COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00419-CV

EX PARTE E.H.

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 17-2148-431

OPINION

I. Introduction

The remedy of expunction allows a person who has been arrested for the commission of an offense to have all information about the arrest removed from governmental entities' and officials' records if he or she meets the requirements of article 55.01 of the code of criminal procedure. *See* Tex. Code Crim. Proc. Ann. art. 55.01 (West 2018); *S.J. v. State*, 438 S.W.3d 838, 841 (Tex. App.—Fort Worth 2014, no pet.). In a single issue in this restricted appeal of an order granting the expunction of E.H.'s arrest records, *see* Tex. R. App. P. 30, Appellant Texas Department of Public Safety (DPS) argues that the trial court

misinterpreted the expunction statute. *See* Tex. Code Crim. Proc. Ann. art. 55.02, § 3(a) (West 2018) (providing that an agency protesting an expunction "may appeal the court's decision in the same manner as in other civil cases").

DPS contends that E.H. was not entitled to have his arrest record expunged after he actually served deferred adjudication community supervision, even though the statute under which E.H. was sentenced was subsequently declared facially unconstitutional, leading to a declaration by the trial court that the deferred adjudication order was void and to dismissal by the trial court of E.H.'s indictment upon the granting of his application for writ of habeas corpus. We dismiss the appeal.

II. Background

In August 2007, E.H. was indicted in cause number F-2007-1770-B for two counts of the felony offense of online solicitation of a minor pursuant to former penal code section 33.021(b). *See* Act of May 21, 2007, 80th Leg., R.S., ch. 610, § 2, 2007 Tex. Gen. Laws 1167, 1167–68. Less than a year later, he pleaded guilty to both counts in exchange for five years' deferred adjudication community supervision and a $2,000 fine. In May 2013, after E.H.'s successful completion of community supervision, he was discharged.

Within months of E.H.'s discharge from community supervision, the court of criminal appeals struck down former penal code section 33.021(b) as facially unconstitutional. *See Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013) (holding that then-penal code section 33.021(b) was overbroad because it

prohibited a wide array of constitutionally protected speech and was not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse). Almost three years later, the trial court granted E.H.'s application for writ of habeas corpus based on the holding in *Lo*. In its August 25, 2016 order granting habeas corpus relief, the trial court expressly found that *Lo* applied to E.H.'s case, declared void the order of deferred adjudication, and dismissed the indictment against E.H.

The order directed the trial court clerk to send a signed copy of the order to E.H.'s counsel, the director of the Denton County Community Supervision and Corrections Department, and the Denton County District Attorney's Office. E.H.'s counsel and the assistant district attorney both signed the order as "[a]pproved as to form and content."

E.H. then filed a five-page petition for expunction. On March 15, 2017, the court administrator set the matter for a hearing on May 5, 2017. DPS filed an answer, generally denying the allegations in E.H.'s petition and attaching copies of E.H.'s indictment, order of deferred adjudication, and discharge order. E.H. responded with a brief in support of expunction, and DPS filed a supplemental answer. On June 7, 2017, E.H. replied with a second brief in support of his expunction petition.

Following the hearing, the trial court issued the order for expunction of records after "consider[ing] the pleadings and other documents on file, the evidence presented, and the arguments of counsel." In its seven-page

expunction order signed on June 12, 2017, the trial judge handwrote that the petition for expunction was heard three days earlier, on June 9, 2017. E.H.'s attorney signed the order approving it as to form and substance. There is no indication from the record which parties were present at the hearing.

On June 15, 2017, the Denton County District Clerk faxed a notification of expunction order to DPS. However, the notification states that the expunction order was granted on *May* 12, 2017, and the fax receipt reflects that only two pages were sent, without any indication of *which* two pages, if any, of the seven-page expunction order were included. The Denton County District Clerk sent another fax to DPS on July 12, 2017; this fax receipt reflected that nine pages were sent but did not otherwise identify the content of those nine pages.

On November 30, 2017, DPS filed a notice of restricted appeal.

