

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

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**NO. 09-16-00057-CV**

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**TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant**

**V.**

**N.E.A., Appellee**

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**On Appeal from the 260th District Court**  
**Orange County, Texas**  
**Trial Cause No. D-150,191-C**

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**MEMORANDUM OPINION**

In this restricted appeal challenging the trial court's expunction order, the Texas Department of Public Safety (DPS), asserts that: (1) legally insufficient evidence supports the expunction order; (2) the trial court erred in ordering an expunction without holding a hearing; and (3) if a hearing was held, no reporter's record was made of the hearing. The appellee did not file a brief. We sustain the appellant's third issue and reverse the trial court's order based on the absence of a reporter's record.

To prevail in a restricted appeal, DPS must establish that:

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

*Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004).

N.E.A. filed a verified petition for expunction of records of a November 5, 1997, arrest for theft and a December 9, 1997, arrest for theft. On August 21, 2015, DPS filed an original answer generally denying all allegations in the petition and specifically denying that N.E.A. was arrested on the dates alleged in the petition for expunction. DPS alleged that N.E.A. was arrested on December 14, 2001 and charged with three offenses, one of which resulted in a conviction.

After DPS answered the petition, the trial court signed an order of expunction reciting that on August 27, 2015, the case came to be heard on “the pleadings and other documents on file herein[.]”<sup>1</sup> Neither a request for findings of fact and conclusions of law nor a motion for new trial appear in the clerk’s record. DPS filed a notice of restricted appeal on February 24, 2016, less than six months after the trial court signed the judgment. The official court reporter certified that there was no

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<sup>1</sup> The District Attorney agreed to the form and substance of the order of expunction.

request for a record to be taken of the hearing on August 27, 2015, and therefore, no reporter's record is available to be filed.

Not every hearing necessarily requires an oral presentation to the court or taking of evidence. *Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.). Accordingly, no evidentiary hearing is required if the trial court has at its disposal all of the information it needs to resolve the issues in the petition for expunction; for example, through pleadings, summary judgment proof, or by judicially noticed court records. *Id.* Here, DPS alleged that the arrest resulted in a final conviction in a third case. The trial court found that two cases had been dismissed but it made no finding with regard to the disposition of any other charges arising out of the arrest. No reporter's record was made, and the clerk's record lacks any documentation concerning the arrest. On this record, it appears an evidentiary hearing was required to resolve the contested facts.

For purposes of a restricted appeal, the face of the record consists of all 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). Where DPS files an answer but does not appear for the hearing, the petitioner's failure to make a reporter's record of the expunction hearing precludes DPS from challenging the legal sufficiency of the evidence. *Tex. Dep't of Pub. Safety v. J.D.R.*, No. 09-08-00402-CV, 2009 WL

2253270, at \*2 (Tex. App.—Beaumont July 30, 2009, no pet.) (mem. op.). “However, because DPS has complained of the absence of a reporter’s record, the trial court’s order must be reversed, and the cause must be remanded for a new hearing.” *Ex parte Ruiz*, No. 04-11-00808-CV, 2012 WL 2834898, at \*1 (Tex. App.—San Antonio July 11, 2012, no pet.) (mem. op.). The error complained of “probably prevented the appellant from properly presenting the case to the court of appeals.” Tex. R. App. P. 44.1(a)(2). Accordingly, we sustain issue three. The trial court’s order of expunction is reversed, and the case is remanded to the trial court for a new hearing.

REVERSED AND REMANDED.

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CHARLES KREGER  
Justice

Submitted on August 1, 2016  
Opinion Delivered March 23, 2017

Before McKeithen, C.J., Kreger and Johnson, JJ.