

Year 2004 Case Summaries

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Unfitness to stand trial rules apply to release/transfer hearing under the determinate sentence act; oral motion for psychiatric exam okay [In re N.S.] (04-1-22).

On February 11, 2004, the Waco Court of Appeals held that the constitutional rights to be competent when tried applies to release/transfer hearings under the determinate sentence act, that an oral motion for a psychiatric examination is sufficient, but that in this case the TYC reports were sufficient to rebut any inference of probable cause to believe that the respondent was not competent.

04-1-22. In the Matter of N.S., UNPUBLISHED, No. 10-01-319-CV, 2004 WL 254215, 2004 Tex.App.Lexis ____ (Tex.App.-Waco 2/11/04) Texas Juvenile Law (5th Ed. 2000).

Facts: In this appeal we decide what if anything a juvenile court must do when a juvenile offender whom the Texas Youth Commission ("TYC") has referred for transfer to the institutional division of the Texas Department of Criminal Justice ("TDCJ") alleges himself to be incompetent. N.S. contends in his sole issue that the court abused its discretion by failing to appoint a psychiatric expert to evaluate his competency when his counsel raised the issue at the beginning of the transfer hearing.

The State initiated proceedings against N.S. in juvenile court by filing a petition on February 2, 2000 alleging that he had engaged in delinquent conduct by committing the offense of capital murder on or about May 9, 1999. The State filed an application for court-ordered temporary mental health services on February 7 alleging N.S. to be mentally ill. The court signed an order on February 18 finding that N.S. was mentally ill and that he posed a danger to himself and others. The court ordered that he receive temporary inpatient mental health services.

After N.S. was treated and released, he entered a negotiated plea. The court found that N.S. had engaged in delinquent conduct as alleged. Pursuant to the plea agreement, the court assessed a determinate sentence of forty years and committed N.S. to TYC.

TYC referred N.S. to the juvenile court for transfer to TDCJ after he turned sixteen. At the commencement of the transfer hearing, N.S.'s counsel informed the court that he had experienced great difficulty communicating with N.S. and had "serious concerns ... that [N.S.] [wa]s not able to assist [counsel] in th[e] hearing." Counsel stated, "I can't certif[y] to the court that I think my client understands what's going on." Counsel asked the court to appoint a psychiatrist to determine whether N.S. was competent for the hearing.

The court made a brief recitation of N.S.'s history regarding mental health issues. The court stated:

I believe that there is enough documentation in the record from the mental health professionals that the court of necessity has to rely on to find that there is-no probable cause ... to believe that he has a mental illness, so therefore I'm going to overrule your motion....

The court then asked N.S. a series of basic questions (e.g., "Are you [N.S.]?") to which the court received mostly unintelligible responses.

N.S.'s counsel informed the court that these were the same kind of responses he had obtained from N.S. when he tried to discuss the case with him. The court concluded, "To the court [N.S.'s responses] match the behavior that is detailed in the papers forwarded to the court by [TYC], so I'm going to maintain my ruling here, so let's proceed with the hearing."

At the conclusion of the hearing, the court ordered N.S.'s transfer to TDCJ to serve out the remainder of his sentence.

Held: Affirmed.

Opinion Text: PERTINENT AUTHORITIES

Based on the date of N.S.'s delinquent conduct, a former version of section 54.11 of the Juvenile Justice Code applied to the transfer hearing. [FN1] That statute provides in pertinent part:

(d) At a hearing under this section the court may consider written reports from probation officers, professional court employees, or professional consultants, in addition to the testimony of witnesses. At least one day before the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court.
 (e) At the hearing, the person to be transferred or released under supervision is entitled to an attorney, to examine all witnesses against him, to present evidence and oral argument, and to previous examination of all reports on and evaluations and examinations of or relating to him that may be used in the hearing.

....
 (i) On conclusion of the hearing on a person who is referred for transfer under Section 61.079(a), Human Resources Code, the court may order:

(1) the return of the person to the Texas Youth Commission; or
 (2) the transfer of the person to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of the person's sentence.

....
 (k) In making a determination under this section, the court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 46, 1995 Tex. Gen. Laws 2517, 2542 (amended 2001) (current version at Tex. Fam.Code. Ann. § 54.11 (Vernon Supp.2004)) (hereinafter cited as "Tex. Fam.Code. Ann. § 54.11").

The former section [FN2] 55.04 (governing juvenile offenders "unfit to proceed") potentially applies to N.S.'s case. [FN3] That statute provides in pertinent part:

(a) A child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in his own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.

(b) If on motion by a party or the court it is alleged that a child may be unfit to proceed as a result of mental illness or mental retardation, the court shall order appropriate examinations as provided by Section 55.01 of this chapter. The information obtained from the examinations must include expert opinion as to whether the child is unfit to proceed as a result of mental illness or mental retardation.

FN2. The term "section" refers hereinafter to a section of the Juvenile Justice Code unless otherwise indicated.

