FILED
19-1051
6/30/2020 1:57 PM
tex-44153864
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 19-1051

**TO THE
SUPREME COURT
OF TEXAS**

**Ex Parte
R.P.G.P.**

*From the Court of Appeals
of the Fourth Judicial District at San Antonio
Cause Number 04-18-00539-CV*

APPELLANT'S BRIEF ON THE MERITS

**Trial Court Cause No. 17655A
in the 216th District Court
of Kerr County, Texas**

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	§	APPELLATE CAUSE NO. 04-18-00539-CV
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BRIEF ON THE MERITS

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

NOW COMES, RPGP, Appellant herein, and hereby files this Brief on the Merits and respectfully shows the following:

STATEMENT OF THE CASE

This case arises out of the denial of a petition for expunction. In denying the petition, the trial court committed reversible error by permitting the State to present evidence, over Appellant's objection, regarding matters subject to an order of nondisclosure outside the confines of the nondisclosure statute, which lists the only circumstances in which disclosure is permitted. Even the Fourth Court, in its split decision affirming the order of the trial court, did not point to any section of the controlling statute to support its holding but, rather, based its decision on sections of the expunction statute of questionable applicability. Further and in the alternative, a plain reading of the expunction statute, in light of new jurisprudence, shows that Appellant is entitled to an expunction on these facts. Finally, if the Court finds that a plain reading does not support that conclusion then, considering both new case law and statutory privileges, the Court should interpret the statute as allowing for expunction as any other reading leads to absurd results.

STATEMENT OF JURSDICTION

The Court has jurisdiction under Art. 5, sec. 3 of the Texas Constitution and Texas Government Code § 22.001.

ISSUES PRESENTED

1. Whether the nondisclosure statute truly outlines, as it says, the only instances when disclosure is permitted or if disclosure is permitted in other circumstances;
2. Whether a plain reading of the statute, in light of new jurisprudence, shows that Appellant is entitled to an expunction on these facts; and
3. Whether, because of new case law and new statutory privileges, Appellant is entitled to an expunction, as the alternative would lead to absurd results.

STATEMENT OF FACTS

Appellant was arrested on March 11, 2015 for the offense of Driving While Intoxicated ("DWI"). (CR 4, 9, 35 & 47). Due to the results of a vehicle inventory search, Appellant was also charged with the offense of Possession of Marijuana under two ounces. (CR 31 & 37). On March 9, 2017, the State dismissed the marijuana charge as Appellant had successfully completed deferred adjudication probation. On March 31, 2017, the State dismissed the DWI charge as Appellant had successfully completed a pretrial intervention program. (CR 5, 9, & 48).

On August 21, 2017, Appellant filed a petition for expunction seeking to have expunged all records of the DWI arrest. (CR 4 - 10). On September 22, 2017, DPS filed a general denial. (CR 31 - 46). On February 21, 2018, records relating to the arrest for possession of marijuana were ordered nondisclosed (RR Vol. 1, p. 8, 8 - 10). On May 11, 2018, Appellant filed an amended petition for expunction. (CR 47 - 50). The matter was set for a hearing on June 28, 2018 before Judge N. Keith Williams in the 216th District Court of Kerr County ("the trial court"). (CR 51).

An Assistant County Attorney from the Kerr County Attorney's Office appeared at the hearing. (RR Vol. 1, p. 2). Over Appellant's objection (RR Vol. 1, p. 9 - 11 & 21 - 27), the Assistant County Attorney, who acknowledged the existence of the order of nondisclosure (RR Vol. 1, p. 10, 8 - 10), was allowed to question Appellant regarding the offense of possession of marijuana (RR Vol. 1, p. 11 - 13) and argue that Appellant did not meet the requirements for expunction because he had served court-ordered community supervision for that charge (RR Vol. 1, p. 13 - 16 & 21). The trial court agreed (RR Vol. 1, p. 27 - 28) and denied the petition (CR 76 - 80). On July 23, 2018, Appellant filed his Notice of Appeal. (CR 82 - 83). The Fourth Court issued its final decision, authored by Justice Patricia O. Alvarez and with which Chief Justice Sandee Bryan Marion joined, affirming the trial court's ruling on July 31, 2019. Justice Liza A. Rodriguez authored a dissenting opinion. Appellant's Motion for Reconsideration was overruled and his final Motion For En Banc Reconsideration denied on October 23, 2019. Appellant timely filed his Petition for Discretionary Review on December 23, 2019.

