Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00100-CV

EX PARTE J.P.

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 2019W1790
Honorable Stephanie R. Boyd, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice
Concurring Opinion by: Liza A. Rodriguez, Justice (joined by Rebeca C. Martinez, Chief Justice)

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 22, 2022

REVERSED AND RENDERED

This is an appeal by the Texas Department of Public Safety of an order granting a petition for expunction of an acquittal. J.P., who was acquitted of a fourth charge for driving while intoxicated (DWI), petitioned the trial court to expunge his records relating to this fourth DWI, notwithstanding his three prior DWI convictions. His petition was granted, and the Department appealed.

Because J.P.'s fourth DWI offense arose out of a criminal episode, and article 55.01(c)'s exception to a right to expunction applies, J.P. was not entitled to expunction of the records and files relating to his fourth DWI arrest, and the trial court erred in granting his petition. We reverse the trial court's order and render judgment denying J.P.'s petition.

BACKGROUND

On April 18, 1994, J.P. was arrested for driving while intoxicated, a Class B misdemeanor. J.P. pled not guilty. A jury found him guilty, and J.P. was convicted. He was assessed a $750 fine and sentenced to two-years' probation. On October 11, 2000, J.P. was arrested for a second DWI, a Class A misdemeanor. J.P. pled guilty and was convicted and assessed a $500 fine and sentenced to nine-months' probation. Later, J.P. was once again arrested for DWI and charged with a third-degree felony offense because of his two prior DWI convictions. J.P. pled guilty to a Class A misdemeanor of DWI 2nd, for which he was convicted on August 19, 2013.

On July 15, 2018, J.P. was arrested for driving while intoxicated. At the time, J.P. had completed the sentences for the three prior DWI convictions. On October 31, 2018, a grand jury issued a true bill of indictment for 3rd Degree Felony offense of DWI 3rd ("July 15 felony DWI").[1] The indictment referenced a DWI judgment of conviction dated April 10, 2001 (from the October 11, 2000 arrest), and the August 19, 2013 DWI conviction. J.P. pled not guilty and the case proceeded to trial. At the end of the guilt-innocence phase of the trial, a jury acquitted J.P. of the July 15 felony DWI. On November 12, 2019, the trial court rendered a judgment of acquittal.

On November 18, 2019, J.P. filed a petition under Chapter 55 of the Texas Code of Criminal Procedure for an expunction order for his July 15 felony DWI. The same day, the trial court granted his petition and signed an expunction order. No reporter's record of the expunction hearing was taken. The Department was timely notified of the acquittal and filed a motion for new trial. The trial court denied the motion, and the Department appeals.

[1] A DWI offense is "a felony of the third degree if it is shown on the trial of the offense that the person has previously been convicted . . . two times of any other offense relating to the operating of a motor vehicle while intoxicated." TEX. PENAL CODE ANN. § 49.09; *accord Ex parte Rodgers*, 598 S.W.3d 262, 267 n.9 (Tex. Crim. App. 2020).

STANDARD OF REVIEW

We review "[a] trial court's ruling on a petition for expunction . . . for abuse of discretion." *State v. T.S.N.*, 547 S.W.3d 617, 620 (Tex. 2018); *accord Ex parte J.A.B.*, 592 S.W.3d 165, 168 (Tex. App.—San Antonio 2019, no pet.). "Under the abuse of discretion standard, appellate courts afford no deference to the trial court's legal determinations because a 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 (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). Under these circumstances, a trial court's legal conclusions are reviewed de novo. *Id.*; *see also Ex parte J.A.B.*, 592 S.W.3d at 168; *Ex parte K.R.K.*, 446 S.W.3d 540, 542 (Tex. App.—San Antonio 2014, no pet.).

When construing a statute, we analyze it "'as a cohesive, contextual whole' with the goal of effectuating the Legislature's intent and employing the presumption that the Legislature intended a just and reasonable result." *T.S.N.*, 547 S.W.3d at 620 (quoting *Sommers for Ala. & Dunlavy, Ltd. v. Sandcastle Homes, Inc.*, 521 S.W.3d 749, 754 (Tex. 2017)). "[O]ur analysis is limited to the application of the plain meaning of the statutory language 'unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.'" *Id.* at 621 (quoting *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014)). "We also 'operate under the presumption that the legislature chooses a statute's language with care, deciding to omit or include words purposefully.'" *Ex parte J.A.B.*, 592 S.W.3d at 169 (quoting *In re Expunction of J.B.*, 564 S.W.3d 436, 440 (Tex. App.—El Paso 2016, no pet.)). Where the "statute assigns detailed definitions to many of the terms it employs, . . . we must adhere to statutory definitions." *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018) (citing *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)).

