

## Year 2004 Case Summaries

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### ***Questioning by juvenile court showed it considered statutory factors in transferring respondent to TDCJ [In re M.M.J.M] (04-1-18).***

On January 29, 2004, the El Paso Court of Appeals held that questioning of witnesses by the juvenile court showed it considered the statutory factors in deciding to transfer respondent to TDCJ under the determinate sentence act.

04-1-18. In the Matter of M.M.J.M., UNPUBLISHED, No. 08-03-00214-CV, 2004 WL 178611, 2001 Tex.App.Lexis \_\_\_\_ (Tex.App.-El Paso 1/29/04) Texas Juvenile Law (5th Ed. 2000).

Facts: Appellant challenges his transfer from incarceration for murder in the Texas Youth Commission (TYC) to the Institutional Division of the Texas Department of Criminal Justice (TDCJ). In his sole point of error, he alleges the trial court abused its discretion in making an arbitrary decision without regard to guiding principles.

In 1999, appellant received a 40 year determinate sentence after being adjudicated delinquent for murder. Pursuant to Texas Family Code section 54.11, the Texas Youth Commission requested his transfer to the Texas Department of Criminal Justice in December of 2002. A transfer hearing held February 18 to 20, 2003 consisted of testimony from six witnesses, including appellant. The TYC's court liaison and a psychologist both testified appellant should transfer to the TDCJ, citing his failure to admit responsibility for the murder and inability to complete the Capital Offenders program at TYC. Appellant's own psychologist classified him as having an average risk of failing on parole and a 31 percent risk of re-offending. He also pointed to chronic emotional difficulties and a low I.Q. as hindering appellant's progress at TYC. Over the course of the hearing, the trial court made a point of questioning some of the witnesses himself. In announcing his decision, the judge made the following statement:

I've considered that a jury of 12 people of your peers says you committed this act. The Eighth Court of Appeals here in El Paso affirmed that decision. Yet I've got this problem in you denying that you even committed this act. That is very problematic to me. I've considered your experiences, although I admittedly knew nothing about you until we started this hearing. I've seen you sit there for two and a half days. I heard your testimony. I've observed your interactions with your family. I've considered your abilities to contribute to society, which I do believe you have some abilities, limited, but you have abilities to contribute. Texas Family Code even suggests that I consider what is in the best interest of you. I've done that also. You yourself admitted that you benefited from being at TYC. I've taken into consideration the recommendation not only of the Texas Youth Commission, but also of your own expert witness, which was afforded to you at the request of your attorney. Your own expert at best suggests that you are an average risk to re offend. He himself has to assume that you've committed this act in order to come up with this prediction. But my entire determination goes back to the offense, Mr. [M.]. I keep seeing the face of a young lady lying on some autopsy table. And I have to respect the decision of 12 jurors. I have to respect the decisions of the Eighth Court of Appeals.

The court then ordered appellant transferred to the TDCJ.

Held: Affirmed.

Opinion Text: Standard of Review

We review a trial court's decision to transfer a juvenile from TYC to the TDCJ under an abuse of discretion standard. See *In re J .M.O.*, 980 S.W.2d 811, 812-13 (Tex.App.--San Antonio 1998, pet. denied). We review the entire record in considering whether the trial court made its decision to transfer appellant in an arbitrary manner without reference to guiding rules. *Id.* at 813. This Court must find no

abuse of discretion if some evidence exists to support the ruling. In re R.G., 994 S.W.2d 309, 312 (Tex.App. Houston [1st Dist.] 1999, pet. denied). The trial court is not required to consider all of the listed factors, and is expressly allowed to consider unlisted but relevant factors. In re C.L., Jr., 874 S.W.2d 880, 886 (Tex.App. Austin 1994, no writ). In this case, the guiding law is Texas Family Code section 54.11(k), which instructs trial courts on factors they should weigh in considering the transfer of a juvenile offender from TYC to TDCJ:

In making a determination under this section, the court may consider the experiences and character of the person before and after commitment to the youth commission, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of the youth commission and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided. Tex. Fam.Code Ann. § 54.11(k) (Vernon 2002) (Emphasis added.)

The statutory use of the word "may" creates discretionary authority for the court to consider various factors in making its determination. See *Buttles v. Navarro*, 766 S.W.2d 893, 894 (Tex.App. San Antonio 1989, no writ). A permissive statute vests the trial court with authority to use its own discretion in weighing those factors. *J.R.W. v. State*, 879 S.W.2d 254, 257 (Tex.App. Dallas 1994, no pet.).

#### Application of Law to Facts of This Case

Appellant contends the trial court abused its discretion in making its decision solely based on the offense. Appellant makes this assertion based on the judge's statement, "my entire determination goes back to the offense." However, reasonable minds may interpret the judge's statement differently. As we review the entire record in order to determine whether the court acted without reference to any guiding rules and principles, we do not consider a single sentence outside its context. In order to accept appellant's argument, this Court would have to disregard the entire contents of the record in the case. Even a cursory reading of the record shows the court reviewed the evidence and formulated thoughtful questions informed by relevant legal considerations, such as this exchange with appellant's psychologist, who classified him as being an average risk of failing on parole:

Court: I'm on page eight of your report. I guess the heading on this is on page seven. The clinical interview. I'm on page eight of the second paragraph. That paragraph really caught my attention because it's in direct relation to the statute and some of the factors that I can consider.

You talk about [M]'s ability or his premeditated nature of the act. Is that based on your reading of the report or is that something that he explained to you?

Witness: This section would be from our dialogue, so something that we talked about.

Court: So in your opinion his account of the offense, it was premeditated?

Witness: That's what his account suggests it is.

Court: And you mentioned also his ability to maintain sexual arousal during a violent act. Why is that significant?

Witness: Well, again you're looking at an individual who when he is discussing the incident with me is describing a rape scenario. So somebody that can kind of maintain sexual arousal most people don't equate violence with sexuality, especially when it terminates in a death. So, the ability to kind of maintain sexual arousal within that violent act would seem to be notable.

Court: His outward facade is incongruent with internalized hostility and anger. What is that in layman's terms?

Witness: That would be when he is talking about up there, the second sentence of that same paragraph. [M] indicated that [the victim] was unaware of his hostility towards her.

So, in other words, here is somebody that he has a relationship with, but he is pretty angry because of these rumors that she's been spreading around. Yet she comes and picks him up. They sneak out and go out. She has no idea that he is angry with her to the point of wanting to harm her.

So kind of that ability to not be genuine with your emotions, to be that controlled of your emotions so that somebody close to you wouldn't realize what you were experiencing.

Court: You talked about his limited ability to assess his own level of risk for future criminal activity and that he appeared naive with regard to his future plans. Can you expound on that a little bit?

Witness: Sure. When we look at a student's ability to talk about kind of their own risk factors, that's something that they would learn in treatment, something that what type of risk factors do you have? How are you going to compensate for those risk factors? What kind of scenarios might not be good scenarios for you to become involved in? What types of individuals should you not hang around?

These questions by the judge portray a weighing of legally relevant factors, including the nature of the offense and the probability of appellant repeating his offense. These factors are expressly allowed by Texas Family Code section 54.11(k). Tex. Fam.Code Ann. § 54.11(k) (Vernon 2002).

The trial court listened to two days of testimony before making its decision. Despite the court's statement about his "entire determination," the record reflects the court's consideration of numerous legally relevant factors in the non-exclusive list provided by section 54.11(k). There is adequate evidence in the record to support the ruling. Therefore, we find the trial court did not abuse its discretion in making its decision to transfer appellant, and we overrule his sole point of error.

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