

Review of Recent Juvenile Cases (2007)

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

Under section 52.02(a), if a child is taken to a juvenile processing office within the meaning of the statute, it is not necessary that the child also be taken to an official designated by the juvenile board. [Gamboa v. State](07-1-13A)

On January 3, 2006, the Houston (14th Dist.) Court of Appeals held that if the option to take a child to the juvenile processing office is exercised, the child need not also be taken to an official designated by the juvenile board.

¶ 07-1-13A. **Gamboa v. State**, MEMORANDUM, No. 14-05-00942-CR, 2007 Tex.App.Lexis 405 (Tex.App.—Houston [14th Dist.], 1/3/07).

Facts: On the night of December 26, 2003, Fausto Montes, Clint Drabeck, and Jason and Ashley Olivas went to a barbeque at Kenneth Wood's house in southwest Houston. Around 11:30 p.m., Wood saw a vehicle pass by his home for the second time that night. The occupants of the vehicle appeared to look very closely at Wood's guests. Shortly thereafter, Wood heard several gunshots coming from the direction of the vehicle and immediately got his gun and returned fire. The vehicle instantly drove away. Wood and his guests discovered that in the fray Montes had been shot.

The party guests went inside the house to call for help. In the meantime, Ashley Olivas unsuccessfully attempted to revive Montes through cardio-pulmonary resuscitation. By the time the ambulance arrived a short time later, Montes was dead.

Just after midnight, Alaine Edwards, at her home in the same area of far southwest Houston, heard her doorbell ring. The man at the door, later identified as appellant, asked if he could use her telephone. Edwards refused the request, but stated that she would call someone for him if necessary. Although appellant declined her offer, he lingered outside her home. After hearing voices outside the door, Edwards placed a 9-1-1 call. She then summoned her neighbor, John Nash, who was the head of her local "Neighborhood Watch" program, to come and investigate. Shortly thereafter, Edwards saw Nash approach appellant several houses down the street. After a brief exchange, Nash and appellant parted ways. Nash, however, remained suspicious and decided to look for appellant again.

Meanwhile, Officer James Welborn with the Houston Police Department, who was on patrol in the area, was dispatched to Wood's residence shortly after midnight. Officer Welborn secured the scene until homicide detective Sergeant James Ramsey and his partner, Sergeant Edward Gonzalez, arrived shortly before 2:00 a.m. Sergeant Ramsey learned that the suspects' vehicle had been located by another police officer, Pamela Tyler, a few miles away. Officer Tyler had discovered a grayish-colored vehicle parked on the wrong side of the street, resting partially in an open field and partially on the sidewalk. The vehicle had significant damage, including several broken windows. When Officer Tyler searched the vehicle, she found a sawed-off shotgun in the

backseat, containing a shell that had been fired recently. Tow truck drivers informed Officer Tyler that a man had walked away from the vehicle carrying a gun. Shortly thereafter, the same man began walking toward the abandoned vehicle. Officer Tyler commanded him to the ground but soon discovered that the man was Nash. He suggested that Officer Tyler look for two to three Hispanic males and provided detailed descriptions of them to the officer.

While Officer Tyler continued pursuit, Nash and another neighbor, Edward Williams, searched the neighborhood for the man (appellant) Alaine Edwards had sighted. Williams found him hiding in a large trash can in Edwards's yard. Holding him at gunpoint until the police arrived, Williams told appellant, "if you move, I will shoot you." Around 1:30 a.m., Officer Ciro Pena, who had been dispatched to the area to assist Officer Tyler, found Williams holding appellant at gunpoint and took appellant into custody. Williams informed Officer Pena that two other individuals had run further down the street. Officer Pena, who was on foot, briefly handcuffed appellant to a light pole while he searched the area for other possible suspects. About that time, Houston Police Officer Dubose arrived at the scene in a patrol car, and Officer Pena placed appellant in the back seat. After taking custody of appellant, Officer Dubose unsuccessfully attempted to pursue another vehicle sighted by Officer Pena, but returned shortly thereafter. Before long, two other suspects were apprehended and also placed in Office Dubose's patrol car.