FN3. The Legislature amended section 55.04 and recodified it as section 55.31 in the same year N.S. engaged in the delinquent conduct for which he was adjudicated. Act of May 27, 1999, 76th Leg., R.S., ch. 1477, § 14, sec. 55.31, 1999 Tex. Gen. Laws 5067, 5076. However, the amended version of the statute applies "only to conduct that occurs on or after the effective date [September 1, 1999] of [the] Act." Act of May 27, 1999, 76th Leg., R.S., ch. 1477, §§ 39(a), 41, 1999 Tex. Gen. Laws 5067, 5090.

Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, sec. 55.04, 1995 Tex. Gen. Laws 2517, 2545 (amended 1999) (current version at Tex. Fam.Code. Ann. § 55.31 (Vernon 2002)) (hereinafter cited as "Tex. Fam.Code. Ann. § 55.04").

Section 55.04 expressly applies to "discretionary transfer[s] to criminal court, adjudication[s], disposition[s], [and] modification[s] of disposition [s]." *Id.* The statute does not on its face seem to apply to section 54.11 transfer hearings. Nevertheless, N.S. contends that due process requires that a juvenile be competent before he can be made to participate in a transfer hearing.

Settled law establishes that juvenile delinquency proceedings must provide constitutionally-mandated due process of law. *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967); *L.G.R. v. State*, 724 S.W.2d 775, 776 (Tex.1987); *In re J.S.S.*, 20 S.W.3d 837, 841 42 (Tex.App.-El Paso 2000, pet. denied); see also *R.X.F. v. State*, 921 S.W.2d 888, 895 (Tex. App. -Waco 1996, no writ) ("Our view is that the state can no more deny a juvenile equal protection of the law in a determinate sentence proceeding than it can an adult in a criminal proceeding."). However, the process due a juvenile delinquent does not equate to that due an adult offender

in every instance. See *Gault*, 387 U.S. at 14, 87 S.Ct. at 1436; *In re J.R.R.*, 696 S.W.2d 382, 383-84 (Tex.1985) (per curiam); J.S.S., 20 S.W.3d at 842.

In *Lanes v. State*, the Court of Criminal Appeals adopted a balancing test it distilled from eight foundational decisions of the Supreme Court of the United States "to determine whether and to what degree" a particular constitutional protection must be afforded a juvenile. [FN4] 767 S.W.2d 789, 794 (Tex.Crim.App.1989); accord *Hidalgo v. State*, 983 S.W.2d 746, 751 (Tex.Crim.App.1999). This test requires an appellate court to "balance [] the function that [the asserted] constitutional or procedural right serve[s] against its impact or degree of impairment on the unique processes of the juvenile court." *Lanes*, 767 S.W.2d at 794; accord *Hidalgo*, 983 S.W.2d at 751-52.

FN4. The eight foundational decisions in chronological order: (1) *Haley v. Ohio*, 332 U.S. 596, 601, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1948) (coerced confession cannot be used against juvenile); (2) *Kent v. U.S.*, 383 U.S. 541, 557, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84 (1966) (juvenile entitled to procedural protections in transfer hearing); (3) *In re Gault*, 387 U.S. 1, 31 55, 87 S.Ct. 1428, 1445 58, 18 L.Ed.2d 527 (1967) (juvenile has due process rights of notice, counsel, confrontation, cross examination, and privilege against self incrimination); (4) *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (State must prove allegation of delinquent conduct beyond a reasonable doubt); (5) *McKeiver v. Pa.*, 403 U.S. 528, 545, 91 S.Ct. 1976, 1986, 29 L.Ed.2d 647 (1971) (juvenile has no constitutional right to jury trial); (6) *Breed v. Jones*, 421 U.S. 519, 528 29, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975) (double jeopardy protections apply to juveniles); (7) *Schall v. Martin*, 467 U.S. 253, 281, 104 S.Ct. 2403, 2419, 81 L.Ed.2d 207 (1984) (pretrial detention of juvenile does not violate due process); (8) *New Jersey v. T.L.O.*, 469 U.S. 325, 341 42, 105 S.Ct. 733, 742 43, 83 L.Ed.2d 720 (1985) (Fourth Amendment does not require probable cause to justify school search).

According to our research, two intermediate appellate courts have employed this test. See J.S.S., 20 S.W.3d at 842-44; *S.D.G. v.. State*, 936 S.W.2d 371, 378 79 (Tex.App-Houston [14th Dist.] 1996, writ denied). We do so as well.

PURPOSES OF JUVENILE JUSTICE SYSTEM

As the Court noted in *Lanes*, the Legislature codified the purposes of the juvenile justice system in the Juvenile Justice Code. See 767 S.W.2d at 794. Section 51.01 provides:

This title shall be construed to effectuate the following public purposes:

- (1) to provide for the protection of the public and public safety;
- (2) consistent with the protection of the public and public safety:
 - (A) to promote the concept of punishment for criminal acts;
 - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and
 - (C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;
- (3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;
- (4) to protect the welfare of the community and to control the commission of unlawful acts by children;
- (5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and
- (6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Tex. Fam.Code. Ann. § 51.01 (Vernon 2002).

In addition, the statute which authorizes TYC to refer a juvenile for transfer to TDCJ provides for such a referral if "the child's conduct ... indicates that the welfare of the community requires the transfer." Tex. Hum. Res.Code Ann. § 61.079(a)(2) (Vernon 2001). As noted above, section 54.11 allows the court to consider a great many factors in determining whether to order the requested transfer:

the court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Tex. Fam.Code. Ann. § 54.11(k).

