



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

No. 07-22-00216-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, APPELLANT

V.

K. A. S., APPELLEE

On Appeal from the 390th District Court
Travis County, Texas
Trial Court No. D-1-EX-22-000261, Honorable Leon J. Grizzard, Presiding

February 7, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

The Texas Department of Public Safety brings this restricted appeal. Through it, the Department challenges an *Order of Expunction* which granted K. A. S.'s petition for expunction. Having no reporter's record of the hearing to determine whether legally sufficient evidence supported the decision, we reverse and remand for new trial.

Background

Appellee was charged with two felonies, one in 2013 and one in 2014. Both involved injury to a child. In early 2022, he filed a verified petition to expunge the records

relating to those crimes. The averments therein tracked those which satisfied the test for obtaining expungement. The Department filed an answer, generally denying the allegations and averring therein that he served terms of community supervision for each offense. Unauthenticated documents purporting to illustrate that accompanied the pleading.¹ The Travis County Attorney's office also filed an answer, generally denying the assertions in appellee's petition.

The trial court set May 5, 2022, as the hearing date. That date came. Whether the court held a live hearing is unknown, as is whether appellee appeared and presented admissible evidence proving his entitlement to expungement. This is so because, as represented by the court reporter, "[n]o record was taken." Nor does the trial court's docket illuminate the matter. Nevertheless, the trial court signed an order on the day of hearing which order granted expungement. The Department perfected its restricted appeal from that final order on June 21, 2022.

Analysis

We begin our review by assessing if the Department satisfied the requirement for pursuing a restricted appeal. A party who did not participate either in person or through counsel in the hearing that resulted in the judgment complained of or timely file a post-judgment motion, request for findings of fact and conclusions of law, or file a timely notice of appeal may pursue such an appeal. TEX. R. APP. P. 30. The notice of restricted appeal must also be filed within six months of the date of the final order sought to be reviewed,

¹ Being ordered to serve community supervision could negate one's entitlement to expunction. See TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2) (stating 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, among other things, there was no court-ordered community supervision under Chapter 42A for the offense).

id. at Rule 26.1(c), and include allegations illustrating compliance with the requisites of Rule 30. TEX. R. APP. P. 25.1(d)(7). So too must the appellant establish those requisites and illustrate that error appears on the face of the record before we can sustain the appeal. *Ex parte E.H.*, 602 S.W.3d 486, 495 (Tex. 2020) (citing *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam)). Our review of the appellate record leads us to conclude the Department carried its burden.

It was a party to the underlying action, did not participate in the hearing that resulted in the judgment complained of, did not timely file a post-judgment motion, did not request for findings of fact and conclusions of law, and did not file a timely, non-restricted notice of appeal. It also perfected its restricted appeal within six months of the May 5, 2022 expunction order. As for establishing error on the face of the record, it complains of the sufficiency of evidence supporting the trial court's decision. Such apparently is a claim of error appearing on the face of the record since it is susceptible to review through a restricted appeal. *Quezada v. Quezada*, No. 07-15-00313-CV, 2016 Tex. App. LEXIS 7296, at *5 (Tex. App.—Amarillo July 11, 2016, no pet.) (mem. op.) (stating that the sufficiency of the evidence to support the decision may be pursued through a restricted appeal).

Yet, we have no reporter's record with which to analyze the Department's sufficiency claim. This being an appeal transferred from the Third Court of Appeals, we are bound by its precedent. TEX. R. APP. P. 41.3. And, per that precedent, "the lack of a reporter's record constitutes error on the face of the record" *Tex. Dep't of Pub. Safety v. L. V.*, No. 03-17-00809-CV, 2018 Tex. App. LEXIS 6152, at *10 (Tex. App.—Austin Aug. 7, 2018, no pet.) (mem. op.); *Arbogust v. Graham*, No. 03-17-00800-CV, 2018

Tex. App. LEXIS 4798, at *3 (Tex. App.—Austin June 28, 2018, no pet.) (mem. op.); see also *Robinson v. Robinson*, 487 S.W.2d 713, 715 (Tex.1972) (stating that “[i]f an appellant exercises due diligence and through no fault of his own is unable to obtain a proper record of the evidence introduced, this may require a new trial where his right to have the case reviewed on appeal can be preserved in no other way”). The absence also requires reversal of the order and remand to the trial court for a new hearing.² *L. V.*, 2018 Tex. App. LEXIS 6152, at *10. Thus, the Department established the last prong of its restricted appeal, as well; error appears on the face of the record.

We reverse the trial court’s expunction order and remand the cause to the trial court for a new hearing.

Brian Quinn
Chief Justice

² To the extent that one may suggest appellee’s verified petition provided the requisite evidentiary support for the trial court’s decision, he would be mistaken. A general denial obligates the plaintiff to establish through competent evidence the contentions averred in his complaint, even if that complaint is verified. *Ex parte D.T.*, No. 07-20-00162-CV, 2021 Tex. App. LEXIS 8450, at *7–8 (Tex. App.—Amarillo Oct. 18, 2021, no pet.) (mem. op.). The Department filed a general denial here. So, appellee needed to present evidence proving entitlement to expunction.