YEAR 2005 CASE SUMMARIES

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

Questioning of respondent by trial court during disposition hearing was not reversible error. [In the Matter of K.P.S.](05-2-35)

On April 28, 2005, the Fort Worth Court of Appeals held that a trial court's questioning of appellant during disposition hearing did not constitute fundamental error, and appellant had to object in order to preserve error for appeal.

05-2-35**.** In the Matter of K.P.S., MEMORANDUM OPINION, No. 2-04-228-CV, 2005 Tex.App.Lexis 3285, (Tex.App.– Fort Worth 4/28/05).

Background: Appellant was charged with one count of arson and one count of forgery. See *TEX. PENAL CODE ANN. § 28.02* (Vernon 2003), *§ 32.21* (Vernon Supp. 2004-05). Appellant waived his right to a jury trial and stipulated to the forgery count. After an adjudication and disposition hearing, the trial court adjudicated appellant delinquent on both counts and ordered that appellant be committed to the Texas Youth Commission for an indeterminate period not to exceed his twenty-first birthday.

Facts: In his first four issues, appellant complains that the trial court violated his right to due process and his Fifth Amendment right not to testify against himself by soliciting and considering information relating to an infraction that appellant had allegedly committed while he was in detention. During appellant's disposition hearing, appellant's counsel contended during his closing argument that appellant has been on "Level One" and has not committed any infractions while he has been in detention. The following exchange then occurred between the trial court and appellant:

> THE COURT: Actually, I think he had a problem last night, is that right?
>
> [APPELLANT]: Huh-uh.
>
> THE COURT: You're not on Level Two Unacceptable?
>
> [APPELLANT]: No ma'am.
>
> THE COURT: That's not what my report dated today indicates.
>
> [APPELLANT]: No, ma'am, the guy told me, he read us our levels, and he told me I was on Level One, still Outstanding.
>
> THE COURT: When did he say that?

[APPELLANT]: This morning.

THE COURT: So there wasn't a problem with you getting a major infraction for talking at the table last night?

[APPELLANT]: No ma'am.

THE COURT: Mr. Sumpter, can you check on that?

PROBATION OFFICER SUMPTER: Yes, Your Honor, I'll check on that.

Appellant's counsel completed his closing argument, and then the following occurred:

THE COURT: Thank You. Ms. Kelleher, did you find out anything?

PROBATION OFFICER KELLEHER: Your Honor, I spoke with the Detention Supervisor, Greg Frick, and your report is correct.

THE COURT: All right. All right. So are you saying nothing happened last night? Are you still saying that?

[APPELLANT]: They didn't tell me anything.

THE COURT: Well, you're the one that would have gotten in trouble. Did you get into any trouble last night?

[APPELLANT]: No, ma'am, I thought I sat by myself last night when I was eating.

THE COURT: You can't remember?

[APPELLANT]: No, ma'am.

Appellant did not object during either exchange.

Held: Affirmed

Memorandum Opinion: To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. *TEX. R. APP. P. 33.1(a)(1)*; *Mosley v. State, 983 S.W.2d 249, 265 (Tex. Crim. App. 1998)* (op. on reh'g), *cert. denied, 526 U.S. 1070, 143 L. Ed. 2d 550 (1999)*. Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. *TEX. R. APP. P. 33.1(a)(2)*; *Mendez v. State, 138 S.W.3d 334, 341 (Tex. Crim. App. 2004)*. "Except for complaints involving systemic (or absolute) requirements, or rights that are waivable only, . . . all other complaints, whether constitutional, statutory, or otherwise, are forfeited by failure to comply with *Rule 33.1(a)*." *Mendez, 138 S.W.3d at 342*.

Appellant argues that the trial court committed fundamental error when it improperly solicited and considered information relating to the alleged infraction. As support for his argument, appellant relies primarily on *Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000)*. In *Blue*, the trial judge apologized to a group of prospective jurors during the jury selection process, telling them that he would have preferred that the defendant plead guilty rather than go to trial. *Id. at 130*. The court of criminal appeals held that

the comments "tainted appellant's presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection." *Id. at 132*.

The present case differs significantly from *Blue.* The trial court's actions did not taint appellant's presumption of innocence. At the time the trial court questioned appellant, it had already adjudicated appellant delinquent. Further, while the trial court in *Blue* directed its comments at prospective jurors, appellant waived his right to a jury trial, and therefore there were no jurors to be affected by the trial court's conduct. Thus, unlike *Blue*, the trial court's conduct did not taint the presumption of appellant's innocence or vitiate the jury's impartiality. Finally, we agree with Justice Keasler, who wrote that *Blue* was "highly unique and litigants should not view [its] holding as an invitation to appeal without making proper timely objections. " *Id. at 139* (Keasler, J., concurring).

Conclusion: The trial court's actions did not constitute fundamental error, and appellant had to object in order to preserve error for appeal. The court overruled appellant's first four issues. The court also held that the evidence was factually sufficient to support the finding that appellant committed arson [opinion omitted].