ISSUES ON APPEAL

In this appeal, the Department presents two issues: (1) that, under Chapter 55, J.P. is not entitled to an expunction of his July 15 felony DWI because he had prior DWI convictions arising out of the same criminal episode as the offense for which he was acquitted, and (2) the evidence is legally insufficient to conclude that J.P. was entitled to expunction.

IS J.P. ENTITLED TO EXPUNCTION UNDER ARTICLE 55.01?

A. The Expunction Statute

Article 55.01 of the Texas Code of Criminal Procedure, entitled "Right to Expunction," provides the framework for our analysis. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01. Article 55.01 "permit[s] the expunction of records of wrongful arrests." *Ex parte J.A.B.*, 592 S.W.3d at 168 (citing *Harris Cty. Dist. Atty's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991)). "If an applicant who has been arrested for the commission of an offense meets all the requirements of the expunction statute, then all information about the arrest is removed from the State's records." *Id.* (citing *In re Expunction of J.B.*, 564 S.W.3d at 439). "Expunction is not a right; it is a statutory privilege." *Id.* (quoting *In re State Bar of Tex.*, 440 S.W.3d 621, 624 (Tex. 2014)). "The petitioner bears the burden of establishing that all of the statutory conditions or requirements are met." *Id.* (citing *T.S.N.*, 547 S.W.3d at 620; *In re Expunction of J.B.*, 564 S.W.3d at 439).

Article 55.01(a) provides that,

> (a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:
>
> (1) the person is tried for the offense for which the person was arrested and is:
>
> (A) acquitted by the trial court, except as provided in Subsection (c) . . . .

TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1)(A). Subsection (c) of article 55.01 provides the following exception to an expunction:

> (c) 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, whether by the trial court, a court of appeals, or the court of criminal appeals, *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 . . . at least one other offense occurring during the criminal episode.*

Id. art. 55.01(c) (emphasis added). 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) [intentionally omitted]; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE ANN. § 3.01; *accord Ex parte K.T.*, No. 20-0977, 2022 WL 1510329, at *2 (Tex. May 13, 2022); *Ex parte J.A.B.*, 592 S.W.3d at 169. At issue in this case is whether J.P.'s fourth DWI arose out of a "criminal episode."

B. Arguments of the Parties

The Department argues that J.P.'s four DWIs fall within the definition of section 3.01(2) because all were the repeated commission of the same DWI offense and, as such, meet the definition of criminal episode.

J.P., on the other hand, argues that he is entitled to expunction because the Department failed to show how the July 15 felony DWI, for which he was acquitted, fell within the statutory definition of criminal episode. In a nutshell, J.P. also contends there is no statute or Texas Supreme Court case law that defines a felony DWI as evidence of a criminal episode per se. He argues that the prior DWIs, especially those noted in the indictment of his July 15 felony DWI, are only relevant to define jurisdiction or the range of punishment and, accordingly, cannot be used as evidence of a criminal episode.

C. Analysis

We begin our analysis by construing the definition of criminal episode under section 3.01(2) of the Texas Penal Code.

1. Criminal Episode Defined

Under section 3.01(2), a criminal episode is defined as "the commission of two or more offenses [that] are the repeated commission of the same or similar offenses." TEX. PENAL CODE ANN. § 3.01(2); *accord Ex parte K.T.*, 2022 WL 1510329, at *2. In construing section 3.01(2), we look to the plain meaning of each word. *T.S.N.*, 547 S.W.3d at 621.

The plain meaning of "repeated" is something that is "renewed or recurring again and again." *Repeated*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/repeated (last visited May 25, 2022).

The plain meaning of "same" is "resembling in every relevant respect." *Same*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/same (last visited May 25, 2022).

The plain meaning of "similar" is something "having characteristics in common: strictly comparable." *Similar*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/similar (last visited May 25, 2022).

Finally, the plain meaning of "offense" is "an infraction of law." *Offense*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/offense (last visited May 25, 2022).

Taken together, the words in section 3.01(2) define a criminal episode as the commission of two or more infractions of law (offenses) that are renewed or occur again and again (repeated) with characteristics in common or comparable (same or similar). *Cf. Ex parte K.T.*, 2022 WL 1510329, at *3 (examining the meaning of the word commission).

Based on the construction of section 3.01(2), J.P.'s three DWI convictions were for commissions of the same or similar repeated offenses and together they constituted a criminal

episode. It is of no importance that the three DWI convictions were distant in time as long as they were "repeated commission of the same or similar offenses." *See* TEX. PENAL CODE ANN. § 3.01(2); *Ex parte J.A.B.*, 592 S.W.3d at 169. "Had the Legislature wanted us to consider a time differential in the application of [section 3.01(2)], it could have easily done so." *Ex parte J.A.B.*, 592 S.W.3d at 169 (quoting *Guidry v. State*, 909 S.W.2d 584, 585 (Tex. App.—Corpus Christi 1995, pet. ref'd)); *see also id.* (Martinez, J., concurring) (encouraging "the Legislature to adopt a narrower definition of 'criminal episode' that better reflects the remedial nature of the expunction statute").

