
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

[2005 Summaries](#) [2004 Summaries](#) [2003 Summaries](#) [2002 Summaries](#) [2001 Summaries](#) [2000 Summaries](#) [1999 Summaries](#)

Trial Court abused its discretion in committing 11 year old to TYC for violating conditions of probation. [In the Matter of S.G.](05-2-25)

On April 6, 2005, the San Antonio Court of Appeals reversed a TYC commitment finding that the evidence was insufficient to support the conclusion that all resources had been expended on probation, or that child posed a threat to the community.

05-2-25. In the Matter of S.G., MEMORANDUM OPINION, No. 04-04-00475-CV, 2005 Tex.App.Lexis 2560 (Tex.App.– San Antonio, 4/6/05).

Facts: In her initial appearance in court, S.G. was adjudicated as a child who engaged in delinquent conduct for committing the offense of burglary of a habitation, a second degree felony. *TEX. PEN. CODE ANN. § 30.02(a)(1), (c)* (Vernon 2003). S.G. was eleven years old at the time of the offense. S.G. was placed on probation for twelve months in the custody of her mother and ordered to pay \$ 5000 restitution in monthly installments of \$ 208. S.G. was also ordered to abide by a 7:00 p.m. curfew, perform 30 hours of community service, attend a victim impact panel, submit to drug testing, and attend school.

In its original motion to modify disposition, the State alleged S.G. violated the terms of her probation by her failure to pay the full restitution amount. The trial court modified its previous disposition, extending S.G.'s probation an additional twelve months, in the custody of her mother, with the remaining restitution amount of \$ 1,276 to be paid in \$ 208 monthly payments.

In its second motion to modify disposition, the State alleged S.G. violated the terms of her probation by her failure to pay the full restitution, and by her expulsion from school. The record is silent as to the reason for S.G.'s expulsion from school, but the State did not file a motion to modify disposition at the time expulsion occurred. The second motion to modify was filed fifteen days before S.G.'s probation was to expire. The trial court modified S.G.'s probation again and extended her probation an additional twelve months, in the custody of her mother, with the remaining restitution amount of \$ 1,126 to be paid in \$ 94 monthly payments.

S.G.'s fourth appearance in the trial court was in June 2003 for a second adjudication for possession of an asthma inhaler at school. No motion to modify was filed for this adjudication, and S.G. continued her probation.

The State filed a third motion to modify disposition in December 2003, again alleging S.G. had violated the terms of her probation by her failure to pay restitution. The trial court modified S.G.'s probation on January 27, 2004, extending it an additional nine months. S.G. was to remain in her mother's custody

and continue to make payments on the remaining \$ 1126 restitution. The trial court also ordered treatment programs for S.G.: individual and family counseling; submitting to drug testing; attending a day treatment center for six months; attending the KAPS program, and spending sixty days on the electronic monitoring (ELM) program.

The State filed a fourth motion to modify disposition less than three months later, on April 26, 2004. The State alleged that S.G. violated the terms of her probation by failing to participate in and cooperate fully with the ELM program and the day treatment program. The violations arose out of the same incident, which occurred on April 13, 2004, when S.G. was dropped off at the mall where she was to ride a van to her day treatment program. S.G. stated that she missed the bus because she went inside the mall to use the restroom. Instead of calling her mother, S.G. went inside the mall with her boyfriend and did not return home until the next day, thus committing two violations of her probation.

S.G. pled true to the allegations. At the hearing, the State and S.G.'s counsel agreed that proper punishment called for probation in the physical custody of the chief probation officer for eighteen months, with placement outside of S.G.'s home at the Southton treatment facility, rather than placement at TYC. Two members of the probation department staffing committee also suggested secured placement other than TYC in their report to the court. The State's attorney explained that S.G.'s prior motions to modify were for failure to pay restitution and one expulsion charge; S.G. was eleven years old when the offense was committed; S.G. had completed and cooperated with the conditions of probation, and she had never tested positive for drugs. The State informed the court that Southton would be the most appropriate placement to address S.G.'s rehabilitative and behavioral issues. n1

n1 In her mother's written statement to the court, she stated that S.G. suffers from Attention Deficit Hyperactivity Disorder (ADHD) and manic depression, for which she takes medication. S.G. has seen various counselors, but not on a regular basis. S.G. has had behavioral issues at school where she has been in trouble for such conduct as burning attendance slips and possessing markers when they were disallowed. The incidents at school have never been the subject of a motion to modify disposition.

