YEAR 2004 CASE SUMMARIES

By
Robert O. Dawson
Bryant Smith Chair in Law
University of Texas School of Law

2004 Summaries 2003 Summaries 2002 Summaries 2001 Summaries 2000 Summaries 1999 Summaries

---

Cannot revoke misdemeanor probation with proof of only two adjudications [In re C.B.J.] (04-3-20).

On July 14, 2004, the Waco Court of Appeals held that the juvenile court cannot revoke probation based on only two misdemeanor adjudications. A dissenting opinion disputed this interpretation of the statute.

04-3-20. In the Matter of C.B.J., UNPUBLISHED, No. 10-03-00008-CV, 2004 WL 1588274, 2004 Tex.App.Lexis ____ (Tex.App.-Waco 7/14/04) Texas Juvenile Law (5th Ed. 2000).

Facts: This is a juvenile case. C.B.J. was found to have engaged in delinquent conduct and was placed on probation. The State filed a motion to modify the disposition order, alleging he (a) committed two offenses, i.e., speeding and assault with a deadly weapon, (b) failed to report the speeding offense to his probation officer, and (c) was expelled from school for sleeping in class, disrespecting a teacher, and throwing a textbook. After a hearing the court found the allegations to be true and signed an order that committed him to the Texas Youth Commission (TYC) for an indeterminate period not to exceed age twenty-one and ordered that the person responsible for his support pay monthly child support to the TYC.

On appeal, C.B.J. asserts two issues: (1) error in disregarding sections 54.05(j) and (k) of the Family Code when the trial court modified the disposition order, and (2) an abuse of discretion in finding that C.B.J. violated the terms of the probation order when he allegedly committed the assault because the finding is not supported by a preponderance of the evidence.

The State did not file a brief. When the time for filing one passed, we requested that a brief be filed or we be notified that no brief would be filed. We received no response.

Held: Reversed and remanded for new modification proceedings.

Opinion Text: LIMITATION ON MODIFICATION ORDERS

The version of subdivision (k) of section 54.05 of the Family Code that is in effect today was not in effect on the date of the modifying order. Act of June 19, 1999, 76th Leg., R.S., ch. 1448, § 2, 1999 Tex. Gen. Laws 4919, 4920, amended by, Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 5.002, 2001 Tex. Gen. Laws 4210, 4226, amended by, Act of June 18, 2003, 78th Leg., R.S., ch. 283, § 21, 2003 Tex. Gen. Laws 1221, 1227. [FN1] Subsection (k) then and now imposes a limitation on the court's ability to modify a disposition order under subsection (f) of section 54.05. Id. (current version at Tex. Fam.Code Ann. § 54.05(k) (Vernon Supp.2004)). Subsection (f), in part, allows a modified disposition order in an adjudication based on a misdemeanor to commit to TYC if the penal violation upon which the modified order is based is a(1) felony or (2) misdemeanor if the requirements of (k) are also met. Id. § 54.05(f). (Vernon Supp.2004). The two requirements of subdivision (k) as it existed in 2002 were (1) the child has been adjudicated for delinquent conduct based on a penal violation of the grade of felony or misdemeanor on at least two previous occasions, and (2) of the previous adjudications, the conduct for one occurred after the date of the other. Act of June 19, 1999, 76th Leg., R.S., ch. 1448, § 2, 1999 Tex. Gen. Laws 4919, 4920, amended by, Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 5.002, 2001 Tex. Gen. Laws 4210, 4226, amended by, Act of June 18, 2003, 78th Leg., R.S., ch. 283, § 21, 2003 Tex. Gen. Laws 1221, 1227.

FN1. The 2001 amendment redesignated the subsection from (j) to (k). The 2003 amendment took effect on September 1 of that year and continued the prior law in effect for conduct occurring prior to the effective date.

C.B.J. had two adjudications for misdemeanors. According to his brief, the first on April 16, 2002, when he was placed on probation. [FN2] The second occurred on September 6, 2002, when the disposition order also provided for probation. The second disposition is the order that was modified and resulted in this appeal. C.B.J. says that the modification order cannot result in commitment to TYC. We agree.

FN2. The modification order also recites that C.B.J. was adjudicated and placed on probation on April 16, 2002.

The Austin Court of Appeals, following the earlier decisions of two other courts of appeals, put it succinctly:

Although the statute in question is not a model of clarity, a careful reading of the pertinent provisions leads to the conclusion that both the Family Code and the legislature's intent are clear: a disposition for adjudication of a misdemeanor offense may only be modified to commit a juvenile to TYC if the child has at least two previous adjudications in addition to the one giving rise to the modification. In other words, before a juvenile may be sent to TYC under section 54.05(k), the child must have been adjudicated delinquent on at least two earlier occasions separate from the adjudication for which disposition is being modified.

In the Matter of A.I., 82 S.W.3d 377, 381 (Tex.App.-Austin 2002, pet. denied) (emphasis in original). Although the issue was raised for the first time on appeal, the court held that the juvenile court had erred in modifying A.I.'s disposition to commit him to TYC and reversed the order and remanded the cause to the juvenile court for a new hearing on the State's motion to modify. Id. at 379.

