

Review of Recent Juvenile Cases (2007)

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

In determinate sentence transfer hearing, trial court did not abuse its discretion by denying request to appoint an expert.[In the Matter of A.A.L.](07-2-11)

On March 8, 2006, the Houston [14th Dist.] Court of Appeals concluded that the trial court did not abuse its discretion in impliedly concluding that Respondent failed to show he had a particularized need for an expert at the transfer hearing.

¶ 07-2-11. **In the Matter of A.A.L.**, MEMORANDUM, No. 14-06-00027-CV, 2007 Tex.App.Lexis 1845 (Tex.App.—Houston [14th Dist.], 3/8/07).

Facts: In May 2004, A.A.L. was committed to three years' confinement at the Texas Youth Commission ("TYC"), with a possibility of transfer to the Texas Department of Criminal Justice ("TDCJ"), for engaging in delinquent conduct by committing the offense of aggravated assault. In August 2005, TYC requested that appellant be transferred to TDCJ to serve out the remainder of his sentence because he was over the age of sixteen and "his conduct within [TYC] . . . indicated that the welfare of the community require[d] his transfer." The trial court held a hearing on this transfer request on October 6, 2005.

At the transfer hearing under *section 54.11 of the Texas Family Code*, appellant requested a continuance and appointment of an expert so that a new psychological evaluation could be done because the evaluation included with TYC's transfer request was five months old and included information that was no longer accurate. *See TEX. FAM. CODE § 54.11* (Vernon Supp. 2006). Specifically, A.A.L.'s counsel noted that A.A.L. had obtained his General Equivalency Diploma ("G.E.D.") since the last evaluation, and that he was not a member of a gang, contrary to information included in the evaluation. The trial court denied A.A.L.'s request and proceeded with the hearing based on the reports in the file, including the five-month-old psychological evaluation.

During testimony at the hearing, TYC's representative, Leonard Cucolo, acknowledged that A.A.L. had obtained his G.E.D. Cucolo also stated that appellant was very disruptive and aggressive towards others, including staff members. A.A.L. had over 150 incidents of misconduct and was referred to security for handling on over twenty occasions. Because of his behavioral problems, A.A.L. was never eligible to participate in the capital offenders treatment program recommended for him by TYC. A.A.L. testified that while he "hangs around with" gang members, he is not a member of a gang. He acknowledged he had behavioral problems while at TYC, but stated that over the last month, his behavior had improved. He testified he was looking forward to participating in the capital offenders program at TYC, and that he did not want to be transferred to TDCJ. At the conclusion of the hearing, the trial court ordered A.A.L. transferred to TDCJ.

Held: Affirmed

Memorandum Opinion: In his sole issue, A.A.L. asserts the trial court erred in denying his request for the appointment of a psychologist. In *Ake v. Oklahoma*, the United States Supreme Court stated that the State must provide a defendant with the basic tools to present his defense within our adversarial system. See 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985). Under certain circumstances, the trial court may be required to appoint an expert to assist the defense. See *Griffith v. State*, 983 S.W.2d 282, 286-87 (Tex. Crim. App. 1998). For the purposes of our analysis, we presume, without deciding, that the *Ake* analysis applies to a transfer hearing under section 54.11 of the Texas Family Code. n1 See TEX. FAM. CODE § 54.11.

n1 The Beaumont Court of Appeals has held that the *Ake* analysis applies to such transfer hearings. See *In the Matter of J.E.H.*, 972 S.W.2d 928, 929 (Tex. App.--Beaumont 1998, pet. denied). However, other courts have stated that hearings under section 54.11 of the Texas Family Code are not part of the guilt-innocence determination and that during such hearings juveniles do not have any of the following: (1) a constitutional right to a jury trial, (2) a constitutional right to confront witnesses, or (3) the due process rights that the juvenile would have at a trial. See *In re C.D.T.*, 98 S.W.3d 280, 282-83 (Tex. App.--Houston [1st Dist.] 2003, pet. denied).

We review the trial court's denial of a request for appointment of a defense expert under an abuse-of-discretion standard. The burden is on the defendant to make a sufficient threshold showing of the need for the expert's assistance. *Griffith*, 983 S.W.2d at 286-87. Under *Ake*, A.A.L. had the burden to make a threshold showing that he had a particularized need for an expert to address a significant issue at trial. See *id.*; *Moore v. State*, 935 S.W.2d 124, 130 (Tex. Crim. App. 1996). Such a showing typically consists of affidavits or other evidence in support of a defensive theory, an explanation as to the nature of the defensive theory and why expert assistance would be helpful in establishing that theory, or a showing that there is a reason to question the State's expert and proof. *Rey v. State*, 897 S.W.2d 333, 341 (Tex. Crim. App. 1995). It is insufficient to offer "little more than undeveloped assertions that the requested assistance would be beneficial." *Moore*, 935 S.W.2d at 130 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)).

A.A.L.'s request for the appointment of an expert consists of the following argument before the trial court:

The record that is going to be given to the Court, my understanding, is a psychological evaluation performed back in May of 2005. I would ask the Court to appoint someone to do a new evaluation, as that evaluation is some five months [old] now; and from reading of her basis of the report, it includes information that's no longer accurate--particularly one of her reasons is that [A.A.L.] didn't have a GED. My understanding is he does have a GED. There's something about gang affiliation at TYC. I talked to my client. There's supposed to be somebody from TYC who told him that was not the case and they put that in his file.

This evaluation is based on wrong information. I don't see how it can be accurate and help the Court any.

I think a new evaluation would need to be done, based on that; and I would ask the Court to continue to appoint somebody, which is allowed under the Statute, for an expert to be appointed to assist the child and have a new evaluation done, since there are changes in circumstances since this last evaluation.

In addition, in a motion for continuance A.A.L. asked the trial court to continue the transfer hearing "until such time as a new Psychological Evaluation can be made which more accurately represents [A.A.L.]'s situation."

Nothing in our record indicates that A.A.L.'s competence or sanity were issues at either his adjudication hearing or at the transfer hearing. The record contains no assertion of any defensive theory to which this

allegedly "stale" psychological evaluation relates, nor did A.A.L. provide the trial court with any affidavits or testimony regarding how an expert's assistance would be helpful to his case. Moreover, the two items A.A.L. complained were improperly reflected in the psychological evaluation (that he had not obtained his G.E.D. and that he was a member of a gang) were addressed through testimony by witnesses at the hearing. The trial court already had before it a five-month-old psychological evaluation. The only reason A.A.L. gave for appointing an expert to do a new evaluation was to correct two parts of the existing evaluation that A.A.L. asserted were not accurate. These alleged inaccuracies could be and were addressed by testimony at the transfer hearing.

Conclusion: Based on this record, even if *Ake* applied, we would conclude that the trial court did not abuse its discretion in impliedly concluding that A.A.L. failed to show he had a particularized need for an expert to address a significant issue at the transfer hearing. Therefore, the trial court did not abuse its discretion by denying A.A.L.'s request to appoint an expert. Accordingly, we overrule A.A.L.'s sole issue and affirm the trial court's order.