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## YEAR 2005 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **Jeopardy attaches in a juvenile proceeding when the jury has been empaneled and sworn. [State v. C.J.F.](05-4-3)**

**On August 25, 2005, the Houston (1<sup>st</sup> Dist.) Court of Appeals held that jeopardy attaching when a jury is empaneled and sworn, concerning adult criminal defendants, applies equally to a juvenile proceedings.**

05-4-3. State v. C.J.F., \_\_\_ S.W.3d \_\_\_, No. 01-04-00257-CV, 2005 Tex.App.Lexis 6931 [Tex.App.—Houston (1<sup>st</sup> Dist), 8/25/05].

**Background.** The State of Texas appeals from dismissal of charges filed against a juvenile, appellee, C.J.F., for engaging in delinquent conduct by committing the felony offense of manslaughter. The trial court dismissed appellee's charges with prejudice on the grounds that the State's petition violated appellee's rights against double jeopardy. The State contends that the trial court's dismissal was erroneous for four reasons. First, the State asserts that appellee failed to satisfy her burden to produce evidence that the facts of the offense were barred by double jeopardy. Second, the State asserts that its nonsuits of the third and fourth amended petitions in cause number 2002-07732J, the pleadings that preceded this cause number, do not constitute a dismissal of the prosecution for the purposes of appellee's right against double jeopardy because the nonsuits were timely taken before any evidence was heard in the case. Third, the State asserts that double jeopardy could not have attached from the third and fourth amended petitions in cause number 2002-07732J because the third amended petition was superseded by the fourth amended petition and was therefore no longer a live pleading, and because the trial court had no jurisdiction over the fourth amended pleading due to lack of service of that petition on appellee. Fourth, as a matter of first impression in Texas, the State contends that, unlike other criminal proceedings, in which jeopardy attaches when the jury is sworn, jeopardy does not attach in a juvenile proceeding until the trier of fact begins to hear evidence or when the first witness is sworn.

**Held.** Affirmed

**Facts.** On April 18, 2002, appellee, a 15-year-old juvenile, was involved in an automobile collision that resulted in the death of Kathryn Sanchez. On September 20, 2002, the State filed its original petition in cause number 2002-07732J, which asserted that appellee intentionally, knowingly, and recklessly caused Sanchez's death. The State filed its first amended petition on October 9, 2002, and filed a second amended petition on January 31, 2003.

On May 1, 2003, the grand jury returned the State's third amended petition, which, like the original petition, alleged that appellee intentionally, knowingly, and recklessly caused Sanchez's death, but, in

addition, authorized a determinate sentence. n1 Upon the State's motion to abandon the words "intentionally" and "knowingly" from the third amended petition, the trial court struck those words from the petition. Believing that the grand jury may have authorized a determinate sentence based on the higher culpable mental states for conduct that was "intentionally" and "knowingly" performed, as compared to "recklessly" performed, the trial court quashed the determinate sentence portion of the petition. After deletion of the higher culpable mental states and the quashing of the authorization for determinate sentencing, the third amended petition remained only as a charge of reckless manslaughter against a juvenile, with no authorization for a determinate sentence. On October 16, 2003, the grand jury returned the State's fourth amended petition, which was identical to the third amended petition's remaining charge of reckless manslaughter, but, in addition, authorized a determinate sentence.

n1 A determinate sentence permits the court to commit the juvenile to the Youth Commission, followed by a possible transfer to the Department of Criminal Justice. *TEX. FAM. CODE ANN. § 54.04(d)(3)* (Vernon Supp. 2004-2005). For a juvenile to be subjected to a determinate sentence the following three requirements must be met: (1) the grand jury must have approved the petition under *Section 53.045*, (2) the court must have found that the child is in need of rehabilitation or that the public is in need of protection, and (3) the child must have engaged in delinquent conduct that consisted of a violation of a penal law listed in *Section 53.045(a)*, which includes manslaughter. *TEX. FAM. CODE ANN. § 53.045* (Vernon 2002), § § 54.04(c), 54.04(d)(3) (Vernon Supp. 2004-2005).

