YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Family Code provision restricting right to jury trial at the disposition hearing does not violate the *Sixth* and the *Fourteenth* Amendments of the Constitution. [In the Matter of F.V.B.](05-3-12)

On June 1, 2005, the Eastland Court of Appeals recognized that the United States Supreme Court and the Texas Court of Criminal Appeals have held that trial courts can determine dispositions, so long as they do not increase the penalty beyond the statutory maximum for the crime.

05-3-12. In the Matter of F.V.B., UNPUBLISHED, No. 11-03-00371-CV, 2005 Tex.App.Lexis 4611 (Tex.App.— Eastland 6/1/05).

Background: This is an appeal from a judgment adjudicating a juvenile of delinquent conduct. The jury found that F.V.B. engaged in delinquent conduct by evading arrest or detention on July 19, 2003, and on August 5, 2003, and by resisting arrest, search, or transportation on July 19, 2003. The trial court committed appellant to the care, custody, and control of the Texas Youth Commission for an indeterminate term not to exceed past his 21st birthday

Facts: Corporal Bobby Neal and Officer John Michael Hufford were the only witnesses at the adjudication hearing. Corporal Neal testified that he was a corporal with the Jail Division of the Midland County Sheriff's Office. Corporal Neal further testified that he was a certified peace officer. Corporal Neal stated that, while he was off duty, he often worked security at the Midland Park Mall. On July 19, 2003, Corporal Neal and two other mall security guards went to investigate a complaint concerning three Hispanic males inhaling paint in the men's restroom near the food court area of the mall.

Corporal Neal saw three Hispanic males leaving the men's restroom. Appellant was one of the three males. One of the males handed appellant a plastic grocery bag. Corporal Neal saw a silver Coors Light beer can "coming out of the top of that plastic bag." One of the other security guards recognized the odor of toluene, an inhalant.

When one of the security guards spoke to the three to make them stop, all three males turned around and looked at the guards. As the three walked away, Corporal Neal "latched onto" appellant to detain him. Appellant's friends left, and the other guards pursued them.

Over his radio, Corporal Neal could hear the other officers talking with the dispatch operator as the officers pursued appellant's friends. Appellant pulled away from Corporal Neal and ran through the food court. Corporal Neal ran after him, telling him to stop. As appellant was attempting to leave the mall, a mall patron grabbed appellant's arm and held him until Corporal Neal arrived.

Corporal Neal testified that appellant continued pulling away and tried to escape again. Corporal Neal decided to secure appellant by placing him on the ground. Appellant was face down on the ground when he rolled over and "threw a punch" at Corporal Neal. Corporal Neal testified that appellant hit either his bullet proof vest or his gun belt and that, while he did not feel the blow, he saw it.

During this time, Corporal Neal repeatedly told appellant to stop resisting or he would use pepper spray. After appellant threw the punch, Corporal Neal used the pepper spray. Appellant then complied by rolling onto his stomach.

Midland Police Officer John Michael Hufford testified that on August 5, 2003, around 7:55 p.m. he answered a "fight in progress" call. When he arrived at the scene, Officer Hufford saw a "large group of subjects in the alley, all black and Hispanic males" ages 15 to 18 years old. Officer Hufford estimated that there were 15 to 20 males. The whole group looked at Officer Hufford when he arrived in his patrol car. Appellant looked directly at Officer Hufford, turned, and ran. No one else ran.

Officer Hufford drove after appellant. The windows of his patrol car were down, and Officer Hufford was yelling at appellant to stop. A short chase ensued. Appellant ran as fast as he could down the alley, across an open field, down a street, through a yard, across another street, and into a parking lot. Appellant stopped in the parking lot, and Officer Hufford got out of his patrol car and handcuffed appellant. Officer Hufford estimated that the chase took about 30 seconds and covered approximately 100 yards.

