Year 2004 Case Summaries

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Although hearsay, psychiatric report is admissible in certification hearing [McKaine v. State] (04-2-24).

On April 29, 2004, the Corpus Christi-Edinburg Court of Appeals held that a psychiatric report, although hearsay, is admissible in a certification hearing; there is no requirement that the report's author must testify at the hearing.

04-2-24. McKaine v. State, ___ S.W.3d ____, No. 13-03-430-CR, 2004 WL 905562, 2004 Tex.App.Lexis ___ (Tex.App.-Corpus Christi-Edinburg 4/29/04) Texas Juvenile Law (5th Ed. 2000).

Facts: By two issues, Dominic McKaine challenges his conviction and sentence for burglary of a habitation and committing aggravated assault therein.

The conviction from which McKaine appeals stems from the following events. On November 12, 2002, McKaine and three other people used force to unlawfully enter the residence of Charles and Amy in Cuero, Texas. McKaine entered the home carrying a twenty-gauge shotgun. His cohorts were armed with handguns. With their weapons drawn, the group forced Charles down onto the kitchen floor, threatening to kill him if he resisted. McKaine then pointed his shotgun at Charles's wife, Amy, and told her to take off her shirt. With her husband and three small children watching, Amy removed her shirt for McKaine, exposing her breasts. McKaine's companions then took Charles into the couple's bedroom, and McKaine took Amy and two of her children into a second bedroom. Once inside, he began to touch Amy, fondling her breasts and repeatedly telling her that he wanted to have sex and that he was going to have sex with her on her child's bed in front of her children. He threatened to kill her, her husband, and her children if she told anyone. McKaine then took Amy into the living room and in front of all three of her children, ordered her to pull down her pants. She refused. McKaine repeated his demand, and again, she refused, saying that she was "on her period." McKaine put his shotgun against the head of Amy's three year old son and said, "Pull down your pants and spread your legs, or I'm going to kill your son." She complied, but McKaine did not have sex with her. He and his companions left, taking a knife, cigarettes, and money belonging to the family. Before leaving, McKaine repeated his threat that he would kill all of them if they told anyone what happened.

At the time of the incident, McKaine was sixteen years old. He was originally charged as a juvenile, but the State petitioned the juvenile court to transfer the case to district court so that he could be prosecuted as an adult. After a hearing, the juvenile court certified McKaine as an adult and transferred the case. Before the district court, McKaine pled guilty to burglary of a habitation and committing aggravated assault therein, a first-degree felony. He requested that a jury determine his punishment. The jury sentenced him to seventy-five years imprisonment.

Held: Reversed as to punishment.

Opinion Text: Analysis

McKaine raises two issues on appeal. First, he challenges the juvenile court's decision to transfer his case to district court for trial as an adult. Second, he argues that the trial court abused its discretion during the punishment phase of the trial by not allowing his attorney to question Amy and Charles regarding their involvement in drug activities.

In his first issue, McKaine claims that the juvenile court erred in transferring his case to district court. [FN4] He complains that the court erred by considering a psychological report because it amounted to hearsay. McKaine also contends that the author of the report should have been present at the transfer hearing to explain her evaluation and the basis for her findings. Finally, he maintains that the juvenile court had insufficient evidence to transfer his case to district court for trial as an adult.

FN4. Under Article 44.47 of the Texas Code of Criminal Procedure, an appeal from a juvenile court's decision to certify a defendant as an adult and to transfer the case under section 54.02 of the family code is a criminal matter. Tex.Code Crim. Proc. Ann. art. 44.47(a), (c) (Vernon Supp.2004). A challenge to the certification and transfer order can be made only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court. Id. art. 44.47(b).

