

Review of Recent Juvenile Cases (2008)

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

In assault prosecution, the trial court is not required to appoint guardian ad litem for the child, where the parent is the victim of the assault.[In the Matter of L.A.P.](08-1-14B)

On February 6, 2007, the San Antonio Court of Appeals held that, if the parent is present, the trial court has the discretion to appoint a guardian ad litem only if the parent is not capable or willing to make a decision in the best interest of the child.

¶ 08-1-14B. **In the Matter of L.A.P.**, MEMORANDUM, No. 04-07-00143-CV, 2008 Tex.App.Lexis 847 (Tex.App.—San Antonio, 2/6/08).

Facts: L.A.P., a fifteen-year-old female, was charged with two counts of assault with bodily injury against her father. The facts of the charged assault are not disputed. L.A.P.'s mother and father picked her up from a police station after she was reported as a runaway. When they returned home, L.A.P. refused to get out of the car. L.A.P.'s father physically removed her from the car and escorted her to her room. During the exchange L.A.P. kicked her father and elbowed him in the jaw. L.A.P.'s parents called the police who, upon arrival, found that L.A.P. had removed the screen to her second-story room and was again attempting to run away. L.A.P. was arrested for assault with bodily injury.

Held: Affirmed

Memorandum Opinion: L.A.P. was represented at trial by attorney Sandra Casias who had been hired by L.A.P.'s father, the complainant in the matter.¹ At that hearing, and before L.A.P. entered a plea, the trial court instructed L.A.P. of her rights and advised her that the court could place her on probation until she reached the age of eighteen either in the care of her parents or in placement outside of her parent's home. L.A.P. waived a jury and pled true to the charge. The court then found L.A.P. delinquent and granted her probation for twelve months in the care of her parents.

¹ L.A.P.'s first attorney also had been retained by L.A.P.'s father but withdrew prior to trial based on a conflict of interest.

After the trial court's verbal adjudication, but before the court recessed, Ms. Casias made the court aware that L.A.P.'s father wanted to address the court. L.A.P.'s father expressed concerns about L.A.P. returning home, stating, "[L.A.P.] and the whole family would be better served if she was in placement." He expressed concern that L.A.P. would attempt to provoke him in an attempt to get him fired and in trouble with C.P.S. L.A.P.'s father also told the court he was concerned for his safety because of L.A.P.'s gang associations and because L.A.P. had recently stated that "she knows people and [he] had better watch out." Ms. Casias strenuously disagreed, arguing that this was L.A.P.'s first referral and that she should be given an opportunity to prove

herself. Ms. Casias stated that she believed L.A.P.'s mother would support probation in the home if allowed to testify. At Ms. Casias's urging, the court then delayed disposition until L.A.P.'s mother could be present.

The following day, L.A.P.'s mother testified that L.A.P. would not be successful on probation at home. L.A.P.'s mother testified that she had recently spoken with L.A.P. and that L.A.P. told her that if she were on probation at home she would not return home until curfew and that she did not wish to attend school. L.A.P.'s mother stated that she was "worried for her safety and ours. She has made some bad choices. She is not responding to us. She is out of control." At the conclusion of this testimony, Ms. Casias again asked the court that her client be given the opportunity to serve probation at home arguing, "She has never been on probation. She advised me she would follow the rules, the monitor and go to school. Her actions have never gone this far or taken her this far. And this has been a big wake up call." The court, however, found that L.A.P. could not be provided the quality of care and level of support and supervision that she needed to meet the conditions of her probation in her home. The court placed L.A.P. on probation for eighteen months in the custody of the Chief Juvenile Probation Officer of Bexar County, for the purposes of residential placement. This appeal followed.

ANALYSIS

L.A.P. contends in her first point of error that she received ineffective assistance of counsel because her attorney was retained by the complainant and thus was impaired by an actual conflict of interest. A criminal defendant has a constitutional right to reasonably effective counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997). "Ineffective assistance of counsel may result when an attorney labors under a conflict of interest." *Monreal*, 947 S.W.2d at 564 (citing *Strickland*, 466 U.S. at 692).

Recently, the Texas Court of Criminal Appeals reaffirmed the "workable standard" initially articulated by the United States Supreme Court for analyzing claims of ineffective assistance of counsel based on an alleged conflict of interest, holding:

[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel *actively represented conflicting interests*, he has not established the constitutional predicate for his claim of ineffective assistance. *Acosta v. State*, 233 S.W.3d 349, 355 (Tex. Crim. App. 2007) (quoting *Cuylar v. Sullivan*, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)) (emphasis in original). "In other words, the appellant must show that an actual conflict of interest existed and that trial counsel actually acted on behalf of those other interests during the trial." *Id.*; see also *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) ("an actual conflict of interest" [means] precisely a conflict *that affected counsel's performance*-as opposed to a mere theoretical division of loyalties") (emphasis in original).