In sum, the Texas juvenile justice system (particularly in the context of a transfer hearing under section 54.11) requires courts to

balance the need for public safety and punishment for criminal conduct with the medical, educational and rehabilitative needs and the best interests of the juvenile delinquent, while simultaneously ensuring that his "constitutional and other legal rights" are protected.

COMPETENCY REQUIREMENT

Due process requires that an adult criminal defendant be competent to stand trial. *Cooper v. Okla.*, 517 U.S. 348, 354, 116 S.Ct. 1373, 1376, 134 L.Ed.2d 498 (1996); *Drope v. Mo.*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-004, 43 L.Ed.2d 103 (1975); *Alcott v. State*, 51 S.W.3d 596, 598 (Tex.Crim.App.2001).

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Cooper, 517 U.S. at 354, 116 S.Ct. at 1376 (quoting *Riggins v. Nev.*, 504 U.S. 127, 139-40, 112 S.Ct. 1810, 1817, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring)); accord *Baltierra v. State*, 586 S.W.2d 553, 556 (Tex.Crim.App.1979); *Garnica v. State*, 53 S.W.3d 457, 458 (Tex.App.-Texarkana 2001, no pet.).

Texas courts have extended this fundamental requirement to criminal proceedings other than a traditional trial. E.g., *Ex parte Potter*, 21 S.W.3d 290, 296 98 (Tex.Crim.App.2000) (extradition); *Thompson v. State*, 654 S.W.2d 26, 27 28 (Tex. App -Tyler 1983, no pet.) (probation revocation).

The Juvenile Justice Code likewise provides that a juvenile must be competent to "be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, sec. 55.04(a), 1995 Tex. Gen. Laws 2517, 2545 (amended 1999); accord Tex. Fam.Code. Ann. § 55.31(a). The Legislature's failure to expressly refer to transfer hearings under section 54.11 in this statute could be construed as an expression of legislative intent that the competency procedures of section 55.04 do not apply to transfer hearings. Cf. *J.S.S.*, 20 S.W.3d at 842 (Legislature's failure to expressly provide for privilege against self incrimination in statute governing disposition hearings "could be interpreted as indicating a legislative determination that the Fifth Amendment privilege does not apply during the disposition hearing").

However, section 311.021(1) of the Code Construction Act provides a presumption that the Legislature enacted section 55.04 intending "compliance with the constitutions of this state and the United States." Tex. Gov't Code Ann. § 311.021(1) (Vernon 1998). Thus, we must interpret section 55.04 in a manner which renders it constitutional if possible. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 706 (Tex.2002).

In addition, the Legislature expressly provided that the Juvenile Justice Code must be construed in such a manner that "the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." Tex. Fam.Code. Ann. § 51.01(6). Construing section 55.04 so that it does not apply to transfer hearings could arguably be contrary to these directives.

IMPACT ON JUVENILE JUSTICE SYSTEM

The Beaumont Court has characterized the transfer hearing as one which provides the juvenile offender "a second chance to persuade the court that he or she should not be imprisoned." In re *J.E.H.*, 972 S.W.2d 928, 931 (Tex.App-Beaumont 1998, pet. denied); accord In re *H.V.R.*, 974 S.W.2d 213, 216 (Tex.App.-San Antonio 1998, no pet.); In re *D.S.*, 921 S.W.2d 383, 386 (Tex.App.-Corpus Christi 1996, writ *dism'd w.o.j.*).

The Beaumont Court concluded in *J.E.H.* that due process requires the appointment of an expert witness for a juvenile offender in a transfer hearing if the juvenile shows the need for the expert "and the fact that the issue concerning which the expert is requested is to be a significant factor in the trial." 972 S.W.2d at 929 (citing *Ake v. Okla.*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985)). Other courts have recognized that the juvenile has a right to effective assistance of counsel and the right to confront adverse witnesses in a transfer hearing. See In re *R.D.B.*, 20 S.W.3d 255, 258 (Tex.App-Texarkana 2000, no pet.); In re *J.M.O.*, 980 S.W.2d 811, 813 (Tex.App. San Antonio 1998, no pet.).

A transfer hearing under section 54.11 is more summary in nature than a trial on the merits. It can thus be argued that requiring a separate competency inquiry in the context of a transfer hearing would merely serve to delay what the Legislature intended to be an expedited matter.

However, a juvenile offender in a transfer hearing has: (1) a right to counsel; (2) a right to confront the witnesses against him; (3) a right to present evidence and argument; and (4) a right to examine before hearing all documentary evidence which may be used in the hearing. Tex. Fam.Code. Ann. § 54.11(e). A juvenile's ability to fully enjoy these rights depends in large part on his competence. See *Cooper*, 517 U.S. at 354, 116 S.Ct. at 1376; *Baltierra*, 586 S.W.2d at 556; *Garnica*, 53 S.W.3d at 458. Accordingly, we conclude

that due process demands that a juvenile offender be competent before being subjected to a transfer hearing under section 54.11.