The juvenile court has exclusive, original jurisdiction over children seventeen years of age and younger. Ex parte Waggoner, 61 S.W.3d 429, 431 (Tex.Crim.App.2001); see Tex. Fam.Code Ann . §§ 51.04(a), 51.02(2) (Vernon 2002) (discussing the jurisdiction of juvenile courts and defining "child"). Texas Family Code Section 54.02(a) provides that the juvenile court may waive its exclusive, original jurisdiction and transfer a child to the appropriate district court for criminal proceedings if the child is alleged to have committed a first-degree felony and was aged fourteen or older at the time of the alleged offense. Tex. Fam.Code Ann. § 54.02(a) (Vernon 2002). A juvenile court's discretionary power to transfer a juvenile can be exercised only after the State files a petition or motion requesting waiver and transfer. Hidalgo v. State, 983 S.W.2d 746, 749 n. 3 (Tex.Crim.App.1999); see Tex. Fam.Code Ann. §§ 53.04, 54.02(b) (Vernon 2002). When the State requests a transfer, the juvenile court is required to conduct a hearing without a jury to consider transfer of the child for criminal proceedings. Tex. Fam.Code Ann. § 54.02(c). Before the transfer hearing, the court must order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Id. § 54.02(d); In re J.S.C., 875 S.W.2d 325, 326 (Tex.App.-Corpus Christi 1994, writ dism'd by agr.). Based on this information, the court must determine whether there is probable cause to believe that the child committed the offense alleged and whether the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the child. See Tex. Fam.Code Ann. § 54.02(a); In re J.S.C., 875 S.W.2d at 326. The juvenile court's decision to transfer a case to district court is reviewed for abuse of discretion. Faisst v. State, 105 S.W.3d 8, 12 (Tex.App. Tyler 2003, no pet.); see In re J.S.C., 875 S.W.2d at 326.

We first consider McKaine's argument that the trial court erred by considering a psychological report because it was inadmissible hearsay. Strict rules of evidence are not applied in transfer proceedings. In re J.S.C., 875 S.W.2d at 330; see also In re J.P.O., 904 S.W.2d 695, 699 (Tex.App.-Corpus Christi 1995, writ denied). Section 54.02(e) authorizes the juvenile court to "consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses." Tex. Fam.Code Ann. § 54.02(e). In at least one case involving the use of a psychiatric evaluation in a transfer hearing, this Court overruled an alleged hearsay error, noting that juvenile courts are authorized to consider such evidence. See In re J.S.C., 875 S.W.2d at 330 (holding that there was "no error in ... the use of records even though [they] ... may not be admissible as evidence at an adjudication hearing"). [FN5] We reach the same conclusion in this case. The juvenile court did not err in admitting the psychological report into evidence.

FN5. Other courts of appeal have also reached this conclusion. See In re J.A.W., 976 S.W.2d 260, 264 (Tex.App.-San Antonio 1998, no pet.) ("Section 54.02(e) of the Family Code, which allows the court to consider written reports from probation officers, professional court employees, and professional consultants, provides an explicit exception to the hearsay rule in a transfer to criminal court proceeding."); In re S.J.M., 922 S.W.2d 241, 242 (Tex.App.-Houston [14th Dist.] 1996, no writ) ("Because a juvenile transfer hearing is dispositional, rather than adjudicational in nature, a juvenile court may consider hearsay reports without violating the juvenile's right of confrontation."); In re G.B.B., 638 S.W.2d 162,164 (Tex.Civ.App.-Houston [1st Dist.] 1982, no writ) ("a juvenile court may consider hearsay reports"); In re Q. D., 600 S.W.2d 392, 394 (Tex.Civ.App.-Fort Worth 1980, no writ) ("Section 54.02 of the Family Code is a statutory exception to the hearsay rule and authorizes the introduction of specified reports that would otherwise be objectionable."); In re R.G.S., 575 S.W.2d 113, 119 (Tex.Civ.App.-Eastland 1978, writ ref'd n.r.e.) ("A juvenile court may consider certain hearsay reports at a transfer ... hearing that would not be admissible at an adjudication hearing.").

