



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-14-00206-CV

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**EX PARTE JACOBY STEVE GOMEZ**

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On Appeal from the 106th District Court  
Lynn County, Texas  
Trial Court No. 13-10-07060; Honorable Carter T. Schildknecht, Presiding

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March 30, 2016

**MEMORANDUM OPINION**

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, the Texas Department of Public Safety (DPS), filed a *Notice of Restricted Appeal* challenging the trial court's *Order of Expunction* wherein it averred that it did not participate, personally or through counsel, in the hearing that resulted in the final judgment it is appealing and did not file any post-judgment motions, request for findings of fact and conclusions of law, or notice of appeal. Appellee, Jacoby Steve Gomez, asserts that DPS did not establish all the elements necessary to pursue a restricted appeal. We reverse and render.

## BACKGROUND

On October 3, 2013, Gomez filed a *Petition for Expunction* of records relating to a 2006 charge of assaulting his girlfriend when he was seventeen years old.<sup>1</sup> He asserted he had been released and the charge had not resulted in a final conviction and was no longer pending. That same date, the trial court entered an order setting a hearing on Gomez's petition for December 3, 2013. The clerk's record establishes that the Lynn County District Clerk advised DPS by facsimile of Gomez's petition and the order setting the hearing.

In its *Original Answer and General Denial* filed on December 2, 2013, DPS explained that Gomez was arrested for assault causing bodily injury to a family member for which he received deferred adjudication community supervision. Copies of the complaint, information, and order of deferred adjudication were attached to the answer.<sup>2</sup> The following day, a hearing was held on Gomez's petition. DPS did not appear and Gomez was the only witness at the hearing.

Gomez testified he has worked at a correctional facility for more than six years and was informed his employment was in jeopardy due to his arrest record. He sought expunction "in the interest of justice" to advance his career in the criminal justice system. The trial court announced it would be in his best interest and society's best interest to grant his petition and entered an *Order of Expunction*, dated December 3, 2013.

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<sup>1</sup> Gomez did not provide any documentation related to the offense.

<sup>2</sup> The documents establish that Gomez had a prior assault against a family member.

Less than six months after the entry of the trial court's order, DPS filed a notice of restricted appeal on May 23, 2014. Gomez filed a *Motion to Dismiss* the appeal which this court denied. *Ex parte Gomez*, No. 07-14-00206-CV, 2014 Tex. App. LEXIS 14054 (Tex. App.—Amarillo June 20, 2014, order).

#### RESTRICTED APPEAL

To prevail, DPS was required to establish that (1) it filed its restricted notice of appeal within six months after judgment was signed; (2) it was a party to the underlying suit; (3) it did not participate in the hearing that resulted in the complained-of judgment, (4) it did not timely file any post-judgment motions or request for findings of fact and conclusions of law; and (5) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). We limit our review in a restricted appeal to the face of the record; we do not consider extrinsic evidence. *Id.* The “face of the record” consists of all the papers that were before the trial court at the time it rendered judgment. *Champion v. Estlow*, 456 S.W.3d 363, 364 (Tex. App.—Austin 2015, pet. denied); *Ex parte Post*, No. 07-14-00138-CV, 2014 Tex. App. LEXIS 10717, at \*3 (Tex. App.—Amarillo Sept. 24, 2014, no pet.). While the scope of appellate review is the same as with an ordinary appeal, the standard of appellate review is restricted in that the reviewing court does not draw any inferences or presumptions from the record but must look solely to the face of the record itself. *Champion*, 456 S.W.3d at 364. As the Texas Supreme Court has said, “a restricted appeal requires error that is *apparent*, not error that may be *inferred*.” *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004) (emphasis in original).

We first address Gomez’s argument that DPS has not shown its entitlement to proceed by restricted appeal for failing to meet the non-participation element. Gomez does not challenge the other elements of a restricted appeal. He acknowledges that DPS filed an answer but maintains DPS intentionally or negligently elected not to participate at the hearing that resulted in the complained-of order.

