COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00339-CV

EX PARTE M.W.

FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. D396-E-12263-16

AND

NO. 02-17-00340-CV

EX PARTE M.W.

FROM THE 432ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. D432-E-12264-16

MEMORANDUM OPINION[1]

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

M.W. appeals from separate take-nothing judgments in the State's favor on his petitions to expunge arrest records. In each appeal, he raises the same three issues: (1) the trial judge erred by calling the case for trial without providing appellant notice of the trial setting, thus violating his due process rights; (2) the trial judge erred by rendering a judgment on the merits rather than a dismissal for want of prosecution; and (3) the evidence is both legally and factually insufficient to support the judgment. We affirm.

Background

Appellant, who is incarcerated, filed pro se petitions to expunge arrest records in the 396th and 432nd District Courts. The State filed an answer and general denial in both cases. With his petitions, appellant filed motions seeking to be bench warranted for trial or, alternatively, to appear by telephone because of his incarceration. Neither trial court ruled on these motions. Appellant has not appealed the implicit denials of his motions. *See In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003).

Both records contain judgments indicating that the parties were duly cited to appear and that appellant did not appear. The 396th District Court's judgment is dated August 17, 2016, and the 432nd District Court's judgment is dated September 1, 2016. The 432nd District Court's judgment notes that the case was first called for trial on June 30, 2016 but that the trial court rescheduled trial to

September 1, 2016 in the interest of justice.[2] Each judgment recites that on the day of trial, the bailiff certified that he called appellant three times from the courthouse doors, but appellant did not appear after a reasonable time. The 396th District Court's judgment also indicates that the trial judge heard evidence and argument. Both courts signed take-nothing judgments in the State's favor, which appellant timely appealed.[3]

Trial Setting Notices

In his first issue, appellant contends that the trial courts erred by rendering post-answer default judgments without giving him proper notice of the trial settings. After appellant filed his brief, the State supplemented the clerk's record in each appeal with the trial setting notices that were generated in each case. Each of those notices corresponds with the trial dates in the recited judgments. Although the records do not contain proof that these notices were actually mailed to appellant,[4] they do contain a letter appellant filed in both trial courts in June

[2]The record does not indicate what specific facts prompted this rescheduling.

[3]Appellant filed his notice of appeal from the 396th District Court's judgment more than thirty days after the trial judge signed the judgment, but within the extension period, and he provided this court with a reasonable explanation of the late filing. *See* Tex. R. App. P. 26.3. Appellant filed his notice of appeal from the 432nd District Court's judgment twenty-five days after the trial judge signed the judgment.

[4]At the bottom of each notice is a handwritten notation, "M&P AB" and a date. Although we can infer that this notation stands for "mailed and posted," we cannot conclude that it is proof appellant received the notices.

2016 acknowledging that he had received notice of the June 30, 2016 and August 17, 2016 dates. Thus, appellant's own filings show that he received notice of the trial setting in the 396th District Court.

Conversely, nothing in the record shows that appellant received notice of the rescheduled trial setting in the 432nd District Court. Nevertheless, we hold that appellant is not entitled to relief because he did not preserve this complaint for appeal by raising it in a motion for new trial.[5] *See* Tex. R. App. P. 21.2 (requiring motion for new trial as prerequisite to complaint on appeal to adduce facts not in the record); Tex. R. Civ. P. 324(b)(1) (providing that a motion for new trial is a prerequisite to an appellate complaint on which evidence must be heard); *Mamou v. Sias*, No. 14-10-01154-CV, 2011 WL 2803437, at *2 (Tex. App.—Houston [14th Dist.] July 19, 2011, no pet.) (mem. op.).

We overrule appellant's first issue.

Judgments on Merits Instead of Dismissals

In his second issue, appellant argues that the trial court was not authorized to render take-nothing judgments upon his failure to appear.

Generally, a defendant cannot take a default judgment that adjudicates the merits of the plaintiff's lawsuit. *Freeman v. Freeman*, 327 S.W.2d 428, 431 (1959), *overruled in part on other grounds by Mapco, Inc. v. Forrest*, 795 S.W.2d

[5]Although the record in the 396th District Court case does not indicate that appellant could have timely filed a motion for new trial, the record in the 432nd District Court case does.