Appellant was separated from the other suspects and placed in the back seat of Officer Pena's patrol car. Appellant admitted that the shotgun found in the vehicle belonged to him. A test of appellant's hands revealed fresh gunshot residue. Officer Gordon Oran, assigned to canine duty with the Houston Police Department, was also dispatched to the area to search for suspects and weapons. Officer Oran's dog located a handgun in the bushes near where appellant was found.

While all of this activity was taking place, Sergeant Ramsey, still at Wood's residence, asked the party guests if they could identify the vehicle involved in the drive-by shooting. Ashley Olivas was taken to the vehicle's location and positively identified the vehicle as the one involved in the drive-by shooting. By the time Sergeant Ramsey arrived with Olivas, three suspects had been apprehended -- appellant, Raymond Duran, and Jose Aguilera. Sergeant Ramsey spoke to Duran and learned that he had been the driver of the vehicle. Duran consented to a search of the vehicle and offered a statement.

Immediately after speaking to Duran, around 3:00 a.m., Sergeant Ramsey began interrogating appellant. Appellant was very cooperative and openly offered information about what had transpired, such as the placement of the individuals in the vehicle at the time of the shooting. During this brief talk, Sergeant Ramsey learned that appellant was only sixteen years old, and immediately terminated the discussion. Sergeant Ramsey next questioned Jose Aguilera, who was uncooperative and refused to offer a statement. However, a test of Aguilera's hands revealed the presence of gunshot residue.

After securing the scene, Sergeant Ramsey immediately drove appellant to Magistrate Judge Villagomez's chambers, which functioned as a juvenile processing office. At 4:40 a.m., Judge Villagomez read appellant his rights in both English and Spanish. After the warnings, Sergeant Ramsey transported appellant to the main police station at 1200 Travis, in downtown Houston. Appellant was placed in interview room number 6 on floor 6, which also was designated as a juvenile office. Sergeant Ramsey interviewed appellant from 5:14 a.m. until 5:36 a.m.. During this brief interview, appellant admitted that he fired one round from a double-barrel shotgun and that Aguilera had fired at least two or three rounds from a handgun. Immediately after the interview, Sergeant Ramsey transported appellant to the juvenile detention center in southeast Houston.

Appellant was charged with the felony offense of murder. He pleaded "not guilty" and sought to suppress the audio-taped statements. The trial court refused to suppress the statements. A jury found appellant guilty as

charged, and assessed punishment at twenty-three years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant contends the trial court erred in denying his motion to suppress. More specifically, appellant, a juvenile at the time of the offense, contends that Sergeant Ramsey failed to comply with *section 52.02(a) of the Texas Family Code* by failing to take him before an "official" designated by the juvenile court. The State responds that appellant waived this complaint because he failed to argue, during the motion-to-suppress hearing, that Judge Villagomez was not an official designated by the juvenile board. In the alternative, the State contends that the statute does not require that the juvenile be taken before an official designated by the juvenile board, but only that the juvenile be taken before the office or an official designated by the juvenile board. See *TEX. FAM. CODE ANN. § 52.02(a)(2)* (Vernon Supp. 2006).

As a threshold matter, we must determine whether appellant preserved this issue for our review. During the motion to suppress hearing, appellant made the following arguments:

Counsel: Very briefly, I believe that the manner in which Mr. Gamboa was picked up upon his arrest sometime after midnight -- he was taken into custody by a police officer. He is handcuffed around the light pole, I believe, for some period of time. My client says 10, 15 minutes. The officer says maybe 30 seconds, of course. The judge is -- it appears that *52.02(a)* has been violated in that no effort was made to take, first of all, to notify the guardian or parent of Franco Gamboa. It was not until 7:25 or 7:15 in the morning of the 27th, some six, seven hours after he had been detained.

He was not taken immediately as the code requires, that without unnecessary delay, and he has been--he has to be taken to a juvenile processing facility. He was detained. He was taken to the scene of where the accident occurred on Orem Street. He was there for a while, sitting in the back of the vehicle, a police officer's unit, later on transferred from that unit, started to be interviewed by Officer Ramsey.

