

# Review of Recent Juvenile Cases (2010)

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

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## Appellate court must remand for appointment of new counsel where appellate issues exist irrespective of filing of Anders brief.[Menson v. State](10-2-1)

**On February 18, 2010 the Amarillo Court of Appeals abated juvenile's appeal and remanded case for appointment of new counsel where old counsel filed Anders brief, and Appellate Court found that potential appellate issues existed.**

¶ 10-2-1. **Menson v. State**, UNPUBLISHED, No. 07-09-0221-CR, 2010 WL 571716 (Tex.App.-Amarillo, 2/18/10).

**Facts:** On June 18, 2007, Appellant was charged by information with the second degree felony offense of aggravated assault. The information also contained an enhancement paragraph alleging that Appellant had previously been convicted of the felony offense of aggravated robbery. Pursuant to a plea bargain, Appellant was placed on deferred adjudication community supervision.

In 2009, the State filed a motion to proceed, alleging ten violations of the terms and conditions of community supervision. Appellant entered a plea of "not true" to those allegations. After a hearing on the State's motion, the trial court found seven of the ten allegations to be true, and adjudicated Appellant guilty of the charged offense.

At the commencement of the punishment phase of the proceeding, no plea was taken as to the enhancement allegation. Brief testimony was presented that Appellant had previously been adjudicated as a juvenile for the offense of aggravated robbery, but no order of adjudication was offered and no evidence was presented as to when that offense was committed. For purposes of enhancement, an adjudication by a juvenile court that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony offense for which the child is committed to the Texas Youth Commission under section 54.04(d)(2), (d)(3), or (m), or section 54.05(f), Family Code, is a final felony conviction. At the conclusion of the hearing, no § 12.42 finding was made as to whether Appellant had previously either been convicted of a felony or adjudicated guilty of delinquent conduct occurring after January 1, 1996. The trial court then sentenced Appellant to twenty-five years confinement and a \$2,000 fine.

**Held:** Appeal abated and remand for appointment of new counsel.

**Opinion:** In presenting this appeal, counsel has filed an Anders brief in support of a motion to withdraw.

Because the trial court assessed Appellant's sentence outside the range of punishment for a second degree felony, a finding of true as to the enhancement paragraph was essential to support the trial court's sentence of twenty-five years confinement. Given the facts of this case, at least four potential issues arise:

- (1) Did the trial court err by not taking a plea to the enhancement allegation?
- (2) Did the trial court err by not making a finding of true to the enhancement allegation?

(3) Was any implied finding of true to the enhancement allegation supported by legally and factually sufficient evidence?

(4) Was the error, if any, harmless?

**Conclusion:** Having concluded that an arguable ground for appeal exists affecting the punishment phase of Appellant's trial, we grant Appellants counsels motion to withdraw, abate this proceeding, and remand this cause to the trial court for the appointment of new counsel.