Affirmed and Opinion Filed October 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00835-CV

EX PARTE CHARLES FERRIS

On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-01805-2019

EN BANC OPINION

Before the En Banc Court
Opinion by Justice Pedersen, III

Appellee Charles Ferris filed a petition for expunction, seeking an order to have all records of his 2018 arrest for driving while intoxicated (DWI) expunged. The trial court granted the expunction order. Appellant Texas Department of Public Safety (the "Department") asserted, both in the trial court and now on appeal, that Ferris is not entitled to expunge the 2018 DWI arrest. Sitting en banc, we conclude that Ferris meets the statutory criteria entitling him to expunction of the 2018 arrest. We affirm the trial court's order.

I. BACKGROUND

On September 4, 2014, Ferris was arrested for DWI with a blood alcohol content of 0.15 or more, a Class A misdemeanor. On July 30, 2015, Ferris pleaded guilty to, and was found guilty of, that charge, which resulted in a final conviction. Ferris thereafter served twenty days in jail on the conviction. He is no longer subject to any jeopardy or restraint resulting from that conviction.

On April 19, 2018, Ferris was arrested for DWI second, a Class A misdemeanor. On March 6, 2019, a jury found that Ferris was not guilty of the charge.

On April 2, 2019, Ferris filed his petition for acquittal expunction, and on April 18, 2019, the court—without hearing—entered an Order Granting Expunction of Criminal Records relating to this acquittal pursuant to Texas Code of Criminal Procedure article 55.01(a)(1)(A). TEX. CODE CRIM. PROC. ANN art. 55.01(a)(1)(A).

On May 6, 2019, the Department filed a motion for new trial, which was heard on June 28, 2019, before the Honorable Mark Rusch. At the hearing, the Department argued that Ferris's April 19, 2018 arrest for DWI was a part of the same "criminal episode" under Section 3.01 of the Texas Penal Code as his September 4, 2014 arrest for DWI. Judge Rusch responded as follows:

> All right. You're going to have to help me out here, Ms. Sicola. I've worked in the criminal justice system for 35 years as a prosecutor and as a judge. I'm board certified in criminal law, just so you know who you're talking to. I have never encountered this situation before. Okay? I've had, in my career as a prosecutor, guys who drove up and down the highway robbing people on both sides of the highway. Some on the same day. Some, like, the day after. I've prosecuted more sex offenders

> for multiple offenses against the same victim as I can count. I've presided over those cases. I've never seen a case where, after the first case is disposed of via a plea and the second crime occurs after the first case is disposed of, that that is described or included within the phrase "criminal episode."

The Department then argued:

> [w]e're not talking about joinder or the consequences of joinder. What we're talking about is this *rare circumstance* that you have under the—under Chapter 55 of the code of criminal procedure where they incorporated this definition, specifically Section 3.01. [The legislature] didn't reference the entire Chapter 3 of the penal code. They picked up this language as a definition. They incorporated it in the 55.01(c). And, I agree that looking at it through the lens[] as a practitioner, as a judge, as a prosecutor and as a defense attorney that when you—when you look at these issues and you think of Section 3.01, you don't think of it in terms of looking at it through the lens[] of the expunction statute. . . . So[,] under these *rare circumstances* where you have an acquittal and a prior conviction for the same offense, we believe that the plain reading of the statute, the expunction statute, is that the acquittal expunction is not permitted. (emphasis added).

During the hearing, the Collin County Criminal District Attorney's office voiced no objection to the expunction. When asked by Judge Rusch whether the Criminal District Attorney's office had a position on this issue, the assistant criminal district attorney informed the judge that the Criminal District Attorney's office signed off on the expunction based on how it was presented and its interpretation of the law.

At the end of the hearing, Judge Rusch denied the Department's motion for new trial, concluding: "I understand the Department's position, and I understand limiting it to [Section] 3.01. But as I—my view of my job is to not read things in a

vacuum." Upon request, the trial court issued findings of fact and conclusions of law, including the following:

1. The Petitioner is entitled to an expunction from his acquitted 2018 DWI charge pursuant to Tex. Code Crim. Proc. art. 55.01(a).