Held: Affirmed

Opinion: Appellant relies on the case of *Illinois v. Wardlow, 528 U.S. 119, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000)*, to support his contention that neither Corporal Neal nor Officer Hufford had reasonable suspicion to detain him based on his flight from their presence. Therefore, appellant argues that the evidence is legally insufficient to support the jury's findings that he evaded detention on either July 19 or August 5. n1 In challenging the jury's finding that he resisted arrest by Corporal Neal on July 19, appellant contends that the evidence is legally insufficient that he used force against the officer. n2 We disagree.

> n1 *TEX. PEN. CODE ANN. § 38.04* (Vernon 2003) provides that a person "commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him."
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> n2 *TEX. PEN. CODE ANN. § 38.03* (Vernon 2003) provides that a person:

Commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.

In *Wardlow*, the Supreme Court held that flight upon noticing the police was a pertinent factor in determining reasonable suspicion for a *Terry n3* stop. Texas courts have followed the holding in *Wardlow* and found that nervous, evasive behavior such as flight may provide reasonable suspicion for an investigative detention. *Balentine v. State, 71 S.W.3d 763 (Tex.Cr.App.2002)*; *Vanderhorst v. State, 52 S.W.3d 237 (Tex.App. - Eastland 2001, no pet'n)*.

> n3 *Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)*.

In the present case, the record reflects that both Corporal Neal and Officer Hufford had sufficient articulable facts to constitute reasonable suspicion to detain appellant. Each officer was responding to a

dispatch call to investigate possible criminal activity in the exact location where appellant was observed. Corporal Neal further observed appellant, a minor, in possession of a beer can and in the presence of inhalant fumes.

Corporal Neal testified that, as he struggled to place handcuffs on appellant, appellant "threw a punch." Corporal Neal saw appellant's blow land on his body. Because he was wearing a protective vest and a gun belt, Corporal Neal stated that he did not feel the blow.

As the trier of fact, the jury could have reasonably concluded that appellant engaged in delinquent conduct. The evidence is legally sufficient. The first three points are overruled.

Constitutional Challenge to Section 54.04(a) of the Texas Family Code

TEX. FAM. CODE ANN. § 54.04 (Vernon Supp. 2004 - 2005) provides in part:

> (a) The disposition hearing shall be separate, distinct, and subsequent to the adjudication hearing. There is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence.

Neither *subsection (d)(3)* nor *(m)* apply to appellant's case.

Appellant contends in his fourth point that *Section 54.04(a)* violates both the *Sixth* and the *Fourteenth* Amendments by denying him a right to a jury trial at the disposition hearing. Appellant relies on *Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*, to support his argument.

In *Apprendi*, the Supreme Court considered the constitutionality of a New Jersey hate crime statute. The jury convicted Apprendi of the second degree felony offense of possession of a firearm for unlawful purposes. New Jersey law provided that the term of imprisonment could be extended beyond the time allotted for a second degree felony if the trial judge found by a preponderance of the evidence that Apprendi acted with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. n4 The trial court found that the crime was motivated by racial bias and assessed punishment at 12 years. In holding that the New Jersey hate crime statute was unconstitutional, the Supreme Court stated:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi v. New Jersey, supra at 489*.

Appellant asks this court to extend the holding in *Apprendi* to find that the Texas Family Code's system of providing a right to trial by jury at the adjudication hearing n5 and providing that the trial court shall determine the disposition of the case is unconstitutional. We decline to do so. Both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized that the *Apprendi* Court addressed only whether the trial court or a jury should determine facts that increased the penalty beyond the statutory maximum for the crime. *Ring v. Arizona, 536 U.S. 584, 585-86, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002)*; *Allen v. State, 108 S.W.3d 281, 285 (Tex.Cr.App.2003)*. Appellant's fourth point is overruled.

> n4 The term of confinement for a second degree felony offense was between 5 and 10 years; the hate crime statute extended the punishment range to between 10 and 20 years. *Apprendi v. New Jeresy, supra at 468*.

n5 *TEX. FAM. CODE ANN. § 54.03* (Vernon Supp. 2004 - 2005).

Conclusion: The judgment of the trial court is affirmed.