The Court of Criminal Appeals reached a similar conclusion when it held that an adult challenging extradition "must be sufficiently competent to consult with his counsel." Potter, 21 S.W.3d at 296. The Court determined that, if an accused sufficiently raises the issue of competency in this context, the trial court should conduct a hearing to determine whether the accused is competent. Id. at 297-98. Because of the expedited nature of extradition proceedings, the Court concluded that a trial court can refer to the competency provisions of the Code of Criminal Procedure for guidance but such provisions do not necessarily control. Id. at 298 n. 11.

A transfer hearing under section 54.11 is likewise expedited in nature. However, section 54.11 provides for much more participation by the juvenile offender than permitted in a habeas proceeding challenging extradition. As the Court of Criminal Appeals noted in Potter, a habeas applicant challenging extradition "could conceivably have knowledge of facts relating to" only two pertinent issues: (1) whether he is the person identified in the extradition request; and (2) whether he was present in the demanding state at the time of the alleged offense. Id. at 297.

Conversely, a juvenile offender in a transfer hearing must be able to consult with counsel regarding: (1) the witnesses against him; (2) any evidence they may decide to present in opposition to the transfer request; and (3) any documentary evidence which may be used in the hearing. See Tex. Fam.Code. Ann. § 54.11(e); see also id. § 54.11(k) (providing for broad range of evidence which juvenile court may consider in determining whether to order transfer). Accordingly, we do not purport to promulgate an expedited competency inquiry tailored to the purposes of the transfer hearing. Cf. Potter, 21 S.W.3d at 298 n. 11.

Rather, we look to section 55.04 which provides a familiar procedure for juvenile courts to follow. We have concluded that due process requires that a juvenile offender be competent to participate in a transfer hearing. Thus, section 55.04 is arguably unconstitutional to the extent that it does not apply to a transfer hearing. However, we must interpret section 55.04 in a manner which renders it constitutional if possible. Tex. Gov't Code Ann. § 311.021(1); Marcus Cable Assocs., 90 S.W.3d at 706; see also Tex. Fam.Code. Ann. § 51.01(6) (Juvenile Justice Code must be construed so that constitutional rights are recognized and enforced).

As stated, section 55.04 expressly applies to "discretionary transfer [s] to criminal court, adjudication[s], disposition[s], [and] modification[s] of disposition[s]." Tex. Fam.Code. Ann. § 55.04(a). The term "modification of disposition" has generally been associated with a hearing to modify a non-TYC disposition under section 54.05 of the Juvenile Justice Code. See Tex. Fam.Code. Ann. § 54.05 (Vernon Supp.2004); e.g., In re L.R., 67 S.W.3d 332, 335 (Tex.App. El Paso 2001, no pet.). However, that precise phrase is not defined in the Juvenile Justice Code. Accordingly, we must apply the ordinary and common meaning of the phrase. Tex. Gov't Code Ann. § 311.011 (Vernon 1998); City of Austin v. Sw. Bell Tel. Co., 92 S.W.3d 434, 442 (Tex.2002).

Section 54.05 applies to "[a]ny disposition, except a commitment to the Texas Youth Commission." Tex. Fam.Code. Ann. § 54.05(a). Thus, a commitment to TYC is a "disposition" under the Juvenile Justice Code. In fact, section 54.04(g) refers to a commitment to TYC under a determinate sentence as "a disposition under Subsection (d)(3)." Tex. Fam.Code. Ann. § 54.04(g) (Vernon Supp.2004). Webster's defines a "modification" in pertinent part as "the making of a limited change in something." Merriam-Webster's Collegiate Dictionary 748 (10th ed., 1993).

The court originally imposed a disposition committing N.S. to TYC. Because TYC asked the court to change N.S.'s place of commitment from TYC to TDCJ, TYC was necessarily requesting a modification of the original disposition. Accordingly, we conclude that a transfer hearing under section 54.11 is a "modification of disposition" proceeding to which section 55.04 applies. Now, we determine whether and/or to what extent the juvenile court complied with section 55.04.

SECTION 55.04

Section 55.04(b) provides in pertinent part, "If on motion by a party or the court it is alleged that a child may be unfit to proceed as a result of mental illness or mental retardation, the court shall order appropriate examinations as provided by Section 55.01 of this chapter." Tex. Fam.Code. Ann. § 55.04(b) (emphasis added). The State contends that N.S. failed to properly raise the issue because he did not file a written motion alleging his incompetency. We disagree.

Section 55.04(b) requires a "motion." The Juvenile Justice Code does not define the term "motion." See Tex. Fam.Code. Ann. § 51.02 (Vernon Supp.2004) ("Definitions" applicable to Juvenile Justice Code). Accordingly, we must apply the ordinary and common meaning of the term. Tex. Gov't Code Ann. § 311.011; Sw. Bell Tel. Co., 92 S.W.3d at 442. Black's Law Dictionary defines a "motion" as a "written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary 1031 (Bryan A. Garner ed., 7th ed., West 1999).

In addition, section 51.17(a) of the Juvenile Justice Code provides that the Rules of Civil Procedure govern juvenile delinquency proceedings except with respect to the burden of proof or when in conflict with a provision of the code. Tex. Fam.Code. Ann. § 51.17(a) (Vernon Supp.2004). Rule of Civil Procedure 21 permits oral motions if presented during the hearing. [FN5] Tex.R. Civ. P.