On January 5, 2004, appellee was admonished concerning the range of punishment for the reckless manslaughter charge in the fourth amended petition, which included authorization for a determinate sentence. During the trial court's voir dire of the jury, which followed, the trial court informed the jurors that appellee was charged with reckless manslaughter and that the punishment range included the possibility of 20 years in prison as a determinate sentence if appellee were transferred to adult prison when she turned 21 years of age. A jury was then empaneled and sworn. Immediately after the jury was released for the day, appellee's attorney informed the trial court, for the first time, that appellee had not been properly served with the fourth amended petition, and that the trial court therefore lacked jurisdiction over appellee's fourth amended petition, for which the jury had already been empaneled. Appellee's attorney stated that, although the trial court lacked jurisdiction over appellee's fourth amended petition, appellee was ready to proceed on the third amended petition, the charge that authorized appellee to be sentenced as a juvenile for reckless manslaughter, but without authorizing determinate sentencing. The State's attorney requested a hearing to determine whether appellee had been properly served, and the trial court conducted an evidentiary hearing on the issue.

Following the hearing and after the trial court questioned whether appellee had been served with the fourth amended petition, appellee and the State's attorney each represented to the trial court that the trial court lacked jurisdiction over the fourth amended petition because it had not been served on appellee. Appellee and the State's attorney disputed, however, whether the third amended petition remained a live pleading in the trial court.

The State argued that the third amended petition had been superseded by the fourth amended petition and that it was therefore no longer a live pleading. Appellee's attorney restated his readiness to proceed on the third amended petition, which did not include the possibility of a determinate sentence, argued that jeopardy had attached on the third amended petition because a jury had been selected and sworn, and objected to dismissal of the jury or declaration of a mistrial.

In its arguments to the trial court concerning its impending decision whether to dismiss the empaneled

jury, the State's attorney criticized appellee's decision to wait to object about the lack of service until after the jury was empaneled and sworn and argued that appellee's "sandbag" technique was unfair. The State's attorney refused to proceed to trial before the jury that had been empaneled on the grounds that the trial court had no jurisdiction to proceed with the fourth amended petition due to the lack of service of that petition on appellee. The State further contended that the jury had never been empaneled to decide the third amended petition because that petition was no longer a live pleading due to the fourth amended petition. The State requested a nonsuit of both the third and fourth amended petitions, which the trial court granted, and the empaneled jury was dismissed over appellee's objection.

On January 13, 2004, the State filed its original petition in new cause number, 2004-00332J. Like the fourth amended petition, the new petition charged appellee with reckless manslaughter and included authorization for a determinate sentence. Appellee filed a motion to dismiss the cause based on double jeopardy violations. In its response to appellee's motion to dismiss, the State contended that double jeopardy did not attach because the trial court lacked jurisdiction to proceed on the fourth amended petition due to lack of service. The trial court dismissed the cause with prejudice, holding that double jeopardy barred any future prosecutions arising out of the same transaction.

**Opinion.** The State's second and fourth arguments assert that appellee's charge is not barred by double jeopardy because the State's nonsuits were timely as a matter of civil law, having been taken before any evidence was heard in the case. The State also asserts that, unlike other criminal proceedings, in which jeopardy attaches when the jury is sworn, jeopardy does not attach in juvenile proceedings until the trier of fact begins to hear evidence or when the first witness is sworn. We address these assertions together.

Juvenile proceedings and appeals from those proceedings are governed by an unlikely and sometimes perplexing hybrid of civil and criminal law. *In the Matter of R.S.C.*, 940 S.W.2d 750, 751-52 (Tex. App.--El Paso 1997, no writ). An appeal from an order of a juvenile court is governed by the requirements pertaining to civil cases generally. *TEX. FAM. CODE ANN. § 56.01(a)-(b)* (Vernon 2002). A juvenile-delinquency proceeding is considered a civil proceeding, but is quasi-criminal in nature. *In re J.R.*, 907 S.W.2d 107, 109 (Tex. App.--Austin 1995, no writ); *C.E.J. v. State*, 788 S.W.2d 849, 852 (Tex. App.--Dallas 1990, writ denied); *Smith v. Rankin*, 661 S.W.2d 152, 153 (Tex. App.--Houston [1st Dist.] 1983, orig. proceeding). The juvenile is guaranteed the same constitutional rights as an adult in a criminal proceeding because the juvenile delinquency proceedings seek to deprive the juvenile of his liberty. *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 1070, 25 L. Ed. 2d 368 (1970) ("The Due Process Clause does require application during the adjudicatory hearing of 'the essentials of due process and fair treatment.'"); *J.R.*, 907 S.W.2d at 109; *C.E.J.*, 788 S.W.2d at 852; *Smith*, 661 S.W.2d at 153 (citing *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. *In re Gault*, 387 U.S. at 13, 87 S. Ct. at 1436.