SUMMARY OF ARGUMENT

Although the Fourth Court was correct in finding that nothing in Tex. Gov't Code Ann. § 411.0765 supported the State's disclosure, it erred in holding that the disclosure was supported by sections of the expunction statute that do not address the issue. Because the nondisclosure statute clearly outlines the only instances when a criminal justice agency can disclose to a district court information subject to an order of nondisclosure, the trial court's admission and consideration of such evidence outside the relevant exceptions constituted an abuse of discretion and a violation of Appellant's substantial rights. In the alternative, even if it did not constitute reversible error, a plain reading of the statute, in light of the Court's decision in *T.S.N.*, shows that Appellant is entitled to an expunction because he meets the requirements. Finally, if the

Court finds that a plain reading does not necessarily support that conclusion then, considering both the new case law and new statutory privileges, the Court should interpret the statute as allowing for expunction under the circumstances as any other reading leads to absurd results, including giving deferred adjudication probation a far greater weight and lasting impact than pretrial intervention and even placing many of those *convicted* of DWI in a far better position than Appellant as well.

ARGUMENT

1. The Fourth Court erred in holding that information subject to an order of nondisclosure may be disclosed outside the confines of Texas Government Code § 411.0765, which lists the only circumstances in which disclosure is permitted

Although the Fourth Court was correct in refusing to adopt the State's argument that disclosure was permitted because a district court is either a "criminal justice agency" or defeating an expunction a "criminal justice purpose,"[1] it erred in holding that the State may still breach an order of nondisclosure in the context of an expunction hearing, a circumstance not listed in the controlling statute. More recently, the Fourteenth Court similarly erred in a case in which it held the same, *Tex. Dep't. of Pub. Safety v. T.R.W.*, 2019 Tex. App. LEXIS 6911 (Tex. App. – Houston [14th Dist.] August 8, 2019, no pet.) (mem. op.).

Texas Government Code § 411.0765 makes clear, in relevant part, that a criminal justice agency may only disclose criminal history record information that is the subject of an order of nondisclosure to another criminal justice agency, for a criminal justice purpose, or to select noncriminal justice entities in certain situations as described in subsection (b). It reads:

> Sec. 411.0765. DISCLOSURE BY CRIMINAL JUSTICE AGENCY.
> (a) A criminal justice agency may disclose criminal history record information that is the subject of an order of nondisclosure of criminal history record information under this subchapter only:

[1] (*Ex Parte Petitto*, No. 04-18-00539-CV, 2019 Tex. App. LEXIS 6531, at *7 (Tex. App. – San Antonio July 31, 2019, pet. ref'd)).

(1) to other criminal justice agencies;
(2) for criminal justice or regulatory licensing purposes;
(3) to an agency or entity listed in Subsection (b);
...
(b) A criminal justice agency may disclose criminal history record information that is the subject of an order of nondisclosure of criminal history record information under this subchapter to the following noncriminal justice agencies or entities only:
(1) the State Board for Educator Certification;
(2) a school district, charter school, private school, regional education service center, commercial transportation company, or education shared service arrangement;
(3) the Texas Medical Board;
(4) the Texas School for the Blind and Visually Impaired;
(5) the Board of Law Examiners;
(6) the State Bar of Texas;
(7) a district court regarding a petition for name change under Subchapter B, Chapter 45, Family Code;...

Contrary to Appellee's arguments, a civil district court is not a "criminal justice agency" and defeating an expunction is not a "criminal justice purpose." Instead, disclosure to a civil district court is governed by subsection (b), which clearly addresses the issue and contains no exception applicable to expunction hearings.

The Government Code defines a "criminal justice agency" as "a federal or state agency that is engaged in the administration of criminal justice under a statute or executive order that allocates a substantial portion of its annual budget to the administration of criminal justice..." Tex. Gov't Code Ann. § 411.071 *referencing* § 411.082(3). The "administration of criminal justice" includes "... the collection, storage, and dissemination of criminal history record information." Tex. Gov't Code Ann. § 411.082(1) *referencing* Tex. Code of Crim. Pro. Art 66.001(1).

Appellee argues that every entity that receives an expunction petition is necessarily a criminal justice agency. But Appellee ignores the fact that "storing" some criminal history information only serves to make an entity a criminal justice agency if it dedicates a "substantial

portion of its annual budget" to that activity. Although DPS may be a criminal justice agency in part because it spends a "substantial portion" of its budget on "the collection, storage, and dissemination of criminal history record information," the same cannot be said of a district court, let alone a district court sitting in its civil capacity. A document referencing criminal history information may occasionally be filed with a civil court but that court cannot reasonably be described as dedicating a "substantial portion" of its budget to the mere storage of this information, especially considering that the percent of civil pleadings that reference criminal history information is obviously small.