2. The Article 55.01(c) exception to acquittal expunction entitlement does not apply because Petitioner's 2018 DWI acquittal did not arise out of "a criminal episode" with his prior 2014 DWI final conviction as that term is defined by Tex. Penal Code § 3.01(2).

3. The 2014 DWI and the 2018 DWI are not part of the same "criminal episode" because they could not be consolidated or joined for trial or sentencing under Penal Code §§ 3.02-3.03.

The Department appealed thereafter. In two issues, the Department asserts (i) Ferris is not entitled to expunge his 2018 DWI arrest under the relevant expunction statute—Texas Code of Criminal Procedure article 55.01(a)(1)(A)—because of the exception to the expunction statute found in article 55.01(c), and (ii) the evidence is legally insufficient to conclude that Ferris was entitled to an expunction. *See* TEX. CODE CRIM. PROC. art. 55.01.

II. EXPUNCTION

A. Standard of Review

"A trial court's ruling on a petition for expunction is reviewed for abuse of discretion." *State v. T.S.N.*, 547 S.W.3d 617, 620 (Tex. 2018). "Under the abuse of discretion standard, appellate courts afford no deference to the trial court's legal determinations because a court has no discretion in deciding what the law is or in applying it to the facts." *Id.* (citing *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640,

643 (Tex. 2009)). "Thus, a trial court's legal conclusions are reviewed de novo." *Id.* (citing *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996)). However, "when we consider factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court." *Pollard v. Merkel*, 114 S.W.3d 695, 697–98 (Tex. App.—Dallas 2003, pet. denied).

As in this case, when the trial court's ruling hinged on a question of law—interpretation of article 55.01—we review the trial court's ruling de novo. *T.S.N.*, 547 S.W.3d at 620.[1] "Statutes are to be analyzed as a cohesive, contextual whole with the goal of effectuating the Legislature's intent and employing the presumption that the Legislature intended a just and reasonable result." *Id.* (internal quotation omitted).[2] "Further, our analysis is limited to application of the plain meaning of the statutory language unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Id*. at 621 (internal quotation omitted). "We read words and phrases in context and construe them according to the rules of grammar and usage." *Harris*, 359 S.W.3d at 629.

"Where an arrest is made pursuant to a charge for a single offense and the person is acquitted . . . then article 55.01(a)(1) entitles the person to expunction of all records and files relating to the arrest." *T.S.N.*, 547 S.W.3d at 621 (citing *J.T.S.*,

[1] *See also Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) ("Statutory construction is a question of law, and we review the record de novo.").

[2] "The legislature intended section 55.01 to permit the expunction of records of wrongful arrests." *Harris Cty. Dist. Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991) (citing *Meyers v. State*, 675 S.W.2d 798, 799 (Tex. App.—Dallas 1984, no writ)).

807 S.W.2d at 574)). "Expunction is not a right; it is a statutory privilege." *In re State Bar of Tex.*, 440 S.W.3d 621, 624 (Tex. 2014) (orig. proceeding). The statute is designed to protect wrongfully accused people from inquiries about their arrests. *Id.* To be entitled to an expunction, a petitioner must satisfy all of the statutory requirements of the expunction statute. *Collin Cty. Dist. Attorney's Office v. Fourrier*, 453 S.W.3d 536, 539 (Tex. App.—Dallas 2014, no pet.).

B. Expunction Statute

The statutory requirements for expunction are found in Code of Criminal Procedure article 55.01. Relevant here, article 55.01(a) provides:

> 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 . . . the person is tried for the offense for which the person was arrested and is . . . acquitted by the trial court, except as provided by Subsection (c)[.]

TEX. CODE CRIM. PROC. art. 55.01(a)(1)(A).