III. Restricted Appeal

A party can prevail in a restricted appeal only if (1) it filed notice of the restricted appeal within six months after the order or judgment was signed, (2) it was a party to the underlying lawsuit, (3) it did not participate in the hearing that resulted in the order or judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law, and (4) error is apparent on the face of the record. *See* Tex. R. App. P. 26.1(c), 30; *Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009). These requirements are jurisdictional and will cut off a party's right to seek relief by way of a restricted appeal if they are not met. *Ex parte K.K.*, No. 02-17-00158-CV,

2018 WL 1324696, at *2 (Tex. App.—Fort Worth Mar. 15, 2018, no pet.) (mem. op.) (citing *Lab. Corp. v. Mid-Town Surgical Ctr., Inc.*, 16 S.W.3d 527, 528–29 (Tex. App.—Dallas 2000, no pet.)). E.H. does not challenge the first two elements.

A. Nonparticipation

E.H. argues that DPS cannot maintain this restricted appeal because the record does not show that it did not participate in person or through counsel in the trial court, and he asserts that DPS in fact participated.[1] While E.H. concedes that the mere filing of an answer does not constitute participation in the "actual trial" for restricted appeal purposes, he argues that DPS did not "*merely* file an answer" but rather filed a 16-page original answer and general denial and a 12-page supplemental answer. But an answer from DPS—regardless of its

[1]Specifically, E.H. argues that because there is no reporter's record, DPS cannot show that it did not participate in the hearing, contending that it "would be peculiar for a government agency to have notice of a hearing, to answer, and then to lie behind the log, taking the chance that the record would not reflect—as the record here does not reflect—that the agency did not participate in the hearing." However, this behavior on the part of DPS with regard to expunctions is not peculiar at all. *See, e.g.*, *Ex parte J.J.*, No. 02-17-00036-CV, 2018 WL 3385475, at *1 (Tex. App.—Fort Worth July 12, 2018, no pet. h.) (mem. op.) (noting that DPS filed an answer, did not appear at expunction hearing, and subsequently sought restricted appeal); *Ex parte Gomez*, No. 07-14-00206-CV, 2016 WL 1274989, at *1 (Tex. App.—Amarillo Mar. 30, 2016, no pet.) (mem. op.) (same); *Tex. Dep't of Pub. Safety v. Radway*, No. 05-13-00476-CV, 2014 WL 1410518, at *1 (Tex. App.—Dallas Apr. 10, 2014, no pet.) (mem. op.) (same); *Tex. Dep't of Pub. Safety v. Sowell*, No. 11-10-00018-CV, 2011 WL 3359716, at *1 (Tex. App.—Eastland Aug. 4, 2011, no pet.) (mem. op. on reh'g) (same). The bottom line, however, is that the record here does not reflect that DPS received notice of the hearing.

length—does not constitute participation in the hearing that resulted in the expunction order and thus does not bar DPS from pursuing this restricted appeal. *See id.* at *2 n.6.

Further, only E.H.'s counsel signed the order, and there is a line drawn through the space provided for the Denton County Criminal District Attorney's signature. No signature spaces were provided for any of the remaining agencies, including DPS. Nothing on the face of the order indicates who attended the June 9 hearing or who was present when the trial judge signed the order on June 12. The docket sheet contained in the clerk's record of this case has no entries. And the record fails to reflect that DPS was notified that the trial court would hear the matter on June 9. *See Ex parte B.M.*, No. 02-14-00336-CV, 2015 WL 3421979, at *1 & n.3 (Tex. App.—Fort Worth May 28, 2015, no pet.) (mem. op.) (observing, in review of whether DPS participated in the hearing, that, among other things, the record failed to reflect that DPS was notified of the hearing date's change).

We are to liberally construe the nonparticipation requirement in favor of the right to appeal. *See Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) ("For over half a century, we have required courts to liberally construe the non-participation requirement for restricted appeals in favor of the right to appeal."). Applying this standard and based on this record, we conclude that DPS has adequately shown nonparticipation. We base this conclusion upon several observations. First, the record reflects that although the June 12 expunction

order was seven pages, the notification of expunction order faxed to DPS from the Denton County District Clerk—on June 15, 2017—contained only two pages. Second, the notification incorrectly stated that the expunction order had been granted on May 12, 2017, thus DPS could have reasonably concluded that its 30-day period to file postjudgment motions or a notice of appeal had already expired and that restricted appeal was its only option. *See* Tex. R. App. P. 26.1; Tex. R. Civ. P. 306a, 329b. Third, the second fax receipt from the Denton County District Clerk, dated July 12, 2017—the last day that DPS could have actually timely filed a postjudgment motion or notice of appeal—reflects that nine pages of *something* were faxed to DPS at 1:58 p.m, but the confirmation itself just states "Your fax has been successfully sent to the Texas Department of Public Safety . . . ."