Further, the language of subsection 411.0765(b) lends significant support to the notion that the legislature did not consider civil courts to be criminal justice agencies. In the list of exceptions relating to the *only* circumstances when information may be shared with what it labels "noncriminal justice agencies or entities," the legislature included "a district court in regards to a petition for name change." Tex. Gov't Code Ann. § 411.0765(b)(7). This is noteworthy not only because the legislature clearly and specifically referred to civil courts as "noncriminal justice agencies or entities" but also because, even as it pertains to those few courts that deal only with family law matters, criminal history information is occasionally presented such as that of one parent or another. Had the legislature believed that this kind of thing turned a civil court into a "criminal justice agency," it would not have designated them as noncriminal. If it viewed district courts as necessarily entitled to nondisclosed information, it would not have viewed them as in need of any exception at all.

The Fourth Court similarly and correctly refused to adopt Appellee's alternative argument that defeating an expunction is somehow a "criminal justice purpose." The statute defines "criminal justice purpose" as "an activity that is included in the administration of criminal

justice." Tex. Gov't Code Ann. § 411.082(4). Again, because the "storage" of criminal history information is part of the administration of criminal justice, Appellee argues that naturally "included" in the term "storage" is any agency action undertaken to protect, if not expand, its right to store information. But, storing information and wanting to store it are two very different things. That a county attorney's office, or any other agency, might wish to breach an order of nondisclosure in an effort to continue to be allowed to store certain information in no way makes those acts naturally "included" in the mere "storage" of the information.

Finally, subsection (b) again provides ample support for Appellant's position. If the legislature intended for "criminal justice purpose" to be interpreted so broadly, it would not have included the exception for "a district court in regards to a petition for name change." After all, if the term "storage" included whatever an agency deemed necessary to protect and maintain its right to store certain information, then defeating a name change would also be a "criminal justice purpose," as name changes no doubt pose serious challenges to the storage of criminal history information as well, and yet it is not. Also, the name change exception exists because, without it, civil courts would not know whether an individual should be granted one considering their criminal history – the same rationale that would stand to support the inclusion of an expunction exception. However, the legislature did not include any exception for "district courts in regards to a petition for expunction" in the statute. Instead, it made any disclosure outside the context of the relevant exceptions punishable as, at minimum, a Class B Misdemeanor. See Tex. Gov't Code Ann. § 411.085(a)(1).

Refusing to adopt Appellee's arguments relating to criminal justice agencies or criminal justice purposes, the Fourth Court only determined that the disclosure was permitted because, in its view, preventing disclosure would amount to failing to give full effect to the expunction

statute, specifically the language regarding a "criminal episode" in Tex. Code Crim. Proc. Ann. art. 55.01(c) and "criminal transaction" in 55.01(a)(2)(A), which it stated would be an improper manner of statutory construction. *Ex Parte Petitto*, 2019 Tex. App. LEXIS 6531, at *10-11.

But, Tex. Code Crim. Proc. Ann. art. 55.01(c) simply does not apply to these facts. It states:

> 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.

Because Appellant did not seek to expunge the records of an offense for which he was acquitted and because he was neither convicted nor remains subject to prosecution for any other offense, this section has no bearing on this case.

As it relates to Tex. Code Crim. Proc. Ann. art. 55.01(a)(2)(A), the Fourth Court based its ruling on the interpretation that, in order for an individual to be entitled to an expunction, there must not have been a charge "based on the arrest" that led to "court-ordered community supervision under Chapter 42A," which includes deferred adjudication probation. *Ex Parte Petitto*, 2019 Tex. App. LEXIS 6531, at *10-11. But, even assuming arguendo that the Fourth Court's interpretation of the statute was correct, its analysis missed the mark. Whether the State can properly breach an order of nondisclosure in the first place and make the sealed information known to a district court is a threshold matter. Further, in finding the disclosure permissible so as to avoid the supposed nullification of these sections of the expunction statute, the majority instead completely nullified the most applicable section of the nondisclosure statute, which clearly governs when information subject to an order of nondisclosure may be disclosed, including to a district court.

The evidence should have also been excluded under Rule 101 of the Texas Rules of Evidence. That rule makes clear that even "Despite [The Texas Rules of Evidence], a court must admit or exclude evidence if required to do so by United States or Texas Constitution, a federal or **Texas statute**, or a rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals." TRE 101(d) (emphasis added). It even goes on to state that, "If possible, a court should resolve by reasonable construction any inconsistency between these rules and applicable... statutory provisions." *Id.* A reasonable construction of the statutes certainly suggests the information should have been excluded from the expunction hearing, as the disclosure was not permitted under the controlling, gatekeeping statute.