The probation officer, however, recommended commitment to TYC. The probation officer argued Southton was not an appropriate placement because it was "probation resources," and argued S.G. had received rehabilitative services in every available program, including felony ISP. The probation officer testified the only treatment option that had not been offered to S.G. was a supervised out-of-home placement at Southton. The record does not reflect that the trial court ever ordered felony ISP in any of its disposition orders. The services received by S.G. were the programs ordered on January 27, 2004 in the third modification order.

At the conclusion of the hearing, the trial judge decided to commit S.G. to TYC until her 21st birthday. The trial judge stated:

I think the probation department has really gone beyond their duty for [S.G.]...this court will find there is a need for a disposition in this case for your rehabilitation and for the protection of the public. I am going to commit you to the Texas Youth Commission. And the specific reasons is this is your sixth appearance before the Court with violations of probation for the fifth time. And the probation department has expended numerous resources, including and not limited to, and these-this is why I will not be able to give you your request for placement. You have had intensive clinical services, felony ISP, electronic monitoring, day treatment, KAPS program. n2 Even with all those different services beyond the normal conditions of probation and services you continue to have problems at home and at school. And you continue to violate your conditions of probation. So the Court is not going to

extend your probation.

In its written order committing S.G. to TYC, the court's stated reasons for its finding were: "6th Appearance in court, and probation expended all resources." The court made specific findings that it was in S.G.'s best interests to be placed outside her home; that reasonable efforts had been made to prevent or eliminate the need to remove S.G. from home; and S.G. could not be provided the quality of care and level of support and supervision at home needed to meet the conditions of her probation.

n2 The record does not reflect that the trial court has ever ordered intensive clinical services or felony ISP services for S.G. or that S.G. has ever received such services.

Held: Reversed and remanded for a new disposition hearing.

Memorandum Opinion: A trial court may modify a juvenile's disposition if the court, after a hearing to modify disposition, finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2004-05). Juvenile courts are vested with a great amount of discretion in determining the suitable disposition of children found to have engaged in delinquent conduct, especially in hearings to modify disposition. *See In re H.G., 993 S.W.2d 211, 213 (Tex. App.-San Antonio 1999, no pet.)*.

Where a child has previously been found delinquent for commission of a felony, an appellate court reviews the record to determine if the trial court abused its discretion in finding, by a preponderance of the evidence, that the juvenile violated a condition of her probation. *Id.* A plea of true to a violation of probation is analogous to a judicial confession which justifies the court's finding the violation was committed by a preponderance of the evidence. *In re M.A.L., 995 S.W.2d 322, 323 (Tex. App.-Waco 1999, no pet.)*. There is no requirement, however, that a trial court commit a child to TYC for every probation violation; the decision to commit a child to TYC is a discretionary decision of the trial court subject to review for an abuse of that discretion. *In re J.P., 136 S.W.3d 629, 632, 47 Tex. Sup. Ct. J. 579 (Tex. 2004)*. A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to guiding rules or principles. Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *In re C.J.H., 79 S.W.3d 698, 702 (Tex. App.-Fort Worth 2002, no pet.)*.

DISCUSSION

S.G. does not dispute that the evidence was legally and factually sufficient to find she committed a violation of her probation conditions. S.G. contends that the trial court's decision to commit her to TYC was arbitrary and unreasonable because the evidence contained in the record is insufficient to support the trial court's findings; the trial court did not take reasonable steps to avoid sending her to TYC; the trial court's decision was based on monetary concerns rather than her best interests; and the disposition failed to conform to the stated goals of the juvenile justice code. n3

n3 S.G. also raises an argument that the trial court abused its discretion because it failed to follow the Progressive Sanctions Guidelines. *Compare TEX. FAM. CODE ANN. § 59.007* (recommending intensive supervision plus probation for commission of a second degree felony), *with id. § § 59.008-.010* (incrementally suggesting placement at a secured correctional facility before commission to TYC). The Family Code does not permit a juvenile to bring this complaint on appeal, however. *See TEX. FAM. CODE ANN. § 59.014(3)* (Vernon Supp. 2004-05) ("A child may not bring an appeal or a postconviction writ of habeas corpus based on...a departure from the sanction level assignment model

provided by this chapter"). A juvenile court's decision is guided by the Progressive Sanctions Guidelines, but the guidelines are not mandatory. *Id.*; *In re C.C.*, 13 S.W.3d 854, 858 (Tex. App.-Austin 2000, no pet.).