The non-participation element is liberally construed in favor of the right to appeal. See *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (*per curiam*). See also *Ex parte Vega*, No. 13-15-00245-CV, 2016 Tex. App. LEXIS 1119, at \*5 (Tex. App.—Corpus Christi Feb. 4, 2016, no pet.). The issue regarding non-participation is whether the appellant participated “in the decision-making event” which resulted in a judgment adjudicating the appellant’s rights. See *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 589 (Tex. 1996). Therefore, the non-participation element is met when DPS merely files an answer but does not participate in person or through counsel at the hearing that resulted in the expunction order. See *Tex. Dep’t of Pub. Safety v. Foster*, 398 S.W.3d 887, 890 (Tex. App.—Dallas 2013, no pet.).

Rule 30 of the Texas Rules of Appellate Procedure applies to a “party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of . . . .” (Emphasis added). In his argument, however, Gomez substitutes “proceedings” for the phrase “in the hearing” to support his argument that DPS participated and therefore cannot avail itself of a restricted appeal. Case law is clear that the non-participation element is met when an answer is filed but a party does not participate in the *hearing* that resulted in the complained-of order. Gomez’s

interpretation that DPS participated by filing an answer is without merit. Accordingly, we conclude DPS is entitled to pursue this restricted appeal.

#### APPLICABLE LAW—EXPUNCTIONS

The right to an expunction of all records and files relating to an arrest is governed by article 55.01(a) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 55.01(a) (West Supp. 2015).<sup>3</sup> Section 55.01(a)(2) specifically provides for expunction if “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 . . . unless the offense is a Class C misdemeanor . . . .” *Id.* If the applicant for expunction meets the requirements of the statute, he is entitled to have all records and files relating to an arrest destroyed. *Ex parte C.P.J. II*, No. 07-15-00278-CV, 2015 Tex. App. LEXIS 11288, at \*3 (Tex. App.—Amarillo Oct. 29, 2015, no pet.).

Addressing the merits of this restricted appeal, DPS maintains Gomez was not entitled to expunction of his records because he did not present legally sufficient evidence establishing his right to an expunction. Specifically, DPS maintains the face of the record shows that Gomez did not establish there was no court-ordered community supervision. We agree.

#### STANDARD OF REVIEW

We review a trial court’s order granting an expunction for abuse of discretion. *Ex parte S.D.*, 457 S.W3d 168, 170 (Tex. App.—Amarillo 2015, no pet.). However, to the extent that the ruling on expunction turns on a question of law, we review the ruling *de*

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<sup>3</sup> Article 55.01(a) of the Code was amended in 2015. See Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.23, 2015 Tex. Gen. Laws 2321, 2373. However, the amendments are not effective until January 2, 2017. Therefore, all references to article 55.01(a) are references to the current version.

*novo* because a trial court has no discretion in determining what the law is or in applying the law to the facts. *Id.* A trial court abuses its discretion if it orders an expunction of records despite an applicant’s failure to satisfy all of the statutory requirements. *Id.* (citing *In re O.R.T.*, 414 S.W.3d 330, 332 (Tex. App.—El Paso 2013, no pet.).

#### ANALYSIS

Having concluded that DPS is entitled to pursue a restricted appeal, the only issue before this court is whether error is apparent on the face of the record. The papers before the trial court provided by DPS as exhibits to its answer demonstrate unequivocally that Gomez’s arrest resulted in a term of court-ordered community supervision for an offense of a higher degree than a Class C misdemeanor. As such, Gomez did not present evidence sufficient to establish his entitlement to expunction. “In the interest of justice” is not an exception to the community supervision limitation of article 55.01(a)(2) of the Code. Because the trial court’s order turns on a question of law, we apply a *de novo* review and conclude the trial court erred in granting Gomez’s petition to have his record expunged. DPS’s sole issue is sustained.

#### CONCLUSION

The trial court’s *Order of Expunction* is reversed. Gomez’s *Petition for Expunction* is denied. TEX. R. APP. P. 43.2 (authorizing rendition of the judgment the trial court should have rendered).

Patrick A. Pirtle  
Justice