Because C.B.J. had not been adjudicated delinquent on at least two previous occasions separate from the adjudication for which disposition was modified, we sustain issue one and will reverse the order and remand the cause for a new hearing on the State's motion to modify. See id.

ABUSE OF DISCRETION

A finding of a violation of probation must be supported by a preponderance of the evidence. We review the finding under an abuse-of-discretion standard. [FN3] In re D.S.S., 72 S.W.3d 725, 727 (Tex.App.-Waco 2002, no pet.). The allegation in the motion to modify, to which C.B.J. pled "false" but which the court found to be true, was that C.B.J. hit the victim on the head with a golf club, which was alleged to be a deadly weapon.

FN3. We review this issue because it is likely to recur in the same form on a rehearing of the State's motion.

At the modification hearing, the victim, C.B.J.'s brother, testified that he and C.B.J. exchanged punches after fighting over a TV remote control, after which C.B.J. got a golf club from his room. He said C.B.J. never hit him with the club and that any blood on the club came from cuts around his nose. An officer testified that C.B.J. told him immediately after the incident that he had not hit his brother with the club.

We find that the court abused its discretion in finding this violation of probation.

CONCLUSION

Having found that the juvenile court erred in entering the Order Modifying Disposition dated December 4, 2002, we reverse the order and remand the cause for a new hearing on the State's motion to modify the disposition.

Chief Justice GRAY dissenting.

I would affirm. The majority errs in not considering C.B.J.'s failure to preserve his complaint, misconstrues the statute, errs in analyzing the modification order as void, and applies an incorrect standard of law to its analysis of the revocation of C.B.J.'s juvenile probation. Because the majority does not affirm, I respectfully dissent.

1. Preservation.

First, the majority fails to consider whether C.B.J. preserved his complaint. An appellate court may and should consider the preservation of error sua sponte. See Tex.R.App. P. 33.1(a); cf. Cecil v. Smith, 804 S.W.2d 509, 510 (Tex.1991); see also Taylor v. State, 55 S.W.3d 584, 586 (Tex.Crim.App.2001), cert. denied, 534 U.S. 1154 (2002); Hughes v. State, 878 S.W.2d 142, 151 (Tex.Crim.App.1993) (op. on reh'g). C.B. J.'s complaint concerning his commitment to the Texas Youth Commission ("TYC") is first raised on appeal. [FN1] C.B.J. waived the complaint.

FN1. C.B. J.'s notice of appeal purports to appeal from the judgment of conviction and sentence.

The majority, without analysis, follows the Austin Court of Appeals in calling the trial court's modification order "void." (Slip op. at 3); In re A.I., 82 S.W.3d 377, 379 (Tex.App.-Austin 2002, pet. denied). Although the majority avoids the use of the word "void," the sole basis for the Austin Court's holding that the appellant could raise his complaint for the first time on appeal and for its disposition of the case was that the modification order was void. See A.I. at 379. In In the Interest of A.I., the Austin Court held, "A criminal sentence unauthorized by law is void, and a defect that renders a sentence void may be raised at any time." Id.; see also In re T.B., No. 12-03-00271-CV, 2004 Tex.App. LEXIS 4926, at *3 (Tex.App.-Tyler June 2, 2004, no pet. h.) (mem op.); In re Q.D.M., 45 S.W.3d 797, 799-800 (Tex.App.-Beaumont 2001, pet. denied) (op. on orig. submission). We should be very cautious in calling a judgment void. See Peacock v. Wave Tec Pools, Inc., 107 S.W.3d 631, 636 (Tex.App.-Waco 2003, no pet.) (op. on orig. submission). "That which is void is without vitality or legal effect." Slaughter v. Qualls, 139 Tex. 340, 345, 162 S.W.2d 671, 674 (1942) (quoting Smith v. Thornhill, 25 S.W.2d 597, 598 (Tex. Comm'n App.1930)). However, the "[m]ere failure to follow proper procedure will not render a judgment void." State ex rel. Latty v. Owens, 907 S.W.2d 484, 485 (Tex.1995).

A.I. thus relies on a line of cases of the Texas Court of Criminal Appeals on "illegal sentences." See Mizell v. State, 119 S.W.3d 804, 806 (Tex.Crim.App.2003); Heath v. State, 817 S.W .2d 335, 339 (Tex.Crim.App.1991) (op. on reh'g). Under that line of cases, "[u]nlike most trial errors which are forfeited if not timely asserted, a party is not required to make a contemporaneous objection to the imposition of an illegal sentence." Mizell at 806 n. 6; accord Heath at 339; cf. Tex.R.App. P. 33.1(a). A.I. thus makes the facile assumption that a criminal sentence is the same as a juvenile disposition judgment or order modifying disposition. This is an assumption that we should not make unnecessarily. The dispositional phase of a juvenile proceeding is broadly comparable to the sentencing phase of a criminal proceeding. See Murphy v. State, 860 S.W.2d 639, 641 n. 1 (Tex.App.-Fort Worth 1993, no pet.). But the juvenile disposition judgment and the criminal sentence are different, and governed by different provisions. Tex.R. Civ. P. 301; Tex.Code Crim. Proc. Ann. art. 42.02 (Vernon Supp.2004). Except in matters of discovery and evidence, and where the Texas Family Code provides to the contrary, juvenile proceedings are governed by the Texas Rules of Civil Procedure. Tex. Fam.Code Ann. § 51.17(a)-(c) (Vernon Supp.2004); In re R.J.H., 79 S.W.3d 1, 6 (Tex.2002).

