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## YEAR 2005 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **Trial court did not abuse its discretion in placing juvenile on probation outside his home after an open plea to burglary. [In the Matter of M.J.A.](05-2-16)**

**On December 8, 2004, the San Antonio Court of Appeals, en banc, (on rehearing) withdrew their previous opinion and affirmed trial courts decision to place juvenile outside the home on a charge of burglary.**

05-2-16. In the Matter of M.J.A., released for publication 3/4/05, No. 04-03-00076-CV, 2004 Tex.App.Lexis 11016 (Tex.App.– San Antonio [rehearing, en banc] 12/8/04).

Facts: Appellant, a juvenile offender, sought review of a judgment from the 289th Judicial District Court, Bexar County (Texas), which placed the juvenile on probation outside his home after he entered an open plea of true to a charge of burglary. The court issued an opinion reversing the trial court's judgment and remanding the cause for further proceedings. The State filed a motion for rehearing en banc.

Before trial, the juvenile was seriously injured in a drive-by shooting. On appeal, he contended that the trial court erred in placing him on probation outside his home. The court, in affirming, ruled that the State carried its burden of proof in showing, pursuant to *Tex. Fam. Code Ann. § 51.01(5)*, that the removal of the juvenile from his home was necessary for his welfare or in the interest of public safety. Because the juvenile had a history of delinquent behavior and associating with other delinquent youths, the trial court did not abuse its discretion in finding that the juvenile's mother, who testified that the juvenile was not always truthful with her, could not provide the care, support, and supervision that he needed to meet the conditions of the probation. The trial court considered his injuries and gave some weight to testimony suggesting that he was less dangerous. Having determined that the juvenile could not receive the appropriate level of care and supervision in his home and that he posed a threat to the public safety and welfare, the trial court acted in accordance with *Tex. Fam. Code Ann. § 54.04(c)* in placing the juvenile on probation outside his home.

Held: Motion for rehearing granted, previous opinion and judgment withdrawn, and trial court's judgment affirmed.

Opinion: The purpose of the Juvenile Justice Code is to provide for the care and protection of the juvenile, placing an emphasis on a program of treatment, training, and rehabilitation. *See TEX. FAM. CODE ANN. § 51.01(2)(C), (3)* (Vernon 2002); *In re D.Z.*, 869 S.W.2d 561, 566 (Tex. App.--Christi 1993, writ denied). However, that is not the only interest served by the juvenile code. The care and protection of the juvenile must be balanced against the welfare of the community and the protection of the public interest. *See TEX. FAM. CODE ANN. § 51.01(1), (4)*; *In re T.D.*, 817 S.W.2d 771, 774-75

(Tex. App.--Houston [1st Dist.] 1991, writ denied). The code's goals should be achieved "in a family environment whenever possible, separating the child from the child's parents [\*3] only when necessary for the child's welfare or in the interest of public safety." *TEX. FAM. CODE ANN. § 51.01(5)*. If the trial court orders the child removed from the home environment, it must state its reasons for doing so in its disposition order. *See id. § 54.04(f)*. We review these reasons and "determine whether they are supported by the evidence and whether they are sufficient to justify the particular disposition ordered." *In re K.T., 107 S.W.3d 65, 68 (Tex. App.--San Antonio 2003, no pet.)*.

## Placement Outside the Home

At the disposition hearing, the trial court heard testimony from several witnesses, including M.A.'s neighbors. The complainant and one of M.A.'s neighbors testified to the events of the day of the burglary. A second neighbor testified that on the day of the burglary he saw M.A. walking toward the complainant's apartment carrying a butcher knife with a nine-inch blade, and, on another day, he overheard M.A. and another resident discussing drugs. This neighbor characterized M.A. as someone who liked to associate with older men, and he said M.A. had a reputation as a burglar, vandal, and "peeping tom." [\*4] A third neighbor said her own son, another boy, and M.A. were caught breaking lights in the apartment complex. When she came home from work, she found the boys in the backseat of a police car; her son crying, the other boy "delirious," and M.A. laughing. Her own apartment had been burglarized twice, and she suspected M.A. because she found him hiding in the bushes near her apartment. She said a neighbor told her M.A. tried to sell him some of the items stolen from her apartment. A fourth neighbor, Carol Tsami, testifying on M.A.'s behalf, said that M.A. had a reputation for burglary, fighting, "being rowdy," and associating with older males. However, Tsami thought M.A.'s behavior had improved significantly since he was shot. M.A.'s probation officer recommended one year probation in the home because M.A.'s grades were good, this was his first adjudication, and he had adequate supervision at home. He testified that M.A.'s mother had previously had him placed outside her home because she was concerned that M.A. socialized with older boys who led him into criminal activity. M.A. returned home one year later. The probation officer admitted he was not aware of M.A.'s reputation in his neighborhood [\*5] for use of marijuana, carrying a butcher knife, or possession of pornographic magazines.