Subsection (c) contains an exception to the general provision permitting expunction of records following an acquittal. *See* TEX. CODE CRIM. PROC. art. 55.01(c). Article 55.01(c) provides:

> A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court, a court of appeals, or the court of criminal appeals, *if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code*, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

TEX. CODE CRIM. PROC. art. 55.01(c). (emphasis added). Penal Code Section 3.01 defines "criminal episode" as:

> the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:
>
> (1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or
>
> (2) the offenses are the repeated commission of the same or similar offenses.

TEX. PENAL CODE ANN. § 3.01.

C. Analysis

The Department, and the dissent, argue that pursuant to the statutes quoted above, Ferris was not entitled to expunction of his 2018 DWI arrest because of his 2014 DWI conviction. The Department asserts that Ferris's two DWI arrests meet Section 3.01(2)'s definition of criminal episode because the offenses "are the repeated commission of the same or similar offense." TEX. PENAL CODE § 3.01(2). The Department argues that, pursuant to the exception set forth in article 55.01(c) of the code of criminal procedure, the trial court should not have expunged Ferris's records relating to the 2018 DWI arrest—even though he was acquitted—because the 2018 DWI arrest "arose out of a criminal episode" involving the commission of the same offense as the 2014 DWI conviction. We do not agree with the Department.

Penal Code Section 3.01

Here, the relevant definition of "criminal episode" is "the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property," when "the offenses are the repeated commission of the same or similar offenses." TEX. PENAL CODE § 3.01(2). The primary dispute in this case involves the interpretation of what constitutes a "criminal offense." "If the text of a statute is ambiguous, or the plain meaning leads to such absurd results, then we can consult extratextual factors, including: . . . the title (caption), preamble, and emergency provision." *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017); *see also* TEX. GOV'T CODE § 311.023.

In interpreting the language of Section 3.01, the Department and the dissent claim that if a person is (i) convicted of a crime and (ii) at any later time commits a second crime that is the same as or similar to the previously convicted crime, then the person is wholly precluded from expunction—regardless of acquittal for the second crime—because the second offense is a part of the same "criminal episode." However, the Department's interpretation overlooks the fact that Section 3.01 is housed under "Chapter 3. Multiple Prosecutions" and instead confines a "criminal episode" to the phrase, "commission of the same or similar offenses." The Department's interpretation removes analysis of the statute from a "cohesive, contextual whole." *T.S.N.*, 547 S.W.3d at 620.

Chapter 3 of the Texas Penal Code addresses multiple prosecutions. *See* TEX. PENAL CODE §§ 3.01–3.04. Specifically, Section 3.01 defines "criminal episode";

Section 3.02 permits consolidation and joinder of prosecutions; Section 3.03 provides sentencing guidelines for offenses arising out of the same criminal episode; and Section 3.04 discusses severance. *See* TEX. PENAL CODE §§ 3.01–3.04. The Department's focus on Section 3.01 and commission of a "same or similar" second offense would strip the prosecutorial aspect from Section 3.01—thereby missing the pattern of facts that constitutes the "criminal episode." *See generally* TEX. PENAL CODE § 3.01.

In the context of this expunction, the Department and the dissent's position that the September 4, 2014 DWI arrest and conviction was the first act in furtherance of a "criminal episode" that continued beyond adjudication, a served sentence, and beyond the two-year statute of limitation for a Class A misdemeanor into April 19, 2018, when the second DWI arrest occurs, is an absurd reading of the expunction statute. Such a cabined view of what constitutes a "criminal episode" creates an absurd, nonsensical result wherein a single "criminal episode" would engulf two DWI arrests, which (i) share no common or continuing pattern of facts; (ii) are impossible to prosecute as multiple prosecutions under Chapter 3 of the Texas Penal Code (through joinder); and (iii) could not share a concurrent sentence. As noted above, the able trial judge was correct. The dissent is "reading things in a vacuum."

The dissent identifies *In re M.T.R.*, a decision by the First Court of Appeals, which involved a fact pattern similar to this case. *See In re M.T.R.*, No. 01-18-00938-CV, 2020 WL 930842, at *1 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020, no pet.).