But even if one makes that dubious assumption, C.B. J.'s complaint does not fall within the "illegal sentence" exception to the preservation rule. The Court of Criminal Appeals has narrowly interpreted "sentence," and thus narrowly interpreted "illegal sentence." [FN3] See State v. Kersh, 127 S.W.3d 775, 777 (Tex.Crim.App.2004); State v. Baize, 981 S.W.2d 204, 205 (Tex.Crim.App.1998) (per curiam); State v. Ross, 953 S.W.2d 748, 750-51 (Tex.Crim.App.1997). "The sentence is that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law," or "nothing more than the portion of the judgment setting out the terms of punishment." Kersh at 777 (quoting Tex.Code Crim. Proc. Ann. art. 42.02; Ross at 750). The sentence "consists of the facts of the punishment itself, including the date of commencement of the sentence, its duration, and the concurrent or cumulative nature of the term of confinement and the amount of the fine, if any." Id. (emphasis in orig.). "Factors that merely affect these facts are not part of the sentence." Id. (emphasis in orig.).

FN3. Judge Hervey of the Court of Criminal Appeals has recently pointed to Judge Charles Campbell's criticism of "the Court's occasional lack of analysis and resort to that talismanic label 'void.' " McClinton v. State, 121 S.W.3d 768, 775 n. 7 (Tex.Crim.App.2003) (Hervey, J., dissenting) (quoting Fortune v. State, 745 S.W.2d 364, 371 (Tex.Crim.App.1988) (Campbell, J., dissenting)). As Judge Campbell wrote, when the "Court is confused or in doubt about a legal concept, [it] resort [s] in utter desperation to that talismanic phrase before which everything quakes and

eventually tumbles to earth, 'fundamental error.' " Fortune at 371 (Campbell, J., dissenting).

An illegal sentence is one that lies outside the statutory range of punishment for the offense. "A sentence that is outside the maximum or minimum range of punishment is unauthorized by law and therefore illegal." Mizell, 119 S.W.3d at 805; accord Heath, 817 S.W.2d at 339. "Nearly every case that has held a sentence not 'authorized by law' or void (such that the alleged defect could be raised for the first time on appeal) involved the trial court's assessment of a punishment that was not applicable to the offense under the controlling statutes. That is, 'the punishment assessed was not within the universe of punishments applicable to the offense.' " Speth v. State, 6 S.W.3d 530, 532 (Tex.Crim.App .1999) (quoting Ex parte Johnson, 697 S.W.2d 605, 607 (Tex.Crim.App.1985)). For example, in Ex parte Pena, the jury assessed Pena's punishment at imprisonment and no fine. Ex parte Pena, 71 S.W.3d 336, 336-37 (Tex.Crim.App.2002). The trial court nonetheless sentenced Pena to imprisonment and a fine of $10,000. Id. The Court of Criminal Appeals held that Pena's sentence was not illegal. Id. The Court drew the distinction that, "For example, had the jury assessed Mr. Pena a $20,000 fine, that sentence would be void and illegal because Texas statutes only permit a maximum of a $10,000 fine." Id. at 336 n. 2; accord Kersh, 127 S.W.3d at 776 (sentence of ten years' imprisonment for a defendant for whom the minimum range of punishment was twenty-five years' imprisonment was illegal); Mizell at 805 ("$0" fine was illegal); Ex parte Beck, 922 S.W.2d 181, 182 (Tex.Crim.App.1996) (per curiam) (sentence of twenty-five years' imprisonment for offense for which maximum range of punishment was two years' imprisonment was illegal). The Court held that the "judgment could have been inaccurate in that it was inconsistent with the jury's verdict, but it is neither 'void' nor 'illegal.' " Pena at 336 (emphasis in orig.).

Though a sentence is illegal if it lies outside the statutory range of punishment for the offense, it is not illegal if it merely lies outside the correct range of punishment for the offender. For example, in Ex parte Beck, a defendant was sentenced as a habitual offender to twenty-five years' imprisonment. Beck, 922 S.W.2d at 182. But the offense of which the defendant was convicted was a state jail felony, for which the maximum penalty was two years' imprisonment, and which could not be enhanced to a habitual offense. Beck at 182. Thus, the sentence, lying outside the range of punishment for the offense, was illegal and void. On the other hand, the use of a void prior conviction to enhance the punishment range for a conviction does not void the sentence in the latter conviction. In Ex parte Patterson, the defendant was sentenced as a habitual offender. Ex parte Patterson, 969 S.W.2d 16, 17 (Tex.Crim.App.1998). The Court of Criminal Appeals held that the use of a void prior judgment of conviction to enhance the defendant's sentence did not render the sentence void. Id. at 19-20; see also Ex parte Williams, 753 S.W.2d 695, 697 (Tex.Crim.App.1988). That is, the improper use of the void prior conviction improperly increased the range of punishment to which the defendant was liable, but the defendant received a sentence that was within a proper range of punishment for the offense of which he was convicted. Punishment as a habitual offender was a possible consequence of a felony conviction.

