

Case Summary

Eric Smith (“Smith”) appeals the trial court’s refusal to expunge the record of his arrest for check deception. Smith contends that the trial court abused its discretion in denying his request for expungement because he committed no offense and no probable cause existed for his arrest. We find that the trial court did not abuse its discretion in denying Smith’s petition for expungement. Therefore, we affirm the judgment of the trial court.

Facts and Procedural History

On April 4, 2000, Smith wrote a check for \$20.00 to a Kroger grocery store. A bank later returned the check to Kroger unsatisfied because Smith’s account had insufficient funds. At that point, a Kroger employee signed a sworn probable cause affidavit, and a magistrate judge issued an order determining that probable cause existed for Smith’s arrest. Smith was arrested and charged with check deception.¹ However, on January 10, 2005, the State filed a motion to dismiss the charge. The trial court granted the motion, and the charge was dismissed without prejudice.² On August 17, 2005, Smith, *pro se*, filed a verified petition for expungement of the record of his arrest for check deception. The trial court denied Smith’s petition.³ Smith now appeals.⁴

¹ Ind. Code § 35-43-5-5.

² There is no indication in the record as to why the State moved to dismiss the charge or why the trial court granted the State’s motion to dismiss.

³ The trial court based its denial of Smith’s petition on an Agreement to Withhold Prosecution on the check deception charge between Smith and the State. One condition of the agreement provided, “Defendant admits the offense of check deception and understands that admission precludes expungement of this arrest.” Appellant’s App. p. 18. On appeal, the State contends, “The trial court properly denied Smith’s request to expunge his arrest for check deception because, in the agreement to withhold prosecution, he agreed that expungement was precluded.” Appellee’s Br. p. 5. Smith argues, however,

Discussion and Decision

On appeal, Smith contends that the trial court abused its discretion in denying his request to expunge the record of his arrest for check deception. Indiana Code § 35-38-5-1 provides, in pertinent part:

- (a) Whenever:
 - (1) an individual is arrested but no criminal charges are filed against the individual; or
 - (2) all criminal charges filed against an individual are dropped because:
 - (A) of a mistaken identity;
 - (B) no offense was in fact committed; or
 - (C) there was an absence of probable cause;the individual may petition the court for expungement of the records related to the arrest.

The expungement statute provides the exclusive means for expunging arrest records, and the trial court does not have the discretion to grant expungement when the petitioner has failed to meet his burden of proving that he falls within the provisions of the statute. *Kleiman v. State*, 590 N.E.2d 660, 661-62 (Ind. Ct. App. 1992), *reh'g denied*.

Here, Smith asserts that because the check deception charge against him was dropped, he was entitled to expungement under subsection (a)(2). Specifically, Smith contends that since the check deception charge was dropped, the offense was never committed and expungement is therefore appropriate under subsection (a)(2)(B). We must disagree. The burden was on Smith to provide evidence to prove the charge was

“This part of the agreement was not checked off when he signed it.” Appellant’s Br. p. 14. Because we hold that the requirements for expungement have not been met, we need not address the effect of the agreement.

⁴ Smith has filed a notice of additional authorities pursuant to Indiana Rule of Appellate Procedure 48, which we hereby accept.

dropped *because* he did not commit the offense. *See, e.g., State v. Sotos*, 558 N.E.2d 909, 911 (Ind. Ct. App. 1990), *trans. denied*. However, Smith merely alleged that no offense was committed without providing evidence to indicate why the charge was actually dropped. Thus, Smith did not carry his burden of proof on this element of the statute. *See id.*

Smith also argues there was a lack of probable cause for his arrest, and therefore, expungement is appropriate under subsection (a)(2)(C). Again, it was incumbent upon Smith to present evidence and prove the charge was dismissed because no probable cause existed. *See id.* However, Smith presented no evidence as to why the charge was dropped beyond his own proclamations of innocence. Furthermore, the record contains a probable cause affidavit indicating that a Kroger employee, under the penalty of perjury, alleged that Smith committed the offense, and a magistrate judge issued an order determining probable cause. Thus, Smith did not carry his burden of proof on this element of the statute.

Smith failed to carry his burden of proving the check deception charge against him was dropped either because no offense was committed or because there was no probable cause for his arrest. As such, the trial court did not abuse its discretion in rejecting Smith's request for expungement. *See State v. Reynolds*, 774 N.E.2d 902, 904 (Ind. Ct. App. 2002) (failure at trial to establish entitlement to expungement pursuant to the exclusive criteria set forth in Indiana Code § 35-38-5-1 precludes expungement).

Affirmed.

SULLIVAN, J., and ROBB, J., concur.