

Review of Recent Juvenile Cases (2008)

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

Prior juvenile felony adjudication is not prior felony for the purposes of applying for probation in adult court. [Thompson v. State](08-4-1)

On August 29, 2008, the Austin Court of Appeals held that the trial court erred in prohibiting respondent from discussing probation at voir dire, where reason for prohibition was respondent's prior juvenile felony adjudication. Error was deemed harmless.

¶ 08-4-1. **Thompson v. State**, __S.W.3d.__, No. 03-07-00255-CR, 2008 WL 3984375 (Tex.App.-Austin, 8/29/08).

Facts: A jury found defendant, Thompson guilty on two counts of aggravated robbery with a deadly weapon, found an enhancement allegation true, and assessed sentence at twenty-five years in prison. The enhancement was from a juvenile felony adjudication where the defendant had been committed to TYC.

Thompson was identified by witnesses as the man who entered a convenience store, fired a gun, threatened several people, and demanded (and was given) money from the cash register. The clerk at the register recognized Thompson as one of her regular customers and the robber. Other eyewitnesses at the store identified Thompson as the robber when he was taken to the store shortly after the offense. A customer called 911 and followed Thompson across a muddy field to a nearby apartment complex. Police followed muddy footprints to an apartment in which they found Thompson and a gun. Gunshot residue was found on Thompson, but not the other occupant of the apartment. Ballistics from the gun matched those on the shell found at the store. The video surveillance tape of the robbery was shown at trial. The jury found Thompson guilty of aggravated robbery by use of a deadly weapon.

Thompson complains that he was improperly prohibited from discussing probation at voir dire. The State filed a motion in limine to prevent "[a]ttempts by defense counsel to voir dire on the issue of probation as the Defendant is ineligible." After hearing arguments, the court stated, "I'm going to find that [juvenile felony] adjudication is a final felony conviction for the purpose of making him probation ineligible under Article 42-[42.12, Section 4\(f\)-4\(e\)](#), and, therefore, I'm not going to permit you to voir dire on probation." During his voir dire examination, Thompson's counsel re-urged his objection and desire to discuss probation, and was again refused.

At punishment, the State presented a fingerprint expert who testified that fingerprints he took from Thompson matched those in Thompson's juvenile records. The records include Thompson's adjudication of delinquency and commission to the Texas Youth Commission for the offense of arson. The trial court took judicial notice that arson is a felony. Thompson's attorney cross-examined the fingerprint expert regarding his technique. Thompson's father testified at length about Thompson's experience in TYC. At one point, the following exchange occurred between Thompson's attorney and father:

Q. So this is about a year before he went to TYC?

A. Correct, I believe so.

Q. And he went to TYC for arson?

A. I believe so.

The focus of Thompson's case at punishment was that he was a young man who had mental and emotional conditions (including diagnoses of attention deficit hyperactivity disorder, mental retardation, schizoaffective disorder, bipolar disorder, oppositional defiance, anxiety, and depression) that overwhelmed his parents and caused him to be exposed to an unsettled home life, bad influences, child protective service custody, and TYC, where he was physically abused. The jury found the enhancement paragraph true, and assessed sentence at 25 years in prison--10 years above the minimum and 74 years below the maximum.

Held: Affirmed

Opinion: The issues on appeal involve the interplay of the statutes concerning juvenile delinquency adjudication, probation, and punishment enhancement. The family code provides:

An adjudication under Section 54.03 that a child engaged in conduct that occurred on or after January 1, 1996, and that constitutes a felony offense resulting in commitment to the Texas Youth Commission under Section 54.04(d)(2), (d)(3), or (m) or 54.05(f) is a final felony conviction only for the purposes of [Sections 12.42\(a\), \(b\), \(c\)\(1\), and \(e\), Penal Code, Tex. Fam. Code Ann. § 51.13](#)(d) (West Supp.2008).

The limitation of the scope for which the adjudications are final felony convictions creates a seeming peculiarity in cases in which someone with a juvenile adjudication for a felony resulting in commitment to TYC (a "juvenile felony") is later charged with a first-degree felony as an adult, and also seeks to be placed on probation. To be placed on probation, a defendant must take certain steps:

A defendant is eligible for community supervision under this section only if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in the defendant's motion is true. [Tex. Code Crim. Proc. Ann. art. 42.12, § 4\(e\)](#) (West Supp.2008).

Because of the family code's limitation of the effect of juvenile felonies, a defendant with only a juvenile felony can apply for probation and truthfully aver that he has not previously been convicted of a felony. See [Tex. Fam. Code Ann. § 51.13](#)(d). However, the juvenile felony adjudication counts as a final felony conviction for purposes of sentence enhancement. See *id.* When a defendant convicted of a first-degree felony is shown at the punishment phase to have been "once before convicted of a felony," the standard 5-to-99-year punishment range [\[FN1\]](#) is enhanced to life or 15 to 99 years in prison. [Tex. Penal Code Ann. § 12.42\(c\)\(1\)](#) (West Supp.2008). A jury cannot recommend probation if it assesses a prison term of more than ten years. [Tex. Code Crim. Proc. Ann. art. 42.12, § 4\(d\)\(1\)](#) (West Supp.2008). Because a jury considering punishment for a first-degree felony conviction enhanced by a prior final felony conviction--including a juvenile felony--cannot assess a punishment of less than 15 years, that jury must assess a punishment of more than 10 years. Thus, although a prior juvenile felony conviction does not prevent a defendant from applying for probation, it prevents the jury from recommending probation when the new conviction is for a first-degree felony enhanced by the prior juvenile felony.

[FN1. Tex. Penal Code Ann. §§ 12.32, 29.03\(a\)\(2\)](#) (West 2003).

Conclusion: In light of the interplay of these statutes and the procedural sequence of events, we conclude that the trial court erred by refusing to allow Thompson to discuss probation at voir dire, but did not err by failing to charge the jury about probation. However, after a review of the evidence admitted, we conclude that the error regarding voir dire discussion was harmless. In addition, we are also of the view that--considering the evidence--even if failing to charge the jury about probation was error, any such error was harmless.