



NUMBER 13-19-00441-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

EX PARTE G.G.

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

MEMORANDUM OPINION

**Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes**

Appellant the Texas Department of Public Safety (the Department) appeals an order expunging all files and records relating to appellee G.G.'s arrest for possession of marijuana, a class B misdemeanor. See TEX. CODE CRIM. PROC. ANN. art. 55.02; TEX. HEALTH & SAFETY CODE ANN. § 481.121. By what we construe as one issue, the Department argues that the trial court's order of expunction is not supported by legally sufficient evidence. We reverse and render.

I. BACKGROUND

On November 21, 2004, G.G. was arrested on two charges: driving while intoxicated (DWI) and possession of marijuana. See TEX. HEALTH & SAFETY CODE ANN. § 481.121; TEX. PENAL CODE ANN. § 49.04. On July 12, 2017, G.G. filed a petition for expunction, pursuant to Article 55.02 of the Texas Code of Criminal Procedure, seeking to expunge records relating to his November 21, 2004 possession of marijuana arrest. See TEX. CODE CRIM. PROC. ANN. art. 55.02. G.G. claimed the possession charge was dismissed on June 22, 2005, and therefore, he was entitled to an expunction.

On September 14, 2017, the Department filed its original answer and general denial, stating G.G. was not entitled to an expunction because multiple charges arose out of the November 21, 2004 arrest, and G.G. was convicted on the adjoining charge: DWI, a class B misdemeanor. See TEX. PENAL CODE ANN. § 49.04. The Department attached copies of the complaint, information, and dismissal¹ for the possession offense and the complaint, information, and judgment of conviction for the DWI offense.

Following a hearing on G.G.'s petition, the trial court granted G.G.'s request for expunction on March 18, 2019. The Department was absent from the proceedings and maintains that it did not receive notice. The Department filed its notice of restricted appeal on September 12, 2019. See TEX. R. APP. P. 30.

II. RESTRICTED APPEAL

Restricted appeals are governed by Rule 30 of the Texas Rules of Appellate Procedure. See *id.*; *Ex parte E.H.*, No. 18-0932, ___ S.W.3d ___, ___, 2020 WL 2503898, at *5 (Tex. May 15, 2020). To sustain a restricted appeal, the filing party must prove:

¹ The State's Motion to Dismiss states the dismissal was made "pursuant to a plea agreement" and does not further specify.

(1) the party filed notice of the restricted appeal within six months after the judgment was signed; (2) the party was a party to the underlying lawsuit; (3) the party did not participate in the hearing that resulted in the complained of judgment and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent from the face of the record. *Ex parte E.H.*, 2020 WL 2503898, at *5; *Pike–Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014) (per curiam); *see also Ex parte A.G.J.*, No. 13-19-00209-CV, 2020 WL 1951543, at *2 (Tex. App.—Corpus Christi–Edinburg Apr. 23, 2020, no pet. h.) (mem. op.). The “face of the record” includes all papers on file in the appeal and the reporter’s record, if any. *Norman Commc’ns. v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam); *see also Tex. Dep’t of Pub. Safety v. Salazar*, No. 13-12-00771-CV, 2013 WL 4399185 at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 15, 2013, no pet.) (mem. op.).

The record here establishes that the Department filed its notice of restricted appeal within six months of the expunction order, did not appear at the expunction hearing, and did not file any post-judgment motions or request findings of fact and conclusions of law, thereby meeting the first three required prongs. *See Pike–Grant*, 447 S.W.3d at 886. We now turn to the fourth prong: whether error is apparent on the face of the record. *See id.*

III. EXPUNCTION

The Department argues that error is apparent on the face of the record because an offense (DWI) arising from the November 21, 2004 arrest resulted in a final conviction, barring G.G.’s entitlement to an expunction of a separate offense (possession) stemming from the same arrest. *See TEX. CODE CRIM. PROC. ANN.* art. 55.01. We agree.