The doctrine of double jeopardy, derived from the *Fifth Amendment to the Constitution of the United States* and applied to the states through the *Fourteenth Amendment*, prohibits a state from putting a defendant in jeopardy twice for the same offense. *See generally Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); *Breed v. Jones*, 421 U.S. 519, 541, 95 S. Ct. 1779, 1791, 44 L. Ed. 2d 346 (1975) (applying due process right against double jeopardy to juveniles); *Downum v. United States*, 372 U.S. 734, 737-38, 10 L. Ed. 2d 100, 83 S. Ct. 1033(1963); *Ex parte Little*, 887 S.W.2d 62, 64 (Tex. Crim. App. 1994) (citing *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978)). In a jury trial of an adult charged with a crime, jeopardy attaches when the jury is empaneled and sworn. *Crist*, 437 U.S. at 38, 98 S. Ct. at 2162. The rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy. *Id.* A defendant's "valued right to have his trial completed by a particular tribunal" is now within the protection of the constitutional guarantee against double jeopardy, since it is that "right" that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. *Id.* at 36; 98

*S. Ct. at 2161*. The time when jeopardy attaches in a jury trial "serves as the lynchpin for all double jeopardy jurisprudence." *Id. at 38; 98 S. Ct. at 2162*. After jeopardy attaches, any charge that is dismissed, waived, abandoned or on which the jury returns an acquittal, may not be retried. *Ex parte Scelles, 511 S.W.2d 300, 301 (Tex. Crim. App. 1974)*.

Double jeopardy constitutional protections enjoyed by adults accused of crimes also apply to juveniles. *Schall v. Martin, 467 U.S. 253, 263, 104 S. Ct. 2403, 2409, 81 L. Ed. 2d 207 (1984)* (citing *Breed, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346*); *In re J.R.R., 696 S.W.2d 382, 384, 28 Tex. Sup. Ct. J. 606 (Tex. 1985)*. When the object of a proceeding is to determine whether a juvenile has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years, the proceeding puts the juvenile in jeopardy. *Breed, 421 U.S. at 529, 95 S. Ct. at 1785*. We are not aware of any courts that have held that jeopardy attaches in juvenile cases at the same time as in an adult criminal proceeding, *i.e.*, when the jury is sworn. But, the constitutional protections afforded to adult criminal defendants must also be afforded to juvenile defendants whose liberty is at stake. *See id.* Court's must "eschew 'the 'civil' label-of-convenience which has been attached to juvenile proceedings'" when a constitutional right is at issue. *Id.* (citing *In re Gault, 387 U.S. at 50, 87 S. Ct. at 1455*).

We hold that the constitutional guarantee that jeopardy attaches when the jury is empaneled and sworn, as recognized by *Crist* concerning adult criminal defendants, applies equally to a juvenile proceeding whose object is to determine whether the juvenile has committed acts that violate a criminal law and whose potential consequences include the deprivation of liberty for many years. More simply stated, jeopardy attaches in a juvenile proceeding, as in an adult criminal proceeding, when the jury has been empaneled and sworn. *See Schall, 467 U.S. at 263, 104 S. Ct. at 2409; Breed, 421 U.S. at 529, 95 S. Ct. at 1785; Crist, 437 U.S. at 38, 98 S. Ct. at 2162*. Therefore, jeopardy attached to appellee's juvenile proceedings when the jury was empaneled and sworn.

