YEAR 2005 CASE SUMMARIES

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

Hearsay allowed in Motion to Modify hearing regarding violations of probation. [In the Matter of M.W.R.](05-2-30)

On April 13, 2005, the San Antonio Court of Appeals held that, in Motion to Modify hearing, confrontation clause not violated by probation officer testifying that appellant's mother informed her that appellant was not at home during his curfew hours.

05-2-30. In The Matter of M.W.R., MEMORANDUM, No. 04-04-00305-CV & 04-04-00306-CV, 2005 Tex. App. Lexis 2778 [Tex. App– San Antonio (4th Dist.) 4/13/05].SP

Facts: The 289th Judicial District Court, Bexar County, Texas, entered an order modifying disposition and committing juvenile to Texas Youth Commission for an indeterminate sentence. Juvenile appealed.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant contends the trial court's admission of hearsay testimony at the modification hearing deprived him of his constitutional right of confrontation. The Sixth Amendment's Confrontation Clause provides: "In all *criminal prosecutions*, the accused shall enjoy the right to...be confronted with the witnesses against him...." U.S. CONST. amend. VI. (Emphasis added). The Fourteenth Amendment of the Constitution makes the Confrontation Clause applicable to the states. *Pointer v. Texas*, 380 U.S. 400, 401, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). Article I, Section 10 of the Texas Constitution and Article 1.05 of the Texas Code of Criminal Procedure also guarantee the accused the right to confront witnesses in all criminal prosecutions. TEX. CONST. art. I, § 10; TEX. CODE. CRIM. PROC. ANN. art. 1.05. Modification of a juvenile probation, like revocation of criminal community supervision, is not a "criminal prosecution" within the meaning of the Sixth Amendment constitutional guarantee. *Compare* TEX. FAM. CODE ANN. § 54.03(b), (e) (Vernon 2002) (explaining that at an adjudication hearing in which the juvenile court's purpose is to decide whether the juvenile is delinquent of a felony or misdemeanor, the juvenile is entitled to a jury trial, counsel, confrontation of witnesses and the right against self-incrimination) *with id*. § 54.05(c) (specifically denying the juvenile the right to a jury in a modification hearing); *see also In re A.M.B.*, 676 S.W.2d 448, 450-51 (Tex. App.-Houston [1st Dist.] 1984, no pet.) (citing *Hood v. State*, 458 S.W.2d 662, 663 (Tex. Crim. App. 1970)) (modification of juvenile probation is not a "trial" for purposes of the Sixth Amendment).

Appellant contends his confrontation rights were violated when the trial court permitted Tracy Munoz, his probation officer, to testify that appellant's mother informed her that appellant was not at home during his curfew hours. However, appellant had already been adjudicated of the underlying offenses. The purpose of the motion to modify disposition was not to determine whether appellant violated any

laws of the United States or Texas, but rather to determine whether appellant violated the curfew conditions of his probation. Appellant's first issue is overruled.

In his second issue, appellant contends the trial court erred in revoking his probation because the evidence was insufficient to find he violated a reasonable and lawful court order.We review a court's decision to modify a juvenile disposition under an abuse of discretion standard. *In re M.A.L.*, 995 S.W.2d 322, 324 (Tex. App.-Waco 1999, no pet.). Because this appeal arises from a proceeding to modify a disposition based on an adjudication of delinquent conduct, we must determine "whether the record shows that the court abused its discretion in finding, by a preponderance of the evidence, a violation of a condition of probation." *Id*. When a juvenile challenges the legal sufficiency of the evidence, we consider only the evidence and inferences tending to support the judgment. *In re S.A.M.*, 933 S.W.2d 744, 745 (Tex. App.-San Antonio 1996, no writ). In reviewing a factual sufficiency claim, we consider and weigh all the evidence in the case and set aside the judgment only if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re J.J.*, 916 S.W.2d 532, 535-36 (Tex. App.-Dallas 1995, no writ). The trial court is the sole trier of facts and judge of the credibility of the witnesses and the weight to be given their testimony. *See Grant v. State*, 566 S.W.2d 954, 956 (Tex. Crim. App. 1978).

The evidence adduced at the modification hearing established appellant was not present at his residence during his curfew hours. Munoz testified she did not encounter appellant at his residence, and he did not come to the door. Munoz was informed by appellant's family members that he was not at home. We disagree with Appellant that the trial court erred in finding, by a preponderance of the evidence, that he violated a reasonable and lawful order of the court.

Conclusion: We affirm the trial court's order.