

REVERSE and REMAND and Opinion Filed August 19, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00769-CV

IN THE MATTER OF DEMPSTER A. ROSS, Appellant

**On Appeal from the 401st Judicial District Court
Collin County, Texas
Trial Court Cause No. 401-05769-2017**

MEMORANDUM OPINION

Before Chief Justice Burns,¹ Justice Pedersen, III, and Justice Evans
Opinion by Justice Evans

Appellant Dempster A. Ross appeals the trial court's order denying his request for expunction of records. We reverse and remand.

BACKGROUND

Ross alleges that he was served with an arrest warrant and placed under custodial arrest on November 2, 2006. Ross further alleges that he was charged with the offense of sexual assault. The date of the alleged offense was July 19, 2005. He

¹ The Honorable David L. Bridges, Justice, participated in the submission of this case, however, he did not participate in the issuance of this opinion due to his death on July 25, 2020. Chief Justice Robert Burns has substituted for Justice Bridges and has reviewed the briefs and the record before the Court.

asserts that on June 19, 2007, the Collin County grand jury “no billed” the charge for sexual assault against Ross.

On December 4, 2017, Ross filed a petition for expunction of the files and records relating to the sexual assault charge. In the petition, Ross asserted that he was entitled to expunction pursuant to article 55.01 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 55.01. Because Ross was incarcerated at the time the petition was filed, Ross filed a motion for bench warrant or, alternatively, moved for a hearing by conference call by motion filed on December 4, 2017. On January 16, 2018, the Collin County District Attorney (CCDA) filed an answer and general denial. In its answer, the CCDA asserted that Ross was not entitled to an expunction because, among other things, Ross was “effectively convicted of the offense.” On numerous occasions, Ross filed hearing requests with the court. On April 24, 2019, the trial court entered an order denying expunction. Ross then filed this appeal.

ANALYSIS

Article 55.02 of the Texas Code of Criminal Procedure governs the procedural requirements related to an expunction of criminal records. TEX. CODE CRIM. PROC. art. 55.02. Expunction is a civil matter even though the statutory authority for it is in the code of criminal procedure. *Ex parte E.H.*, 602 S.W.3d 486, 489 (Tex. 2020) (“Although the expunction statute appears within the code of criminal procedure, an expunction proceeding is civil in nature.” citing *State v. T.S.N.*, 547 S.W.3d 617, 619

(Tex. 2018)). “Because an expunction proceeding is civil rather than criminal in nature, the petitioner bears the burden to prove all statutory requirements have been satisfied.” *Ex Parte Enger*, 512 S.W.3d 912, 914 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Tex. Dep’t of Pub. Safety v. J.H.J.*, 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.)). To provide a petitioner an opportunity to meet his burden of proof, the expunction statute explicitly requires the trial court to set a hearing and to give reasonable notice to each official, agency, or government entity which was named in the petition seeking an expunction of criminal records. *See id.* §2(c). Section 2(c) specifically provides:

The court *shall* set a hearing on the matter no sooner than thirty days from the filing of the petition and shall give to each official or agency or other governmental entity named in the petition reasonable notice of the hearing by: (1) certified mail, return receipt requested; or (2) secure electronic mail, electronic transmission, or facsimile transmission.

Id. (emphasis added). When construing this provision, courts have held that an evidentiary hearing is not necessarily required if the petition seeking expunction can be decided on the paper record alone. *See Ex parte Wilson*, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.) (“For example, a trial court may rule on an expunction petition without conducting a formal hearing and without the consideration of live testimony, if it has at its disposal all the information it needs to resolve the issues raised by the petition. Presumably, that information might be available by what is in the pleadings, by summary judgment proof, or by judicially noticing court records.”) (internal citations omitted).

Here, however, the CCDA filed a general denial. In a civil case, even in an expunction case, a general denial puts a plaintiff on proof of every fact essential to his case. *See State v. Herron*, 53 S.W.3d 843, 847 (Tex. App.—Fort Worth 2001, no pet.); *In re C.G.*, 594 S.W.3d 708, 712 (Tex. App.—El Paso 2019, no pet.) (“Once a general denial is filed in an expunction proceeding, all facts in a petition for expunction are placed at issue and cannot constitute evidence to support the petition.”). In addition, neither Ross nor the CCDA filed any summary judgment filing, nor did the trial court judicially notice any court records. Accordingly, we conclude that a hearing was necessary as the CCDA placed all facts at issue by filing its denial and neither Ross nor the CCDA thereafter submitted record evidence to support the expunction motion or the counter-argument. *See In re C.G.*, 594 S.W.3d at 713; *Ex parte Luan Le*, No. 05-12-00248-CV, 2013 WL 2725593, at *5 (Tex. App.—Dallas June 12, 2013, no pet.) (mem. op.) (trial court “erred by denying the petition for expunction without an evidentiary hearing and without permitting appellant an opportunity to prove his entitlement to expunction.”). Before ruling, the trial court failed to set the matter for a hearing and provide reasonable notice to the CCDA or other agencies. Absent notice, the CCDA was deprived of an opportunity to contest the expunction, and Ross was deprived of an opportunity to present evidence to respond to the CCDA’s arguments. We conclude the trial court erred by rendering its order on contested pleadings, without record evidence, and

without giving reasonable notice as required for expunction of criminal records.²

See TEX. CODE CRIM. PROC. art. 55.02, §2(c); *In re C.G.*, 594 S.W.3d at 713.

CONCLUSION

We reverse the trial court's order denying the request for expunction of records and remand this matter to the trial court for a hearing in accordance with this opinion.

/David Evans/

DAVID EVANS
JUSTICE

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² As we have determined that the case must be remanded to the trial court for a hearing, we need not address Ross's issues raised on appeal.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE MATTER OF DEMPSTER

A. ROSS, Appellant

No. 05-19-00769-CV

On Appeal from the 401st Judicial
District Court, Collin County, Texas
Trial Court Cause No. 401-05769-
2017.

Opinion delivered by Justice Evans.
Chief Justice Burns and Justice
Pedersen, III participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellant's request for expunction is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Dempster A. Ross recover his costs of this appeal from appellee Collin County District Attorney's Office.

Judgment entered August 19, 2020.