COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00194-CV
NO. 02-16-00195-CV
NO. 02-16-00196-CV

S.S. APPELLANT

V.

THE STATE OF TEXAS APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF DENTON COUNTY
TRIAL COURT NOS. CV-2016-00350, CV-2016-00351, CV-2016-00352

MEMORANDUM OPINION[1]

After S.S. was denied employment because of misdemeanor offenses she committed in 2001 and 2003, she filed petitions for nondisclosure of the criminal-history record information related to those offenses. The trial court denied her

[1]*See* Tex. R. App. P. 47.4.

petitions. In four issues on appeal, S.S. argues that the trial court erred and violated her due-process and equal-protection rights by not applying the statute in effect at the time she filed her petitions and by not conducting an evidentiary hearing as required by that statute, and that the trial court erred by holding a hearing on her petitions without a responsive pleading from, and a hearing request by, the State. We affirm.

Background

In June 2001, the trial court placed S.S. on deferred-adjudication community supervision for criminal mischief and marijuana possession. Roughly a year later, the trial court adjudicated her guilty of both offenses and sentenced her to 60 days in jail.

In 2003, a jury convicted S.S. of harassment and assessed punishment at 150 days' confinement and a $1,000 fine. The trial court suspended the sentence and placed her on community supervision for 24 months, which she successfully completed.

In February 2016, S.S. filed a petition for nondisclosure in each case requesting an order prohibiting criminal-justice agencies from disclosing to the public her criminal-history record information. At the hearing on her petitions, S.S. argued that she was entitled to a nondisclosure order under recently enacted government code sections 411.0735, 411.074, and 411.0745. Tex. Gov't Code Ann. §§ 411.0735 ("Procedure for Conviction and Confinement; Certain Misdemeanors"), .074 ("Required Conditions for Receiving an Order of

Nondisclosure"), .0745 ("Petition and Order") (West Supp. 2016). The trial court concluded that these sections did not apply because S.S. committed the offenses before the September 1, 2015 effective date and that S.S. did not satisfy the statutory requirements for nondisclosure that were in effect at the time she committed the offenses. Finding S.S. ineligible for nondisclosure in each case, the trial court thus denied her petitions.

Analysis

In her first and second issues, respectively, S.S. complains that the trial court erred by not applying the statute in effect at the time she filed her petition and by not conducting an evidentiary hearing on all statutorily mandated issues. Specifically, she contends that the trial court should have proceeded under government code sections 411.074[2] and 411.0745[3] and allowed her to put on

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[2]Section 411.074(a) states:

> (a) A person may be granted an order of nondisclosure of criminal history record information under this subchapter and, when applicable, is entitled to petition the court to receive an order under this subchapter only if, during the period after the court pronounced the sentence or placed the person on deferred adjudication community supervision for the offense for which the order of nondisclosure is requested, and during any applicable waiting period after completion of the sentence or deferred adjudication community supervision required by this subchapter, the person is not convicted of or placed on deferred adjudication community supervision under Section 5, Article 42.12, Code of Criminal Procedure, for any offense other than an offense under the Transportation Code punishable by fine only.

Tex. Gov't Code Ann. § 411.074(a) (footnote omitted).

evidence that nondisclosure would serve the best interest of justice. The State responds that these sections do not apply because S.S. committed the offenses before the statute's effective date. The State also asserts that S.S. is ineligible for nondisclosure under the earlier law that does apply to her. We agree with the State.

S.S.'s first issue hinges on statutory construction, something we review de novo and with the primary objective being to ascertain and to give effect to the legislature's intent as expressed in the statute. *See Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 494 (Tex. 2013); *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). To determine that intent, "[w]e look to the [statute's] enabling language as well as the content of the statute

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[3]Section 411.0745(e) provides:

> On receipt of a petition under this section, the court shall provide notice to the state and an opportunity for a hearing on whether the person is entitled to file the petition and issuance of the order is in the best interest of justice. The court shall hold a hearing before determining whether to issue an order of nondisclosure of criminal history record information, except that a hearing is not required if:
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> > (1) the state does not request a hearing on the issue before the 45th day after the date on which the state receives notice under this subsection; and
> >
> > (2) the court determines that:
> >
> > > (A) the person is entitled to file the petition; and
> > >
> > > (B) the order is in the best interest of justice.