The State insists, however, that civil rules of procedure control, instead of the criminal law principles of double jeopardy, and that its nonsuits were timely filed in accordance with the rules of civil procedure. The State relies on *In re S.B.C.* to demonstrate that these rules control over jeopardy principles in a juvenile proceeding. *805 S.W.2d 1 (Tex. App.--Tyler 1991, writ denied)*. *In re S.B.C.*, however, did not address the effect of a dismissal after the jury had been sworn, as here, and is distinguishable from the case before us for that reason. *See id. at 9* (holding that double jeopardy did not bar refiling of original cause dismissed after detention hearing under circumstances in which court did not adjudicate merits of original cause). We therefore conclude that, even if the nonsuits were timely filed according to the civil rules of procedure, we hold that jeopardy attached to appellee's juvenile proceedings when the jury was empaneled and sworn because the civil rules of procedure must bow to the constitutional protections against double jeopardy. *See Schall, 467 U.S. at 263, 104 S. Ct. at 2409; Breed, 421 U.S. at 531, 95 S. Ct. at 1787; Crist, 437 U.S. at 38, 98 S. Ct. at 2162*.

We are not persuaded by the State's second and fourth contentions regarding the trial court's ruling and overrule those contentions.

### **Appellee's Burden to Present the Trial Court with a Sufficient Record**

In its first challenge to the trial court's ruling, the State contends that appellee failed to satisfy her burden to present the trial court with a sufficient record to prove that the prosecution of cause number 2004-00332J would violate her double jeopardy rights. The State further contends that appellee did not satisfy her burden to prove a double jeopardy violation because the parties litigated appellee's double jeopardy claim by written motions alone.

The Court of Criminal Appeals addressed these issues recently in *Hill v. State*, 90 S.W.3d 308 (Tex. Crim. App. 2002), in which the defendant filed a motion contending that his trial was barred by double jeopardy. *Hill*, 90 S.W.3d at 311, 313 (discussing *State v. Torres*, 805 S.W.2d 418, 421 (Tex. Crim. App. 1991), and stating that the "initial burden of proving the double jeopardy is on the defendant."). The trial court ruled on the motion after discussing the events of the previous trial with the prosecutor and defense counsel. *Id.* at 311-12. On appeal, the State argued that the defendant's double jeopardy claim must fail because he did not introduce any supporting evidence. *Id.* at 312. The Court of Criminal Appeals disagreed and held that, although the defendant did not introduce evidence on the motion, "the State did not object to the format of the hearing or the manner in which the Court made its findings. In fact, the State readily participated in the proceedings." *Id.* Moreover, the court concluded that when "a plea of jeopardy is before the same court and judge," the "requirements concerning the plea are relaxed." *Id.*

The court reiterated the rationale supporting this conclusion, first explained in *Shaffer v. State*, by stating, "the requirement that the defendant present evidence in support of his allegation of former jeopardy serves a legitimate state interest" because "the trial court has no way of knowing that the allegations in the plea are true." *Hill*, 90 S.W.3d at 312 (quoting *Shaffer v. State*, 477 S.W.2d 873, 875 (Tex. Crim. App. 1971)). But, "the procedural requirements which must be followed are not arid rituals of meaningless form." *Id.* Instead, "former jeopardy need not be specially pled" when the trial court either knows or should know of the former proceeding, such as in those cases where the former jeopardy arose in the same case." *Id.* The rule does not apply, therefore, when it is unnecessary or would serve no purpose. *Id.* (quoting *Shaffer*, 477 S.W.2d at 875-76).

Here, as in *Hill* and *Torres*, requiring a defendant to present evidence in support of his double jeopardy claim would exalt form over substance. *See id.*; *Torres*, 805 S.W.2d at 422. The motion to dismiss based on double jeopardy was before the same trial court and judge, and was made shortly after the State filed the new petition in cause No. 2004-00332J. Requiring appellee to have presented evidence to the trial court would "serve no purpose" because the judge knew of the former proceeding, and because the judge, as well as both parties, had discussed double jeopardy when the State non-suited the third and fourth amended petitions. *See Hill*, 90 S.W.3d at 312. We note further that, as in *Hill* and in *Torres*, the State did not object to the format of the hearing and did not request a hearing on the motion to dismiss. *See Hill*, 90 S.W.3d at 312; *Torres*, 805 S.W.2d at 421. Instead, the State readily participated in the proceedings by filing a written response to appellee's motion to dismiss. *See id.*

Not having objected to the format of the hearing or the manner in which the trial court made its findings, and having actually participated in those proceedings, the State may not claim now that appellee did not meet her burden of producing sufficient evidence. *See Torres*, 805 S.W.2d at 421. Likewise, the State may not object now to the nature of the proceedings. *See id.*

We are not persuaded by the State's first contention that the trial court erred and therefore overrule that contention.