Irregularities, on the other hand, in the procedure leading up to the sentence constitute ordinary error that is subject to the preservation requirement. Kersh, 127 S.W.3d at 777. In State v. Baize, for example, the trial court erroneously permitted the defendant to make an untimely sentencing election. Baize, 981 S.W.2d at 206; see Tex.Code Crim. Proc. Ann. art. 37.07, § 2(b) (Vernon Supp.2004). The Code of Criminal Procedure generally provides that the judge assesses a criminal defendant's punishment, except that "where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the ... jury." Tex.Code Crim. Proc. Ann. art. 37.07, § 2(b). However, "the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment." Id. In Baize, the trial court permitted the defendant to change his election, over the State's objection, after the jury found the defendant guilty. Baize at 205. The Court held that the sentence was not illegal. Id. at 206 207. Likewise, the trial court's failure to enter an affirmative finding that the defendant used a deadly weapon during the commission of the offense, though significantly affecting the length of the defendant's imprisonment, does not constitute part of the sentence. Ross, 953 S.W.2d at 750 51.

This distinction applies in the context of juveniles. For example, in Ex parte White, an underage defendant was sentenced to imprisonment. See Ex parte White, 50 Tex.Crim. 473, 473, 98 S.W. 850, 851 (1906). The defendant was fourteen years of age. Id. The law then required that a defendant under sixteen years of age could only be imprisoned on a jury finding, and the court was required to "submit the question to the jury in his charge as to whether or not such accused should be placed in the penitentiary or state reformatory." Id., 50 Tex.Crim. at 474. The jury heard no evidence on the issue, and the trial court failed to submit the issue to the jury. Id. The Court of Criminal Appeals held

that the sentence was not void. Id. That is, the sentence of imprisonment lay within the range of punishment for the offense, regardless of whether it was error to impose it on the juvenile defendant.

In the instant cause, C.B.J.'s commitment to TYC "for an indeterminate period of time not to exceed the time when [C.B.J.] shall be 21 years of age" was one of the possible consequences of the revocation of misdemeanor juvenile probation. See Tex. Fam.Code Ann. § 54.05(f) (Vernon Supp.2004). Accordingly, C.B. J.'s disposition was not illegal, and thus not void. The disposition was infected, at most, with ordinary error which is waived if not complained of in the trial court. C.B. J., therefore, was required to complain to the trial court concerning the commitment to TYC as a prerequisite to appealing it. He did not.

Moreover, it is well-established under the criminal jurisprudence, at least, that a court of appeals may not reverse the trial court on a "theory of law never presented to the trial court or raised on appeal." Williams v. State, 114 S.W.3d 920, 921 (Tex.Crim.App.2003) (citing Hailey v. State, 87 S.W.3d 118, 121-22 (Tex.Crim.App.2002), cert. denied, 538 U.S. 1060 (2003)). C.B.J. did not present his complaint concerning his commitment to TYC in the trial court, and does not argue on appeal either that he did so present it or that he need not have so presented it.

Accordingly, we should overrule C.B. J.'s first issue as waived. Because the majority does not do so, I respectfully dissent.

2. Statutory Interpretation.

Next, even if C.B. J.'s first issue were preserved or not required to be preserved, the majority errs in its interpretation of the controlling statute. The trial court, on the majority's analysis, erred in ordering C.B.J. committed to TYC on the basis of C.B. J.'s juvenile record. (Slip op. at 2-3.) The majority, like the Austin Court on which it relies and the other courts that have held likewise in interpreting the 2001 version of the statute, misconstrues the statute and disregards the Legislature's intent. (See id.); A.I., 82 S.W.3d 377; see also T.B., 2004 Tex.App. LEXIS 4926; In re C.E.T., No. 08 03 00125 CV, 2004 Tex.App. LEXIS 2757, at *5-*7 (Tex.App. El Paso Mar. 26, 2004, no pet.) (mem.op.); In re J.W., 118 S.W.3d 927, 929 (Tex.App. Dallas 2003, pet. denied). [FN7] It is telling that the majority, though purporting to interpret the statute, does not quote it, but only paraphrases it, for the statute's language refutes the majority's analysis. (Cf. slip op. at 2.)

FN7. See also, interpreting the 1999 version of the statute, In re S.B., 94 S.W.3d 717, 719 (Tex.App.-San Antonio 2002, no pet.); In re N.P., 69 S.W.3d 300, 302 (Tex.App.-Fort Worth 2002, pet. denied) (per curiam); Q.D.M., 45 S.W.3d 797.

I assume that the majority interprets the correct version of the statute. The majority interprets the statute as amended in 2001. (Slip op. at 2-3.) C.B.J. argues as vaguely as possible under "Texas Family Code sections 54.05(j) and (k)." The Legislature promulgated former Texas Family Code Section 54.05(j) in 1999. Act of May 30, 1999, 76th Leg., R.S., ch. 1448, § 2, sec. (j), 1999 Tex. Gen. Laws 4919, 4920-21 (amended 2001, 2003) (current version at Tex. Fam.Code Ann. § 54.05(k) (Vernon Supp.2004)). Former Subsection (j) applies to conduct occurring on or after the effective date of the statute, namely September 1, 1999. Id. § 3(a)-(b), 1999 Tex. Gen. Laws at 4921. In 2001, the Legislature redesignated the subsection as Subsection (k), and amended it to provide:

The court may modify a disposition under Subsection (f) that is based on a finding that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
(1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least two previous occasions; and
(2) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication.

Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 28, 2001 Tex. Gen. Laws 3142, 3154 (amended 2003) (current version at Tex. Fam.Code Ann. § 54.05(k)). That former version of Section 54.05(k) applies to "conduct that occurs on or after the effective date" of the amendment, namely September 1, 2001. Id. § 72(b), 2001 Tex. Gen. Laws at 3175; see id. § 72(a). Section 54.05(k) was again amended in 2003, effective for conduct occurring on or after September 1, 2003. See Tex. Fam.Code Ann. § 54.05(k); Act of June 2, 2003, 78th Leg., R.S., ch. 283, § 21, sec. (k), 2003 Tex.

Gen. Laws 1221, 1227; id. § 62(a)-(b), 2003 Tex. Gen. Laws at 1245. C.B.J. was adjudicated delinquent for Class A misdemeanor assault on April 16, 2002. I do not find in the record when C.B.J. committed the conduct for which he was adjudicated on April 16, 2002. C.B. J.'s juvenile probation officer testified that he became involved in C.B. J.'s case as early as August 2000. But C.B.J. was again adjudicated delinquent for Class A misdemeanor assault on September 6, 2002, for conduct alleged to have occurred on or about July 22, 2002. And the violations of C.B. J.'s probation found by the court were alleged to have occurred in September and October 2002. Thus, I assume that the facts dictate that the 2001 version of the statute is the controlling law.

The majority, following the Austin Court, holds:

[A] disposition for adjudication of a misdemeanor offense may only be modified to commit a juvenile to TYC if the child has at least two previous adjudications in addition to the one giving rise to the modification. In other words, before a juvenile may be sent to TYC under section 54.05(k), the child must have been adjudicated delinquent on at least two earlier occasions separate from the adjudication for which disposition is being modified.

(Slip op. at 3 (quoting A.I., 82 S.W.3d at 381) (emphasis in A.I.).) I note, first, that A.I. relies on an earlier case interpreting the 1999 version of the statute, without acknowledging the differences between the 1999 and 2001 versions. A.I. at 381 (citing In re A.N., 54 S.W.3d 487, 492 (Tex.App.-Fort Worth 2001, pet. denied) (interpreting Act of May 30, 1999, 76th Leg., R.S., ch. 1448, § 2, 1999 Tex. Gen. Laws at 4920-21 (amended 2001, 2003))); see also T.B., 2004 Tex.App. LEXIS 4926, at *7; C.E.T., 2004 Tex.App. LEXIS 2757, at *5; J.W., 118 S.W.3d at 929. Cases interpreting the earlier, significantly different, version of the statute are of little, if any, weight in this regard. The version of the statute adopted in 1999 provided, "of the previous adjudications, the conduct that was the basis for the adjudications occurred after the date of another previous adjudication." Act of May 30, 1999, 76th Leg., R.S., ch. 1448, § 2, sec. (j)(2), 1999 Tex. Gen. Laws at 4921 (amended 2001, 2003) (emphasis added). As amended in 2001, the statute provided, "of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication." Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 28, sec. (2), 2001 Tex. Gen. Laws at 3154 (amended 2003) (emphasis added). This amendment "communicate[d] [the Legislature's] intent that only one adjudication prior to the misdemeanor adjudication for which a child is on probation is needed to revoke probation and commit the child to the TYC." Robert O. Dawson, Tex. Juv. Probation Comm'n, Texas Juvenile Law 30 (5th ed. Supp.2001); but see S.B., 94 S.W.3d at 719.

Next, the majority, following A.I., confuses the requirements for an original disposition under Family Code Section 54.04 with the requirements for a modification of a disposition under Section 54.05. See generally Tex. Fam.Code Ann. §§ 54.04, 54.05 (Vernon Supp.2004) (current versions). As the Supreme Court has recently emphasized, Sections 54.04 and 54.05 are different in their purposes, procedures, and effects. See In re J.P., 47 Tex. Sup.Ct. J. 579, 579-80, 2004 Tex. LEXIS 440, at *2-*5 (Tex. May 14, 2004). Thus, the requirements for an original disposition should not be imported to a modification of a disposition. Id.

Following the Fort Worth Court of Appeals, the A.I. court notes that "section 54.04, governing when a child adjudicated for a misdemeanor offense may be committed to TYC in an initial disposition, is clear in its requirement that the child have already been adjudicated twice." A.I., 82 S.W.3d at 380 (citing A.N., 54 S.W.3d at 492). This premise is unexceptional. Section 54.04 provides that a juvenile court may make an original disposition committing a child to TYC for delinquent conduct that violates a penal law of the grade of misdemeanor if:

(1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of misdemeanor on at least two previous occasions;
(2) of the previous adjudications, the conduct that was the basis for one of the adjudications occurred after the date of another previous adjudication; and
(3) the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications.

Tex. Fam.Code Ann. § 54.04(s). [FN9] Section 54.04(s) thus expressly requires that "the conduct that is the basis of the current adjudication occurred after the date of at least two previous adjudications." Id.