Once he realized that he was dealing with a juvenile, according to his testimony, he stopped asking him questions, and soon thereafter, not immediately, but soon thereafter took him to the magistrate. He still had to tie ends at the scene that he was in charge with on Orem Street. And it was sometime, sometime after that that he proceeded to take him to the magistrate, I believe Judge Villagomez, at 49 San Jacinto.

No effort was made to make contact with parents or guardians or anyone at that has custody of Franco Gamboa at that time. And according to *52.02 of the Family Code*, it states very clearly that without unnecessary delay and without first taking the child to any place other than a juvenile processing officer, designated under *Section 52.02*, they must do the following then. That section enumerates six things that the officers must do. None of which were done in this case.

But instead Mr. Gamboa is driven around by several officers. We know Officer Pena and Ramsey are involved. And we also know of another officer that also transported him out there at the scene at the, at those hours of the early morning. We feel, your Honor, that *52.02* has been violated; and as a result, any confession obtained of the violation we feel should be suppressed. Thank you, your Honor.

...

Counsel: Your Honor, going back to *Comer v. State* and other cases that had resulted from that decision, again, very strictly applying 52.02(a), the Court in *Comer v. State*, about ten years ago, in explaining the language of 52.02 dictated what an officer must do, quote, without unnecessary delay when he takes a child into custody. And in that case the Court concluded that the clear intent of the statutory scheme as a whole from this point on is that the decision as to whether further detention is called for is to be made not by law enforcement personal but by the intake or other authority, other authorized officer, of the court.

It appears that the legislature intended to restrict involvement of law enforcement officers to initial seizure and prompt release of commitment of the juvenile offender.

I submit to the Court that through the testimony of the officers that testified and also the witnesses that Mr. Gamboa presented there is certainly a violation of the sections of the Family Code that we have alluded to. And for those reasons we ask this Court to suppress the confession or statement that was obtained from Mr. Gamboa while he was in custody, and his rights under the Family Code were being violated.

The Court: That will be denied.

Within the above exchange, appellant does not make the complaint he now makes on appeal -- that Judge Villagomez was not an official designated by the juvenile board. When the appellate complaint fails to comport with the trial objection, nothing is preserved for review. *See Swain v. State, 181 S.W.3d 359, 367 (Tex. Crim. App. 2005)*. Because appellant's complaint on appeal does not comport with the arguments made in the trial court, it is waived. *See Pham v. State, 125 S.W.3d 622, 629 (Tex. App.-Houston [1st Dist.] 2003)* (concluding that error was not preserved when defendant failed to allude to the failure of the police to take him promptly to particular room at police station specifically designated as juvenile processing office upon arrest for murder), *aff'd, 175 S.W.3d 767 (Tex. Crim. App. 2005)*. However, even if appellant had not failed to preserve error, we would find no merit in his first issue.

Appellant's complaint is that once Sergeant Ramsey decided to take him into custody, he was required to cease any further investigation of the case, and immediately take him to an official designated by the juvenile board. Appellant contends that because the record fails to show that Judge Villagomez was an "official" designated by the juvenile board, appellant's rights were violated, and, therefore, the oral statements he made to Sergeant Ramsey should have been suppressed. Appellant's interpretation of the statute is incorrect.

Appellant relies on *Comer v. State, 776 S.W.2d 191 (Tex. Crim. App. 1989)*, in which the Court of Criminal Appeals reviewed whether a written statement by a juvenile should be suppressed when section 52.02(a) had not been followed but the statement appeared to be admissible under section 51.09(b)(1). *Id. at 194-95*. In that case, three hours had elapsed from the time the juvenile was taken into custody until he was transported to a juvenile detention center. *Id.* In the interval, the juvenile was taken to a justice of the peace from whom he received the appropriate Family Code admonishments and then made a full confession in writing before the justice of the peace. *Id.* On review, the Court of Criminal Appeals concluded that the three-hour time-period was an unnecessary delay and that the written statement was inadmissible, notwithstanding section 51.09(b)(1). *Comer, 776 S.W.2d at 196*. n1 The high court stated that Title Three of the Family Code contained competing interests: to protect "the public from the unlawful acts of children while concomitantly insulating those children from the stigma of criminality and providing for their welfare and edification." *Id. at 193*. The *Comer* court then held that, "[W]here the officer deems it necessary to take the child into custody, section 52.02(a) . . . dictates what he must then do 'without unnecessary delay and without first taking the child

anywhere else." *Id. at 194*. Because *section 52.02(a)*'s provisions were not followed, and the taint of illegality had not dissipated, there was a violation of *article 38.23 of the Code of Criminal Procedure*, and the court remanded the case for a harm analysis. *Id. at 196-97*. Appellant does not complain that his rights were violated because there was an "unnecessary delay" in taking him to a juvenile processing office or an official designated by the juvenile board, only that Judge Villagomez was not an official designated by the juvenile board.

