

CRIMINALLAW

Clearing Criminal Records in Texas

BY FRED DAHR



Your 17-year-old daughter goes to her senior prom knowing that it will be her greatest night ever. Instead, her boyfriend leaves her mid-dance for a sophomore. Your daughter gets drunk, punches the sophomore, and drives away. Eventually, the police arrest her for D.W.I., assault, and possession of marijuana (for the three pounds of hydro found underneath her car seat). She accepts a plea deal and takes probation for the D.W.I., credit for time served in jail before you bonded her out for the assault, and three years deferred adjudication for the felony dope charge. Four years later, her criminal history prevents her from getting a job, despite being salutatorian of her college class. What can be cleared off her record?

In the last few years, the frequency of criminal background checks has exploded. The growth is a result of security concerns since the terrorist attacks, corporate worries about employee liability, and the ease of information dissemination on the Internet. A criminal background search of a person on the Texas Department of Public Safety website costs \$3, and an infamous private company, Public Data, sells 250 searches for \$25. When a Texan applies for employment or to live in an apartment complex, he or she will usually be subjected to a criminal background search.

Texas law allows its citizens to clear their adult criminal record in limited circumstances. (A 17-year-old is an adult; someone 16 or younger is a juvenile.) The two main procedures are expunction and non-disclosure. Expunction is primarily for defendants whose charges are dismissed or who win not-guilty verdicts. Non-disclosure applies only to defendants who successfully complete deferred adjudication for certain offenses.

Neither expunction nor non-disclosure applies to a final conviction, so any defendant sentenced to jail, prison, or probation cannot clear that conviction from his or her record (unless granted a pardon). Your daughter is stuck with the assault and D.W.I. convictions. Her only recourse is to seek a pardon from the governor or to challenge the conviction through a writ of habeas corpus.

Every day across Texas, hundreds of misdemeanor defendants accept plea agreements, taking as their punishment credit for the one or two days spent in custody. However, what seems like a good deal is not, as the conviction will stay on their record, forever impacting their ability to find a job or an apartment.

Expunction

An expunction basically erases the offense record and allows the person who receives the remedy to deny the arrest and prosecution. Expunctions are a civil suit handled in district court. A denial can be appealed to the court of appeals.

The typical expunction occurs when someone is arrested for a crime, but the charges are dismissed. If the state has not presented an indictment against the person for a felony arising out of the transaction, the person must meet the following requirements to win an expunction: 1) the person has been released without a final conviction or deferred adjudication; and 2) the person does not have a felony conviction in the five-year period preceding the arrest.

If a felony indictment has been presented for a felony arising out of the transaction, then the above requirements apply *and*: 1) the statute of limitations must have expired; and 2) the court must find that the indictment was dismissed or quashed for various reasons.

Another typical expunction situation occurs when a person is acquitted at trial. In this case, the person has an expedited right to expunction; after a proper request, the order must be granted within 30 days of the date of acquittal. An expunction may also be sought if a person is pardoned, is acquitted by the Court of Criminal Appeals, or is a victim of a type of identity theft (when someone is arrested and falsely gives the petitioner's name as his or her own).

Non-Disclosure

Certain deferred adjudication offenses can be sealed with non-disclosure. Deferred adjudication — which is given to many first-time offenders — is a special type of probation: If the person satisfactorily completes the community supervision period, the charges are “dismissed” and the person does not receive a final conviction (unlike with regular, or “straight,” probation). However, if the person violates the terms of his or her deferred probation, the state can file a motion to adjudicate and the

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judge can sentence the person to any term within the statutory range. If adjudicated, the person has a final conviction.

“Dismissed” is in quotes above because while the person who successfully completes deferred adjudication does not have a final conviction, an offense record will still appear on criminal history searches. In fact, the biggest misconception in Texas criminal law is that upon successful completion of deferred adjudication, the offense record goes away. A non-disclosure order is required to seal the record.

Consider the following scenario: A person successfully completes deferred adjudication for a misdemeanor. He applies for a job and correctly checks “no” where the employment application asks if he has ever been convicted of a crime. He gets the job. The employer then runs a background check and finds the deferred record. The employer confronts the employee about lying on his job application. Employee denies lying, correctly stating that under Texas law he does not have a final conviction. Employer does not care about this legal distinction and fires the employee.

To be eligible for non-disclosure, the petitioner must successfully complete the deferred adjudication probation. Furthermore, the petitioner cannot ever have been convicted or placed on deferred adjudication for certain offenses. Those offenses include crimes that require registration as a sex offender; aggravated kidnapping; murder; injury to a child; stalking; or any offense that involves family violence. If a person takes deferred adjudication for assault with family violence, that offense can never be non-disclosed and any



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other deferred probation that the person receives cannot be non-disclosed.

For a felony, five years from the date of the discharge of probation must elapse before a petition for non-disclosure can be filed. (Congress recently shortened the waiting period from 10 years.) For most misdemeanors, a petitioner can file immediately after completing the deferred adjudication. However, for some misdemeanors, a petitioner must wait two years after the date of discharge before seeking a petition for non-disclosure. Misdemeanors that require a two-year waiting period include assault, deadly conduct, disorderly conduct, and unlawfully carrying a weapon. For the offenses that require a waiting period, the petitioner cannot be convicted or placed on deferred adjudication for another offense during the applicable interval.

If a person meets the eligibility requirements, he or she files the petition for non-disclosure in the trial court where prosecuted. Ultimately, the trial judge in that court decides whether non-disclosure is in the "best of interest of justice" and should be granted. In this regard, non-disclosure is more subjective than expunction. A person who meets the eligibility requirements for expunction usually wins the remedy; however, with non-disclosure, the trial judge has discretion and may rule against the petitioner.

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Like expunction, a person granted non-disclosure can deny the arrest and prosecution of the offense.

FRED DAHR



practices criminal defense law in Houston. He can be reached via his website www.TexasDefenseLaw.com.

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