Finally, inclusion of the nondisclosed information clearly violated Appellant's substantial rights. The erroneous admission of evidence requires reversal "only if the error probably (though not necessarily) resulted in an improper judgment." *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). This is certainly the case here. That Appellant was placed on deferred adjudication probation for another offense was the sole reason why the trial court denied his petition for expunction. (RR Vol. 1, p. 27 - 28).

2. In the alternative, even if the trial court did not commit reversible error, Appellant should be granted an expunction because a plain reading of the statute, in light of new jurisprudence, shows that he meets the requirements

In the alternative, even if the Court finds the trial court did not err by considering the information subject to the order of nondisclosure, Appellant should still have been granted an expunction because, in light of the *T.S.N.* decision, he met the requirements of the statute.

The expunction statute provides, 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, unless the offense is a Class C misdemeanor, 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:

...

(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:

...

(b) the person completed a pretrial intervention program authorized under Section 76.011, Government Code...

Tex. Code Crim. Pro. Ann. Art 55.01(a)(2)(A)(ii)(b).

As Appellant has been released of the charge, it did not lead to a final conviction, there was no court-ordered community supervision *for the offense*, and because the information was dismissed due to his having completed a pretrial intervention program, the Court should find that Appellant meets the requirements for expunction. The only argument against this reading of the statute is that the section is entirely "arrest-based" and that nothing can be expunged unless everything can, as the Court had previously held. The Fourth Court of Appeals had also held the same. *See Tex. Dep't of Pub. Safety v. Ryerson*, No. 04-16-00276-CV, 2016 Tex. App. LEXIS 13707, 2016 WL 7445063, at *2 (Tex. App.- San Antonio Dec. 28, 2016, pet. denied); *Ex parte K.R.K.*, 446 S.W.3d 540, 543 (Tex. App. – San Antonio 2014, no pet.).

But, the way the expunction statute is to be read has changed. The Court more recently held, in *State v. T.S.N.*, 547 S.W.3d 617 (Tex. 2018), that the expunction statute is "neither entirely arrest-based nor offense-based" as "different parts of the article... address different factual scenarios." *T.S.N.*, 547 S.W.3d at 623. Although it expressed no opinion on Art. 55.01(a)(2), as it was not at issue in that case, the Court specifically rejected the "all-or-nothing approach" advocated by the State. *Id.* at 619. Even more recently, the Fourteenth Court of Appeals, in *Ex parte N.B.J.*, 552 S.W.3d 376 (Tex. App. – Houston [14th Dist.] 2018, no pet.), applied "*T.S.N.*'s teachings" and extended the same rationale to Art. 55.01(a)(2), albeit Art. 55.01(a)(2)(B). *N.B.J.*, 552 S.W.3d at 383-84.

In *T.S.N*, a woman was arrested for aggravated assault with a deadly weapon as well as an older warrant for theft by check. *State v. T.S.N.*, 547 S.W.3d 617, 618 (Tex. 2018). She pleaded guilty to the theft but not guilty to the assault charge. *Id.* The case went to trial and she was acquitted. *Id.* T.S.N. later filed a petition seeking to have the records relating to the assault charge expunged. *Id.* at 619. The State opposed the petition and argued that T.S.N. was not entitled to expunge all record of the assault because she was not entitled to expunge any record of the theft. *Id* at 621. The State further stressed the "difficulties" posed by "partial expunction." *Id.* at 623. After a careful examination of the language of the statute, the Court disagreed and found that, at least under the facts of that case, T.S.N. was entitled to an expunction despite there being only one arrest, noting that the charges did not relate to a single episode of criminal conduct. *Id.* at 623-24.

The Court should apply the teachings of *T.S.N.* to Appellant's case. Although it dealt with different facts, the same analysis can be used both as it relates to syntax and, most importantly, its core holdings that 1) the statute is not wholly "arrest-based;" 2) records relating to an

individual charge can be expunged under certain circumstances; and 3) the limited weight that should be afforded to the State's typical complaint regarding the so-called difficulties of partial expunction.

A plain reading of the statute suggests that Appellant is entitled to expunge records of his DWI arrest because he has in fact been released of the charge, it did not lead to a final conviction, there was no court-ordered community supervision for the offense, and because the information was dismissed due to his having completed a pretrial intervention program. It is fair to say that the only reason why the Court would have previously held to the contrary was because of the formerly widespread opinion that the entire statute was arrest-based and that it makes no allowance for the expunction of records relating to individual offenses. But, as the Court has since overruled this jurisprudence, it should now find Appellant entitled to an expunction on these facts.