700, 703 (Tex. 1990); *In re A.E.G.*, No. 09-11-00363-CV, 2012 WL 1664219, at *2 (Tex. App.—Beaumont May 10, 2012, no pet.) (mem. op.); *Beller v. Fry Roofing, Inc.*, No. 04-05-00159-CV, 2005 WL 3115828, at *2 (Tex. App.—San Antonio Nov. 23, 2005, no pet.) (mem. op.); *cf. Chacon v. Jellison*, No. 03-02-00072-CV, 2003 WL 1560184, at *4 (Tex. App.—Austin Mar. 27, 2003, no pet.) (mem. op.) (reiterating holding—on review of judgment dismissing defaulting plaintiff's claims and ordering that plaintiff take nothing against defendant—that our law "does not authorize a defendant to take a default judgment which adjudicates against the plaintiff the merits of his suit"). But 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 G.W.*, No. 02-16-00409-CV, 2017 WL 3633538, at *2 (Tex. App.—Fort Worth Aug. 24, 2017, no pet.) (mem. op.) (quoting *Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.)). Therefore, under similar circumstances, this court has held that a person whose expunction petition was denied in his absence must show harm. *Ex parte G.W.*, 2017 WL 3633538, at *2–3; *McCarroll v. Tex. Dep't of Pub. Safety*, 86 S.W.3d 376, 378 (Tex. App.—Fort Worth 2002, no pet.); *see* Tex. R. App. P. 41.1(a).

The only harm appellant alleges is that he did not receive notice of the trial settings sufficient to support dismissals for want of prosecution; therefore, he

does not ask us to reform the judgments to be dismissals and asks that we vacate them instead. Because we have already overruled appellant's complaint regarding lack of notice, we also overrule his second issue based on the same complaint. *See Ex parte G.W.*, 2017 WL 3633538, at *2–3; *McCarroll*, 86 S.W.3d at 378; *see* Tex. R. App. P. 41.1(a); *see also* Tex. R. App. P. 38.1(j) (requiring appellant's brief to describe nature of relief sought); *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 392 (Tex. 2011) ("Generally, a party is not entitled to relief it does not request.").

Sufficiency of the Evidence

Appellant argues in his third issue that the evidence is either legally or factually insufficient to support the trial court's take-nothing judgments against him. Although appellant acknowledges that the judgments are presumed to be valid, he contends that he has overcome the presumption of regularity because the judgments indicate he did not appear, the State as the defendant had no need to present evidence, and therefore there must have been no evidence offered.

Although no reporter's record was taken in either case,[6] the 396th District Court's judgment indicates that the trial court heard "evidence and argument." Generally, when we do not have a reporter's record and the record indicates that the trial court held an evidentiary hearing, we must presume that the evidence is

[6]Appellant has not complained about the lack of a reporter's record in either case.

sufficient to support the trial court's judgment. *See Schafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1991); *Simon v. York Crane & Rigging Co., Inc.*, 739 S.W.2d 793, 795 (Tex. 1987); *Nat'l Land Records, LLC v. Peirson Patterson, LLP*, No. 12-16-00205-CV, 2017 WL 2829331, at *5 (Tex. App.—Tyler June 30, 2017, no pet.) (mem. op.). Although the State as the defendant was not obligated to offer any evidence here, that does not mean it did not do so. *See Nance v. Nance*, 904 S.W.2d 890, 892 (Tex. App.—Corpus Christi 1995, no writ). Thus, we presume that the 396th District Court's judgment is supported by sufficient evidence.

Although the 432nd District Court's judgment states that the case was called for "evidence and argument" on June 30, 2016, it further states that it was rescheduled for September 1, 2016 in the interest of justice. The judgment does not recite that the 432nd District Court heard any evidence or argument on September 1, 2016. There is no docket sheet in the record, nor is there summary-judgment proof or any indication that the State asked the trial judge to judicially notice any documents or records. The pleadings therefore are the only pertinent documents in this case on which the trial court could have made its decision. *See Ex parte G.W.*, 2017 WL 3633538, at *2; *Wilson*, 224 S.W.3d at 863.