B. No Error on the Face of this Record

We review a trial court's ruling on a petition for expunction for an abuse of discretion, but to the extent that the ruling turns on a question of law, we review it de novo because the trial court has no discretion in determining what the law is or in applying the law to the facts. *K.K.*, 2018 WL 1324696, at *3. Further, when construing a statute, our primary objective is to ascertain and give effect to the legislature's intent. *S.J.*, 438 S.W.3d at 843.

The traditional and primary purpose of the expunction statute is to remove records of wrongful arrests. *Id.* at 841. Generally, an arrest is not wrongful when a defendant pleads guilty or nolo contendere to an offense arising from the arrest and, as required by the code of criminal procedure, a court finds that evidence

substantiates the defendant's guilt while deferring a formal adjudication of guilt. *Id.* at 841–42. And because a petitioner's right to expunction is purely a matter of statutory privilege, he bears the burden to show that all of the required statutory conditions have been met. *Id.* at 841 (citing *Tex. Dep't of Pub. Safety v. Nail*, 305 S.W.3d 673, 675 (Tex. App.—Austin 2010, no pet.) (op. on reh'g)); *see In re I.V.*, 415 S.W.3d 926, 929 (Tex. App.—El Paso 2013, no pet.) (stating that in a "statutory cause of action, all provisions are mandatory and exclusive").

1. Statutory Language

Since its enactment, code of criminal procedure article 55.01 has been amended 14 times. *Ex parte Smirl*, 514 S.W.3d 365, 368 (Tex. App.—Amarillo 2017, no pet.) (noting that some of the amendments were enacted to lower the barrier to expunctions for cases that have been dismissed). As applicable to the expunction petition at issue in this case, the statute provided that if an expunction applicant has been released, if the charge is no longer pending and has not resulted in a final conviction, if there was no court-ordered community supervision for the offense, and if the indictment following the arrest was dismissed because it was void, the applicant should be entitled to expunction:

> (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:
>
> . . . .
>
> (2) 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 the offense*, unless the offense is a Class C misdemeanor, provided that:
>
> > (A) regardless of whether any statute of limitations exists for the offense and whether any limitations period for the offense has expired, an indictment . . . charging the person with the commission of any felony offense arising out of the same transaction for which the person was arrested:
> >
> > . . . .
> >
> > > (ii) if presented at any time following the arrest, *was dismissed or quashed*, and the court finds that the indictment or information was dismissed or quashed . . . *because the indictment or information was void* . . . .

Act of May 25, 2011, 82nd Leg., R.S., ch. 690, § 1, 2011 Tex. Sess. Law Serv. 1651, 1651–52 (amended 2017); *id.*, ch. 894, § 1, 2011 Tex. Sess. Law Serv. 2274, 2274–75 (amended 2017) (current version at Tex. Code Crim. Proc. Ann. art. 55.01). [Emphasis added.] The legislature made the 2011 amendment applicable to "an expunction of arrest records and files for any criminal offense that occurred before, on, or after the effective date of this Act," which was September 1, 2011. *Id.*, ch. 690, §§ 7–8, 2011 Tex. Sess. Law Serv. at 1655; *id.*, ch. 894, §§ 3–4, 2011 Tex. Sess. Law Serv. at 2276. The offenses here were alleged to have been committed in October 2006.[2]

[2]Unlike the 2011 amendment, the 2015 amendment to article 55.01 was not retroactive. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 2.23, 4.01–.02, 2015 Tex. Sess. Law Serv. 2320, 2372–73, 2394. While the 2017 amendment was retroactive, its effective date was September 1, 2017. *See* Act of May 24, 2017, 85th Leg., R.S., ch. 693, §§ 1, 7–8, 2017 Tex. Sess. Law Serv.