Leon Webster n1 testified that he also believed M.A.'s behavior improved after the shooting, and Webster thought M.A. was now more willing to accept supervision. Webster testified that he spent more time with M.A. than M.A.'s mother because of her work hours. Although Webster may be commended on his efforts with M.A., he is, as M.A.'s mother's "significant other," under no obligation to continue those efforts. That obligation lies with M.A.'s mother, Ms. Teresa Allen. Ms. Allen believed M.A.'s behavior changed for the better after the shooting. Ms. Allen said M.A. denied his involvement in the burglary when she asked him about it shortly after he was charged. However, after the first day of trial and the night before the disposition hearing, M.A. told her "that he did go into that lady's house." It was not until the disposition hearing that Ms. Allen realized who "that lady" was; she apparently thought the complainant was another woman in the neighborhood. The State asked Ms. Allen, "Are you telling us for the last year he has not been honest with you about this?" She responded as follows: [\*6]

I never knew, okay, up until it came up that he was going to be charged. I take that back. Rumors - the neighbors had been telling me some kids had been breaking in there, and they was not aware, you understand what I am saying, I didn't know [M.A.] was involved in all the breaking in and out. There is nothing in my house that shows that, like no new TV in my house, or a VCR or a microwave. . . .

n1 Although Webster testified he has known M.A. since M.A. was a baby, Webster has not played a constant role in M.A.'s life. Webster and M.A.'s mother are currently living together; however, Webster has moved in and out of M.A.'s mother's home over the years.

Nothing indicates an obligation on his part to remain in M.A.'s home or a part of his life.

Ms. Allen admitted she did not know M.A. associated with older boys and men. When asked if M.A. was "more of a follower, [could] older children influence him," she responded, "To do whatsoever, whatever I guess, yes, that's where all his stuff originated [\*7] from." Although Ms. Allen said she would ensure M.A. only associated with children his own age, she explained that her work schedule occasionally required her to be at work from 8:30 a.m. until midnight. Ms. Allen was asked:

Q. And you want [M.A.] to be open with you. Do you feel he is open with you?

A. To a degree, yes.

Q. Just not about the criminal activity?

A. Whether or not he is doing thing [sic] I don't approve of.

Q. And there could be more things, you don't know because he has not told you?

A. He doesn't have that much freedom. When these things were going on could be the time I was at work. So it is not like 24 hours of time where he can get into different types of things.

As to his association with J.T. Tsami, n2 the following exchange occurred:

Q. Ms. Allen, I would like to know how you feel about [M.A.] hanging out with J.T., who is 14 years old and we know for a fact is sexually active, and we know his mom has come in here today and said the reason he is sexually active is because of peer pressure. And we know he is charged with aggravated sexual assault. How do you feel about your son with a child like that?

A. When [\*8] him and J.T. is together, it is not a matter of him spending the night over at J.T.'s house or J.T. spending the night at my house. He never came to my house after dark. . . If he comes over there they are usually going to play ball.

Q. You don't have any concerns about J.T. and your son hanging out?

A. Not as far as his charges, no.

. . .

Q. . . . Do you not have concerns about these two boys who are so easily swayed hanging out together and committing very serious crimes?

A. No, because they don't hang out everyday. . . .

The trial court also questioned Ms. Allen about what she was told by M.A. and about her ability to supervise M.A.:

Q. So is it your understanding [M.A.] was burglarizing this lady's home for Mike?

A. Maybe. You know, Judge Kelsey, I don't really know how it went.

Q. Slow down. This is your child and you love him and you are concerned about him,

correct?

