NUMBER 13-16-00197-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

EX PARTE DARLENE GAIL MCKINNEY

On appeal from the 103rd District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Benavides, and Hinojosa
Memorandum Opinion by Justice Contreras

Appellant, the Texas Department of Public Safety (the Department), brings this restricted appeal from the trial court's order expunging the arrest records of appellee, Darlene Gail McKinney. The Department contends by two issues that the trial court erred in expunging records of two arrests for driving while intoxicated (DWI). We reverse and render judgment denying McKinney's petition for expunction.

I. BACKGROUND

McKinney was arrested for DWI on May 23, 1998 and July 20, 2013. After the

1998 arrest, McKinney was charged by information with DWI, a Class B misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04 (West, Westlaw through 2015 R.S.). Pursuant to an agreement, the State moved to dismiss the DWI charge in exchange for McKinney's plea of guilty to reckless driving, a misdemeanor carrying a punishment not to exceed a fine of $200 and confinement in county jail for thirty days. *See* TEX. TRANSP. CODE ANN. § 545.401 (West, Westlaw through 2015 R.S.). The trial court granted the State's motion to dismiss the DWI charge and the State then filed a new information alleging reckless driving under a separate cause number. On February 9, 1999, McKinney pleaded guilty to the offense of reckless driving. The trial court deferred a finding of guilt, placed McKinney on community supervision for nine months, and assessed a $200 fine. The conditions of community supervision, which were attached to the judgment, contained a handwritten addendum stating that "Defendant shall have unsupervised probation."

Following her 2013 arrest, McKinney was again charged by information with DWI. In February 2015, the State charged McKinney in a separate cause number with the offense of failing to drive within a single lane on a multiple-lane roadway, a misdemeanor, also allegedly committed on July 20, 2013. *See id.* § 545.060(a) (West, Westlaw through 2015 R.S.); *see also id.* § 542.301 (West, Westlaw through 2015 R.S.). McKinney pleaded nolo contendere to the latter offense on February 23, 2015, and the trial court found her guilty and sentenced her to a fine and court costs of $300.10. The State then moved to dismiss the DWI charge and the trial court granted the motion.

On March 16, 2015, McKinney filed a petition to expunge the records of both the 1998 and 2013 arrests under article 55.01(a)(2) of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2) (West, Westlaw through 2015 R.S.).

The Department filed an answer asserting that expunction is barred (1) as to the 1998 arrest because that arrest resulted in the imposition of court-ordered community supervision, and (2) as to the 2013 arrest because that arrest resulted in a conviction.

McKinney testified at a May 27, 2015 hearing that her attorney in the 1998 case told her that her conviction for reckless driving would make her arrest eligible for expunction because her "probation . . . was specifically to be unsupervised." McKinney stated that she would not have agreed to plead guilty to the reckless driving charge if she believed that expunction was not available. As to the 2013 arrest, McKinney's attorney argued that offense was "not a charge deriving from the arrest" because the order dismissing the DWI charge states that the reason for the dismissal was that she "was convicted in another case." Counsel further stated that "we intended to get deferred adjudication on that, as well," but "the Judge didn't write it down as deferred adjudication." After hearing further argument from counsel at another hearing on September 22, 2015, the trial court granted McKinney's petition for expunction as to both the 1998 and 2013 arrests.

This restricted appeal followed.[1]

II. DISCUSSION

A. Restricted Appeal

To attack an order by restricted appeal, the Department must show: (1) it was a party who did not participate in the hearing that resulted in the judgment complained of; (2) it filed a notice of appeal within six months after the order was signed; (3) it did not timely file a post-judgment motion or request findings of fact and conclusions of law; and

[1] McKinney has not filed a brief to assist us in the resolution of this matter.

(4) error is apparent on the face of the record. TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *Tex. Dep't of Pub. Safety v. Fredricks*, 235 S.W.3d 275, 278 (Tex. App.—Corpus Christi 2007, no pet.).

The record indicates that the Department was a party, that it did not appear at either hearing,[2] that it filed a notice of restricted appeal within six months of the expunction order, and that no post-judgment motions or request for findings of fact and conclusions of law were filed. We therefore must determine if error is apparent from the face of the record. *See Alexander*, 134 S.W.3d at 848*; Fredricks*, 235 S.W.3d at 278. The "face of the record" includes all papers on file in the appeal and the reporter's record, if any. *Fredricks*, 235 S.W.3d at 280.

B. Applicable Law

The expunction statute is an exception to the established principle that court proceedings and records should be open to the public. *In re State Bar of Tex*., 440 S.W.3d 621, 624 (Tex. 2014). It is designed to protect wrongfully-accused people from inquiries about their arrests. *Id*. A petitioner's right to expunction is purely a matter of statutory privilege, and the petitioner bears the burden of demonstrating that all of the required statutory conditions have been met. *Tex. Dep't of Pub. Safety v. Ibarra*, 444 S.W.3d 735, 738–39 (Tex. App.—Corpus Christi 2014, pet. denied); *Fredricks*, 235 S.W.3d at 281. The trial court must strictly comply with the statutory requirements, and