McKaine also argues that Dr. Karan Redus, who conducted his psychological evaluation and authored the report, should have testified at the transfer hearing. He contends that the juvenile court's duty to conduct a "full investigation and hearing" is not complete without live testimony from the author of any reports relied upon under section 54.02(e). Tex. Fam.Code Ann. § 54.02(c), (e). The State has not responded to this argument. Nevertheless, we cannot conclude that the juvenile court abused its discretion. The family code does not specifically require that the juvenile court hear live testimony from a professional consultant whose written report is considered under section 54.02(e). Id. § 54.02(e). It allows the court to consider "written reports from ... professional consultants in addition to the testimony of witnesses." Id. (emphasis added). Although McKaine makes compelling arguments regarding the court's duty to be fully informed of the juvenile's circumstances, he has cited no cases holding that the court must receive live testimony in addition to the written reports. Our research has unearthed no such authority. Thus, we cannot conclude that the trial court abused its discretion. In so holding, we note that although McKaine's trial counsel complained of Dr. Redus's absence at the hearing, the record does not show that he ever attempted to subpoena her or otherwise solicit her testimony. The record shows that McKaine's trial counsel received proper notice of Dr. Redus's report under section 54.02(e). Id.

Finally, McKaine argues that the juvenile court erred in transferring his case to district court because the evidence was insufficient to support a transfer. McKaine has not specified whether his challenge is to the legal or factual sufficiency of the evidence or to both. See In re J.P.O., 904 S.W.2d at 699-700 ("The juvenile court's findings of fact are reviewed by the same standards that are applied in

reviewing the legal or factual sufficiency of the evidence supporting a jury's answers to a charge."). He has not cited authorities for his contention that the evidence is insufficient. See Tex.R.App. P. 38.1(h) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). McKaine argues that the evidence adduced at the transfer hearing was insufficient to support a transfer because it showed that: (1) he had never been adjudicated of a felony as a juvenile; (2) he suffered from drug addiction and had not received treatment; and (3) the Texas Youth Commission offered services that could assist in rehabilitating him. The State has not responded to McKaine's sufficiency arguments. Assuming without deciding that McKaine has properly presented this issue for review, we hold that it does not warrant reversal because his arguments do not address all of the grounds for the juvenile court's decision. Specifically, McKaine has not addressed the court's finding that the seriousness of the offense necessitated criminal proceedings to protect the welfare of the community.

As noted above, the juvenile court has discretion to waive its jurisdiction and transfer a case to criminal court if it finds that there is probable cause to believe that the child committed the offense alleged and that the welfare of the community requires criminal proceedings because of the seriousness of the offense or the background of the child. See Tex. Fam.Code Ann. § 54.02(a); In re J.S.C., 875 S.W.2d at 326. In making this determination, the court is required to consider: (1) whether the alleged offense was against a person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities available to the juvenile court. Tex. Fam.Code Ann. § 54.02(f). While the juvenile court must consider all of these factors before transferring the case to district court, it is not required to find that each factor is established by the evidence. In re D.D., 938 S.W.2d 172, 176 (Tex.App.-Fort Worth 1996, no writ); In re J.S.C., 875 S.W.2d at 329; In re M.D.B., 757 S.W.2d 415, 417 (Tex.App.-Houston [14th Dist.] 1988, no writ). The court is also not required to give each factor equal weight as long as each is considered. In re J.J., 916 S.W.2d 532, 535 (Tex.App.-Dallas 1995, no writ); In re C.C.G., 805 S.W.2d 10, 15 (Tex.App.-Tyler 1991, writ denied).

In its order, the juvenile court discussed each of the foregoing factors and how they influenced its decision. The court also noted that "[a]fter conducting ... [a] full investigation, including evidence and argument of counsel, the Court finds that the welfare of the community requires criminal proceedings, because of the seriousness of the offenses and the background of the child and ... [because] there is probable cause to believe the child committed the offenses...." On appeal, McKaine argues that his background did not require criminal proceedings for the protection of the community's welfare, but he does not challenge the court's finding that the seriousness of the offense warranted criminal proceedings. A court does not abuse its discretion by finding the community's welfare requires transfer due to the seriousness of the crime alone, despite the child's background. See In re D.D., 938 S.W.2d at 177; In re C.C.G., 805 S.W.2d at 15. Thus, even if we were to sustain McKaine's challenge regarding his background, his failure to challenge the court's finding regarding the seriousness of the offense would preclude relief on his sufficiency arguments. Appellant's first issue is overruled.

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