COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00370-CV

EX PARTE V.A., JR.

FROM THE 211TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 16-07168-211

MEMORANDUM OPINION[1]

Pro se appellant V.A., Jr. appeals the trial court's order dismissing his petition for expunction. In three points, he contends that the order is erroneous because he meets the statutory requirements for an expunction and that the court's failure to conduct an evidentiary hearing before signing the order violated his constitutional rights to due process and to access to courts. We disagree with these arguments and affirm the trial court's order.

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

Background Facts

Appellant filed a petition for expunction of records relating to his "charge and confinement" for aggravated robbery "in Denton County Cause No. F-2007-0838-C." In the petition, he conceded that he was "currently incarcerated" on the "charge at issue." Nonetheless, he claimed that under chapter 55 of the code of criminal procedure,[2] he was entitled to have all records and files related to that charge expunged.

To the petition, appellant attached a "Register of Actions" related to a different Denton County case, cause number F-2007-1732-C. That cause related to a charge for theft, and the register indicated that the theft charge had been dismissed. Appellant also filed a declaration of his inability to pay costs related to the expunction petition.

The State answered the expunction petition. In the answer, the State contended that appellant was not entitled to expunction of records related to cause number F-2007-0838-C because he was found guilty in that case and was serving a twenty-three-year sentence. Thus, the State contended that appellant's petition was frivolous and asked the trial court to dismiss it. Appellant did not file any documents contradicting the State's assertions that he was convicted of aggravated robbery in cause number F-2007-0838-C and that he was serving his sentence for that offense.

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[2] *See* Tex. Code Crim. Proc. Ann. arts. 55.01–.06 (West 2006 & Supp. 2016).

In accordance with the State's request, the trial court signed an order dismissing appellant's expunction petition. Appellant brought this appeal.

The Resolution of Appellant's Points

We construe appellant's three points as presenting contentions that he met the requirements for an expunction under chapter 55, that the trial court violated his right of due process by not conducting an evidentiary hearing before dismissing his petition, and that the court's failure to hold a hearing also violated his right of access to courts. The State contends that the trial court did not err because appellant cannot establish the statutory conditions for an expunction and because under the circumstances of this case, the law did not require the court to hold an evidentiary hearing. We agree with the State's arguments.

Generally, we review a trial court's ruling on an expunction petition under an abuse-of-discretion standard. *Ex parte S.B.M.*, 467 S.W.3d 715, 717 (Tex. App.—Fort Worth 2015, no pet.). But to the extent a ruling on an expunction petition turns on a question of law, we review the ruling de novo because a trial court has no discretion in determining what the law is or in correctly applying the law to the facts. *Id.*

No entitlement to expunction

Article 55.01 of the code of criminal procedure provides a statutory right to expunge criminal records under certain conditions. *See* Tex. Code Crim. Proc. Ann. art. 55.01; *S.B.M.*, 467 S.W.3d at 718 ("An expunction will be granted only when a petitioner satisfies all statutory conditions. The petitioner bears the

burden of demonstrating that each statutory condition has been met." (citations omitted)); *State v. N.R.J.*, 453 S.W.3d 76, 79 (Tex. App.—Fort Worth 2014, pet. denied) ("A petitioner's right to an expunction is purely a matter of statutory privilege, and the petitioner bears the burden of demonstrating that each of the required statutory conditions [has] been met."). Article 55.01 states in part,

> (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:
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> (1) the person is tried for the offense for which the person was arrested and is:
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> (A) acquitted by the trial court, except as provided by Subsection (c); or
>
> (B) convicted and subsequently:
>
> (i) pardoned for a reason other than that described by Subparagraph (ii); or
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> (ii) pardoned or otherwise granted relief on the basis of actual innocence with respect to that offense, if the applicable pardon or court order clearly indicates on its face that the pardon or order was granted or rendered on the basis of the person's actual innocence; or
>
> (2) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending . . . .

Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)–(2). Under this statute, an expunction is not available when the petitioner has been convicted, the conviction is final, and the conviction has not been overturned or affected by a pardon. *See id.* arts. 55.01(a)(1)–(2), (b)(1), 55.02, § 1a(a) (explaining that the "trial court presiding over a case in which a defendant is convicted *and*

subsequently granted relief or pardoned on the basis of actual innocence . . . shall enter an order of expunction" (emphasis added)); *see also Henry v. State*, No. 04-16-00319-CV, 2017 WL 361763, at *1 (Tex. App.—San Antonio Jan. 25, 2017, no pet.) (mem. op.) ("[A]s a general rule, article 55.01 does not permit expunction of records resulting in a final conviction."); *S.J. v. State*, 438 S.W.3d 838, 841 (Tex. App.—Fort Worth 2014, no pet.) ("The traditional and primary purpose of the expunction statute is to remove records of wrongful arrests.").