21; accord *City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 673 (Tex.1979); *Lee v. Palo Pinto County*, 966 S.W.2d 83, 85 (Tex.App-Eastland), pet. denied per curiam, 988 S.W.2d 739 (Tex.1998).

FN5. Rule 21 provides in pertinent part:

Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket. Tex.R. Civ. P. 21 (emphasis added).

Finally, we note that, if the Legislature had intended to require a written motion under section 55.04(b), it could easily have said so. Cf. Tex. Fam.Code. Ann. §§ 54.034(2), 56.01(n)(2) (Vernon 2002) (both discussing plea-bargaining juvenile's limited right to appeal rulings on matters raised by pretrial "written motion"). The Legislature's failure to expressly require a written motion indicates that it did not so intend. See *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 549 (Tex.2001); *Walker v. City of Georgetown*, 86 S.W.3d 249, 257 (Tex.App-Austin 2002, pet. denied).

For the foregoing reasons, we conclude that N.S.'s oral motion sufficiently invoked the court's obligation under section 55.04(b) to "order appropriate examinations as provided by Section 55.01." Tex. Fam.Code. Ann. § 55.04(b).

The version of section 55.01 applicable to N.S.'s case provides in pertinent part,

"At any stage of the proceedings under this title, the juvenile court may order a child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision to be examined by appropriate experts, including a physician, psychiatrist, or psychologist." Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, sec. 55.01(a), 1995 Tex. Gen. Laws at 2542-43 (amended 1999) (current version at Tex.

Fam.Code. Ann. § 55.11 (Vernon 2002)).

Section 55.04(b) requires a juvenile court on motion to order the examination of the child by an "appropriate expert." The court failed to do so in N.S.'s case. We must determine whether N.S. was harmed by this error.

HARM ANALYSIS

Because N.S. received a determinate sentence, we apply the harmless error standards of Rule of Appellate Procedure 44.2, usually applicable to criminal appeals. In *re L.R.*, 84 S.W.3d 701, 706-07 (Tex.App. Houston [1st Dist.] 2002, no pet.); In *re C.R.*, 995 S.W.2d 778, 785-86 (Tex.App. Austin 1999, pet. denied). The proper harm analysis depends on whether the error at issue is "constitutional" or "non-constitutional." See Tex.R.App. P. 44.2; *Aguirre Mata v. State*, 992 S.W.2d 495, 498 (Tex.Crim.App.1999).

N.S. does not complain that the court erred by making him proceed with the transfer hearing even though he was incompetent. That would be a constitutional error. Instead, N.S. complains that the court used an erroneous procedure to determine whether he was competent. This constitutes a "non-constitutional" error. See *Carranza v. State*, 980 S.W.2d 653, 656 (Tex.Crim.App.1998); *Rachuig v. State*, 972 S.W.2d 170, 174-76 (Tex.App. Waco 1998, pet. ref'd).

Such error does not require reversal unless we conclude that N.S.'s "substantial rights" were affected thereby. Tex.R.App. P. 44.2(b). As this Court has explained,

In applying the test for "harmless error," our primary question is what effect the error had, or reasonably may have had, upon the jury's decision. We must view the error, not in isolation, but in relation to the entire proceedings. An error is harmless if the reviewing court, after viewing the entire record, determines that no substantial rights of the defendant were affected because the error did not influence or had only a slight influence on the verdict. Stated another way, an error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict.

The error must have affected the outcome of the lower court proceedings. That is to say, if we have "grave doubts" about whether an error did not affect the outcome, we must treat the error as if it did. "Grave doubt," means that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." The uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a "substantial and injurious effect or influence in determining the jury's verdict").

Fowler v. State, 958 S.W.2d 853, 865 (Tex.App.-Waco 1997) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995)), aff'd, 991 S.W.2d 258 (Tex.Crim.App.1999).

Rather than ordering a psychiatric examination, the court reviewed "the papers forwarded to the court by [TYC]." The court also took judicial notice of "all the paperwork filed regarding [N.S.'s] mental health status and all the findings that were made pursuant to that." Although the court did not specifically identify these "papers," the reporter's record contains four TYC reports concerning N.S.: (1) a psychological evaluation report regarding four evaluations, the most recent having been conducted on April 23, 2001 (the "Cuppett report"); (2) at TYC Corsicana Residential Treatment Center report regarding a November 25, 2000 psychological consultation (the "Lloyd report"); (3) a memorandum prepared by a psychiatrist at the residential treatment center regarding a May 1, 2001 mental health status review hearing held to determine whether N.S. should be admitted to TYC's Corsicana Stabilization Unit (the "Taft report"); and (4) an August 25, 2001 report prepared by TYC personnel reviewing N.S.'s history and recommending that he be transferred to TDCJ (the "Cucolo report"). In addition, N.S. offered a report regarding a June 25, 1999 psychological evaluation (the "Shinder report") and a January 12, 2000 psychiatric report (the "Blaisdell report").