2. Analysis

DPS argues that regardless of how E.H.'s period of community supervision ended or what happened after it ended, because E.H. actually served community supervision, the expunction of his arrest should have been denied. E.H. responds that because the order of deferred adjudication was vacated in its entirety, the order had no legal effect and accordingly left him in the same position as if no such order had been entered.

a. Applicable Cases

E.H. relies on *Harris County District Attorney's Office v. D.W.B.*, 860 S.W.2d 719 (Tex. App.—Houston [1st Dist.] 1993, no writ), to support his argument, while DPS relies on *Texas Education Agency v. S.E.H.*, No. 01-16-00420-CV, 2017 WL 2438643 (Tex. App.—Houston [1st Dist.] June 6, 2017, no pet.). These cases, separated by almost a quarter of a century, contain facts very similar to the case at bar. Although they apply different versions of the statute, these and other cases are instructive in our analysis.

(1) *Harris County District Attorney's Office v. D.W.B.*

D.W.B. was arrested in 1981 for the misdemeanor offense of enticing a child. 860 S.W.2d at 720. He pleaded nolo contendere and received deferred adjudication, which he successfully completed. *Id.* Eight years later, he filed a

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3083, 3083–84, 3086; Act of May 28, 2017, 85th Leg., R.S., ch. 1149, §§ 1, 10–11, 2017 Tex. Sess. Law Serv. 4370, 4370–71, 4373. E.H. filed his petition for expunction in March 2017, and the trial court granted it in June 2017.

post conviction application for writ of habeas corpus, alleging that the order of deferred adjudication was illegal because the record failed to show his affirmative waiver of his right to a jury trial. *Id.* The trial court granted habeas corpus relief and set aside the deferred adjudication order; the State did not appeal the grant of habeas corpus relief, and the information charging D.W.B. with enticing a child was dismissed for insufficient evidence on the State's motion. *Id.* D.W.B. subsequently sought expunction of the arrest record. *Id.* at 720–21.

The court held that D.W.B. was entitled to expunction. *Id.* at 722. It based its reasoning on the lack of any "valid court-ordered probation." *Id.* That is, despite D.W.B.'s having pleaded nolo contendere and having received and completed deferred adjudication, the habeas corpus relief that was granted included a new trial, which restored the case to its position before the former trial, which the State did not appeal, and which accordingly became a final order that the court characterized as "the law of the case."[3] *Id.*

(2) *Texas Education Agency v. S.E.H.*

In *S.E.H.*, the same court reached the opposite result. In that case, a public school teacher repeatedly solicited sex from someone he believed to be a

[3]The law-of-the-case doctrine is the principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *Farmers Grp. Ins., Inc. v. Poteet*, 434 S.W.3d 316, 329 (Tex. App.—Fort Worth 2014, pet. denied). This definition would not apply to the State's failure to appeal D.W.B.'s grant of habeas relief in *D.W.B.* *See In re McReynolds*, 502 S.W.3d 884, 888 (Tex. App.—Dallas 2016, no pet.) ("Texas trial court decisions have no precedential effect.").

thirteen-year-old girl, was arrested for online solicitation of a minor in violation of penal code section 33.021(b), and pleaded guilty in exchange for eight years' deferred adjudication community supervision. 2017 WL 2438643, at *1. Like E.H., he filed an application for writ of habeas corpus after that version of section 33.021(b) was found facially unconstitutional in *Lo*. *Id.* After the habeas corpus application was granted and the case against him was dismissed, he filed a petition for expunction, which the trial court granted. *Id.*

Unlike in *D.W.B.*, the court reversed the trial court's order granting expunction, basing its reasoning on article 55.01's plain language. *Id.* at *3. The court reasoned that the record reflected—and S.E.H. admitted—that he was placed on community supervision and that the plain language of article 55.01 dictated that a petitioner is only entitled to expunction if "there was no court-ordered community supervision under Article 42.12 for the offense." *Id.* (quoting Tex. Code Crim. Proc. Ann. art. 55.01(a)(2)). The court stated that because it was not at liberty to rewrite a statute that provided no exception for those who were on court-ordered community supervision for violating a statute later determined to be void, S.E.H. was not entitled to expunction. *Id.* In reaching its conclusion, the court did not address its prior opinion in *D.W.B.*