### **Jurisdiction and Lack of Service for the Fourth Amended Petition**

In its third challenge to the trial court's ruling, the State contends that jeopardy could not have attached because the trial court lacked jurisdiction over the fourth amended petition due to lack of service.

The record shows that appellee was served with the third amended petition that alleged reckless manslaughter without the possibility of determinate sentencing, but the trial court concluded that appellee may not have been served with the fourth amended petition, which was identical to the third amended petition, except that it allowed the possibility of a determinate sentence.

As the State acknowledges, this Court has held that lack of service of a later amended petition is not required for the trial court to have jurisdiction when a juvenile has been properly served with the original petition. *See In re S.D.W.*, 811 S.W.2d 739, 746 (Tex. App.--Houston [1st Dist.] 1991, no writ) (citing *McBride v. State*, 655 S.W.2d 280, 283 (Tex. App.--Houston [14th Dist.] 1983, no writ) ("When jurisdiction attached [by virtue of a properly served citation in the original petition], the court did not lose jurisdiction because the State may have failed to follow the statutory guidelines in serving appellant with an amended petition."); *In re G.A.T.*, 16 S.W.3d 818, 823 (Tex. App.--Houston [14th Dist.] 2000, *pet. denied*) (holding that juvenile court acquires jurisdiction over respondent when served with original petition); *cf. In re M.D.R.*, 113 S.W.3d 552, 553-54 (Tex. App.--Texarkana, 2003, no *pet.*) (holding that, when nothing in record affirmatively showed service on juvenile, trial court did not have jurisdiction).

When initially filed, the State's petition provides notice to the juvenile, and service of summons on the juvenile gives the trial court personal jurisdiction over the juvenile. TEX. FAM. CODE ANN. § § 53.04, .06, .07 (Vernon 2002); *Johnson v. State*, 551 S.W.2d 379, 382 (Tex. Crim. App. 1977). We conclude that the trial court acquired jurisdiction over appellee, who was properly served with the original petition, regardless of whether appellee was served with the subsequent amended petition. *See In re S.D.W.*, 811 S.W.2d at 746.

The State urges us not to rule that service on a later amended petition is not required for the trial court to have jurisdiction over a juvenile who is properly served with the original petition, for the following reasons: (1) juvenile defendants should be served in the same manner as adult defendants who receive service of subsequent indictments, (2) the rules of civil procedure require that, when subsequent pleadings impose a more onerous judgment on a defendant, those pleadings must be served on the defendant, (3) appellee's rights to due process require that she be served with the fourth amended petition because it imposes the possibility of a determinate sentence, which the third amended petition did not, and (4) the trial court, State's attorney, and appellee's attorney were all "of the opinion" that the trial court lost jurisdiction over appellee's fourth amended petition due to lack of service. Furthermore, and in the alternative, the State contends that, even if the trial court had jurisdiction to proceed on the fourth amended petition, there was a "manifest necessity" for the trial court to grant the dismissal.

The State did not, however, present these argument to the trial court in its response to appellee's motion to dismiss on the grounds of double jeopardy. Although not usually in the position of appellant, the State must follow the rules of appellate procedure when acting as appellant. *State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998). Accordingly, every argument that the State wishes to assert on appeal must have first been made at trial. *Id.*; *see TEX. R. APP. P. 33.1*. As the Court of Criminal Appeals has recently reaffirmed, *rule 33.1's* "raise it or waive it" forfeiture rule applies equally to the State and the defendant. *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002). Because the State did not raise these issues to the trial court, the State has not preserved them for our review and any error has been waived. *See TEX. R. APP. P. 33.1; Martinez*, 91 S.W.3d at 336.

We therefore reject the State's third assertion of trial court error.

**Conclusion.** The trial court properly dismissed cause no. 2004-00332J. We affirm the judgment of the trial court.