

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00279-CV**

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**Texas Department of Public Safety, Appellant**

**v.**

**M. G., Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 403RD JUDICIAL DISTRICT  
NO. D-1-EX-15-000739, HONORABLE BRENDA KENNEDY, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

The Texas Department of Public Safety filed this appeal challenging the district court's order for expunction of records relating to M.G.'s arrest for sexual assault and practicing medicine without a license. DPS contends that M.G. was not entitled to expunction of his arrest records because he failed to prove that he met the statutory requirements for expunction. We will reverse the district court's order and render judgment denying M.G. expunction of his records.

**BACKGROUND**

In 2015, M.G. filed a petition seeking to expunge records of his arrest for sexual assault, a second-degree felony, and practicing medicine without a license, a third-degree felony. The indictment shows that the charges were based on the grand jury's finding that M.G. sexually assaulted the victim while purporting to conduct a gynecological exam. After M.G. was convicted in another case of a similar charge arising from another incident, these charges were dismissed

“pending further investigation.” *See Green v. State*, 137 S.W.3d 356, 367 (Tex. App.—Austin 2004, pet. ref’d) (affirming M.G.’s conviction for practicing medicine without license and causing psychological harm to another victim by performing purported gynecological exam). M.G.’s expunction petition specifically alleged that he was entitled to expunction under Texas Code of Criminal Procedure article 55.01(a)(2)(A)(ii) “because the indictment was DISMISSED.” *See Act of May 27, 2011, 82d Leg., R.S., ch. 894, § 1, 2011 Tex. Gen. Laws 2275, 2275–76* (amended 2015, 2017) (current version at Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)(c), (d)). He also alleged that his indictment was void on its face and that his charge of practicing medicine without a license was based on statutes that were unconstitutional.

DPS filed an answer generally denying all allegations in M.G.’s expunction petition, demanding strict proof of his allegations, and contending that M.G. was not entitled to expunction of the records. The Travis County District Attorney’s Office intervened, filed an answer generally denying all allegations in M.G.’s petition, demanding strict proof, and filed special exceptions contending that M.G. failed to state a cause of action under the expunction statute because he failed to plead all elements of the cause of action. The DA’s office also filed a trial memorandum noting that expunction is improper if a person is convicted of any charge arising from the same arrest and contending that M.G. was arrested at the same time on the charges that were dismissed and the charge that ultimately resulted in his conviction. M.G. filed a response disputing that contention.

The Travis County Criminal Law Magistrate issued findings and recommendations without holding an evidentiary hearing. The magistrate found that M.G. was not arrested on both cases at the same time and recommended granting M.G.’s petition for expunction. That same day,

the district court signed an Order Directing Expunction of Criminal Records adopting the magistrate's findings and recommendations, concluding that the court had jurisdiction over the cause and the parties, and further concluding that legal requirements for notice to other parties were met.

The order stated, in relevant part:

The Court has adopted the findings of fact and recommendations of the Travis County Criminal Law Magistrate. All requirements of law concerning notice to other parties having been complied with, and it appearing to the Court that it has jurisdiction over this cause and all parties entitled to notice of these proceedings having received notice, the Court proceeded to consider the cause. It is the decision of this Court that Petitioner is entitled to have his records expunged. It is therefore ORDERED that all records arising out of Petitioner's arrest by the Austin Police Department for Sexual Assault and Practicing Medicine without a license on July 15, 2001 (may show on some records as July 16, 2001) which is the subject of this cause, are EXPUNGED.

Notably, neither the magistrate nor the district court stated whether M.G. met his burden of proving that he met the statutory requirements for expunction, and no reference to article 55.01 appears in either of their rulings. DPS subsequently filed this appeal challenging the expunction order.

### **DISCUSSION**

Expunction is a statutory privilege, not a constitutional or common-law right. *In re Expunction*, 465 S.W.3d 283, 290 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (op. on reh'g). The statutory right to seek an expunction is available only when all of the statutory conditions have been met. *Texas Dep't of Pub. Safety v. Nail*, 305 S.W.3d 673, 674 (Tex. App.—Austin 2010, no pet.) (op. on reh'g). Trial courts must strictly comply with the statutory requirements and have no

equitable power to expand the availability of the remedy beyond what the Legislature has provided. *Id.* at 675 (internal citations omitted).

A petitioner bears the burden of proving compliance with all statutory requirements for expunction in this civil proceeding. *Travis Cty. Dist. Attorney v. M.M.*, 354 S.W.3d 920, 923 (Tex. App.—Austin 2011, no pet.). “To be entitled to an expunction under Article 55.01(a)(2)(A)(ii)” —as M.G. specifically pleaded here—“the petitioner is required to prove that the indictment was dismissed because a mistake, false information, or other similar reason caused the presentment of the indictment.” *In re Expunction of A.M.*, 511 S.W.3d 591, 596 (Tex. App.—El Paso 2015, no pet.) (citing Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)). A petitioner cannot meet his burden of proving compliance with all statutory requirements for expunction of criminal records with mere allegations in a verified pleading. *Ex parte K.R.K.*, 446 S.W.3d 540, 544 (Tex. App.—San Antonio 2014, no pet.) (noting that “allegations in a petition seeking expunction are not evidence”). Further, a petitioner is not entitled to expunction simply because the State did not pursue the specific charges for which the petitioner was originally arrested. *Ex parte Barham*, 534 S.W.3d 547, 551 (Tex. App.—Texarkana 2017, no pet.). That fact, without more, does not demonstrate that the original charges were wrongful. *Id.* In such circumstances, additional information must be provided to demonstrate that the original charges were wrongful before a petitioner may obtain expunction under subsection (a)(2) of article 55.01. *Id.*

### **Standard of review**

We review a trial court’s order granting or denying expunction for abuse of discretion, which generally means that the trial court acted without reference to any guiding rules or principles.

