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Expunctions

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and are not official opinions of the Office of the Texas Attorney General.

What is expunction?

- Black's Law Dictionary:
 - "[E]xpunge" means to "[t]o remove from a record, list, or book; to erase or destroy."
 - "[E]xpungement of record" means "[t]he removal of a conviction . . . from a person's criminal record."

Expunction in Texas

- Although expunction is a civil remedy, it's governed by Texas Code of Criminal Procedure Chapter 55.
 - 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” (emphasis added).
 - Agencies must expunge all records and files within the scope of an expunction order.
 - Violation is a Class B misdemeanor. Art. 55.04,§3.

Why do state agencies care about expunction?

- Professionals whose state licenses have been revoked may regain licensure.
- Agency and public concern (*e.g.*, a former teacher arrested for sexual misconduct with a minor)
- Two potential avenues of relief for a licensing agency:
 - Argue that expunction is unavailable.
 - Ask for limitation of the scope of expunction.

Topics to be covered

I. Entitlement to Expunction

- Scenarios in which expunction is available
- Proof required to support a valid expunction order

II. Scope of Expunction Order

- Article 55.01(a): “all records and files relating to the arrest”
- Evidence of underlying conduct is distinct

III. Appeals

- May be appealed in same manner as any other civil case
- Restricted appeals are common – and often successful

I. Entitlement to Expunction

Article 55.01(a)(1)-(2)

- Article 55.01(a) identifies who is entitled to expunction. *E.g.*, a person who is:
 - tried and acquitted
 - tried, convicted, and pardoned
 - released before trial, if other conditions are satisfied
- Statute is very specific – and convoluted in parts.
- If a specific scenario is not covered, the petitioner is not entitled to expunction.

Petitioner's burden

- The petitioner bears the burden of showing entitlement to expunction.
 - Article 55.01(a)(2)(A)(ii), for instance, requires proof that the petitioner's indictment or information was dismissed or quashed for one of several specific reasons.
 - *Ex parte Cephus*, 410 S.W.3d 416, 420 (Tex. App.— Houston [14th Dist.] 2013, no pet.) ("Even if a void indictment is shown, the expunction statute still requires that the indictment must have been dismissed or quashed.")
 - Article 55.02, § 2 requires an expunction petition to contain specific identifying information (e.g., date of birth, driver's license number).
 - Article 55.02, § 3 requires specific information to be included in the expunction order.

Petitioner's burden (continued)

- Even when the petitioner's burden is not satisfied, District Attorneys will often agree to expunction orders and not challenge their scope.
 - Agencies are not bound by a District Attorney's agreement. *DPS v. Katopodis*, 886 S.W.2d 455, 458 (Tex. App.—Houston [1st Dist.] 1994, no writ).
 - An agency may appear at the expunction hearing and introduce evidence of documents in its possession that are outside the scope of expunction.
 - If the agency misses the hearing, it may be able to seek relief through a motion for new trial or bill of review (or through a restricted appeal).

Judicial clemency does not make expunction available

- Judicial clemency results in “complete[] rehabilitat[ion].” *Cuellar v. State*, 70 S.W.3d 815, 819 (Tex. Crim. App. 2002).
 - “[T]he conviction is wiped away, the indictment dismissed, and the person is free to walk away from the courtroom ‘released from all penalties and disabilities’ resulting from the conviction.” *Id.* (quoting former Tex. Code Crim. Proc. art. 42.12, § 20(a)).
- Nevertheless, the expunction petitioner must still prove what Chapter 55 requires.
 - *E.g.*, *DPS v. J.H.J.*, 274 S.W.3d 803, 808-09 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (probation order precluded expunction)

Habeas corpus relief and *Texas Education Agency v. S.E.H.*

- Former teacher S.E.H. was placed on community supervision for online solicitation of sex from a minor.
- S.E.H. argued that, because the online solicitation statute was declared unconstitutional in *Ex parte Lo*, 424 S.W.3d 10, 19–27 (Tex. Crim. App. 2013), and he obtained habeas corpus relief on that basis, there was no community supervision as a matter of law.
- Was S.E.H. entitled to expunction?

Texas Education Agency v. S.E.H.