Paul Cuppett, a licensed professional counselor employed by TYC, prepared the Cuppett report and testified at the transfer hearing. Cuppett testified and his report reflects his opinion that N.S. is malingering (i.e., faking his psychiatric symptoms). He testified that N.S.'s non-responsive conduct is consistent with his behavior throughout the course of his incarceration and, specifically, during his various psychiatric/psychological evaluations. Cuppett opined that another psychiatric examination would not likely yield different results. He testified, "The preponderance, though, of the data from my evaluation and prior evaluations all suggest malingering is at least a piece of what's going on with [N.S.]." He noted that any expert who was called upon to conduct an additional evaluation "would once again be reliant on data generated by other evaluators as well as their impressions on what the lack of interaction means."

The Lloyd report, the Taft report, and the Cucolo report all conclude that N.S. has been malingering throughout the course of his incarceration.

The Shinder report similarly notes that N.S. "did not put forth optimal effort in [his] evaluation." The Shinder report reflects that N.S. understood the charges against him at that time and understood the probable disposition of his case. [FN6] The Shinder report also indicates that N.S. understood the nature of the proceedings against him. [FN7]

FN6. N.S. told Dr. Shinder in this evaluation, "They say I will probably go to TYC for a while. I don't want to go, but if I have to go, I'll go and just take it."

FN7. N.S. referred to his lawyer as "someone who helps me try to get out of this" and the judge as "someone who may give me a chance if I cooperate."

The Blaisdell report provides information most likely to support a conclusion that N.S. was not competent at the time of the transfer hearing. Dr. Blaisdell opined that N.S. seemed to have difficulty understanding the nature of the proceedings or the probable disposition of his case. He concluded:

This case involves the analysis of several pieces of data, many of which do not point to the same conclusion, if analyzed at different points in time. If [N.S.] had been interviewed and assessed for this through much of 1999, he would likely have been found competent to stand trial. It is clear from the videotape shortly after his arrest that he was able to understand and appreciate the charges and would have likely been able to assist his attorney in his defense. This is supported by some of the findings from both psychological evaluations performed in the first half of 1999. However, beginning this past Fall, I believe that the evaluatee began experiencing a deterioration of his mental status and his psychiatric functioning. This is clearly a young man with some sociopathic traits; as such, the probability of malingering cannot be discounted. However, in my professional medical opinion, I believe that this is not the most relevant problem at this point.

In sum, all but the Blaisdell report suggest that N.S. is competent and malingering. Even Dr. Blaisdell could not discount "the probability of malingering." Cuppett testified that N.S.'s behavior while in TYC custody and his conduct at each of his psychiatric/psychological evaluations has remained consistent. He opined that an additional evaluation would not likely yield a different conclusion.

For the foregoing reasons, the court's erroneous failure to appoint an "appropriate expert" to evaluate N.S.'s competency did not affect his substantial rights. See Tex.R.App. P. 44.2(b). Accordingly, we conclude that his sole issue is without merit.

Chief Justice GRAY concurring.

I agree that the order transferring N.S. to prison should be affirmed. But, if we have to spend 18 pages to address an issue not raised by the parties, we need to reexamine what it is we are doing. This is such a case.

Pursuant to a plea agreement, the juvenile court adjudicated N.S. delinquent for committing capital murder, assessed a determinative sentence of 40 years, and committed N.S. to the Texas Youth Commission with the possibility of a transfer to prison. Tex. Fam.Code

Ann. § 54.04(d)(3) (Vernon 2002). N.S. did not appeal his adjudication or disposition.

After N.S. turned 16 years old, the Texas Youth Commission referred N.S. to the juvenile court for transfer to prison. See Tex. Hum. Res.Code Ann. § 61.079 (Vernon 2001). A release/transfer [FN1] hearing before the juvenile court was scheduled within 60 days of the Commission's referral. See Tex. Fam.Code Ann. § 54.11 (Vernon 2002). At the hearing, N.S.'s counsel informed the juvenile court that he had difficulty communicating with N.S. and had "serious concerns" that N.S. was not able to assist him during the hearing. Counsel asked the court to consider delaying the hearing and appointing a psychiatrist to determine if N.S. was competent to proceed with the hearing. The juvenile court denied counsel's request.

FN1. The record contains a letter from the Texas Youth Commission requesting a transfer hearing to determine whether N.S. should be transferred to prison. According to section 54.11 of the Texas Family Code, the trial court may, on conclusion of a hearing on a person referred for transfer, order the return of the person to the Texas Youth Commission or the transfer of the person to prison for completion of the person's sentence. Tex. Fam.Code Ann. § 54.11(i)(Vernon Supp.2004). The Texas Youth Commission has the option to request a release hearing or a transfer hearing. See Tex. Hum. Resources Code Ann. §§ 61.079(a) & 61.081(f)(Vernon 2001). We use the phrase "release/transfer hearing" rather than "transfer hearing" as the majority does to avoid confusion of this post trial, post sentence hearing with the ability of the juvenile court to waive its jurisdiction prior to adjudication and transfer the juvenile to criminal court. See Tex. Fam.Code Ann. § 54.02 (Vernon 2002).

The hearing continued, and the court ordered N.S. transferred to prison. Id. § 54.11(i)(2).

While I agree that the juvenile court's order should be affirmed, I disagree with the analysis conducted by the majority.

DUE PROCESS IS NOT THE ISSUE

The majority opinion spends a great deal of time discussing whether due process requires N.S. to be competent before being subjected to a "transfer hearing." This entire discussion is unnecessary, and I express no opinion on the issue.