Similarly, "section 3.01(2) does not require that the offenses be committed in the same or similar fashion—only that the offenses are the repeated commission of the same or similar offense." *Ex parte J.A.B.*, 592 S.W.3d at 169 (citing *Waddell v. State*, 456 S.W.3d 366, 370 (Tex. App.—Corpus Christi 2015, no pet.)); *see also Ex parte K.T.*, 2022 WL 1510329, at *5 ("Acquitted offenses can still 'arise from' the two categories of criminal episodes that § 3.01 describes.").

We now turn to J.P.'s arguments.

2. Felony DWI as Criminal Episode

J.P. first argues that no statute defines a felony DWI as a criminal episode per se. But he fails to cite any authority requiring a statute to create such a definition. In the absence of appropriate citations to legal authority, J.P.'s argument is inadequately briefed and presents nothing for our review. *See* TEX. R. APP. P. 38.1(i) (providing that an appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record"); *Wheeler, Tr. of L&P Children's Tr. v. San Miguel Elec. Coop., Inc.*, 610 S.W.3d 60, 68 (Tex. App.—San Antonio 2020, pet. denied) (noting that an appellant who does not properly brief the issues for appellate review waives any complaint); *In re Estate of*

Valdez, 406 S.W.3d 228, 235 (Tex. App.—San Antonio 2013, pet. denied) (concluding an issue was inadequately briefed under Rule 38.1(i) and therefore waived).

J.P. further argues that there is no supreme court case that defines a felony DWI as a criminal episode per se. But where there is no controlling supreme court precedent, it is axiomatic that courts of appeals may construe statutes to determine their meaning. *See, e.g.*, *Ex parte J.A.B.*, 592 S.W.3d at 169.

3. Prior DWIs as Evidence of Criminal Episode

J.P. argues the Department was legally precluded from offering the indictment of the July 15 felony DWI as evidence of a criminal episode because (1) under article 38.03 of the Texas Code of Criminal Procedure, that indictment was not evidence of a criminal episode given that J.P. was not charged as an habitual criminal or as a repeat offender under section 12.42 of the Penal Code,[2] and (2) the prior DWI convictions are only relevant for jurisdictional or punishment purposes and were rendered moot when J.P. was acquitted of the July 15 felony DWI.

Article 38.03 states,

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

[2] Section 12.42 of the Penal Code provides in part,

> (a) Except as provided by Subsection (c)(2), if it is shown on the trial of a felony of the third degree that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the second degree.
>
> (b) Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony of the second degree that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the first degree.
>
> (c)(1) If it is shown on the trial of a felony of the first degree that the defendant has previously been finally convicted of a felony other than a state jail felony punishable under Section 12.35(a), on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 15 years. In addition to imprisonment, an individual may be punished by a fine not to exceed $10,000.

TEX. PENAL CODE ANN. § 12.42.

> The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to *no inference of guilt at his trial*.

TEX. CODE CRIM. PROC. ANN. art. 38.03 (emphasis added).

The issue before us, however, is not whether the indictment was used at the trial of the July 15 felony DWI offense to prove his guilt of that offense. That issue was resolved at the trial of the July 15 felony DWI. The only issue we must resolve is whether J.P.'s July 15 felony DWI arose out of a criminal episode. Accordingly, we conclude that J.P.'s argument that article 38.03 prevents the Department from introducing the indictment as evidence of prior similar offenses is without merit.

Next, J.P. argues that the prior DWI convictions in the indictment, even if proven to be true, were noted in the indictment to determine jurisdiction or the punishment of the July 15 felony DWI. J.P. cites *Oliva v. State*, 548 S.W.3rd 518 (Tex. Crim. App. 2018) and *Zapien-Garcia v. Texas*, No. 03-17-00779-CR, 2019 WL 2308590 (Tex. App.—Austin May 31, 2019, pet. ref'd, untimely filed) (mem. op., not designated for publication) for the proposition that because prior DWI convictions determine the jurisdiction of the courts or are used to enhance the punishment of the offense, his prior DWI convictions were rendered moot and cannot be used as evidence of a criminal episode. Accordingly, he argues, he is entitled to an expunction order under section 1 of Article 55.02 of the Texas Code of Criminal Procedure.