FN9. Section 54.04(s), as amended in 2001, "applies only to a disposition by a court made on or after the effective date

of this act without regard to whether previous adjudications of delinquent conduct on which the disposition is based occurred before, on, or after the effective date," namely September 1, 2001. Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 23, 2001 Tex. Gen. Laws at 3153; see id. § 72(c), 2001 Tex. Gen. Laws at 3175. The trial court made C.B. J.'s disposition, the modification of which C.B.J. appeals, in September 2002.

But the line of cases on which the majority relies draws an impermissible conclusion from this premise. Those cases transfer that language, which governs original dispositions, to the statute governing modifications of dispositions, holding, "a current adjudication cannot also be a previous adjudication." See A.I., 82 S.W.3d at 381 (citing A.N., 54 S.W.3d at 492); see also C.E . T., 2004 Tex.App. LEXIS 2757. Yet former Section 54.05(k), which governs modifications of dispositions, does not use the term "current adjudication." Cf. Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 28, 2001 Tex. Gen. Laws at 3154 (amended 2003). The plain language of Section 54.04(s) compels the interpretation that in disposing of a child adjudicated for a misdemeanor the court can commit the child to TYC only if the child has been adjudicated delinquent at least twice prior to the "current adjudication." See Tex. Fam.Code Ann. § 54.04(s). But the plain language of former Section 54.05(k) does not compel that interpretation for modifications of dispositions, where the phrase "current adjudication" is not part of the language of Section 54.05(k) at all. In the circumstances of a revocation of juvenile probation for a violation of a condition of probation, Section 54.05 "allows a trial court to decline third and fourth chances to a juvenile who has abused a second one," and to commit a juvenile to TYC upon revocation. J.P., 47 Tex. Sup.Ct. J. at 581, 2004 Tex. LEXIS 440, at *12.

The goal of statutory construction is to determine and implement the Legislature's intent in promulgating the statute being construed. See Tex. Gov't Code Ann. § 312.005 (Vernon 1998); City of San Antonio v. City of Boerne, 111 S.W.3d 22, 25 (Tex.2003); In re Canales, 52 S.W.3d 698, 702 (Tex.2001) (orig.proceeding); see also Tex. Fam.Code Ann. § 51.01 (Vernon 2002) (Juvenile Justice Code to be construed with regard to protection of public safety). I see no valid objection to interpreting "adjudic[ations] ... on at least two prior occasions" and "previous adjudications" to refer to adjudications "prior" and "previous" to the proceeding to modify disposition. See Act of May 24, 2001, 77th Leg., R.S., ch. 1297, § 28, 2001 Tex. Gen. Laws at 3154 (amended 2003). Thus, only one adjudication other than the misdemeanor adjudication for which the disposition is being modified would be required. See Dawson & Tex. Juv. Probation Comm'n, Texas Juvenile Law 220 (5th ed.2000).

The legislative history supports this interpretation. See Tex. Gov't Code Ann. § 311.023 (Vernon 1998); Stary v. DeBord, 967 S.W.2d 352, 354 (Tex.1998) (citing In re R.J.J., 959 S.W.2d 185, 187 (Tex.1998) (per curiam)); Dawson & Tex. Juv. Probation Comm'n, Texas Juvenile Law 30 (Supp.2001). In particular, the Legislature's 2003 amendments to the statute manifest its intent. "When the meaning of an existing law is uncertain, the Legislature's later interpretation of it is highly persuasive." Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist., 917 S.W.2d 19, 21 (Tex.1996); but see In re C.O.S., 988 S.W.2d 760, 764 & n. 15 (Tex.1999). "[W]here a later act implies a particular construction of an existing law, and particularly where the existing law is ambiguous or its meaning uncertain, interpretation of the prior act by the Legislature as contained in the later act is persuasive when a court is called upon to interpret the prior law." Stanford v. Butler, 142 Tex. 692, 701-702, 181 S.W.2d 269, 274 (1944) (orig.proceeding). In 2003, the Legislature again amended Section 54.05(k). As amended in 2003, the statute provides:

The court may modify a disposition under Subsection (f) that is based on an adjudication that the child engaged in delinquent conduct that violates a penal law of the grade of misdemeanor if:
(1) the child has been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony or misdemeanor on at least one previous occasion before the adjudication that prompted the disposition that is being modified; and
(2) the conduct that was the basis of the adjudication that prompted the disposition that is being modified occurred after the date of the previous adjudication.

Tex. Fam.Code Ann. § 54.05(k) (emphasis added). This amendment was intended as a clarification of prior law and not as a change in law. The bill analyses to the 2003 amendments to Section 54.05(k) state that the amendment:

clarifies that for commitment to the Texas Youth Commission for a violation of a condition of a Class A or B misdemeanor probation there must have been at least one adjudication for a felony or Class A or B misdemeanor offense before the adjudication that resulted in the child's current probation.

