

Review of Recent Juvenile Cases (2007)

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

Recitation in judgement that notice to all parties was proper is sufficient, without a record controverting same.[In the Matter of E.V.](07-3-11)

On February 2, 2006, the El Paso Court of Appeals held that recitations in judgements regarding notice may be presumed regular where the record is absent any controverting material.

¶ 07-3-11. **In the Matter of E.V.**, ___ S.W.3d. ___, No. 08-04-00364, 2006 Tex.App.Lexis 945 (Tex.App.— El Paso, 2/2/06), reh den'd 3/1/06, pet. for rev. den'd 5/19/06.

Facts: Appellant E.V. is a citizen of Mexico. He was first detained while in the United States in connection with the unlawful carrying of a club in violation of Texas law. The State dismissed this indictment in December of 1998. On the same day as the dismissal, the State filed an amended petition alleging that Appellant had intentionally fled from law enforcement officials who were attempting to detain him in connection with another matter. The State subsequently filed a motion to dismiss and the trial court granted the motion.

In October of 2000, the State filed a petition against E.V. for murder. A hearing was set for early November of 2000. Prior to the scheduled hearing, the State filed a second amended petition alleging attempted murder, breaking into a vehicle, and destroying and/or damaging property. The State sought a determinate sentence and the grand jury approved on four counts: (1) murder; (2) attempted murder; (3) burglary of a vehicle; and (4) criminal mischief. A pretrial hearing was set and all parties were ordered to appear. On motion by counsel, Appellant underwent a psychological evaluation. After a hearing, the trial court found that E.V. was fit to proceed to trial. In February of 2001, pursuant to a plea agreement, Appellant was adjudicated delinquent and received a thirty-year determinate sentence to be served at the Texas Youth Commission with a possible transfer to the Institutional Division of the Texas Department of Criminal Justice.

In September of 2004, the Texas Youth Commission sent a letter to the trial court requesting that a hearing be conducted to determine whether or not Appellant should be transferred to the Institutional Division of the Texas Department of Criminal Justice. The trial court set a date for the transfer hearing and ordered all parties, both Appellant and parents, to attend.

In Issue One, Appellant argues that the *Texas Family Code section 54.11* is both unconstitutional on its face and as applied to him. Appellant argues that the court's decision to transfer him to the Institutional Division of the Texas Department of Criminal Justice is actually a sentence enhancement. He relies on *Apprendiv. New Jersey, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 2365 n.19, 147 L. Ed. 2d 435 (2000)* for the proposition that as a sentence enhancement, the factors enumerated under the Texas Family Code must be found by a jury beyond a reasonable doubt to withstand constitutional scrutiny.

Held: Affirmed.

Opinion: Appellant argues that the transfer proceeding was unlawful because Appellant's mother was not notified in accordance with *TEX.FAM.CODE ANN. § 54.11. Section 54.11(b)(2)* requires that notice of the transfer hearing be given to, among others, the parents of the individual to be transferred. See *TEX.FAM.CODE ANN. § 54.11(b)(2)*. During the hearing, the following exchange took place between the trial court, Appellant and trial counsel:

The Court: Are you in contact with your parents?

Appellant: Yes, sir.

The Court: Where are they?

Appellant: My mother is in Mexico and my grandmother is here in El Paso.

The Court: How about your father?

Appellant: I don't got no father, sir.

The Court: They had intentions of being here, do you know?

Trial Counsel: His uncle is here, Your Honor. That is him walking in the door.

We note that during the proceedings, counsel failed to object to a defect in notice during the hearing or to otherwise direct the trial court's attention to a defect in notice as to Appellant's mother.

Assuming, *arguendo*, this issue was properly preserved, the order transferring Appellant to the Institutional Division of the Texas Department of Criminal Justice recited that "after due notice had been issued on all parties as requested by *Section 54.11(b)* and *(d)* Texas Family Code" We may presume the regularity of recitations like this in judgments. See *Breazeale v. State*, 683 S.W.2d 446, 450-51 (Tex.Crim.App. 1985)(Op. on reh'g); *In re B.D.*, 16 S.W.3d 77, 80 (Tex.App.--Houston [1st Dist.] 2000, *pet. denied*). However, we will only presume this regularity where the record is absent any controverting material. *Casillas v. State Office of Risk Management*, 146 S.W.3d 735, 738 (Tex.App.--El Paso 2004, *no pet.*), citing *Gen. Elec. Capital Assurance Co. v. Jackson*, 135 S.W.3d 849, 853 (Tex.App.--Houston [1st Dist.] 2004, *pet. denied*). If the record supports a court's finding, as set forth in a judgment or order, that all parties were notified, notice will be deemed adequate. See *In re R.G.*, 994 S.W.2d 309, 311-12 (Tex.App.--Houston [1st Dist.] 1999, *pet. denied*). Although the issue in *R.G.* concerned notice to the appellant, we think the reasoning is applicable to situations in which an appellant alleges that notice to other parties, as required by the same statute, was insufficient.

Here, the Texas Youth Commission sent a letter to the trial court requesting a transfer hearing and counsel was appointed to represent Appellant. Prior to that hearing, private counsel was retained for Appellant. Counsel informed the trial court that he knew Appellant's mother, aunt, and uncle. Appellant's uncle actually attended the hearing. The only controverting evidence in this case was the absence of Appellant's parents at the hearing. However, Appellant's uncle did attend the hearing, presumably because his parents could not. Based on the foregoing, we think the record sufficiently supports the recitation in the court's order that notice was served on the parties as required by statute. Therefore, Issue Two is overruled.

Conclusion: Having addressed each of Appellant's issues, we affirm the judgment of the trial court.