In *In re M.T.R.*, the defendant was arrested in 2012 for boating while intoxicated (BWI) in Montgomery County. *Id.* He subsequently pleaded guilty to the 2012 BWI offense, was convicted, served his punishment, and paid a fine. *Id.* In October 2015, the defendant was arrested and charged with DWI in Fort Bend County. *Id.* The defendant was acquitted of the DWI charge in Fort Bend County, and he sought and obtained an expunction of the acquitted DWI arrest. *Id.* The Department appealed, and our sister Court held that the 2012 BWI and 2015 DWI were a part of the same criminal episode—interpreting Section 3.01's definition of "criminal episode" outside of the context of prosecution. *Id.* at *4.[3] We disagree with their reasoning.

The Department and dissent's interpretation of "criminal episode" would lead to absurd results in the context of expunction. For example, consider the following hypothetical. As a seventeen-year-old, Jane Doe is convicted of shoplifting a $74.99 makeup kit (a Class C misdemeanor). Later, as a seventy-seven-year-old, Jane Doe is arrested and charged for the theft of $350,000.00 from her employer (a first-degree felony). Assume her case is then dismissed because the police arrested the wrong woman; further assume that the prosecutor so certifies under article 55.01(a)(2)(A)(i)(d) that she was the wrong person. *See* TEX. CODE CRIM. PROC. art. 55.01(a)(2)(A)(i)(d).[4] The State ultimately convicts a different woman.

[3] "M.T.R.'s attempt to rely on other cases applying the definition of 'criminal episode' in the context of whether certain prosecutions may be consolidated or whether a convicted defendant's sentences can run consecutively are likewise unavailing." *In re M.T.R.*, 2020 WL 930842, at *1.

[4] As noted above, the Collin County District Attorney's office did not oppose Ferris's expunction.

In this scenario, seventy-seven-year-old Jane Doe would be precluded from expunction of the first-degree felony arrest records because the "criminal episode" that began with the theft offense (of the makeup kit), occurring 60 years prior, would continue into the arrest for theft from her employer, occurring in mature adulthood. This wrongful arrest (and the agreement of the prosecutor, and basic fairness, notwithstanding) would potentially have significant collateral consequences on the rest of her life.

The Department, and now the dissent, frame this situation as a "*rare circumstance*." *See supra* at 3. Let us consider speeding tickets. Does a Texas resident not have a right to an expunction after her first speeding ticket?[5] That is most certainly not a "*rare circumstance*." Many Texans receive and expunge their first speeding ticket around the age of seventeen. Under the Department and dissent's construction of the statute, all future speeding tickets are ineligible for expunction as they are part of a lifelong "criminal episode." Under that construction, how many Texans would be—even now—in the midst of such a criminal episode?

We reiterate that the Department's counsel stated to the trial court:

> I agree that looking at it through the lens[] as a practitioner, as a judge, as a prosecutor and as a defense attorney that when you -- when you look at these issues and you think of Section 3.01, you don't think of it in terms of looking at it through the lens[] of the expunction statute.

[5] *See* TEX. CODE CRIM. PROC. art. 55.01(a)(2)(A)(i)(a).

In her own argument, counsel for the Department concedes that its construction of "criminal episode" (expunction) is not the commonly understood meaning of that term. Certainly, no such unusual construction is indicated by the expunction statute. If the Legislature wanted an unusual definition to apply to expunctions, it could have defined "criminal episode" for expunctions as such in the statute. Instead, article 55.01(c) cites a commonly understood term of art in criminal law.[6] "Even when a statute provides its own definition or explanation of a term . . . in applying that definition, we should not ignore altogether the common meaning of the words being defined, unless the statutory text compels otherwise." *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 135 (Tex. 2019).