A. Yes.

Q. So if your child has done something wrong, and he is telling you he did something wrong, I know you asked him some questions?

A. Yes, I did.

Q. What did [M.A.] get for burglarizing this lady's house? What did he get? What did he get?

A. [\*9] He didn't tell me anything.

Q. He didn't get any money?

A. He didn't tell me. I asked him what happened. He said - - he just said they were going to burglarize the house. I said what happened to the stuff? I asked him that and he told me that Mike took it and gave it to somebody else. And they are not there anymore.

Q. That is not telling me nothing [sic].

A. You understand what I am saying? I am telling you what he told me.

**Q. So he is still not forthcoming. He is not telling you everything. Is that right?**

**A. I guess. n3**

...

Q. The person who takes care and watches [M.A.] is Mr. Webster, right?

A. Most of the time.

Q. Because you are at work?

A. Yes.

Q. Basically [M.A.] is just doing his own thing, except for when he follows Mr. Webster's instructions. Is that correct?

A. He usually minds Leon. He is into computers a lot of the time. He can keep him in.

Q. Who is into computers?

A. Leon.

Q. I thought you were referring to [M.A.]?

A. Computer technician.

Q. The supervision of this young man is pretty much you rely on Mr. Webster to help you. You have to work long hours to make a living? [\*10]

A. Sometimes, yes.

Finally, the prosecutor asked Ms. Allen about her ability to supervise M.A.:

Q. Can you tell us just briefly how often [M.A.] is left by himself where he is not in school and you are not around, and Mr. Webster is not around?

A. Rarely. If Leon cannot be with him, I would usually find a way. My mom will pick him up from school or I would take off an hour from work and take him. I don't normally leave him there by himself, not if I am at work or something like that. He has been at the house by himself if I went to the store, but it is never no long period of time.

Q. Can you explain if he is not being left alone how he could have committed this burglary?

A. No, I can't.

n2 J.T., who is Carol Tsami's fourteen-year-old son, was charged with aggravated sexual assault. At the time of M.A.'s disposition hearing, J.T.'s case was unadjudicated.

n3 The conversation between M.A. and his mother occurred almost six months after the shooting allegedly changed M.A.'s life.

[\*11]

Based on this evidence, we hold that the State carried its burden of proof and the trial court did not abuse its discretion in finding that "[M.A.], in [his] home, [could not] be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation." *See TEX. FAM. CODE ANN. § 54.04(c)*.

#### Care at Southton Facility

The dissent states that "resolution of this case centers upon . . . [1] whether the evidence supports the trial court's implicit conclusions that placement outside the home 'is necessary for the child's welfare or in the interest of public safety" and, if so, [2] whether it will provide M.A. with "the care that should be provided by parents." *See slip op. at \_\_\_*. We agree with the first part of this statement because safety of the public is a primary concern of the Juvenile Justice Code. *See In the Matter of J.P., 136 S.W.3d 629, 632, 47 Tex. Sup. Ct. J. 579 (Tex. 2004)* (noting that a "primary concern" of the Juvenile Justice Code is "the safety of the public"). However, we disagree with the second part of the dissent's statement because [HN4] nothing in the Juvenile Justice Code [\*12] requires the trial court to determine, or the State to prove, that the public or private institution or agency will provide a specific type of care, rehabilitation, or supervision. The dissent's conclusion that there is ". . . no evidence regarding the Southton facility or the care it provides. . ." erroneously places a burden on the State that the code does not require.

Instead, under the code, a child may not be placed "on probation outside the child's home . . . unless the court or jury finds that the child, *in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of the probation . . .*" *TEX. FAM. CODE ANN. § 54.04(c)* (Vernon Supp. 2004) (emphasis added). If such a finding is made, "the court or jury may . . . place the child on probation . . . [in] a suitable public or private institution or agency, except the Texas Youth Commission." *Id.* at § 54.04(d)(1)(B)(ii). Therefore, [HN6] the trial court here was authorized to place M.A. on probation outside his home if the court found that he would not receive the care and supervision in his home necessary to meet the conditions [\*13] of his probation. As stated above, the record supports such a finding.