HOUSE COMM. JUV. JUST. & FAM. ISSUES, BILL ANALYSIS, Tex. H.B. 2319, 78th Leg., R.S., at 3, § 19 (2003) (comm.report) (emphasis added); [FN10] SEN.CRIM. JUST. COMM., BILL ANALYSIS, Tex. H.B. 2319, 78th Leg., R.S., at 3, § 19 (2003) (engrossed version) (emphasis added); [FN11] SEN.CRIM. JUST. COMM., BILL ANALYSIS, Tex. H.B. 2319, 78th Leg., R.S., at 2 3, § 19 (2003) (comm.report) (emphasis added). [FN12] As the Chair of the Juvenile Law Section of the State Bar of Texas has noted:

FN10. http://.capitol.state.tx.us/bin//.cmd? LEG= & = & = & = & = & = & =(last visited June 12, 2004).

FN11. http://.capitol.state.tx.us/bin//.cmd? LEG= & = & = & = & = & = & =(last visited June 12, 2004).

FN12. http://.capitol.state.tx.us/bin//.cmd? LEG= & = & = & = & = & = & =(last visited June 12, 2004).

This change is made in hopes of clarifying that in order to Modify a child to TYC for a violation of a Class A or B Misdemeanor Probation, there had to be at least one adjudication for either a felony or a class A or B Misdemeanor prior to this adjudication that is now being modified.

Arthur Provenghi, Modification of Disposition, in TEX. JUV. PROBATION COMM'N & STATE BAR OF TEX., JUVENILE LAW SPECIALIZATION REVIEW COURSE 4 (2003), ht tp://www.juvenilelaw.org/Articles/Modification.pdf (last visited June 16, 2004) (emphasis added).

Accordingly, the Legislature's intent is clear that only one adjudication prior to the adjudication for which the disposition is being modified is required to modify a disposition to commit a child to TYC. We thus should overrule C.B. J.'s first issue. Because the majority does not do so, I respectfully dissent.

3. Voidness.

Next, even if the majority were correct that the trial court erred, the judgment is not void, and thus should not be reversed in toto. "In general, as long as the court entering a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void." Reiss v. Reiss, 118 S.W.3d 439, 443 (Tex.2003). "Errors other than lack of jurisdiction, such as 'a court's action contrary to a statute or statutory equivalent,' merely render the judgment voidable so that it may be 'corrected through the ordinary appellate process or other proper proceedings.' " Id. (quoting Mapco, Inc. v. Forrest, 795 S.W.2d 700, 703 (Tex.1990) (per curiam)). "A judgment is void only when it is clear that the court rendering the judgment had no jurisdiction over the parties or subject matter, no jurisdiction to render judgment, or no capacity to act as a court." State ex rel. Latty, 907 S.W.2d at 485.

"The fact that a portion of a[ ] judgment[ ] or sentence may be invalid does not necessarily mean that the entire ... judgment[ ] or sentence is invalid or 'void.' " Puente v. State, 71 S.W.3d 340, 344 (Tex.Crim.App.2002). At most, under the "illegal sentence" rule, "if a punishment is not authorized by law, that portion of the sentence imposing that punishment is void." Speth, 6 S.W.3d at 531 (quoting Heath, 817 S.W.2d at 336) (emphasis added). If, as the majority concludes, the commitment order is erroneous, the judgment, nonetheless, is not void. We should, under those circumstances, reverse the erroneous part of the modification order and remand for further proceedings. See Tex.R.App. P. 43.2; CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 243 (Tex.2002); N.P., 69 S.W.3d at 302-303.

Accordingly, we should not hold that the trial court's order is void. Because the majority does hold that the order is entirely void, I respectfully dissent.

4. Finding.

Lastly, the majority errs in holding that the trial court erred in finding that C.B.J. violated one condition of his juvenile probation. The majority ignores and misinterprets the law. C.B. J.'s pleas of true to allegations that he violated other conditions of probation mean that we should not even consider the merits of C.B. J.'s second issue. But, even if it were correct for us to consider the issue, the majority applies the wrong legal standard and misapplies the standard.

First, we should not even consider the merits of C.B. J.'s second issue. "A violation of one condition of probation is sufficient to support a trial court's order modifying a juvenile's disposition." In re C.O., No. 04-01-00630-CV, 2002

Tex.App. LEXIS 2681, at *5-*6 (Tex.App.-San Antonio Apr. 17, 2002, no pet.) (not designated for publication); accord In re J.D.B., No. 07-99-0047-CV, 2001 Tex.App. LEXIS 2707, at *5 (Tex.App.-Amarillo Apr. 25, 2001, no pet.) (not designated for publication). "When the trial court modifies disposition on multiple grounds, we reverse the trial court's modification order only if appellant successfully challenges all modification grounds." D.R.C. v. State, No. 05 94 00823 CV, 1995 Tex.App. LEXIS 3949, at *3 (Tex.App.-Dallas Jan. 19, 1995, no writ) (not designated for publication); accord In re R.E., No. 04-02-00443-CV, 2003 Tex.App. LEXIS 5543, at *1 (Tex.App.-San Antonio July 2, 2003, no pet.) (mem.op.); In re S.H., 846 S.W.2d 103, 106 (Tex.App. Corpus Christi 1992, no writ); see J.D.B., at *5.