Constitutional rights, including allegations of due process violations, can be waived by a failure to present the argument to the trial court. See *Whatley v. State*, 946 S.W.2d 73, 75 (Tex.Crim.App.1997); *Cockrell v. State*, 933 S.W.2d 73, 94 95 (Tex.Crim.App.1996) (Maloney, J., concurring); *leppert v. State*, 908 S.W.2d 217, 219 (Tex.Crim.App.1995). N.S. did not argue to the trial court that due process required that he be competent before being subjected to a "transfer hearing." He simply wanted a delay in the proceedings to have a psychiatrist appointed to examine him. The majority's due process discussion is not responsive to any issue raised by N.S. and should not be addressed.

Likewise, even constitutional issues must be adequately briefed. See *Chuong Duong Tong v. State*, 25 S.W.3d 707, 710 (Tex.Crim.App.2000). The only argument made by N.S. that could remotely be considered an argument concerning due process came in a letter brief to the court after oral argument. N.S. stated that a "transfer hearing" was "roughly equivalent" to the punishment phase of a criminal trial and that the guarantee of the due process right to be competent applied during a probation revocation hearing. There was no discussion as to why a release/transfer hearing was equivalent to the punishment phase of a criminal trial. There was also no connection made between a release/transfer hearing and a probation revocation hearing. Thus, a due process argument was not properly briefed and should not be considered.

With that said, I write to discuss the issue actually presented by the parties at trial and in their briefs.

THE ISSUE

N.S. contends that the trial court erred in failing to continue his release/transfer hearing and in failing to appoint a psychiatric expert to determine N.S.'s competency. N.S. relies primarily on the provisions of Texas Family Code section 55.31 in support of his appeal. That section provides in part:

A child ... found to have engaged in delinquent conduct ... who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.

Tex. Fam.Code Ann. § 55.31(a) (Vernon 2002). This section further provides that on a motion by a party, the juvenile court shall determine whether probable cause exists to believe that the juvenile is unfit to proceed as a result of mental illness or mental retardation. Id. at (b). If the court determines that there is probable cause to believe the juvenile is unfit to proceed, the court shall temporarily stay the proceeding and order the juvenile to be examined by a mental health agency or professional. Id. at (c); Tex. Fam.Code Ann. § 51.20 (Vernon 2002). It is this probable cause determination about which N.S. complains.

Without argument to the juvenile court or citation of authority to this Court, N.S. takes the position that the provisions of section 55.31 apply to a release/transfer hearing held under section 54.11 of the Texas Family Code. In its response to N.S.'s issue, the State challenges the applicability of section 55.31 to a release/transfer hearing. After argument, N.S. submitted a letter brief in which he contended, in effect, that regardless of whether section 55.31 applied, section 55.11 would apply to a release/transfer hearing. Section 55.11 pertains to juvenile mental illness determinations and examinations. See Tex. Fam.Code Ann. § 55.11 (Vernon 2002).

But sections 55.11 and 55.31 do not control this appeal. N.S.'s delinquent conduct occurred in May of 1999. Sections 55.11 and 55.31 became effective on September 1, 1999 and apply "only to conduct that occurs on or after the effective date of this Act." Act of May 27, 1999, 76th Leg., R.S., ch. 1477, §§ 39(a), 41, 1999 Tex. Gen. Laws 5067, 5090. Conduct violating a penal law of the State occurs on or after the effective date of these sections if every element of the violation occurs on or after that date. *Id.* Conduct that occurs before the effective date of these sections is covered by the law in effect at the time the conduct occurred, and the former law is continued in effect for that purpose. *Id.* The statute in effect at the time N.S.'s conduct occurred was former section 55.04. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, 1995 Tex. Gen. Laws 2517, 2545 (amended 1999) (hereinafter referred to as "former section 55.04"). [FN2]

FN2. There is no comparable statute to section 55.11 other than former section 55.04. Former section 55.02, entitled "Child with Mental Illness," did not contain a mechanism to require the court to order psychiatric examinations. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 47, 1995 Tex. Gen. Laws 2517, 2543 (amended 1999).

At the release/transfer hearing and in their briefs, the parties argued whether there was evidence of probable cause to determine that N.S. was unfit to proceed. Probable cause is only relevant under the current provisions, not former section 55.04. Thus, the parties were effectively relying on the application of the current provisions in their arguments to the juvenile court regarding N.S.'s fitness to proceed and the trial court's duty to have N.S.'s fitness evaluated. The trial court cannot commit error for failing to follow section 55.31 or section 55.11 when N.S.'s delinquent conduct was covered by former section 55.04. N.S.'s issue should be overruled on this basis alone.

Nevertheless, had N.S. made his argument pursuant to former section 55.04, the disposition of this case would be the same. Importantly, subsection (a) of 55.04 is almost the same as subsection (a) of 55.31. The only change was to make the language of section 55.04(a) gender neutral when it was recodified as section 55.31(a). Thus, the following analysis would be applicable to either section.

As noted earlier, if a juvenile is unfit to proceed in juvenile court, he shall not be subjected to a discretionary transfer to criminal court, an adjudication, a disposition, or a modification of a disposition. This language has remained the same. Neither section mentions a release/transfer hearing.