The remedy of expunction permits a person who has been arrested for the commission of a criminal offense, and who meets certain other conditions, to have the

opportunity to have all records and files related to that arrest removed from the government's records. See *id.* at 55.01–.02. Although the statute is codified in the Texas Code of Criminal Procedure, an expunction proceeding is civil in nature. *Ex parte E.H.*, 2020 WL 2503898, at *2; *State v. T.S.N.*, 547 S.W.3d 617, 619 (Tex. 2018). Thus, it is the petitioner's burden to show that all the statutory conditions—each mandatory and exclusive—have been met. *Ex parte E.H.*, 2020 WL 2503898, at *2. It is an abuse of discretion for the trial court to order an expunction when the statutory conditions have not been met because the trial court possesses “no equitable power to permit expunction where it is not allowed” by statute. *Id.* To the extent that the trial court's ruling on an expunction petition turns on a question of law, we review that ruling de novo. *Id.*; *Tex. Dep't of Pub. Safety v. Ibarra*, 444 S.W.3d 735, 738 (Tex. App.—Corpus Christi–Edinburg 2014, pet. denied).

Article 55.01(a)(2) provides that a person who is arrested but not tried for an offense is entitled to an expunction order if

- (1) “the person has been released”;
- (2) “the charge, if any, has not resulted in a final conviction and is no longer pending”; and
- (3) “there was no court-ordered community supervision under Chapter 42A for the offense, unless the offense is a Class C misdemeanor”; “provided that”
- (4) the indictment or information charging the person with the offense either
 - a. was not timely presented within particular deadlines following the arrest, or
 - b. was timely presented but was dismissed or quashed for particular reasons, including “reason indicating absence of probable cause”; or

- (5) “prosecution of the person for the offense for which the person was arrested is no longer possible because the limitations period has expired.”

TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2).

Although the Texas Supreme Court has expressly declined to decide whether article 55.01(a)(2) is arrest-based or charge-based, see *T.S.N.*, 547 S.W.3d at 622, this Court and a majority of our sister courts have held that the expunction statute is arrest-based, “meaning that an applicant may not obtain an expunction of records unless all charges stemming from the arrest meet” the requirements of article 55.01(a)(2). *Matter of J.G.*, 588 S.W.3d 290, 293 (Tex. App.—El Paso 2019, no pet.); see e.g., *Ex Parte Vega*, 510 S.W.3d 544, 551 (Tex. App.—Corpus Christi–Edinburg 2016, no pet.) (holding that the statute is arrest-based); *In re Expunction*, 465 S.W.3d 283, 292 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (same); see *Ex Parte S.D.*, 457 S.W.3d 168, 172 (Tex. App.—Amarillo 2015, no pet.) (same); *S.J. v. State*, 438 S.W.3d 838, 845-46 (Tex. App.—Fort Worth 2014, no pet.); *Tex. Dep’t of Pub. Safety v. Dicken*, 415 S.W.3d 476, 481 (Tex. App.—San Antonio 2013, no pet.) (same); see also *Tex. Dep’t of Pub. Safety v. C.B.*, No. 13-17-00377-CV, 2018 WL 3062482, at *3 (Tex. App.—Corpus Christi–Edinburg June 21, 2018, no pet.) (mem. op.) (same). In other words, under this Court’s precedent, G.G. was not entitled to have the records related to his possession arrest expunged under article 55.01(a)(2) unless he established that all of the charges arising from the same arrest satisfied article 55’s requirements or that an exception, i.e., dismissal due to “reason indicating absence of probable cause” applied. See *Ex Parte Vega*, 510 S.W.3d at 551; see also *C.B.*, 2018 WL 3062482, at *3.

The record reflects G.G. was originally arrested on two charges, DWI and possession of marijuana. As part of a plea agreement, the State dismissed the

possession charge and G.G. pleaded guilty to the DWI charge. In contravention of Article 55.01(a)(2), the DWI charge, which stems from the same arrest as his possession charge, resulted in a final conviction. See *Ex Parte Vega*, 510 S.W.3d at 551; see also *C.B.*, 2018 WL 3062482, at *3. Thus, G.G. failed to show that all of the article 55 statutory requirements were met or that an exception applied. See TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2). Therefore, error is apparent on the face of the record, and the trial court abused its discretion in granting the expunction of G.G.'s arrest. We sustain the Department's first issue.

IV. CONCLUSION

We reverse the trial court's order granting G.G.'s expunction and render judgment denying G.G.'s petition for expunction.

GREGORY T. PERKES
Justice

Delivered and filed the
9th day of July, 2020.