



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-17-00120-CV

EX PARTE TIMOTHY E. HO

On Appeal from the 196th District Court
Hunt County, Texas
Trial Court No. 85199

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

On September 15, 2017, Timothy E. Ho filed a petition for expunction of all records and files relating to (1) a dismissed Class B misdemeanor charge for alleged possession of less than two ounces of marihuana and (2) an allegedly dismissed, Class C possession of drug paraphernalia charge that arose from a December 17, 2014, arrest. The expunction was granted on October 19, 2017. The Texas Department of Public Safety (DPS) brings this restricted appeal of the trial court's order of expunction and argues (1) that Ho was not entitled to expunge records arising from the December 17, 2014, arrest because he was convicted of the drug paraphernalia charge and (2) that the case must be reversed and remanded for a new trial because no reporter's record was made of the hearing. Because we find that a reporter's record of the hearing is required but was not made, we reverse the trial court's order of expunction and remand the cause for a new hearing.

I. Standard of Review

Since the DPS is attacking the trial court's judgment by restricted appeal, it must establish that:

(1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it did not participate in the hearing that resulted in the 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.

Ins. Co. of State of Pa. v. Lejeune, 297 S.W.3d 254, 255 (Tex. 2009) (per curiam) (quoting *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)); see TEX. R. APP. P. 26.1(c),

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The clerk's record shows that the DPS timely brought its restricted appeal, was a party to Ho's expunction, did not participate in the hearing that resulted in the judgment, and did not file any timely post-judgment motions. *See Ex parte Locke*, No. 06-07-00105-CV, 2008 WL 850153, at *1 (Tex. App.—Texarkana Mar. 28, 2008, no pet.) (mem. op.). Thus, we address whether error is apparent on the face of the record.

“The face of the record in a restricted appeal consists of all papers on file in the appeal, including the reporter's record.” *Tex Dep't of Pub. Safety v. A.M.*, No. 03-17-00114-CV, 2018 WL 1177601, at *2 (Tex. App.—Austin Mar. 7, 2018, no pet.) (mem. op.) (citing *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam)). “Absence of legally sufficient evidence to support a judgment is reviewable in a restricted appeal.” *Id.* (citing *Norman Commc'ns*, 955 S.W.2d at 270).

II. Error Is Apparent on the Face of the Record

“The purpose of the expunction statute is to allow an individual who has been wrongfully arrested to expunge the records of that arrest.” *Ex parte Myers*, 24 S.W.3d 477, 480 (Tex. App.—Texarkana 2000, no pet.); *see also Tex. Dep't of Pub. Safety v. Failla*, 619 S.W.2d 215, 217 (Tex. Civ. App.—Texarkana 1981, no writ) (“This section was never intended to allow a person who is arrested, pleads guilty to an offense, and receives probation pursuant to a guilty plea to expunge arrest and court records concerning that offense.”). However, the “right to expunction is neither a common law nor a constitutional right,” but is instead “a statutory privilege which is granted and can be limited by the legislature.” *Myers*, 24 S.W.3d at 480. “[T]he burden of proving compliance with the statutory requirements is on the petitioner.” *In re D.W.H.*, 458 S.W.3d 99, 104 (Tex.

App.—El Paso 2014, no pet.); *see Travis Cty. Dist. Atty. v. M.M.*, 354 S.W.3d 920, 923 (Tex. App.—Austin 2011, no pet.). The expunction statute, Article 55.01 of the Texas Code of Criminal Procedure, sets forth the requirements necessary to obtain the statutory privilege of expunction. TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2018)).

In pertinent part, the version of Article 55.01 applicable to this case provided:

(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:

(1) the person is tried for the offense for which the person was arrested and is:

(A) acquitted by the trial court . . . ; or

(B) convicted and subsequently:

(i) pardoned for a reason other than that described by Subparagraph (ii);
or

(ii) pardoned or otherwise granted relief on the basis of actual innocence with respect to that offense . . . ; or

(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 *Chapter 42A* 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 or information charging the person with the commission of a misdemeanor offense based on the person's arrest . . . arising out of the same transaction for which the person was arrested:

(i) has not been presented against the person at any time following the arrest, . . .