However, the court has subsequently voted to hear *S.E.H.* en banc. *See* en banc order, No. 01-16-00420-CV (Mar. 16, 2018). In its order granting en banc reconsideration, the court withdrew the June 6, 2017 opinion, vacated its

judgment, and ordered that the parties could file supplemental briefing on the limited issue of whether *D.W.B.* should be overruled. *Id.*

(3) *Ex parte C.D.*

The Tyler court recently addressed the same issue before us. *See Ex parte C.D.*, No. 12-17-00309-CV, 2018 WL 3569838, at *1 (Tex. App.—Tyler June 20, 2018, no pet. h.) (mem. op. on reh'g). C.D., too, was charged with online solicitation of a minor, and he pleaded guilty in exchange for ten years' deferred adjudication community supervision. *Id.* After *Lo*, he was released from the conditions of his community supervision and his criminal case was dismissed. *Id.* He then filed a petition to expunge all criminal records and files related to his October 2010 arrest, and the State, as DPS does here, argued that he was not entitled to expunction because he had served community supervision as a result of the arrest. *Id.*

Referencing *D.W.B.*, the court held that C.D. was entitled to expunction because "any and all orders in C.D.'s online solicitation of a minor case" had been vacated, and this necessarily included the order of deferred adjudication that had placed C.D. on community supervision. *Id.* at *3. That is, "[a]s a result of the order being vacated, it is as if the trial court never ordered C.D. to serve community supervision." *Id.* (referencing the legal definition of "vacate" and *Martinez v. State*, 194 S.W.3d 699, 701 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).

b. Other Related Cases

When the court of criminal appeals declared in *Lo* that former section 33.021(b) was facially unconstitutional, it effectively decriminalized the online-solicitation-of-a-minor offense described in that subsection. Four years later, the court considered the effect of decriminalization, albeit in a different context. *See Vandyke v. State*, 538 S.W.3d 561, 565 (Tex. Crim. App. 2017). In *Vandyke*, the court considered whether legislation that retroactively decriminalized certain behavior infringed on the separation of powers under the state constitution. *See id.* The appellant in *Vandyke* was assessed 25 years' confinement as punishment for an offense that the legislature later retroactively decriminalized. *Id.* at 566–69.

In considering whether the legislature's action of retroactively decriminalizing the acts at issue infringed on the executive's power to grant clemency, the court recognized that the state constitution vests all lawmaking power in the legislature—including the power to make, alter, and repeal laws—and "the sole authority to establish criminal offenses and prescribe punishments," *id.* at 573, while the governor's clemency power allows the governor to affect the punishment to which an individual is subjected but not to affect the underlying conviction—pardons and other forms of clemency do not allow courts to forget either the crime or the conviction. *Id.* at 574. The state constitution does not grant the governor the power to destroy judicial orders, judgments, and decrees. *Id.* at 577, 578 (observing that an individual may ultimately remove a pardoned

conviction from his or her criminal records through expunction, a judicial process). *But see Davis v. Tex. Dep't of Pub. Safety*, No. 07-07-00053-CV, 2007 WL 2693838, at *1 (Tex. App.—Amarillo Sept. 14, 2007, no pet.) (mem. op.) ("[C]ourts lack inherent or equitable power to expunge criminal records; rather, that relief arises from statute and strict compliance with its conditions or terms is required.").

Significant to this appeal, the court held that when the legislature decriminalizes conduct and allows for retroactive application thereof, then-pending convictions (including those on appeal) that are predicated on that conduct are invalid, and the appropriate remedy is to reverse the conviction and dismiss the prosecution. *Vandyke*, 538 S.W.3d at 579 (noting that there can be no penalty or criminality in violating a repealed statute).

