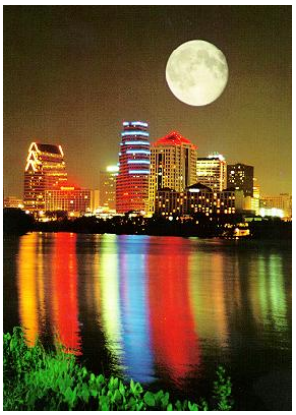

One Fabulous Skyline

TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-519-2588

Web Site: www.texindbar.org

Vol. 28, No. 38 - September 28, 2020

Case Name: ***In the Matter of the Expunction of T.D.N.***

- **NATURE OF CASE**: Expunction Proceedings
- **COUNTY**: Midland
- **C/A CASE No**. 08-19-00164-CV
- **DATE OF OPINION**: September 21, 2020 **OPINION**: Chief Justice Jeff Alley
- **DISPOSITION**: Trial Court Reversed
- **TRIAL COURT**: 441st D/C; Hon. Jeffrey Robnett
- **LAWYERS**: Brooke Dacus & Tommy Hull (Defense); Brent Burpee (DPS)

602 Expunction Proceedings / Entitlement to Relief: A grand jury indicted T.D.N. in August 2015, on one count of sexual assault, alleging that on or about May 17, 2015, T.D.N. sexually assaulted a victim who was unconscious at the time. In December 2015, the grand jury re-indicted T.D.N. in the same cause number on one count of burglary of a habitation, alleging that T.D.N. entered a habitation with the intent to commit, and "did commit, a felony, namely, Sexual Assault." In July 2015, T.D.N. was arrested on that charge, but was later tried and acquitted. T.D.N. then filed a petition to expunge the records of his arrest based on the acquittal. Without waiting for a response from the Department, the trial court signed an order granting the expunction. Upon learning of the order, DPS moved for a new trial. In its motion, the Department argued that T.D.N. was not entitled to an expunction because in 2002 he was convicted of one count of aggravated sexual assault of a child. The Department argued that as defined by the legislature in the expunction statute, the 2015 offense for which T.D.N. was acquitted was part of the same "criminal episode" as the 2002 aggravated sexual assault offense, which in turn rendered T.D.N. ineligible to receive an expunction. Following a hearing, the trial court denied the Department's motion, thereby upholding the order of expunction.

Holding: [Section 3.01] of the Penal Code provides two separate methods for determining whether multiple offenses arose from the same "criminal episode." *** T.D.N.'s arguments address the first method set forth in subsection (1). But the Department does not seek to use this subsection. Instead, it relies on subsection (2), which allows a court to determine that multiple offenses arose from the same criminal episode if they constituted the "repeated commission of the same or

similar offenses." *** And under this subsection, there is no requirement that the two offenses have a factual nexus or relationship to each other. To the contrary, the legislature has imposed no requirement in Section 3.01(2) that the two "repeated" offenses must involve the same victim, be close in temporal or geographic proximity, or were committed in the same or similar fashion. *** We must presume that the legislature's failure to include any such requirements in subsection (2) was deliberate, and that the legislature expressed its intent that no such requirements should be imposed. *** For that reason, we reject T.D.N.'s argument that the 2015 and 2002 offenses did not arise from the same criminal episode just because they involved different victims and occurred several years apart. Instead, we turn our attention to whether the two offenses can be said to constitute the "repeated commission of the same or similar offense" under Section 3.01(2) of the Code. *** The Penal Code provides that a person commits the offense of sexual assault, if the person "intentionally or knowingly: (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor[.]" Similarly, a person commits the offense of aggravated sexual assault of a child by intentionally or knowingly engaging in virtually the same conduct, but adds an extra element requiring the victim to be a child under the age of 14 years, and dispenses with the requirement that the conduct be without the victim's consent. *** The two offenses prohibit the same type of conduct, and have in essence the same gravamen--the commission of a sexual assault. *** We therefore conclude that the Department is correct in asserting that the 2015 acquitted offense of burglary with the commission of a sexual assault, was the "same or similar" in nature to the 2002 conviction for aggravated sexual assault of a child. *** T.D.N., however, contends that even if we consider the 2015 and the 2002 offenses to be the "same or similar" offenses, the literal wording of Section 3.01 of the Penal Code covers only the "repeated commission" of an offense. Because the jury acquitted T.D.N. on the second charge, he has not "repeated" an offense. In other words, the "repeated commission" language requires at least two committed offenses before they form a "criminal episode" for purposes of the expunction statute. Applied here, T.D.N. urges that because a jury acquitted him of the 2015 offense, the Department cannot claim that he "committed" the 2015 offense, and that he only "committed" one offense: the 2002 offense of aggravated sexual assault of a child, which by itself is not the "repeated commission" of the offense. *** We reject T.D.N.'s argument because otherwise, we would have to ignore express language in Article 55.01(c) that allows for a single conviction to establish the predicate for a "criminal episode." *** Because we have determined that the two offenses did in fact arise from the same criminal episode, we conclude that the trial court erred in granting the expunction.

(**John G. Jasuta**) Maybe we should bring back forehead branding. Then we wouldn't have to waste our time with cases like this based on a stupid law which says, basically, once you leave you will never be allowed back in. Remember "paid your debt to society." LOL.

(**David A. Schulman**) My personal opinion that the expunction process is a waste of time notwithstanding, this holding, as well as the numerous Courts of Appeals' opinions on which

it is based, is both wrong and unconscionable. Translated from one lawyer's version of lawyerese (or as my sweetie would say, "weasel words") into plain English, this theory means that you cannot expunge the record of an arrest, even when acquitted, if once previously convicted of a similar offense. To me, getting the history of an arrest expunged when one has been wrongly accused of an offense simply because he or she was once convicted of the same offense is even more important to the person with a record, because it stands as proof to some, that the person hasn't changed their ways. The holding may be correct, but the holding is wrong.