According to a plain reading of the statute, commitment to TYC by modification order is permissible if: 1) a juvenile originally committed a felony or multiple misdemeanors; and 2) the juvenile subsequently violates one or more conditions of her probation. *TEX. FAM. CODE ANN. § 54.05(f)*. The Texas Supreme Court recently reiterated, however, that:

The statute does not *require* commitment to TYC for every probation violation; it provides only that a trial court's disposition "*may be modified*" in such circumstances. This is a discretionary decision, and subject to review for an abuse of that discretion.

In re J.P., 136 S.W.2d at 632 (emphasis in original). TYC is the "most severe form of incarceration contemplated in the juvenile justice scheme" that has historically been "reserved for only serious juvenile offenders." *Id.* at 634 (Schneider, J., concurring) (discussing the permanent, lasting effects of placement at TYC). A proper commitment to TYC generally occurs when the delinquent child involved has engaged in some type of violent activity which makes him or her potentially dangerous to the public, or where the child has been given a negative recommendation for probation. *See In re L.G.*, 728 S.W.2d 939, 945 (Tex. App.-Austin, 1987, writ ref'd n.r.e.). This is supported by the goals of the juvenile justice code. The primary concern of the juvenile code is to provide for the protection of the public and public safety. *TEX. FAM. CODE ANN. § 51.01* (Vernon 2002). Balanced with that interest, however, is the juvenile code's goal to provide for the care and protection of the juvenile, placing an emphasis on a program of treatment, training, and rehabilitation. *See id.* § 51.01(2)(C), (3).

The only evidence adduced at the hearing supporting commitment to TYC was the recommendation of the probation officer. The probation officer stated placement at Southton was inappropriate because it was "probation resources." The trial court agreed, reasoning that TYC was more appropriate because "resources would come from the State rather than the County." This reason for placement at TYC does not conform to the stated goals of the juvenile justice code, *see id.* § 51.01, and is not a proper reason for committing a child to TYC. The probation officer also emphasized that S. G. exhausted probation resources and received all the rehabilitative services available to her. While we are mindful that we may not substitute our decision for the trial court's decision, we also may not affirm its decision when there is insufficient evidence in the record to support the conclusions made. In its written order and at trial, the court stated as its primary reason for revoking S.G.'s probation was S.G. had exhausted probation's attempts to rehabilitate her. The court, relying on the testimony of the probation officer, stated S.G. received intensive clinical services, felony ISP, electronic monitoring, day treatment, and the KAPS program. None of the disposition orders in the record reflect that the trial court has ever ordered felony ISP or intensive clinical services for S.G. She was ordered on January 27, 2004 to receive individual and family counseling, attend the day treatment program, submit to drug testing, spend sixty days on the electronic monitor (ELM), and attend the KAPS program. The record is silent as to the reason S.G. was offered these services only during the last seventy-five days of a three and a half year probation. n4 Based on the record, this is insufficient evidence to support the trial court's conclusion that probation had expended all resources in an effort to rehabilitate S.G.

n4 We note that, other than the expulsion, which was not grounds for a motion to modify probation at the time of expulsion, the sole reason S.G.'s probation was extended for such a long period is that she was unable to comply with the restitution order. At all times relevant, S.G. has been under the age of sixteen.

Further, there is insufficient evidence in the record to support the conclusion that S.G. poses a threat to

the community. The violations resulting in placement at TYC consisted of S.G.'s act of skipping her day treatment program to go to the mall with her boyfriend. Because we agree that the trial court's decision in this particular instance was arbitrary and unreasonable, we sustain S.G.'s sole issue. We reverse and remand the cause for a new disposition hearing.

Conclusion: The evidence was insufficient to support the trial court's conclusion that probation had expended all resources in an effort to rehabilitate the juvenile, and there was no showing that she posed a threat to the community.

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