n1 We note that *section 51.095* is the current section governing the admissibility of the statement of a child.

Subject to an exception that does not apply to the facts of this case, under *section 52.02(a)*, "a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office designated under *Section 52.025*," shall do one of the following:

- (1) release the child to a parent, guardian, custodian of the child, or other responsible adult upon that person's promise to bring the child before the juvenile court as requested by the court;
- (2) bring the child before *the office or an official* designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates a condition of probation imposed by the juvenile court;
- (3) bring the child to a detention facility designated by the juvenile board;
- (4) bring the child to a secure detention facility as provided by Section 51.12 (j);
- (5) bring the medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment; or
- (6) dispose of the case under Section 52.03. n2

TEX. FAM. CODE ANN. § 52.02(a). (emphasis added).

The plain language of this section does not require that the child must be taken before an official designated by the juvenile board, but rather that he be brought before the office *or* an official designated by the juvenile board. The officers complied with the plain language of *section 52.02(a)*. Because Sergeant Ramsey was the only homicide detective at the scene, he could not leave with appellant until the scene was secure, which took thirty to forty minutes. As soon as Sergeant Ramsey had ensured that the other homicide officers were on their way to collect evidence and process the scene, he took appellant to Judge Villagomez's chambers, which functioned as a juvenile processing office. While there, appellant was given his warnings. Following these warnings, appellant was taken to another designated juvenile processing office, where his statement was taken. Immediately thereafter, appellant was transported to a juvenile detention center. Based on this evidence, we conclude that it was not necessary that Judge Villagomez be an official designated by the juvenile board. *Cf. Baptist Vie Le v. State, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999)* (concluding that juvenile's statement should have been suppressed because there was nothing in the record to support that the homicide division at the Houston Police Department was an office designated by the juvenile court under *section 52.02(a)*). n3

n2 *Section 52.025* provides as follows:

(a) The juvenile board may designate an office or a room, which may be located in a police facility or sheriff's offices, as the juvenile processing office for the temporary detention of a child taken into custody under Section 52.01. The office may not be a cell or holding facility used for detentions other than detentions under this section. The juvenile board by written order may prescribe the conditions of the designation and limit the activities that may occur in the office during the temporary detention.

(b) A child may be detained in a juvenile processing office only for:

(1) the return of the child to the custody of a person under *Section 52.02(a)(1)*;

(2) the completion of essential forms and records required by the juvenile court or this title;

(3) the photographing and fingerprinting of the child if otherwise authorized at the time of temporary detention by this title;

(4) the issuance of warnings to the child as required or permitted by this title; or

(5) the receipt of a statement by the child under Section 51.095(a)(1), (2), (3), or (5).

(c) A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney.

(d) A child may not be detained in a juvenile processing office for longer than six hours.

TEX. FAM. CODE ANN. § 52.025 (Vernon Supp. 2006).

n3 In *Baptist*, the Court of Criminal Appeals considered whether *section 52.02(a)* was violated when the officer took the juvenile to a magistrate and then directly to the homicide division in the Houston Police Department. *993 S.W.2d at 655*. The high court concluded that because the homicide division was not a juvenile processing center and did not satisfy any of the other statutory options in *section 52.02(a)*, the statement taken was inadmissible. *Id*; see also *Gonzales v. State*, *67 S.W.3d 910, 912-13 (Tex. Crim. App. 2002)*.

Conclusion: Because appellant was taken to a juvenile processing office within the meaning of the statute, it is not necessary that Judge Villagomez was an official designated by the juvenile board, and, therefore, appellant's rights under *section 52.02(a)* were not violated. Accordingly, we overrule appellant's first issue.