Turning to the record before us, we first focus on whether trial counsel was burdened by an actual conflict of interest. Although L.A.P.'s counsel was retained by her father, there is nothing in the record showing Ms. Casias actively represented the father's interests. See *Cuylar*, 446 U.S. at 349-50. L.A.P. argues that Ms. Casias's act of advising the court that L.A.P.'s father wished to speak during the first disposition hearing is evidence of her conflicting interest. We disagree. Ms. Casias's actions of calling to the court's attention that L.A.P.'s father "wanted to address the court" does not demonstrate that Ms. Casias was actively representing the conflicting interests of the complainant. To the contrary, there is no indication that Ms. Casias knew what L.A.P.'s father intended to say. She did not advocate on his behalf. Indeed, the record reflects that Ms. Casias attempted to interrupt the father once he began speaking but the trial court responded, "Let the father finish his thoughts." Furthermore, at both hearings, Ms. Casias strenuously argued against the father's position and in favor of her

client's desire for placement at home. Because the record does not establish counsel actively represented conflicting interests, L.A.P. has failed to establish the constitutional predicate for her claim of ineffective assistance. *Acosta*, 233 S.W.3d at 355.

In her second point of error, L.A.P. asserts the trial court had a duty to inquire into the conflict of interest. L.A.P. argues that the court should have known of the potential conflict of interest because L.A.P.'s first attorney of record had withdrawn as counsel, stating a conflict of interest, and because Ms. Casias felt the need to put on the record that L.A.P. was satisfied with her representation. We disagree.

A trial court is required to investigate a potential conflict of interest only when the court knows or should know that a particular conflict exists. *Cuyler*, 446 U.S. at 347; *Calloway v. State*, 699 S.W.2d 824, 829 (Tex. Crim. App. 1985). The record reveals that at the hearing, and prior to L.A.P. entering her plea, Ms. Casias questioned L.A.P. and her father as follows:

MS. CASIAS: Mr. ,² do you understand that and agree that I represent [L.A.P.], the respondent in this case, where you were the alleged victim that occurred on December 21, 2006?

THE FATHER: Yes

MS. CASIAS: You agree you retained me to represent [L.A.P.]'s interest and not your interest?

THE FATHER: Yes

MS. CASIAS: And [L.A.P.], do you agree that I have represented you and advocated on your behalf?

THE RESPONDENT: Yes.

In addition, when questioned by the court as to whether she was "happy and satisfied" with her attorney, L.A.P. again answered in the affirmative. We find nothing about this exchange or the circumstances of this case that would make the trial judge aware of an actual conflict or impose an affirmative duty of further inquiry. In addition, in *Mickens v. Taylor*, the United States Supreme Court held that a trial court's failure to inquire into the alleged conflict of interest does not reduce the defendant's burden of proof. 535 U.S. at 173-74. In other words, to seek a reversal where the trial judge neglects a duty to inquire into a potential conflict, the defendant must still establish that a conflict of interest adversely affected the lawyer's performance. *Id.* at 174. As discussed above, L.A.P. has failed to establish that her counsel actively represented conflicting interests.

² The names of the family have been omitted in compliance with *TEX. FAM. CODE ANN. § 56.01(j)* (Vernon 2002).

L.A.P. contends in her final point of error that the trial court erred by failing to appoint a guardian ad litem to represent her interests. She argues that since her father was the complainant and both parents objected to her placement on probation in their home she was essentially denied the assistance and guidance of a friendly adult.

The court is required to appoint a guardian ad litem only when a parent or guardian does not appear with a child in juvenile court. *TEX. FAM. CODE ANN. § 51.11(a)* (Vernon 2002). If a parent is present, the trial court has the discretion to appoint a guardian ad litem if the parent is not capable or willing to make a decision in the best interest of the child. *TEX. FAM. CODE ANN. § 51.11(b)* (Vernon 2002); see also *In re P.S.G.*, 942 S.W.2d

227, 229 (Tex. App.--Beaumont 1997, no writ) (noting appointment under section 51.11(b) rests in the sound discretion of the trial court). Here, the trial court was not required to appoint a guardian ad litem because L.A.P.'s father was present during the initial adjudication and disposition hearing and both parents were present at the continuation hearing the next day. Furthermore, there is nothing in the record suggesting that L.A.P.'s parents were not capable or willing to make decisions in L.A.P.'s best interest. In fact, both parents testified they were worried not only for their own safety but also for L.A.P.'s safety. Moreover, the trial court agreed that probation outside of the home was in L.A.P.'s best interest. Thus, the trial court did not abuse its discretion by failing to appoint a guardian ad litem.

Conclusion: Finding no error, we affirm the judgment of the trial court.