(continued)

- A panel of the First Court of Appeals said he was not entitled to expunction. No. 01-16-00420-CV, 2017 WL 2438643 (Tex. App.—Houston [1st Dist.] June 6, 2017).
- On reconsideration en banc, the court affirmed the expunction order. 571 S.W.3d 372 (Tex. App.—Houston [1st Dist.] 2018). The court reasoned that the prosecution was void *ab initio* and that the court-ordered community supervision was also void *ab initio*.

Article 55.01(c)

- Petitioner pleads guilty to DWI.
- Petitioner is later arrested, charged with DWI second, and acquitted.
- Is Petitioner entitled to expunction of records pertaining to the offense for which she was acquitted?

Article 55.01(c) (continued)

- Article 55.01(c):
 - 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.

Article 55.01(c) (continued)

- Texas Penal Code Section 3.01:
 - “[C]riminal episode” means 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.

Article 55.01(c) (continued)

- *DPS v. K.T. and Ex parte Ferris*, Nos. 20-0977 & 21-0075

II. Scope of Expunction

Arrest records vs. records of independent investigations

- What “records and files . . . relat[e] to the arrest” within the meaning of Article 55.01(a)?
- Addressed in *Ex parte S.C.*, 305 S.W.3d 258 (Tex. App.—Houston [14th Dist.] 2009, no pet.):
 - Texas State Securities Board conducted its own investigation of a licensee who was later arrested.
 - The court held that records and files relating to the arrest were subject to expunction.
 - But the records of board’s internal investigation were not subject to expunction.

Expunction does not erase the underlying conduct

- *In re State Bar of Tex.*, 440 S.W.3d 621 (Tex. 2014) (“The expunction statute’s purpose is not to eradicate all evidence of wrongful conduct.”)
 - Expunction allows a person to answer “no” to the “have you ever been arrested?” question on applications for jobs, education, credit, &c.
 - But that doesn’t mean the person didn’t engage in the underlying conduct, which may be significant to a state agency.
 - Different burdens of proof = agency may have grounds to oppose relicensure even if person was tried and acquitted of the underlying misconduct.

Expunction of part of a record

- Scenario: A person is arrested for two unrelated offenses. Expunction appears to be available as to one offense but not the other (e.g., the person pleads guilty to one charge but is acquitted of another).
- Does the guilty plea make expunction unavailable as to both offenses?

Expunction of part of a record (continued)

- *State v. T.S.N.*, 547 S.W.3d 617 (Tex. 2018)
- *Ex parte R.P.G.P.*, 623 S.W.3d 313 (Tex. 2021)

III. Appeals

Appeal is as in other civil cases

- Article 55.02, § 3(a): “[A]n agency protesting the expunction may appeal the court’s decision in the same manner as in other civil cases.”
 - Rules regarding appeals from final judgments apply.
 - Notice of appeal must be filed 30 days after judgment (unless extended by post-judgment motion).

Standard of review

- An appellate court “reviews a trial court’s grant or denial of a petition for expunction under an abuse of discretion standard.”
 - That statement is misleading because trial court has no discretion to misapply the law.
 - If the petitioner meets statutory criteria, he is entitled to expunction; if he doesn’t, he isn’t.
 - Effectively de novo review.

Boilerplate in expunction opinions

- Expunction is a privilege, not a right; strict compliance with the statute is required.
- Courts have no equitable power to extend the protections of the expunction statute beyond its stated provisions.
- Expunction petitioners bear the burden to prove that all statutory requirements have been satisfied.

Restricted appeals

- Restricted appeals are also possible and common. *See* Tex. R. App. P. 30.
 - Appellant must have been a party but not appeared at the expunction hearing.
 - Notice of appeal must be filed within six months of judgment.
 - Error must appear on the face of the record.
- Restricted appeals are often successful because the appellant can show that the record does not contain proof that the petitioner bore the burden of presenting.

In a restricted appeal, who must ensure a proper record?

- Scenario: A respondent agency files a general denial in response to an expunction petition. The trial court grants expunction, and the agency argues that the petitioner failed to meet his burden of proof, but there's no reporter's record.
 - Should the appellate court affirm based on an assumption that the trial court received the necessary evidence?
 - Or should it reverse because the absence of a reporter's record makes it impossible to know whether the petitioner met his burden of proof?
- *Ex parte Graves*, No. 04-16-00570-CV, 2017 WL 3159459 (Tex. App.—San Antonio July 26, 2017, pet. denied) (mem. op.): The court reversed the expunction order based on the absence of the reporter's record.

Thank you!