YEAR 2005 CASE SUMMARIES

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

In Motion to Modify Hearing, mother's instruction to respondent to go look for his brother after curfew, did not raise the defense of necessity.[In the Matter of A.D.] (05-3-37B)

On May 25, 2005, the Tyler Court of Appeals held that the evidence did not show that obeying his mother's instructions was immediately necessary to avoid imminent harm or that avoiding the harm clearly outweighed the harm sought to be prevented by the condition of his court-ordered probation.

05-3-37B. In the Matter of A.D., ___S.W.3d.___, No. 12-04-00039-CV, 2005 Tex.App.Lexis 4007 (Tex.App.— Tyler, 5/25/05) rel for pub. 8/4/05.

Background: A jury found that defendant engaged in delinquent conduct. He was placed on juvenile probation. The trial court modified disposition and ordered defendant committed to the Texas Youth Commission.

Held: Affirmed.

Facts: On August 19, 2002, the juvenile court found beyond a reasonable doubt that, on or about December 13, 2001, A.D. engaged in delinquent conduct by committing the offense of indecency with a child in violation of *section 21.11 of the Texas Penal Code*. *See TEX. PEN. CODE ANN. § 21.11* (Vernon 2003). The juvenile court ordered that A.D. be placed on juvenile probation under the terms of *Section 54.04(d) of the Texas Family Code* until he reached eighteen years of age. *See TEX. FAM. CODE ANN. § 54.04(d)* (Vernon 2002). The terms and conditions of his probation included the following:

> 1. Commit no offense against the laws of this or any other State, or any political subdivision thereof, or of the United States.
>
> 10. Reside in the home of [your parents] and obey all the rules and regulations of the person to whom you are released.
>
> 14. Remain in the company of the person(s) to whom you are released at all times unless you ask for and receive permission prior to leaving their company at which time you will notify the person(s) to whom you were released by the Court as to where you are, who you are with, and what you are doing at all times.
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> 15. Remain in the home of the person(s) to whom you were released between the hours of

6:00 p.m. and 6:00 a.m. Sunday-Thursday, and 6:00 p.m. and 6:00 a.m. Friday-Saturday, unless the person(s) to whom you are released are given permission by the Probation Officer for you to do otherwise or unless you are with the person(s) to whom you were released.

On December 18, 2003, the State filed a petition to modify disposition alleging that on or about December 4, A.D. violated a condition of his court-ordered probation in that he did not remain in the home of the person to whom he was released during curfew hours in direct violation of condition number 14. The State also alleged that A.D. violated conditions 1 and 10.

At the hearing on the State's petition, A.D.'s mother testified that although A.D. did break some rules of her house, he stopped as soon as he was told to do so. Officer Scott Behrend, a police officer with the Tyler Police Department, testified that at approximately 8:00 p.m. on December 4, he was dispatched to Douglas Elementary School after an alarm was sounded on the front door. He observed one person standing outside a propped-open door and, after noticing the police, that person and four other persons left the building running, carrying boxes. Behrend caught and arrested one of the individuals who, after questioning, gave police the names of the four other individuals who were involved in the alleged burglary. One of those named was A.D., who was taken into custody at his home. The other three were also arrested. Behrend testified that ice cream was in the boxes taken from the school.

While being processed by the police department, A.D. stated that he was not involved. Later, according to Behrend, A.D. contradicted this statement. As Behrend was writing his report, all five persons arrested for the alleged burglary at the school were being observed by the police in a briefing room. As they began to talk among themselves, A.D. stated that he had run through his yard and in a certain route to get away from the police. A.D. also made statements about trading the ice cream and told the other persons to remain silent. After Behrend's testimony, A.D. moved for and was granted a directed verdict on the first count of the State's petition, a violation of condition 10.

A.D. testified that on December 4, he was at his residence. Around 6:30 p.m., his mother sent him to look for his brother. A.D. complied. Shortly thereafter, the police arrived at his home. A.D. admitted that he had to obey his mother and that he knew that his curfew was 6:00 p.m. Further, A.D. knew that his mother was supposed to ensure that he abided by the conditions of his probation, including his curfew. Based on the evidence, the juvenile court found that on December 4, A.D. intentionally and knowingly violated a condition of his court-ordered probation in that he did not remain in the home of the person to whom he was released during curfew hours, conduct in direct violation of condition 14. Further, the juvenile court failed to find that A.D. violated condition 1. The juvenile court committed A.D. to the Texas Youth Commission indeterminately and signed an order incorporating its ruling. This appeal followed.

Opinion: In his second issue, A.D. contends that there is either no evidence or the evidence is factually insufficient to support the trial court's finding that he violated a condition of his probation. More specifically, A.D. argues that condition 14 of his court-ordered probation did not include a curfew and that a curfew allegation is a separate and distinct violation of his probation that must be separately pleaded and proved. Further, A.D. contends that to allow the State to prove he violated condition 14 where the State alleged violation of condition 15 would be clearly wrong and unjust.