The dissent's interpretation of "criminal episode" fits the adjective definition of "absurd"—"ridiculously unreasonable, unsound, or incongruous." *Absurd*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/absurd, (last visited October 2, 2020). The dissent's broad definition of "criminal episode" is "overly harsh and strays from the Legislature's original intent." *Ex parte J.A.B.*, 592 S.W.3d 165, 170 (Tex. App.—San Antonio 2019, no pet.) (Martinez, J., concurring).

The trial court correctly read article 55.01 and Section 3.01 that the "2014 DWI and the 2018 DWI are not part of the same 'criminal episode' because they could not be consolidated or joined for trial or sentencing under Penal Code §§ 3.02-

[6] *See supra* at 6.

3.03." The alleged April 19, 2018 DWI offense does not constitute a "criminal episode" in combination with the September 4, 2014 DWI conviction, thereby precluding expunction. "We conclude that an admission of guilt to an offense that does not arise from the same criminal episode as an offense for which the accused is acquitted and for which the accused was charged prior to being arrested does not bar an expunction of records concerning the acquitted offense." *State v. T.S.N.*, 523 S.W.3d 171, 176 (Tex. App.—Dallas 2017), *aff'd*, 547 S.W.3d 617 (Tex. 2018). For that reason, Ferris's arrest record for the 2018 DWI offense is available for expunction. We overrule the Department's first issue that Ferris was not entitled to expunction of an acquitted charge under article 55.01(c).

III. LEGAL SUFFICIENCY

A. Standard of Review

"The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's verdict." *Scott Pelley P.C. v. Wynne*, No. 05-15-01560-CV, 2017 WL 3699823, at *8 (Tex. App.—Dallas Aug. 28, 2017, pet. denied) (mem. op.). The Department, as the party challenging the legal sufficiency of the evidence on a matter for which it did not bear the burden of proof, "must demonstrate on appeal there is no evidence to support the trial court's adverse findings." *Qui Phuoc Ho v. MacArthur Ranch, LLC*, 395 S.W.3d 325, 328 (Tex. App.—Dallas 2013, no

pet.) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)). The Texas Supreme Court instructs:

> "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.

City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005) (citation omitted). We "consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *Id.* at 822. When reviewing the record, an appellate court decides whether any of the evidence supports the challenged finding of fact. *See Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.). "If more than a scintilla of evidence exists to support the finding of fact, the legal sufficiency challenge will not prevail." *Scott Pelley*, 2017 WL 3699823, at *8. "More than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

B. Analysis

Here, the Department argues that the record is devoid of any evidence that the 2014 DWI did not result in a conviction and that, therefore, the record precludes expunction of the 2018 DWI arrest based on the Department's above-discussed

interpretation of what constitutes a "criminal episode" and of the exception to expunction under article 55.01(c). *See* TEX. CODE CRIM. PROC. art. 55.01(c). The evidentiary record shows that (i) Ferris was arrested for a DWI second Class A misdemeanor on April 19, 2018, and (ii) Ferris was acquitted by a jury finding of not-guilty to the offense of DWI second, Class A misdemeanor on March 6, 2019. The Department does not dispute or controvert those facts, which are vital to Ferris's expunction.

Because we conclude that the 2014 DWI and 2018 DWI arrest are not a part of the same "criminal episode" and in light of the undisputed evidentiary record, we conclude that there was sufficient evidence to support the trial court's judgment. We overrule the Department's second issue that the evidence was legally insufficient to conclude Ferris was entitled to an expunction.

IV. CONCLUSION

The trial court's order is affirmed.

/Bill Pedersen, III/
BILL PEDERSEN, III
JUSTICE

Evans, J., dissenting, joined by Burns, C.J., and Whitehill, Schenck, Partida-Kipness, and Browning, J.J.

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE EX PARTE: CHARLES FERRIS No. 05-19-00835-CV	On Appeal from the 401st Judicial District Court, Collin County, Texas Trial Court Cause No. 401-01805-2019. Opinion delivered by Justice Pedersen, III, before the Court sitting en banc.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Charles Ferris shall recover his costs of this appeal from appellee Texas Department of Public Safety.

Judgment entered October 2, 2020.