(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 person completed a pretrial intervention program authorized under Section 76.011, Government Code, because the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense, or because the indictment or information was void

Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.23, 2015 Tex. Gen. Laws 2321, 2373–74 (current version at TEX. CODE CRIM. PROC. art. 55.01(a)(2)(A)(i)(c)).

“Article 55.01 does not permit expunctions for an arrest resulting in a final conviction.” *Ex parte Hernandez*, No. 13-15-00518-CV, 2017 WL 1737959, at *2 (Tex. App.—Corpus Christi May 4, 2017, no pet.) (mem. op.). Further, Texas courts “have held that article 55.01 requires an ‘arrest-based’ approach to expunction because it authorizes expunction of records concerning an arrest.” *A.M.*, 2018 WL 1177601, at *2 (citing *Tex. Dep’t of Pub. Safety v. J.A.M.*, No. 01-16-00814-CV, 2017 WL 1629444, at *2 (Tex. App.—Houston [1st Dist.] May 2, 2017, no pet.) (mem. op.); *T.H. v. Tex. Dep’t of Pub. Safety*, No. 03-15-00304-CV, 2016 WL 5874869, at *3 (Tex. App.—Austin Oct. 6, 2016, no pet.) (mem. op.); *S.J. v. State*, 438 S.W.3d 838, 843–46 (Tex. App.—Fort Worth 2014, no pet.); *Tex. Dep’t of Pub. Safety v. Dicken*, 415 S.W.3d 476, 479 (Tex. App.—San Antonio 2013, no pet.)). “If expunction is not available for all charges stemming from an arrest, it is not available for any of them.” *Id.* “When an arrest is not wrongful, removal and destruction of records relating to it harms the public’s interest of using the records ‘in subsequent punishment proceedings, including subsequent applications for probation.’” *S.J. v. State*, 438 S.W.3d 838, 841 (Tex. App.—Fort Worth 2014, no pet.) (quoting *Harris Cty. Dist. Attorney’s Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991)).

Here, the DPS filed an answer arguing that Ho was not entitled to expunge records relating to his December 2014 arrest because he pled guilty to, and was convicted of, the possession of drug paraphernalia charge. To its answer, the DPS attached the misdemeanor complaint, Ho's signed plea agreement papers, the trial court's acceptance of Ho's plea, and the trial court's assessment of a \$2,000.00 fine against Ho for possession of drug paraphernalia in cause number 11C143906 in the Justice of the Peace Court of Hunt County, Texas. Citing those records, the DPS argues that Ho failed to meet his burden to prove entitlement to the trial court's expunction order.

Although the attachments to the DPS's answer indicated that Ho may not have been entitled to expunge records from his December 2014 arrest, "[w]ithout a reporter's record, we cannot know what evidence, if any, was introduced at the hearing." *Ex parte Tippens*, No. 06-17-00100-CV, 2018 WL 1440462, at *3 (Tex. App.—Texarkana Mar. 23, 2018, no pet.) (mem. op.) (quoting *Ex parte Ruiz*, No. 04-11-00808-CV, 2012 WL 2834898, at *1 (Tex. App.—San Antonio July 11, 2012, no pet.) (mem. op.)). "We also cannot take as true the allegations in the DPS's answer." *Id.* "[B]ecause DPS has complained of the absence of a reporter's record, the trial court's order must be reversed, and the cause must be remanded for a new hearing." *Id.* (quoting *Ruiz*, 2012 WL 2834898, at *1); see *Tex. Dep't of Pub. Safety v. Redding*, No. 11-12-00285-CV, 2013 WL 3203813, at *2 (Tex. App.—Eastland Jun 20, 2013, no pet.). We sustain the DPS's point of error complaining of the lack of a reporter's record.

III. Conclusion

We reverse the trial court's expunction order and remand the matter for a new hearing.

Bailey C. Moseley
Justice

Date Submitted: May 3, 2018
Date Decided: May 4, 2018