The State's motion to modify C.B. J.'s disposition alleged that he had violated several of the conditions of his juvenile probation, and the trial court found all of the allegations true. C.B.J. contends that the trial court erred in finding that C.B.J. violated the condition of probation that he "commit no offense against the laws," by committing aggravated assault with a deadly weapon against his brother. C.B.J. does not contend that the court erred in finding that C.B.J. violated the other conditions as alleged in the State's motion. Here, C.B.J. does not even attempt to challenge, much less successfully challenge, the trial court's other findings. Accordingly, we should not consider C.B. J.'s issue.

But were we to consider C.B. J.'s second issue, we should overrule it. The majority does not apply the correct standard of review. "We review a court's decision to modify a juvenile disposition under an abuse-of-discretion standard." In re D.S.S., 72 S.W.3d 725, 727 (Tex.App. Waco 2002, no pet.). In an appeal arising "from a proceeding to modify a disposition based on an adjudication of delinquent conduct, we must determine 'whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation.' " Id. (quoting In re M.A.L., 995 S.W.2d 322, 324 (Tex.App.-Waco 1999, no pet.)). "When the judgment of a trial court is supported by evidence, the Court of Appeals should not substitute its collective judgment for the decision of the trial court." In re M _____ H _____, 662 S.W.2d 764, 768 (Tex.App.-Corpus Christi 1983, no writ). The court must "examine the evidence in the light most favorable to the trial court's order revoking probation." In re T.R.S., 115 S.W.3d 318, 321 (Tex.App.-Texarkana 2003, no pet.); see Browder v. State, 109 S.W.3d 484, 490 (Tex.Crim.App.2003); Garrett v. State, 619 S.W.2d 172, 174 (Tex.Crim.App. [Panel Op.] 1981). But the majority views the evidence in the light least favorable to the trial court's order, and cites only the evidence contrary to the trial court's finding. The court notes that the victim testified that C.B.J. did not strike his brother with a golf club, as alleged in the motion to modify, and that "any blood on the club came from cuts around his nose." (See slip op. at 4.) The majority does not suggest how that blood, or indeed those cuts, came to be around the victim's nose. (Cf.id.)

Viewing the evidence, as we must, under this standard, the trial court did not abuse its discretion. B.F. J., C.B. J.'s brother, testified as follows. He and C.B.J. got into a fistfight and threw a few punches at each other. After the fight, he had some blood around his nose from where C.B.J. punched him there, one bump, and no bruises. During a break in the fighting, C.B.J. went into another room, and returned with a golf club. As B.F.J. testified, he heard Jennifer, C.B.J.'s girlfriend, "say, 'No, stop, C[. B. J.]' And then he had a golf club, but then and he hit or Jen stopped him and then it was like that." C.B.J. testified that he "blacked out" during the fight, and admitted that he did not "remember that much" from the day of the fight. B.F.J. went to a neighbor's house, and called the police. The neighbor testified that B.F.J. was "covered in blood, actually dripping on the steps." Officer Earl Spencer, who responded to B.F. J.'s call, testified as follows. B.F.J. had "quite a lot" of blood on him. He was bleeding from his nose and mouth, and the blood was dripping from his face down his neck onto his shirt. His lips were swollen, he had cuts and welts under his eyes, one eye was swollen and the other was puffy, and he had bruises on his upper body and shoulders. B.F.J. was "a bit coherent." Officer Spencer called an ambulance for B.F.J.C.B.J. had a small cut or bruise on one of his eyes, but no blood on his hands or anywhere else on his body. C.B.J. admitted to Officer Spencer that he was not injured. Officer Spencer found a golf club in B.F. J.'s house. The club had a "large amount" of blood on the head, and lesser amounts on the shaft. The officers testified that there was no other blood at the scene of the offense. The trial court could have found by the preponderance of the evidence that C.B.J. committed aggravated assault by striking B.F.J. with the golf club.

The majority also fails to apply or misapplies the law in another regard. The majority fails to give due deference to the factfinder. "The trier of fact is the sole judge of the credibility of witnesses and the weight to be given to their testimony." Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 761 (Tex.2003). "In a probation revocation hearing, the trial court is the sole trier of fact." T.R.S., 115 S.W.3d at 321. "The trial court also determines the

credibility of the witnesses and the weight to be given their testimony." Id.; accord M_____ H_____, 662 S .W.2d at 768. The trial court "may accept or reject any or all of the witnesses' testimony." T.R.S. at 321; see M_____ H_____ at 768. B.F.J. denied that C.B.J. struck him with the club. B.F.J. testified that his blood came to be on the club as he "walked by it." Officer Steve O'Neal testified that C.B.J. had stated that he had not hit B.F.J. with the club, but that the blood had gotten on the club when C.B.J. had fallen on it. C.B. J.'s father testified that C.B.J. appeared to have been beaten worse than B.F.J. On the record before us, it cannot be said that the trial court would have abused its discretion in disregarding this testimony of C.B. J.'s brother and father as biased or not credible. See Fairris v. State, 515 S.W.2d 921, 924 (Tex.Crim.App.1974).

On this evidence, correctly viewed under the correct standard, the trial court did not abuse its discretion in finding by the preponderance of the evidence that C.B.J. violated the conditions of probation as alleged. We thus should overrule C.B. J.'s second issue. Because the majority does not do so, I respectfully dissent.

CONCLUSION

We should, therefore, after overruling C.B. J.'s issues, affirm the modification order. Because the majority does not do so, I respectfully dissent.