## Public Safety and Welfare

The trial court also was required to consider the public's safety and welfare. *See TEX. FAM. CODE ANN. § 54.01(e)(4)*; *see also In the Matter of J.P.*, 136 S.W.3d 629, 2004 WL 1087303 at \*3. The dissent concedes there is "abundant evidence from which the trial court could have concluded that placement outside the home was necessary in the interest of public safety *before* [the shooting]." *See slip op.* at \_\_\_ (emphasis in original). n4 The dissent also concedes there is evidence, albeit "very little" evidence, that M.A. posed a threat to public safety *after* the shooting. *Id.* at \_\_\_. The dissent describes the shooting as "pivotal" in understanding the testimony at trial. However, the importance of that event and its affect, if any, on M.A. was for the trial court, and not this court, to decide because that decision necessarily involved an evaluation of credibility and demeanor. The trial court had the advantage of considering the factual sequence of events as outlined by the dissent. But, as evidenced by its reasoning set [\*14] forth below, the trial court had to determine whether M.A. truly experienced a life-altering experience following the shooting or whether his conduct, his "reputation for taking advantage of friendly relationships for his own gain," and his mother's apparent inability to supervise him warranted placing M.A. on probation outside his home.

n4 The dissent characterizes this evidence as "the rankest hearsay and gossip." No objections were raised to any testimony as being "hearsay" and it was the prerogative of the fact-finder, here the trial court, to determine what testimony was mere gossip and the weight to be given any such gossip.

The trial court initially committed M.A. to the Texas Youth Commission, citing among its reasons a concern for the safety of the community. While informing M.A. of its disposition, the court referred to the shooting several times:

"The only thing that intervenes is you got shot and that slowed you down. Otherwise there is no telling what you would be before this Court for. Because [\*15] you were running straight down the hill getting in trouble."

"In Mr. Echols' report there is mention this young man started having problems at age nine. He has been placed out of the home in the past and then the burglary, the breaking the street lights comes up, going down the alley with a butcher knife. All these problems, even with him being shot, when he recovers what says he is not going to go back to his old habits if he doesn't get the appropriate help?"

". . . [M.A.], look, I am going to have to find there is a need for disposition and as for your rehabilitation. But I think more importantly for the protection of the community in which you were residing where several, and let me count them, at least four people from your neighborhood came in and testified about the problems they were having while you lived in the neighborhood, or were living in the neighborhood and miraculously everything calms down when you leave. And then you come back to the neighborhood but you are recuperating because you have been shot, not able to do anything. It is my opinion that you have been out of control for a while, sir. . . ."

Later, on its own initiative, the court modified its [\*16] disposition order and placed M.A. on probation outside his home and in the custody of the chief juvenile probation officer. Again, the court considered M.A.'s behavior before and after the shooting: "I believe the Texas Youth Commission is also appropriate, but because of your age, your physical condition being injured in the past, and to give you one opportunity to prove that you can do a good job, I am going to give you an opportunity to go to placement."

The trial court's decision not to commit M.A. to the Texas Youth Commission indicates the court placed

some emphasis on the shooting and gave some weight to the testimony that M.A. had turned his life around. However, the trial court's decision to place him on probation outside his home, rather than in his home, indicates the court did not discount - as the dissent does in its opinion - M.A.'s conduct before the shooting and his reputation in the neighborhood. It is apparent the trial court implicitly arrived at two conclusions. First, either not enough time had elapsed since the shooting to determine whether M.A. had truly changed his life or M.A. had not so completely changed his life since the shooting that he was no longer [\*17] a threat to the public safety and welfare. Second, M.A.'s family environment remained unchanged since the shooting; thus, the purposes of the Juvenile Justice Code - "to provide for the protection of the public and public safety" and "to protect the welfare of the community and to control the commission of unlawful acts by children" - could not be achieved in his home environment.

## CONCLUSION

Having determined that M.A. could not receive the appropriate level of care and supervision in his home and that he posed a threat to the safety and welfare of his community, the purposes of the Juvenile Justice Code were satisfied by the court's decision to place M.A. on probation outside his home. The court's reasoning indicates it considered and applied the code's purposes, and acted with reference to its guiding principles.

Conclusion: Therefore, the trial court did not abuse its discretion in placing M.A. on probation outside his home. We overrule M.A.'s issue on appeal and affirm the trial court's judgment.

Dissent not included.