Id. § 411.0745(e).

itself." *Nangia v. Taylor*, 338 S.W.3d 768, 770 (Tex. App.—Beaumont 2011, no pet.).

In 2015—a dozen years after S.S.'s last offense—the legislature amended and transferred portions of the statutory provisions governing orders of nondisclosure from section 411.081(d) through (i) to a newly enacted government-code subchapter. *See* Act of May 21, 2015, 84th Leg., R.S., ch. 1279, §§ 1–13, 2015 Tex. Sess. Law Serv. 4327, 4327–34 (West) (codified at Tex. Gov't Code Ann. §§ 411.071–.0775 (West Supp. 2016)); *see also* Tex. Gov't Code Ann. § 411.081(d)–(i) (West Supp. 2016). Before these amendments, nondisclosure was available only in certain cases in which a person was placed on deferred-adjudication community supervision and later received a discharge and dismissal. *See* Act of May 31, 2003, 78th Leg., R.S., ch. 1236, § 4, sec. 411.081(d)–(e), 2003 Tex. Gen. Laws 3499, 3500–01 (amended 2005, 2007, 2013, 2015) (current version at Tex. Gov't Code Ann. §§ 411.0725(b)–(e), 411.074). But now, the statute also allows for nondisclosure after misdemeanor *convictions* in certain cases. Relevant to this case, newly added sections 411.073 and 411.0375 allow someone to seek nondisclosure of certain misdemeanor convictions that resulted in community supervision or confinement. *See* Tex. Gov't Code Ann. §§ 411.073, .0735.

Unfortunately for S.S., these changes in the law apply only prospectively, that is, to the nondisclosure of criminal-history record information for offenses committed after their September 1, 2015 effective date:

> SECTION 32. The changes in law made by this Act apply only to the issuance of an order of nondisclosure of criminal history record information for an offense committed on or after the effective date of this Act. The issuance of an order of nondisclosure of criminal history record information for an offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.
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> . . . .
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> SECTION 34. This Act takes effect September 1, 2015.

Act of May 21, 2015, 84th Leg., R.S., ch. 1279, §§ 32, 34, 2015 Tex. Sess. Law Serv. 4327, 4339 (West). Because S.S. committed the offenses in 2001 and 2003, whether she could receive a nondisclosure order related to these offenses is governed by the law then in effect. *See id.*; *cf.* Tex. Gov't Code Ann. § 311.022 (West 2013) ("A statute is presumed to be prospective in its operation unless expressly made retrospective.").[4] S.S. admits that she does not qualify for nondisclosure under the former law.

Despite the amendment's enabling language, S.S. maintains that the trial court should have nevertheless applied the statute's current version. She supports this contention with three cases interpreting former section 411.081(d), a provision that contemplated a hearing on whether the person was entitled to file

[4]We recognize that the former version of the nondisclosure law was not in effect at the time S.S. committed the 2001 and 2003 offenses. *See* Act of May 31, 2003, 78th Leg., R.S., ch. 1236, § 6(a), (c), 2003 Tex. Gen. Laws 3499, 3502. However, as explained below, that statute was expressly made retrospective. *See id.*

the petition and whether issuance of the order was in the best interest of justice. *See Harris v. State*, 402 S.W.3d 758, 759–60, 763–66 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Carter v. State*, No. 04-07-00854-CV, 2008 WL 4172877, at *1 (Tex. App.—San Antonio Sept. 10, 2008, no pet.) (mem. op.); *Fulgham v. State*, 170 S.W.3d 836, 836–37 (Tex. App.—Corpus Christi 2005, no pet.). But none of these cases helps S.S.