[2] A Cameron County assistant district attorney appeared at both hearings and argued against expunction. Prior to the first hearing, McKinney's counsel objected to the appearance of the assistant district attorney on the basis that the district attorney's office did not file an answer, and the trial court overruled the objection. We have held in the context of a restricted appeal of an expunction order that the Department meets the non-participation requirement if it did not appear at the final hearing, even though the district attorney appeared and argued against expunction at that hearing. *See Ex parte Vega*, No. 13-15-00245-CV, 2016 WL 455327, at *2 (Tex. App.—Corpus Christi Feb. 4, 2016, no pet.) (citing *Pike–Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam)) (noting that "[w]e liberally construe the nonparticipation requirement in favor of the right to appeal").

neither an appellate court nor the trial court has any equitable power to extend the protections of the expunction statute beyond its stated provisions. *Tex. Dep't of Pub. Safety v. M.R.S.*, 468 S.W.3d 553, 555 (Tex. App.—Beaumont 2015, no pet.).

The expunction statute, article 55.01 of the Texas Code of Criminal Procedure, provides in relevant part as follows:

> (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 Chapter 42A for the offense, unless the offense is a Class C misdemeanor . . . .

TEX. CODE CRIM. PROC. ANN. art. 55.01. "Court-ordered community supervision" includes deferred-adjudication community supervision. *Tex. Dep't of Pub. Safety v. Nail*, 305 S.W.3d 673, 681 (Tex. App.—Austin 2010, no pet.); *Tex. Dep't of Pub. Safety v. Butler*, 941 S.W.2d 318, 321 (Tex. App.—Corpus Christi 1997, no writ); *State v. Knight*, 813 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1991, no writ) (noting that the expunction statute is "not intended to allow a person who is arrested, pleads guilty to an offense, and receives probation after pleading guilty, to expunge his record").

C. Analysis

The Department argues by two issues that the trial court erred in expunging records of both the 1998 and 2013 arrests. We agree.

The record clearly reflects that McKinney entered into a plea agreement in 1999 under which the State agreed to dismiss the Class B misdemeanor DWI charge in exchange for McKinney's guilty plea to reckless driving. Thus, the reckless driving charge resulted from the DWI arrest. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2). Even

though McKinney was never convicted of any offense arising out of the 1998 arrest, she pleaded guilty to reckless driving as a result of that arrest and was ordered to submit to community supervision; therefore, article 55.01 does not permit expunction of the records of that arrest. *See id.*; *In re O.R.T.*, 414 S.W.3d 330, 335 (Tex. App.—El Paso 2013, no pet.) ("When a defendant admits guilt to an offense arising out of an arrest, he concedes that the arrest was not wrongful for purposes of the expunction statute."); *Nail*, 305 S.W.3d at 681; *Rodriguez v. State*, 224 S.W.3d 783, 785 (Tex. App.—Eastland 2007, no pet.) (holding that appellant did not meet requirements of article 55.01(a) where she pleaded guilty to a Class C misdemeanor arising from the arrest). This is not changed by the fact that the community supervision order stated that "Defendant shall have unsupervised probation." *See Ex parte Green*, 373 S.W.3d 111, 114 (Tex. App.—San Antonio 2012, no pet.) (holding that court-ordered community supervision was imposed, thereby precluding expunction, even though the trial court specified that deferred-adjudication probation was "unsupervised"); *see also Tex. Dep't of Pub. Safety v. Dicken*, 415 S.W.3d 476, 481 (Tex. App.—San Antonio 2013, no pet.) (noting that "the expunction statute was not intended to allow an individual who is arrested, and enters a plea of guilty to an offense arising from the arrest, to expunge the arrest and all court records concerning the arrest").

As to the 2013 arrest, McKinney pleaded guilty and was convicted of the misdemeanor offense of failure to drive in a single lane, which was alleged to have occurred on the same day as McKinney's arrest for DWI. Again, the record reflects that the charge to which McKinney pleaded guilty resulted from the arrest which she now seeks to expunge. *See* TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2). Because the charge "resulted in a conviction," the records of the arrest are not expungeable under article

55.01. *See id.*; *Dicken*, 415 S.W.3d at 481. This is true notwithstanding the fact that, as McKinney's trial counsel argued, failure to drive in a single lane is not a lesser-included offense of DWI. *See In re J.O.*, 353 S.W.3d 291, 294 (Tex. App.—El Paso 2011, no pet.) (noting that there is nothing in article 55.01 "to indicate that the Legislature intended to limit the 'resulted from' requirement to final convictions for offenses which would otherwise be considered 'lesser-included' of the expunction offense").

We conclude that error is apparent on the face of the record. *See Alexander*, 134 S.W.3d at 848*; Fredricks*, 235 S.W.3d at 278. Accordingly, the Department's issues are sustained.

III. CONCLUSION

We reverse the trial court's order and render judgment denying McKinney's petition for expunction as to her 1999 and 2013 arrests. Pursuant to the Department's prayer for relief, we order any documents surrendered to the trial court or to McKinney returned to the submitting agencies. *See Fredricks*, 235 S.W.3d at 282; *see also Ex parte Elliot*, 815 S.W.2d 251, 252 (Tex. 1991) (per curiam) (providing that reversal of the order of expunction applies to all respondents, even if they did not participate in the appeal).

DORI CONTRERAS
Justice

Delivered and filed the
20th day of April, 2017.