Appellant stated in his expunction petition that he was then confined on the "charge at issue" in cause number F-2007-0838-C. He did not allege or provide evidence establishing that he had been pardoned for his conviction in that case or that the conviction had been overturned. On appeal, he concedes that he was "found guilty of Agg. Robbery."[3] Thus, we conclude that appellant could not

[3]In other parts of his brief, appellant appears to contend that the State convicted him of the lesser-included offense of theft. We take judicial notice of our opinion affirming appellant's aggravated robbery conviction in cause number F-2007-0838-C. *See [A.] v. State*, No. 02-07-00373-CR, 2008 WL 2330941, at *1 (Tex. App.—Fort Worth June 5, 2008, pet. ref'd) (mem. op., not designated for publication); *see also Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987) (explaining that an "appellate court may take judicial notice of its own records in the same or related proceedings involving same or nearly same parties").

In his brief, appellant discusses several circumstances relating to his aggravated robbery conviction. For example, he argues that there is "no medical or scientific evidence . . . to prove that [he] . . . came into contact with . . . the alleged victim." To the extent that appellant attempts to collaterally attack his aggravated robbery conviction through his arguments in this appeal, we reject that challenge. *See Ex parte Cephus*, 410 S.W.3d 416, 419 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("A collateral attack on a final judgment may not be brought in an expunction proceeding.").

satisfy the statutory requirements for an expunction of records relating to his arrest for that offense and that the trial court did not abuse its discretion by denying his request for an expunction. *See* Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)–(2); *S.B.M.*, 467 S.W.3d at 717–18. We overrule his first point.

No entitlement to evidentiary hearing

In his second point, appellant appears to argue that the trial court denied his constitutional right of due process by ruling on the petition without conducting an evidentiary hearing. Through a related assertion in his third point, he appears to contend that the lack of an evidentiary hearing resulted in his denial of a constitutional right of access to courts.

Article 55.02, section 2(c) requires a court to set a hearing on an expunction petition. Tex. Code Crim. Proc. Ann. art. 55.02, § 2(c). However, Texas courts have repeatedly held that a trial court may rule on an expunction petition without conducting a formal hearing and without considering live testimony "if it has at its disposal all the information it needs to resolve the issues raised by the petition. Presumably, that information might be available by what is in the pleadings, by summary judgment proof, or by judicially noticing court records." *Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.) (citation omitted); *see Sepeda v. State*, No. 14-15-00790-CV, 2016 WL 6561473, at *5 (Tex. App.—Houston [14th Dist.] Nov. 3, 2016, no pet.) (mem. op.) ("The trial court could have concluded Sepeda had not filed an expunction petition satisfying the statutory requirements of article 55.01, and therefore the

only hearing required under this circumstance was the trial court's review of Sepeda's pleadings."); *Cephus*, 410 S.W.3d at 420–21 (concluding that neither the statutory requirement for a "hearing" nor due process necessarily contemplate a personal appearance or oral presentation and that a "prison inmate's right to access the courts does not entail the right to appear personally"); *Ex parte Luan Le*, No. 05-12-00248-CV, 2013 WL 2725593, at *3 (Tex. App.—Dallas June 12, 2013, no pet.) (mem. op.) ("[A]n expunction proceeding does not necessarily require a formal hearing. A trial court may rule on an expunction petition without permitting live testimony if the court has all the information necessary to resolve the issues raised by the petition.").

Here, appellant pled in his 2016 petition that he was then incarcerated in a state prison on the 2007 charge on which he sought an expunction. From this information, the trial court could have reasonably deduced that appellant had been convicted and was serving a sentence for that charge and thus did not qualify for an expunction. *See* Tex. Code Crim. Proc. Ann. art. 55.01(a)(1)–(2). Moreover, the trial court could have reasonably found that appellant would be unable to present evidence supporting his petition for expunction related to cause number F-2007-0838-C because he relied on an attached register of actions related to a different case. Finally, although the State did not attach evidence relating to appellant's aggravated robbery conviction to its response to appellant's petition, we presume that the trial court—the same court that presided over cause number F-2007-0838-C—took judicial notice of its own records

relating to the conviction and relied on those records in reaching its decision. *See Marble Slab Creamery, Inc. v. Wesic, Inc.*, 823 S.W.2d 436, 439 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("The trial court is entitled to take judicial notice of its own records where the same subject matter between the same parties is involved. As the reviewing court, we may presume that the trial court took such judicial notice of the record without any request being made and without any announcement that it has done so." (citations omitted)); *see also Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex. 1961) ("It is well recognized that a trial court may take judicial notice of its own records in a cause involving the same subject matter between the same, or practically the same, parties.").

Under these specific circumstances, we cannot conclude that the trial court violated appellant's rights to due process or access to courts by ruling on his petition without conducting a formal hearing at which he could appear and present evidence. *See Sepeda*, 2016 WL 6561473, at *5; *Cephus*, 410 S.W.3d at 420–21. We overrule appellant's second and third points.

Conclusion

Having overruled all of appellant's points, we affirm the trial court's order dismissing his expunction petition.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER and PITTMAN, JJ.

DELIVERED: May 11, 2017