In his expunction petition, appellant identified the trial court case number for the records he wanted expunged, the arrest date and county, the nature of the offense—aggravated assault with a deadly weapon, the "agencies, officials,

or other public entities" that he believed had pertinent records, and the reason for expunction—that the case was "either dismissed or [he] was placed on deferred adjudicate[ion] probation and after successfully completing the terms of the probation[,] the case was dismissed." *See* Tex. Code Crim. Proc. Ann. art. 55.01(a)(2) (West 2018) (providing that 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 has been released, (2) the charge, if any, has not resulted in a final conviction, (3) the charge, if any, is no longer pending, and (4) there was no court-ordered community supervision under Article 42.12 for the offense, unless the offense is a Class C misdemeanor). The State asserted in its answer and general denial that "[i]nformation available to [it] indicates the petitioner has prior criminal arrests and probations for assaultive offenses, making the at-issue arrest for another assaultive offense part of a criminal episode. *See* Tex. Penal Code Ann. § 3.01(2) (West 2011).[7] The at-issue arrest is, therefore, ineligible for expunction."[8]

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[7]A single criminal episode includes the repeated commission of the same offense. *Cobb v. State*, 85 S.W.3d 258, 266 (Tex. Crim. App. 2002), *cert. denied*, 537 U.S. 1195 (2003).

[8]Article 55.01(c) of the code of criminal procedure provides that a trial court may not expunge arrest records when a person is subsequently acquitted "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 or remains subject to prosecution for at least one other offense occurring during the criminal episode." Tex. Code Crim. Proc. Ann. art. 55.01(c) (West 2018).

As appellant acknowledges, he had the burden to prove his entitlement to expunction. *See Heine v. Tex. Dep't of Pub. Safety*, 92 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied). Therefore, in determining his no-evidence issue, we must review all the evidence to determine whether he established his entitlement to expunction as a matter of law. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). Likewise, in determining his factual-sufficiency issue, we must determine whether the trial court's failure to find in his favor is against the great weight and preponderance of the credible evidence. *Dow Chem. Co.*, 46 S.W.3d at 242; *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988).

Once the State has put the expunction petitioner's allegations at issue by filing an answer, the petitioner must present evidence to substantiate his pleadings in order to prevail. *Ex parte J.J.*, No. 02-17-00036-CV, 2018 WL 3385475, at *4 (Tex. App.—Fort Worth July 12, 2018, no pet. h.) (mem. op.). Appellant did not do so. Nothing in the record confirms whether appellant's aggravated assault with a deadly weapon charge was either dismissed outright, dismissed after appellant successfully completed deferred adjudication community supervision, or whether appellant was acquitted of the aggravated assault but had been convicted of other assaults, as the State asserted. Additionally, the record does not show whether, if appellant was placed on deferred adjudication community supervision for the aggravated assault arrest, the trial court nevertheless imposed article 42.12 community supervision

conditions, which would preclude expunction. *See* Tex. Code Crim. Proc. Ann. art. 55.01(a)(2); *Tex. Dep't of Pub. Safety v. J.B.R.*, 510 S.W.3d 610, 618–19 (Tex. App.—El Paso 2016, no pet.) (holding that petitioner failed to adduce legally sufficient evidence that he did not serve a term of court-ordered community supervision under article 42.12 when his deferred adjudication order reflected that the trial judge ordered him to comply with "article 42.12" community supervision conditions). Accordingly, we hold that appellant's argument fails under either standard of review.

We overrule appellant's third issue.

Conclusion

Having overruled all of appellant's issues, we affirm the trial court's judgments.

/s/ Wade Birdwell
WADE BIRDWELL
JUSTICE

PANEL: MEIER and BIRDWELL, JJ.; REBECCA SIMMONS, J. (Sitting by Assignment).

DELIVERED: August 30, 2018