*Nail*, 305 S.W.3d at 678 (internal citations omitted). To the extent an expunction ruling turns on a question of law, we review it de novo because a trial court has no discretion in determining what the law is or applying the law to the facts; a court abuses its discretion if it misinterprets or misapplies the law. *Id.*

**M.G. was not entitled to order of expunction under article 55.01(a)(2)(A)(ii)**

DPS contends that M.G. was not entitled to expunction of his arrest records because he failed to prove that he met the statutory requirements for expunction. We agree.

M.G. pleaded that he was entitled to expunction under Texas Code of Criminal Procedure article 55.01(a)(2)(A)(ii). The version of that statute in effect when he filed his petition provided, in relevant part:

(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, . . . 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 or charging the person with the commission of any felony offense 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, and

....

(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, or 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 . . . .

2011 Tex. Gen. Laws at 2275–76 (current version at Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)(a)–(d)). Thus, under the relevant version of the expunction statute in article 55.01(a)(2)(A)(ii), a petitioner seeking expunction must prove that: (1) he has been released; (2) the charge, if any, did not result in a final conviction; (3) the charge, if any, is no longer pending; (4) there was no court-ordered community supervision under article 42.12 for the offense, unless it was a class C misdemeanor; (5) an indictment or information charging him with the commission of any felony offense arising out of the same transaction for which he was arrested, if presented, was dismissed or quashed; and (6) the trial court found that the indictment or information was dismissed or quashed because of mistake, false information, or some other reason indicating the absence of probable cause at the time of the dismissal to believe he committed the offense. *Id.*; *In re Expunction of A.M.*, 511 S.W.3d at 594 (citing Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)).

As we have noted, entitlement to expunction under article 55.01(a)(2)(A)(ii) requires proof that the indictment was dismissed because a mistake, false information, or other similar reason caused the presentment of the indictment. *In re Expunction of A.M.*, 511 S.W.3d at 594 (citing Tex. Code Crim. Proc. art. 55.01(a)(2)(A)(ii)). A finding that the presentment of the indictment was made because of “false information” or “mistake” requires proof that the grand jury’s decision was

based on erroneous facts. *Id.* (citing *Kendall v. State*, 997 S.W.2d 630, 632 (Tex. App.—Dallas 1998, pet. denied)).

Here, the record reflects only that the indictment was dismissed “pending further investigation” and because of M.G.’s conviction in another case. *See Durham v. State*, No. 09-16-00308-CV, 2017 Tex. App. LEXIS 7331, at \*7 (Tex. App.—Beaumont Aug. 3, 2017, no pet.) (mem. op.) (concluding that petitioner failed to establish statutory requirements for expunction where record showed only that one cause number was dismissed after he was sentenced in another cause number). No further explanation appears in the order of dismissal of the charges. There were no findings by the magistrate or the district court as to the reason for the dismissal.

M.G.’s expunction petition consisted of his allegations that no crime occurred,<sup>1</sup> that his indictment was void, and that the statutes prohibiting the practice of medicine without a license were unconstitutional. But allegations in an expunction petition are not evidence. *See Ex parte K.R.K.*, 446 S.W.3d at 544; *Ex parte Guajardo*, 70 S.W.3d 202, 206 (Tex. App.—San Antonio 2001, no pet.); *Texas Dep’t of Pub. Safety v. Mendoza*, 952 S.W.2d 560, 562 (Tex. App.—San Antonio 1997, no writ) (noting that petitioner seeking expunction of arrest records “was required to testify or put on other evidence at the hearing to prove up the facts contained in the petition”). M.G. provided no proof that his indictment was dismissed because of mistake, false information, or some other reason indicating the absence of probable cause at the time of the dismissal to believe he committed the offense. He offered nothing showing that the grand jury’s decision was based on

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<sup>1</sup> In his appellate brief, M.G. contends that there was no proof that the sexual assault for which he was indicted “occurred without the other party’s consent.”

erroneous facts. He did not show that his indictment was void. M.G. had the burden of proving his compliance with all statutory requirements for expunction of criminal records. *See M.M.*, 354 S.W.3d at 923. He has not done so.

We conclude that M.G. was not entitled to expunction as pleaded under article 55.01(a)(2)(A)(ii) for records of his arrest for sexual assault and practicing medicine without a license, and that the district court abused its discretion by granting the petition for expunction. *See Nail*, 305 S.W.3d at 678. We sustain DPS's complaint as to M.G.'s failure to prove that he met the statutory requirements for expunction.<sup>2</sup>

### CONCLUSION

We reverse the district court's March 24, 2016 Order Directing Expunction of Criminal Records and render judgment that M.G. take nothing by his petition.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Shannon\*

Reversed and Rendered

Filed: April 25, 2018

\* Before Bob E. Shannon, Chief Justice (retired), Third Court of Appeals, sitting by assignment. *See Tex. Gov't Code* § 74.003(b).

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<sup>2</sup> Based on our resolution of this threshold complaint, we need not address DPS's issue seeking construction of "arrest" as used in the expunction statute.