

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00139-CV**

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**DECARLOS MONTRAY GARRETT, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 221st District Court  
Montgomery County, Texas  
Trial Cause No. 10-01-00255 CV**

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**MEMORANDUM OPINION**

Decarlos Montray Garrett appeals the denial of his petition for expunction of arrest records. Garrett contends the trial court abused its discretion in failing to issue a bench warrant for him to attend the expunction hearing, in failing to appoint him counsel, and in denying his petition to expunge the records. Finding no error by the trial court, we affirm the judgment.

Chapter 55 of the Texas Code of Criminal Procedure establishes a civil proceeding for expunging certain criminal records. *See* Tex. Code Crim. Proc. Ann. arts. 55.01-.06

(West 2006 & Supp. 2010). Under article 55.01(a) of the Code of Criminal Procedure, a person placed under a custodial or noncustodial arrest for commission of a felony is entitled to have all records and files relating to the arrest expunged if the person meets certain statutory requirements. *Id.* art. 55.01(a) (West Supp. 2010). Expunction is a statutory privilege. To obtain relief, a petitioner must strictly comply with the statute. *State v. Echeverry*, 267 S.W.3d 423, 425 (Tex. App.—Corpus Christi 2008, pet. denied). When a party holding criminal records opposes a petition for expunction, the petitioner must meet his burden of proof by submitting evidence on each element of his claim. *Ex parte Jackson*, 132 S.W.3d 713, 716 (Tex. App.—Dallas 2004, no pet.).

Garrett seeks expunction of arrest records in a case that was dismissed. Garrett was neither acquitted of the offense nor subsequently pardoned. He must meet each of the following conditions in order to have his arrest records expunged:

(A) an indictment or information . . . has not been presented . . . or . . . the indictment or information has been dismissed or quashed, and:

(i) the limitations period expired before the date on which a petition for expunction was filed under Article 55.02; or

(ii) the court finds that the indictment or information was dismissed or quashed because the . . . presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause . . . or because it was void;

(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

(C) the person has not been convicted of a felony in the five years preceding the date of the arrest.

Tex. Code Crim. Proc. Ann. art. 55.01(a)(2).

Garrett claimed he was served with an indictment on July 23, 2002, in Cause No. 01-05-03310-CR in Montgomery County and was “under arrest for the offenses of aggravated robbery and aggravated kidnapping on January 31, 2001.” Garrett claimed he was never tried for the offenses. Garrett requested that the court clerk send an expunction order to the agencies and officials he named in his petition. He filed a motion for bench warrant.

The Montgomery County District Attorney’s Office filed an answer to Garrett’s petition, and asked the trial court to deny the petition because “the petitioner has not alleged, and cannot prove, that he had not been convicted of a felony offense in the five years preceding the date of the arrest[.]” The district attorney’s office attached to its answer copies of the indictment, the December 9, 2002 dismissal of the aggravated robbery charge in Montgomery County, and records documenting Garrett’s arrest on July 23, 2002. The district attorney’s office attached an indictment against Garrett for aggravated robbery with a deadly weapon in Cause No. 886,344 in the 338th District Court in Harris County, and a March 1, 2002 Harris County judgment in Cause No. 886,344, which resulted from a jury finding Garrett guilty and sentencing Garrett to ninety-nine years in prison.

The Texas Department of Public Safety also filed an Affirmative Defense and Original Answer in response to Garrett’s petition. Texas DPS attached the Harris County indictment and conviction in Cause No. 886,334, and stated the conviction precluded the

expunction of the records. The DPS argued that because Garrett “was convicted of a felony less than five years before his arrest for Aggravated Robbery and Aggravated Kidnapping[,]” he was not entitled to expunction under article 55.01 of the Texas Code of Criminal Procedure.

In response to the answers, Garrett filed a response in which he argued that on February 24, 2001, “he was arrested in Harris County, Texas, by both ‘Harris and Montgomery County Police Officers[]’ . . . [i]n what was a joint task force.” He stated he was taken into Harris County’s custody, and “was restrained in his liberty by Montgomery County, who’d placed a detainer against him.” He admits he was indicted in Montgomery County on May 22, 2001. He argues that prior to being arrested by the Montgomery and Harris County task force on February 24, 2001, he had no convictions on his record, and therefore, met the requirements for expunction of records. Garrett filed a motion for appointment of counsel. The trial court denied Garrett’s petition for expunction.

Garrett argues in his first issue that the trial court abused its discretion in failing to bench warrant him for an expunction hearing. A notation of “No Bench Warrant. Hrg. by submission” was made on Garrett’s motion for bench warrant. “Not every civil hearing necessarily requires a personal appearance before the court or an oral presentation to the court.” *Gross v. State*, No. 09-06-229-CV, 2006 Tex. App. LEXIS 10098, at \*7 (Tex. App.—Beaumont Nov. 22, 2006, no pet.) (mem. op.). A court may rule upon an

applicant's right to expunction without holding a hearing if all of the facts necessary to determine the issue are before the court. *Ex parte Current*, 877 S.W.2d 833, 839 (Tex. App.—Waco 1994, no writ). Under the circumstances here, the trial court did not abuse its discretion in failing to bench warrant Garrett for an expunction hearing. Issue one is overruled.

In his second issue, Garrett maintains the trial court abused its discretion in failing to appoint him counsel. We review a trial court's failure to appoint trial counsel in a civil case for an abuse of discretion. Tex. Gov't Code Ann. § 24.016 (West 2004); *Gibson v. Tolbert*, 102 S.W.3d 710, 712 (Tex. 2003). "A district judge may appoint counsel to attend to the cause of a party who makes an affidavit that he is too poor to employ counsel to attend to the cause." Tex. Gov't Code Ann. § 24.016; *see Gibson*, 102 S.W.3d at 712. There is no automatic or statutory right to the appointment of counsel in an expunction proceeding. The decision whether or not to appoint an attorney is within the discretion of the trial court. *Pitts v. State*, 113 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("[E]xpunction proceedings are not 'exceptional cases' requiring trial courts to appoint counsel for indigent litigants[.]"). On this record, the trial court had the necessary facts to determine the issue before it without conducting a hearing and without the necessity of appointing counsel. Issue two is overruled.

In his third issue, Garrett asserts the trial court abused its discretion in denying his petition for expunction. In denying Garrett's petition for expunction, the trial court judge

noted on Garrett’s proposed order of expunction, “Denied. Def was convicted of a felony in 5 years preceding arrest[,]” and the judge initialed and dated the notation. Garrett claims he meets the criteria for expunction under article 55.01 of the Texas Code of Criminal Procedure and that his petition for expunction was denied because the trial court “mistakenly held that [Garrett] had been convicted within the five years of being arrested on this case[.]” Allegations in a petition seeking expunction are not evidence. *Ex parte Guajardo*, 70 S.W.3d 202, 206 (Tex. App.—San Antonio 2001, no pet.). The record before the Court documents Garrett’s July 23, 2002 arrest in Cause No. 01-05-03310-CR in the 221st District Court in Montgomery County, and his March 1, 2002 conviction for aggravated robbery with a deadly weapon in Cause No. 886,344 in the 338th District Court in Harris County. The trial court did not abuse its discretion. The trial court’s order is affirmed.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on April 5, 2011  
Opinion Delivered April 28, 2011

Before McKeithen, C.J., Gaultney and Horton JJ.