

Year 2004 Case Summaries

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TYC official may testify to hearsay in release/transfer hearing; risk of re-offending justified transfer to TDCJ [In re C.G.] (04-2-18).

On April 21, 2004, the San Antonio Court of Appeals upheld a transfer of the respondent from TYC to TDCJ under the determinate sentence act and held that the TYC official who testified could testify as to what other TYC employees had stated about respondent's behavior while in TYC.

04-2-18. In the Matter of C.G., UNPUBLISHED, No. 04-03-00197-CV, 2004 WL 839632, 2004 Tex.App.Lexis ____ (Tex.App.-San Antonio 4/21/04) Texas Juvenile Law (5th Ed. 2000).

Facts: C.G., a minor, appeals the order transferring him from the custody of the Texas Youth Commission ("TYC") to the Institutional Division of the Texas Department of Criminal Justice ("TDCJ"). In two issues, C.G. contends that the trial court erred in admitting the testimony of a TYC official at the transfer hearing and that the evidence is insufficient to support the trial court's transfer order.

In March of 2000, C.G. waived his right to a jury trial and pled true to aggravated sexual assault of his five-year-old half-sister. See Tex. Penal Code Ann. § 22.021 (Vernon 2000). The trial court entered its order of adjudication and sentenced C.G. to a five-year determinate sentence to commence at TYC. After conducting a transfer hearing on February 3, 2003, the trial court ordered C.G. to be transferred to TDCJ for the remainder of his sentence. This appeal ensued.

Held: Affirmed.

Opinion Text: STANDARD OF REVIEW

When reviewing the trial court's decision to transfer a juvenile from TYC to TDCJ, the reviewing court employs an abuse of discretion standard. In the Matter of J.M.O., 980 S.W.2d 811, 813 (Tex.App.-San Antonio 1998, pet. denied). The entire record must be reviewed to determine if the trial court acted without reference to guiding rules and in an arbitrary manner. Id. If some evidence exists to support the trial court's decision, there is no abuse of discretion. Id.

ANALYSIS

In deciding whether to transfer a juvenile to TDCJ, a court may consider: 1) the experiences and character of the juvenile before and after commitment to TYC; 2) the nature of the offense that the juvenile committed and the manner in which it was committed; 3) the ability of the juvenile to contribute to society; 4) the protection of the victim of the offense or any member of the victim's family; 5) the recommendations of TYC and prosecuting attorney; 6) the best interest of the juvenile; and 7) any other relevant factor. Tex. Fam.Code Ann. § 54.11(k) (Vernon 2002). Additionally, the court may consider written reports from probation officers, court employees, professional consultants, and testimony from witnesses. Tex. Fam.Code Ann. § 54.11(d). At least one day before the hearing, the court must provide the juvenile's counsel with access to all written materials to be considered by the court. Id. The juvenile is entitled to examine all witnesses against him, to present evidence and argument, and to review all reports and evaluations that may be used at the hearing. Tex. Fam.Code Ann. § 54.11(e); see In the Matter of M.R., 5 S.W.3d 879, 881 (Tex.App.-San Antonio 1999, pet. denied).

1. Admission of Cucolo's Testimony

In his first issue, C.G. contends the trial court erred in permitting Leonard Cucolo ("Cucolo"), a TYC official, to testify on behalf of the State based on his report summarizing C.G.'s behavior at TYC. He argues that because Cucolo did not have personal knowledge of all the information summarized in the report and was not qualified as an expert, his testimony was inadmissible hearsay. See Tex.R. Evid. 602, 703, 802.

Upon commencement of the hearing, the trial court asked C.G.'s attorney if he had received a copy of the report and access to other court documents at least one day prior to the hearing. After C.G.'s attorney confirmed that he had received the TYC report as well as access to the other documents, the State called Cucolo to testify about C.G.'s progress while incarcerated at TYC. When the State attempted to introduce Cucolo's report into evidence, C.G.'s attorney objected to the portions of the report regarding C.G.'s treatment and behavioral summary because they were not based on Cucolo's personal knowledge. The argument raised on appeal is that Cucolo's testimony was inadmissible; however, C.G.'s objection at the hearing dealt only with the admissibility of the report itself, not Cucolo's testimony. Therefore, C.G.'s argument on appeal was not preserved for appellate review. Tex.R.App. P. 33.1.

Even if C.G.'s issue on appeal had been preserved, it would have failed. When the juvenile has received a copy of the TYC summary report before the hearing, a TYC official may testify to hearsay contained in the report. In the Matter of M.R., 5 S.W.3d at 882; In the Matter of J.M.O., 980 S.W.2d at 813. A transfer hearing does not have the same stringent due process requirements as a trial where a defendant's guilt or innocence is decided. In the Matter of M.R., 5 S.W.3d at 881-82; In the Matter of J.M.O., 980 S.W.2d at 813. The juvenile's limited right of confrontation at a transfer hearing is adequately protected by his ability to call the authors of the report for purposes of cross examination. In the Matter of J.M.O., 980 S.W.2d at 813. Therefore, it was not error to permit Cucolo to testify based on the report at the transfer hearing.

2. Sufficiency of the Evidence

In his second issue, C.G. argues the trial court erred in transferring him to TDCJ because there was insufficient evidence that he posed a continuing threat to his half-sister or that he was unable to make a positive contribution to society.

Cucolo testified that the purpose of his report was to evaluate C.G.'s overall progress and his risk of re-offending, and to make a recommendation regarding the status of C.G.'s incarceration. Cucolo testified that while in TYC custody, C.G. had committed 81 conduct violations, was placed in solitary confinement on ten different occasions for aggressive behavior, and failed to fully participate in the rehabilitation program for sex offenders. He stated that while C.G. had made excellent academic progress, he posed a high risk of committing another offense if released. Cucolo recommended that because C.G. had continued his gang-related activity and still experienced sexual fantasies about his half-sister, C.G. should be transferred to TDCJ for the remainder of his sentence. Furthermore, C.G.'s last conduct violation occurred less than one month before the transfer hearing.

C.G. testified on his own behalf at the hearing. He acknowledged that he had not completed the sex offender rehabilitation program due to his past immaturity and failure to accept responsibility for his actions. He testified that over time, however, his attitude had changed. He stated that if he was allowed to return to TYC to complete the program, he would not pose a risk upon his release. Yet, when asked about the gang-related circumstances surrounding his cousin's death, C.G. testified he wanted to "get" the individual responsible for killing him; he later denied he would act upon his emotions. C.G. also admitted to participating in a rape and described it as an act of vengeance.

After a complete review of the record, it is clear the trial court did not abuse its discretion in declining to release C.G. and transferring him from TYC to TDCJ. Accordingly, we affirm the order of the trial court.