A similar result occurs when a judgment is declared void. In the criminal context, a judgment is void when (1) the document purporting to be a charging instrument does not satisfy the constitutional requisites of a charging instrument, depriving the trial court of jurisdiction over the defendant; (2) the trial court lacks subject matter jurisdiction over the offense charged; (3) the record reflects that there is no evidence to support the conviction; or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel when he has not waived that right. *Martinez*, 194 S.W.3d at 701–02 (referencing *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001)). In *Nix*, the court of criminal appeals recited the "void judgment" exception, which provides that "there are

some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question." *Nix*, 65 S.W.3d at 667; *see also Matter of Wilson*, 932 S.W.2d 263, 266–67 (Tex. App.—El Paso 1996, no writ) (stating that the failure of an indictment to allege all elements of an offense renders the indictment void, rendering a conviction based on that indictment a nullity and entitling a defendant to expunction if other statutory elements are met).

And on the civil side, which is where expunctions fall, a judgment is void when it is apparent that the court rendering judgment had no jurisdiction over the parties or property, no jurisdiction over the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005); *see also Martinez*, 194 S.W.3d at 701 (observing that a void judgment is a nullity and can be attacked at any time and "where an original judgment imposing probation is void, there is no judgment imposing probation"). For example, when a juvenile defendant does not receive the summons for a hearing on whether to transfer him to the criminal district court, this renders the transfer order void and voids any action taken after that void order. *Ex parte Jackson*, 132 S.W.3d 713, 715–16 (Tex. App.—Dallas 2004, no pet.);[4] *see also*

[4]In *Jackson*, although the transfer order was void, which also rendered the subsequent indictments presented by the grand jury void, the applicant was not entitled to expunction because he did not show that he met the rest of the requirements for the version of article 55.01 applicable to his petition. 132 S.W.3d at 716.

In re D.M., No. 02-17-00059-CV, 2018 WL 1630704, at *5 (Tex. App.—Fort Worth Apr. 5, 2018, no pet.) (mem. op.) (applying civil standard of review to juvenile cases).

c. Analysis

We acknowledge that, as argued by DPS, there is no express provision in the applicable expunction statute that carves out a specific exception for individuals whose convictions were later rendered void due to a declaration that the statute supporting the conviction was unconstitutional. But the plain language of the version of article 55.01 applicable to this case, taken as a whole, indicates that (1) if the expunction applicant has been released, (2) if the charge has not resulted in a final conviction and is no longer pending, and (3) if the indictment, if presented at any time following the arrest, was dismissed because it was void, then regardless of whether any time of any sort was served, the applicant should be entitled to expunction. *See* Act of May 25, 2011, 82nd Leg., R.S., ch. 894, § 1, 2011 Tex. Sess. Law Serv. at 2274–75. That is, when the indictment disappeared as a result of the trial court's grant of habeas corpus relief because the statute that authorized it was void, so too did the conditions upon which E.H. was "confined." *See* Tex. Code Crim. Proc. Ann. art. 11.072 (West 2015) (setting out the procedure to apply for habeas corpus relief in a community supervision case).

The void statute, E.H.'s subsequently granted habeas relief, and the role under the separation of powers that courts play in expunction and in the

interpretation of judgments and statutes mandate this result, despite E.H.'s having pleaded guilty to the offenses for which he was arrested. *Cf. Harris Cty. Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991) (stating, in a case involving a criminal conviction that was not declared unconstitutional or otherwise void, that after article 55.01's 1979 amendment, the expunction law was not intended to allow a person who receives probation pursuant to a guilty plea to expunge arrest and court records concerning that offense); *State v. N.R.J.*, 453 S.W.3d 76, 82 (Tex. App.—Fort Worth 2014, pet. denied) (holding that when a defendant admits guilt to an offense in the course of pleading guilty or nolo contendere to a second offense and requests that the trial court account for that admission in determining sentence for the second offense under penal code section 12.45, the admitted, unadjudicated offense is not expungeable).[5]

Because DPS has failed to establish error on the face of the record, we overrule its sole issue.

[5]We see a difference between pleading guilty to acts that remain criminal and pleading guilty to acts subsequently determined not to be criminal. Thus, both *J.T.S.* and *N.R.J.* are distinguishable from the facts present here.

IV. Conclusion

Having overruled DPS's sole issue on the basis of failure to establish error on the face of the record, we dismiss this restricted appeal for want of jurisdiction. *See K.K.*, 2018 WL 1324696, at *2.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; PITTMAN and BIRDWELL, JJ.

DELIVERED: August 16, 2018