In *Oliva*, the defendant was charged by information with a DWI. *Oliva*, 548 S.W.3d at 520. The information contained the commission of the current DWI and a prior DWI conviction. The focus of the guilt-innocence stage of trial was solely on the current DWI conviction. The defendant was found guilty. *Id.* At the punishment stage, the State introduced evidence of the prior DWI conviction. The jury found the prior conviction to be true and assessed punishment at 180-days' confinement. The judgment labeled the current conviction as a "DWI 2nd." *Id.*

On appeal, the appellate court held that a prior DWI conviction constituted an element of a current DWI offense. Because no evidence of a prior conviction was introduced at the guilt-innocence stage of the trial, the evidence was legally insufficient to support a prior-conviction allegation. *Id.*

The Court of Criminal Appeals disagreed. It held that a prior DWI conviction was not an element of a current DWI offense. Instead, evidence of a prior DWI conviction could be used to determine a court's jurisdiction or as evidence to enhance the current DWI offense in the punishment phase. *Id.* at 526. *Oliva* held that it was jurisdictional in that the prior DWI convictions "are those that raise the level of the offense from a misdemeanor to a felony, which in turn results in vesting jurisdiction of the offense in district court—a court that generally lacks jurisdiction over misdemeanors." *Id.* at 533. As to enhancement of the offense, *Oliva* held that because prior convictions elevate a DWI to a third-degree felony under Penal Code section 49.09(a), they could only be used as evidence in the punishment phase. *Id.* at 534.

In *Zapien-Garcia*, the defendant was charged with DWI—with two prior DWI convictions in 2005 and 2011. *Zapien-Garcia v. State*, 2019 WL 2308590, at *1. The defendant had a third prior conviction in 2002, which he contended was illegal. The issue on appeal was whether the district court erred during the punishment phase of the trial by preventing the defendant from presenting evidence regarding an allegedly "faulty translation of a waiver of his constitutional rights" that was used during the 2002 proceedings, which he claimed was illegal, on relevancy grounds. *Id.* at *8.

The Austin Court of Appeals held that prior convictions, although not relevant in the guilt-innocence phase, were relevant at the punishment phase because it presented different issues than those contemplated in the guilt-innocence phase. *Id.* at *9. Although the court agreed that the trial

court erred in not allowing the defendant to present evidence of the faulty conviction of the 2002 DWI, the court found the error did not result in harm warranting reversal. *Id.* at *10.

We disagree that *Oliva* and *Zapien-Garcia* apply. Neither case stands for the proposition that prior DWI convictions are moot or exempt from the definition of criminal episode because they are only relevant to jurisdictional or punishment questions.

In *Oliva*, the issues were whether a prior DWI conviction was an element of a current DWI offense and whether the prior DWI conviction had to be presented at the guilt-innocence phase of the trial. *Oliva*, 548 S.W.3d at 519–20. In *Zapien-Garcia*, the issue was limited to whether the illegality of a prior DWI arrest was relevant evidence in the punishment phase. *Zapien-Garcia v. State*, 2019 WL 2308590, at *1. Here, the issue is whether, given his three prior DWI convictions, J.P.'s July 15 felony DWI arose out of a criminal episode. We conclude that J.P.'s reliance on *Oliva* and *Zapien-Garcia* is without merit.

Having rejected J.P.'s arguments, we now turn to the issue of whether the July 15 felony DWI is subject to expunction.

4. J.P. Is Not Entitled to an Expunction Order

Under subsection (c) of article 55.01, J.P. is not entitled to expunction of the records relating to the July 15 felony DWI "*if the offense for which [J.P.] was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code.*" TEX. CODE CRIM. PROC. ANN. art. 55.01(c) (emphasis added); *see Ex parte J.A.B.*, 592 S.W.3d at 169. Having established that J.P.'s three DWI convictions constitute a criminal episode under section 3.01(2) of the Texas Penal Code, and J.P.'s July 15 felony DWI charged offense arose out of that criminal episode, we hold that J.P. is not entitled to an expunction order for the July 15 felony DWI. *See Ex parte K.T.*, 2022 WL 1510329, at *4 (noting that "the State *can* block an expunction of an acquittal [because it] can 'arise from' an already-identified criminal episode"). We sustain the Department's first issue.

Because J.P. was not entitled to an expunction order, we need not address the Department's legal sufficiency of the evidence challenge. *See* TEX. R. APP. P. 47.1.

CONCLUSION

Given J.P.'s three prior convictions for DWI, we hold that his July 15 felony DWI charged offense arose out of a criminal episode. Consequently, under article 55.01 of the Texas Code of Criminal Procedure, J.P. is not eligible for an expunction order for the records and files relating to his July 15 felony DWI. We reverse the trial court's expunction order and render judgment denying J.P.'s petition for an order of expunction.

Patricia O. Alvarez, Justice