A trial court's modification of a juvenile disposition is reviewed under an abuse of discretion standard. ***Matter of T.R.S.***, *115 S.W.3d 318, 320 (Tex. App.-Texarkana 2003, no pet.)*. In a probation revocation hearing, the decision whether to revoke rests within the discretion of the trial court. ***Id.*** The trial court is not authorized to revoke probation without a showing that the probationer has violated a condition of the probation imposed by the court. ***Id.*** The burden of proof in a probation revocation hearing is by a preponderance of the evidence. ***Cobb v. State***, *851 S.W.2d 871, 873 (Tex. Crim. App. 1993)*; ***Cardona v.***

***State**, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)*.

When a juvenile challenges the legal sufficiency of the evidence by a no-evidence issue, we consider only that evidence and those inferences which tend to support the challenged findings and disregard any and all evidence and inferences to the contrary. ***In re H.G.**, 993 S.W.2d 211, 213 (Tex. App.-San Antonio 1999, no pet.)*. When reviewing a factual sufficiency challenge in a juvenile case, we consider the totality of the evidence to determine whether the evidence supporting the finding is so weak or the evidence contrary to the finding is so overwhelming that it is clearly wrong and unjust. ***Id.*** The trier of fact is the exclusive judge of the credibility of the witnesses and, as such, may believe or disbelieve any witness and resolve any inconsistencies in the testimony of any witness. ***Matter of T.R.S.**, 115 S.W.3d at 321*; ***In re H.G.**, 993 S.W.2d at 213*.

Officer Behrend testified that he arrested A.D. for allegedly burglarizing an elementary school on December 4, 2003. Behrend testified that the burglary occurred at approximately 8:00 p.m. He also testified that A.D. stated he evaded police on that date and talked about trading the stolen items. A.D. testified that in response to his mother's instructions on that same date, he left his residence around 6:30 p.m. to look for his brother A.D. also admitted that he knew his curfew was 6:00 p.m. Considering only the evidence and inferences tending to support the findings, we conclude that the juvenile court did not abuse its discretion by finding that A.D. violated a condition of his probation by not remaining in the home of the person to whom he was released during curfew hours. *See **In re H.G.**, 993 S.W.2d at 213*.

Having found the evidence legally sufficient, we consider A.D.'s challenge to the factual sufficiency, considering the totality of the evidence. ***Id.*** Behrend admitted that he caught only one alleged burglar at the school, who gave the police A.D.'s name. Behrend acknowledged that while A.D. was being processed at the police department, he denied being involved in the alleged burglary. A.D. testified that he had to comply with his mother's instructions to look for his brother and that his mother was supposed to ensure that he abided by the conditions of his probation. All this evidence tends to favor A.D. However, the trier of fact is the sole judge of the credibility of witnesses, may believe or disbelieve any witness, and may resolve any inconsistencies in the witness's testimony. *See **id.*** In reviewing the totality of the evidence, we conclude that the evidence supporting the finding is not so weak nor is the evidence contrary to the finding so overwhelming that it is clearly wrong and unjust. *See **id.***

Variance Issues Omitted.

NECESSITY DEFENSE

In his first issue, A.D. contends that, if he successfully raised the necessity defense, the juvenile court abused its discretion by finding that he violated a condition of his probation. We must first decide whether A.D. raised the necessity defense. The defendant has the burden of presenting facts raising such a defense. **Sheridan v. State**, *950 S.W.2d 755, 758 (Tex. App.-Fort Worth 1997, no pet.*).

To raise the necessity defense, a defendant must admit that he committed the offense charged and then offer the alleged necessity as a justification for his conduct. ***Ford v. State**, 112 S.W.3d 788, 793 (Tex. App.-Houston [14th Dist.] 2003, no pet.)*. Conduct is justified if (1) the defendant reasonably believes the conduct is immediately necessary to avoid imminent harm, (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct, and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear. *TEX. PEN. CODE ANN. § 9.22* (Vernon 2003). "Imminent" means something that is impending. ***Pennington v. State**, 54 S.W.3d 852, 857 (Tex. App.-Fort Worth 2001, pet. ref'd)*. Harm is imminent when there is an emergency situation and it is "immediately necessary" to avoid that harm. ***Id.*** (quoting ***Jackson v. State**, 50 S.W.3d 579, 594-95*

(Tex. App.-Fort Worth 2001, pet. ref'd)). In other words, a split-second decision is required without time to consider the law. ***Id.***

In the evidence adduced at the modification hearing, A.D. testified that on December 4, his mother instructed him to look for his brother. A.D. admitted that, in response, he left the house after his curfew of 6:00 p.m. A.D. testified that he had to comply with his mother's instructions. However, A.D.'s testimony does not show that he reasonably believed his conduct in obeying his mother's instructions was immediately necessary to avoid imminent harm or that avoiding the harm clearly outweighed the harm sought to be prevented by the condition of his court-ordered probation. *See TEX. PEN. CODE ANN. § 9.22*. Nor does A.D.'s testimony show that he believed the harm was imminent, that there was an emergency situation, or that a split-second decision was required. *See* ***Pennington****, 54 S.W.3d at 857*. Because there is no evidence that A.D.'s conduct was justified, we conclude that he has failed to raise the necessity defense. *See* ***Sheridan****, 950 S.W.2d at 758*. Having concluded that A.D. failed to raise the necessity defense, we do not consider whether the juvenile court abused its discretion by finding that he violated a condition of his probation. Accordingly, we overrule A.D.'s first issue.

Conclusion: The judgment of the trial court is affirmed.

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