It is true that the courts in *Harris* and *Fulgham* applied the statute that was in effect at the time those petitioners filed for nondisclosure rather than when they were placed on deferred adjudication (Harris in 2001 and Fulgham in 1980). *See Harris*, 402 S.W.3d at 759; *Fulgham*, 170 S.W.3d at 836. But a critical statutory distinction exists: when section 411.081 was amended in 2003 to add subsections (d) through (f), the enabling language expressly made that law retrospective:

> The changes in law made by this Act to Section 411.081, Government Code, as amended by this Act . . . apply to information related to a deferred adjudication or similar procedure described by Subsection (f), Section 411.081, Government Code, as added by this Act, regardless of whether the deferred adjudication or procedure is entered before, on, or after the effective date of this Act.

See Act of May 31, 2003, 78th Leg., R.S., ch. 1236, § 6(c), 2003 Tex. Gen. Laws 3499, 3502. Here, in contrast, the 2015 amendment's enabling language stated that changes in the law were to be applied prospectively only. *See* Act of May 21, 2015, 84th Leg., R.S., ch. 1279, §§ 32, 34, 2015 Tex. Sess. Law Serv. 4327,

4339 (West). *Harris* and *Fulgham* thus do not compel us to apply the current version of the nondisclosure statute (and we would be wrong if we did).

Because S.S. committed the offenses before the legislature amended the nondisclosure statute in 2015, prospectively, those amendments do not apply to her petitions, and the trial court therefore did not err by not applying the statute's current version. We overrule S.S.'s first issue.

S.S. also contends that under *Harris*, *Fulgham*, and *Carter*, the trial court erred by not conducting a hearing on whether nondisclosure served the best interest of justice. The *Harris* and *Fulgham* courts held that the trial courts should have conducted a best-interest hearing—but unlike here, those petitioners were statutorily entitled to seek nondisclosure. *See Harris*, 402 S.W.3d at 763–66; *Fulgham*, 170 S.W.3d at 836–37 & 837 n.1. The third case, *Carter*, yielded a one-paragraph opinion referring among other things to the trial court's failure to conduct a hearing. 2008 WL 4172877, at *1. But on appeal the State had actually joined Carter's request that the case be remanded with instructions to grant the nondisclosure petition, at the very least implying that (unlike S.S.) Carter was statutorily entitled to file the petition. *See id.* Here, even assuming that the trial court should have held a hearing on whether a nondisclosure order was in the best interest of justice,[5] S.S. was not harmed because she was

[5]The State argues that S.S. failed to preserve this issue, but our review of the record shows that she did.

ineligible to petition for such an order in the first place. We therefore overrule her second issue.

In her third issue, S.S. contends that "denial of employment is a matter of constitutional magnitude" and that the trial court violated her due-process and equal-protection rights by not applying the current nondisclosure statute and by refusing to conduct a best-interest-of-justice hearing. As the State correctly notes, S.S. did not preserve these complaints.

To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating the specific grounds for the desired ruling, if not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a). S.S. did not raise her constitutional complaints in the trial court and thus did not preserve them for our review. *See* Tex. R. App. P. 33.1(a)(1); *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993) (holding appellant waived due-process and equal-protection challenges by failing to raise them in the trial court); *In re Baby Boy R.*, 191 S.W.3d 916, 921 (Tex. App.—Dallas, pet. denied) (stating that constitutional claims must be raised in the trial court or they are not preserved for appellate review), *cert. denied*, 549 U.S. 1080 (2006).[6] We overrule S.S.'s third issue.

[6]To the extent S.S. is arguing that the current statute is unconstitutional as applied to her, she likewise did not preserve this argument for our review. *See* Tex. R. App. P. 33.1(a); *In re E.V.*, 225 S.W.3d 231, 233–34 (Tex. App.—El Paso 2006, pet. denied).

S.S.'s fourth and final issue is that the trial court erred by holding a hearing on her petitions without a responsive pleading from, and a hearing request by, the State. During oral argument, S.S. conceded that she failed to preserve error on this issue, and we therefore overrule it as well.

Conclusion

Having overruled each of her four issues, we affirm the trial court's orders denying S.S.'s petitions for nondisclosure.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

DELIVERED: April 13, 2017