* TEX. R. APP. P. 26.1(c). Accordingly, the Department met the restricted appeal's first requirement. *See id.*; *Tex. Dep't of Pub. Safety v. Foster*, 398 S.W.3d 887, 890 (Tex. App.—Dallas 2013, no pet.).

**B. Party to the Underlying Action and Nonparticipation**

Based on Vela's Petition for Expunction, the Department is a "party to the underlying lawsuit," and the record clearly supports the Department "did not participate . . . in the hearing that resulted in the judgment complained of and . . . did not timely file a postjudgment motion or requests for findings of fact and conclusions of law." *See* TEX. R. APP. P. 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). We, therefore, turn to whether error is apparent on the face of the record. *See* TEX. R. APP. P. 30; *Foster*, 398 S.W.3d at 890. In other words, whether on the face of the record, the trial court erred in granting Vela's petition for expunction.

**SUFFICIENCY OF THE EVIDENCE**

The Department contends the evidence is insufficient to establish Vela's right to an expunction under the Texas Code of Criminal Procedure article 55.01, subsections (a) or (b). We address subsection (b) first. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a), (b).

**A. Texas Code of Criminal Procedure Article 55.01(b)**

The findings of fact included in the trial court's order set forth the necessary requirements under which a district court may expunge records. As previously noted, the trial court found the District Attorney "recommended the expunction."

Texas Code of Criminal Procedure article 55.01(b)(2) provides as follows:

> (b) [A] district court . . . may expunge all records and files relating to the arrest of a person . . . if:
>
> . . . .
>
> (2) an office of the attorney representing the state authorized by law to prosecute the offense for which the person was arrested *recommends* the expunction to the court before the person is tried for the offense, regardless of whether an indictment or information has been presented against the person in relation to the offense.

*See id.* art. 55.01(b)(2) (emphasis added).

During the hearing, trial counsel asserted Vela's petition was "based upon the consent or permission of the District Attorney's office." Vela bore the "burden of proving that all of the statutory requirements were satisfied." *See Ex parte Green*, 373 S.W.3d 111, 113 (Tex. App.—San Antonio 2012, no pet.) (citing *State v. Knight*, 813 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1991, no writ)). In other words, Vela was required to present evidence that the District Attorney's office *recommended* the expunction. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(b)(2). The ordinary meaning of the term "recommend" is "to suggest an act or course of action," to endorse, or present as acceptable. MERRIAM-WEBSTER DICTIONARY (11th ed. 2014). *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008) (construing "statute's words according to their plain and common meaning"); *accord City of San Antonio v. Caruso*, 350 S.W.3d 247, 250 (Tex. App.—San Antonio 2011, pet. denied).

Based on a review of the record, the only affirmative statement attributable to the District Attorney's Office was the certificate attached to Vela's petition averring "the offense and/or records are not needed for use in any criminal investigation, including the prosecution of another person." Considering the strict compliance required under article 55.01, we cannot conclude the certificate or the District Attorney "not appearing at the [expunction] hearing" qualify as a *recommendation* by the District Attorney's Office for the expunction of Vela's records. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(b)(2); *Collin Cty. Dist. Atty's Office v. Fourrier*, 453 S.W.3d 536, 539 (Tex. App.—Dallas 2014, no pet.). Accordingly, we conclude the evidence is insufficient to establish Vela's entitlement to an expunction under article 55.01(b)(2).

Because Vela's Petition for Expunction and the trial court's order also assert Vela's entitlement to an expunction under article 55.01(a)(2), we next address whether the record supports that Vela established his entitlement to an expunction under article 55.01(a)(2). *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2).

**B. Texas Code of Criminal Procedure Article 55.01(a)(2)**

Vela contends that because the trial court took judicial notice of the court's file, the record contained the necessary adjudicative facts required upon which the trial court could enter judgment. The Department argues article 55.01(a)(2) precludes an expunction under these facts.

Based on the documents attached to the Department's answer, the trial court could have reasonably determined Vela was (1) arrested; (2) subsequently charged by indictment for burglary of a building; and (3) pursuant to a plea agreement, Vela entered a plea of guilty to the lesser included offense of criminal trespass for which he completed two-years' deferred adjudication probation. *See In re Expunction*, 465 S.W.3d 283, 291 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (op. on reh'g). Taking judicial notice of the trial court's file does not change the requirements under article 55.01(a)(2) or absolve Vela of his obligation to demonstrate the erroneousness of the original charges entitling Vela to an expunction. *See Ex parte Barham*, 534 S.W.3d 547, 551 (Tex. App.—Texarkana 2017, no pet.); *Green*, 373 S.W.3d at 113; *see also* TEX. CODE CRIM. PROC. ANN. art. 55.01(2)(a). More specifically, taking judicial notice of the trial court's file did not provide evidence that Vela's plea of criminal trespass, in exchange for the dismissal of the burglary of a building charge, was statutorily eligible for expunction.

This case is analogous to *Ex parte F.T.K.*, No. 13-16-00535-CV, 2018 WL 2440545 (Tex. App.—Corpus Christi May 31, 2018, no pet.) (mem. op.). The jury acquitted F.T.K. of aggravated assault but convicted him of the lesser included offense of assault causing bodily injury against a family member. *Id*. at *1; *see also Ex parte Vega*, 510 S.W.3d 544, 550–51 (Tex. App.—Corpus Christi 2016, no pet.) (concluding "resulted in a final conviction" includes pleading guilty to a lesser-included offense of the one for which he was arrested). Like the court in *F.T.K.*, we look to the Texas Supreme Court's analysis in *T.S.N.* for guidance. "[R]ecords and files relating to '*the*

offense' encompass the whole of the records and files relating to '*the* arrest.'" *See State v. T.S.N.*, 547 S.W.3d 617, 621 (Tex. 2018) (citing TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1)).

Here, Vela's original charge was burglary of a building. As part of a plea agreement, he entered a plea of guilty to criminal trespass and the State dismissed the burglary of a building charge. Although the burglary of a building charge was dismissed, Vela served community supervision for the criminal trespass rendering Vela ineligible for expunction. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2); *see also Tex. Dep't of Pub. Safety v. Nail*, 305 S.W.3d 673, 681 (Tex. App.—Austin 2010, no pet.) (concluding "Court-ordered community supervision" includes deferred-adjudication community supervision). Accordingly, because Vela was placed on community supervision for a lesser-included offense of burglary of a building, he is not entitled to expunction of the offense for which he was arrested.

## CONCLUSION

Because we conclude Vela failed to establish his entitlement to an expunction of the charges stemming from his arrest for burglary of a building under article 55.01(a)(2) or (b)(2), the trial court erred in granting the petition for expunction. Accordingly, we reverse the trial court's order and render judgment denying Appellee Oseas Vela's petition for expunction.

Patricia O. Alvarez, Justice