The plain language of former section 55.04(a) explicitly mentions four proceedings that occur at varying stages in the juvenile adjudication process. The titles of sections 54.02, 54.03, 54.04, and 54.05 of the Family Code correspond with those mentioned in section 55.31 and former section 55.04.

Section 54.02, entitled "Waiver of Jurisdiction and Discretionary Transfer to Criminal Court," is a pre-trial proceeding which allows the juvenile court to waive its jurisdiction over a juvenile and transfer him to the appropriate district court for criminal proceedings. Tex. Fam.Code Ann. § 54.02 (Vernon 2002). If a transfer occurs at this stage of the proceeding, the juvenile is tried as an adult. *Id.* at (h). This hearing had already occurred and is not the subject of this appeal.

Section 54.03 provides for an "Adjudication Hearing," where it is determined whether the juvenile engaged in delinquent conduct. Tex. Fam.Code Ann. § 54.03 (Vernon 2002). This hearing is similar to the guilt/innocence phase of a criminal trial. And the State has the burden of proving the juvenile engaged in delinquent conduct beyond a reasonable doubt. *Id.* at (f). This hearing had already occurred and is not the subject of this appeal.

Section 54.04 addresses the "Disposition Hearing," which is similar to the punishment phase of a criminal trial. Tex. Fam.Code Ann. § 54.04 (Vernon 2002); see *In the Matter of J.E.H.*, 972 S.W.2d 928, 930 (Tex.App. Beaumont 1998, pet. denied). This phase includes the option of the court or jury to sentence the juvenile to the Texas Youth Commission with a possible transfer to the Texas Department of Criminal Justice for a specific term of years, not to exceed 40 years. Tex. Fam.Code Ann. § 54.04(d)(3) (Vernon 2002). This hearing had already occurred and is not the subject of this appeal.

Section 54.05 allows for a "Hearing to Modify Disposition." Tex. Fam.Code Ann. § 54.05 (Vernon 2002). At this proceeding, a prior disposition can be modified. *Id.* But a prior disposition involving a commitment to the Texas Youth Commission cannot be modified. *Id.* Because N.S. had been committed to the Texas Youth Commission, the provision for this type hearing is not applicable to N.S. and is, therefore, not the subject of this appeal.

A release/transfer hearing pursuant to section 54.11 is not related to a trial and sentence as are the four enumerated sections discussed previously. Thus, the provisions of section 55.31 or of former section 55.04 do not apply to a release/transfer hearing. N.S. cannot use those provisions to show himself entitled to a fitness hearing. Although the State did not advance this argument before the juvenile court, it is well settled that this Court can affirm a trial court's decision on a legal theory not presented to the trial court without violating "ordinary notions of procedural default." *Hailey v. State*, 87 S.W.3d 118, 121 (Tex.Crim.App.2002).

In passing, N.S. states in his brief, "... the fact that the matter at bar was a 'transfer hearing' is of no concern; sentencing is part of the trial and competency considerations apply." It is true that, statutorily, an adult defendant must be competent to be sentenced. *Casey v. State*, 924 S.W.2d 946, 949 (Tex.Crim.App.1996). But N.S. offers no authority or explanation as to why a release/transfer hearing would be considered a part of sentencing.

A release/transfer hearing is not a part of sentencing. As the Corpus Christi Court has noted, a juvenile is not tried again at the release/transfer hearing. In the Matter of D.S., 921 S.W.2d 383, 387 (Tex.App.-Corpus Christi 1996, writ dismissed w.o.j.). At a release/transfer hearing, the juvenile has a second chance to persuade the court that he should not be imprisoned; but this is after he has already been sentenced to a determinate number of years. *Id.* The juvenile court is simply determining which entity, Texas Youth Commission or prison, is the most suitable place for the juvenile to continue to serve his sentence; the sentence which was previously determined. See Tex. Fam.Code Ann. § 54.11(i) (Vernon 2002). The San Antonio court echoes this characterization of a release/transfer hearing. In the Matter of H.V.R., 974 S.W.2d 213, 216 (Tex.App.-San Antonio 1998, no writ); see also In the Matter of J.A.H., No. 04-99-00560-CV, 2000 Tex.App. Lexis 6194, *8 (San Antonio September 13, 2000, no pet.) (not designated for publication). N.S. has provided this Court with no authority, and I have found none, that persuades me that the release/transfer hearing is a part of the sentencing procedure which would require the juvenile to be fit to proceed at that time. [FN3]

FN3. We note that the Beaumont Court, without addressing the issue and without any explanation or analysis, infers that a release/transfer hearing is the equivalent of a sentencing hearing. In the Matter of J.E.H., 972 S.W.2d 928, 930 (Tex.App. Beaumont 1998, pet. denied).

Therefore, under the plain language of the statute, former section 55.04 does not apply to a release/transfer hearing. Because it does not apply to a release/transfer hearing, the trial court did not err in failing to continue the hearing and appoint a psychiatric expert to determine N.S.'s fitness to proceed with the release/transfer hearing. For this alternate reason N.S.'s issue should be overruled as well.

For the reasons discussed, I concur in only the result reached by the majority opinion.

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