

Review of Recent Juvenile Cases (2007)

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

Failure to file a motion for new trial waives factual sufficiency challenge on appeal in jury trial only.[In the Matter of F.F.G.](07-1-8)

On November 29, 2006, the Austin Court of Appeals corrected a prior opinion (in rehearing) holding that failure to file a motion for new trial does not waive factual sufficiency challenges in a bench trial, only in a jury trial.

¶ 07-1-8. **In the Matter of F.F.G.**, MEMORANDUM, No. 03-05-00854-CV, 2006 Tex.App.Lexis 10306 (Tex.App.—Austin, 11/29/06). On rehearing. Substitute and correct opinion ¶ 06-4-6, **In the Matter of F.F.G.**, MEMORANDUM, No. 03-05-00854-CV, 2006 Tex.App.Lexis 8844 (Tex.App.—Austin, 10/12/06).

Background: F.F.G. appeals from his adjudication as delinquent based on the offense of criminal mischief resulting in pecuniary loss in an amount more than \$50 but less than \$500. *See Tex. Penal Code Ann. § 28.03* (West Supp. 2006). After adjudicating F.F.G. delinquent, the trial court placed F.F.G. on nine months' probation and ordered him to pay restitution of \$408. In his sole point of error, F.F.G. contends that the evidence presented at trial is factually insufficient to support the trial court's adjudication of delinquency. We affirm the trial court's adjudication.

Opinion on Rehearing: We must address the State's argument that F.F.G. failed to properly preserve the issue of factual sufficiency. The State argues that because the Texas Family Code mandates that juvenile delinquency proceedings are governed by the Texas Rules of Civil Procedure, *see Tex. Fam. Code Ann. § 51.17(a)* (West Supp. 2006), F.F.G. was required to file a motion for new trial to preserve his factual sufficiency complaint. However, F.F.G. was adjudicated delinquent in a bench trial; a motion for new trial is only required to preserve complaints about the factual sufficiency of the evidence supporting jury findings. *Tex. R. App. P. 33.1(d)*; *Tex. R. Civ. P. 324(b)(2)*; *Westech Eng'g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 197 (Tex. App.—Austin 1992, *no pet.*). We hold that F.F.G. properly preserved his factual sufficiency complaint for appellate review.

Conclusion: We withdraw our October 12, 2006 opinion and judgment, and substitute this opinion in order to address an error raised in F.F.G.'s motion for rehearing. While we agree with F.F.G. that a motion for new trial was not required to preserve the issue of factual sufficiency, we adhere to the holding in our original opinion that the evidence presented is factually sufficient to support the trial court's adjudication, and thus overrule F.F.G.'s motion for rehearing, which requested that we reverse the judgment of the trial court.