3. Even if the Court does not believe that a plain reading of the statute necessarily supports Appellant's position then, because of both new case law and new statutory privileges, the Court should interpret the statute as allowing for expunction because any other interpretation leads to absurd results

To deny Appellant an expunction on these facts would amount to, in many cases, giving deferred adjudication probation a far greater and more lasting impact than pretrial intervention and even allow many individuals actually convicted of DWI to end up in far a better position than those who successfully completed pretrial intervention programs, results that could not possibly have been intended by the legislature.

Courts have recognized that the expunction statute has never been "a model of clarity." *See S.J. v. State*, 438 S.W.3d 838, 843 (Tex. App. – Fort Worth 2018, no pet.). And, although Courts are generally to rely on the plain meaning of the text of a statute, this is not the case when "a different meaning is...apparent from context" or when "such a construction leads to absurd

results." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008) (citing *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)). The analysis of statutes is also to be informed by the presumption that "a just and reasonable result is intended." *Id.* (citing Tex. Gov't Code Ann. 311.021(2) & (3)).

Appellant's case, like that of *T.S.N.*, presents a novel situation. Unlike so many others, this is not a case where an individual seeks an expunction of an original charge after pleading guilty to a lesser-included or an expunction of one charge that was dismissed when another charge for which he was arrested ultimately led to conviction. Even though Appellant committed two offenses on one evening, Appellant was convicted of nothing and both charges were dismissed. One charge was dismissed after he completed deferred adjudication probation and all records relating to this charge have already been ordered nondisclosed. The other, which he now seeks to expunge, was dismissed because he completed a pretrial intervention program that was always meant to be superior to deferred adjudication probation, and which was specifically designed to lead to expunction. To not allow expunction in Appellant's case would be to flip the purpose of these programs on their head.

This is especially true in light of the recent additions to the nondisclosure statute found in Tex. Gov't Code Ann. § 411.0731 and 411.0736, which now allow for many first-time DWI offenders to have their records nondisclosed. It makes little sense that the legislature would want many individuals actually convicted of DWI to end up in a better position than those who were not. After all, and as recognized again by the Court in *T.S.N.*, "although the legislature has specifically provided for expunction under only limited, specified circumstances, that it has done so at all evidence its intent to, under certain circumstances, free persons from the permanent shadow and burden of an arrest record, even while requiring arrest records to be maintained for

use in subsequent punishment proceedings and to document and deter recidivism." *T.S.N.*, 547 S.W.3d at 623 (citing *Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. 1991)).

The Court could find for Appellant by holding that Art. 55.01(a)(2)(A) is offense-based but it need not go nearly that far. The Court could simply hold that an individual is entitled to an expunction after completing a pretrial intervention program as long as no other charge stemming from the arrest led to a conviction. An even narrower holding would be that an individual is entitled to an expunction after successfully completing a pretrial intervention program as long as any other offense stemming from the arrest has been ordered nondisclosed because the information is not subject to disclosure by the State under the controlling statute. Any of these options would align far better with legislative intent, as it could not possibly be the intent of the legislature that deferred adjudication suddenly trump pretrial intervention or, let alone, that many individuals actually convicted of DWI end up in a far better position than those who were not.

CONCLUSION

Because the nondisclosure statute clearly outlines the only instances when a criminal justice agency may disclose to a district court information subject to an order of nondisclosure, the Fourth Court erred in holding that the trial court could admit and consider such evidence outside the confines of Tex. Gov't Code Ann. § 411.0765. Even if it did not constitute reversible error, however, a plain reading of the statute, in light of the Court's decision in *T.S.N.*, shows that Appellant is entitled to an expunction on these facts. Finally, if the Court finds that a plain reading does not necessarily support that conclusion then, considering both the new case law and new statutory privileges, the Court should interpret the statute as allowing for expunction under the circumstances as any other reading leads to absurd results.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests this Honorable Court reverse the decision of the Fourth Court of Appeals in affirming the trial court's denial of his petition for expunction and grant his petition for those reasons stated herein and grant all such further relief to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on June 30, 2020, a true and correct copy of the above and foregoing document was served on the Texas Department of Public Safety, the Office of the 216th District Attorney of Kerr County, Texas, and the Office of the County Attorney, Kerr County, Texas, by email to expunctions@dps.texas.gov, lwilke@co.kerr.tx.us, and hstebbins@co.kerr.tx.us.

/s/ Harold J. Danford
Harold J. Danford

CERTIFICATION OF COMPLIANCE

This petition complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this petition, the

undersigned attorney certifies that this brief contains no more than 4,484 words, exclusive of the sections exempted by Rule 9.4(i)(1).

/s/ Harold J. Danford
Harold J. Danford