YEAR 2005 CASE SUMMARIES

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

The issue of whether a child lacks responsibility for his conduct as a result of mental illness must be tried to the court or jury at the adjudication hearing, not during the hearing to modify disposition. [In the Matter of D.B.](05-4-12)

On September 30, 2005, the Dallas Court of Appeals (5th Dist.) held that testimony during the hearing to modify disposition concerning appellant's mental status failed because the issue regarding lack of responsibility must be brought during the adjudication hearing.

05-4-12. **In the Matter of D.B.**, MEMORANDUM, No. 05-04-01152-CV, 2005 Tex.App.Lexis 8144 [Tex.App.— Dallas (5th Dist.), 9/30/05].

Facts: On May 28, 2003, the trial court signed an order of adjudication and judgment of disposition with placement that found appellant had engaged in delinquent conduct. The court placed appellant on probation for twelve months at the Dallas County Youth Village (the Village). On January 13, 2004, the State filed a motion to modify disposition, alleging appellant violated the conditions of his probation by being unsatisfactorily discharged from court-ordered placement and failing to obey the rules of placement. Following a hearing, the court found appellant violated the conditions of probation, sustained the State's motion, and committed appellant to TYC.

Held: Affirmed

Memorandum Opinion: In his first issue, appellant argues that, because he was mentally ill at the time of the probation violations, he lacked responsibility for his conduct. Appellant asserts the fact that he was properly medicated for five months in detention without any incidents of aggression proves his behavior at the Village was the result of his mental illness. Thus, appellant argues, the trial court erred in finding him responsible for his conduct, in violation of *section 55.51*. The State responds that the issue of whether appellant lacked responsibility for his conduct was not properly before the trial court during the hearing to modify disposition and should not be considered on appeal. Alternatively, the State responds that appellant failed to prove by a preponderance of the evidence that he was unable to appreciate the wrongfulness of his conduct or conform his conduct to the law due to mental illness.

When we construe a statute, we begin with the words used. *See Cities of Austin, Dallas, Ft. Worth, and Hereford v. Southwestern Bell Tele. Co., 92 S.W.3d 434, 442, 45 Tex. Sup. Ct. J. 767 (Tex. 2002)*. If a statute is clear and unambiguous, we will interpret the statute according to its plain meaning. *See McIntyre v. Ramirez, 109 S.W.3d 741, 745, 46 Tex. Sup. Ct. J. 854 (Tex. 2003)*. *Section 55.51(c)* provides that the issue of whether a child is not responsible for the child's conduct as a result of mental illness shall be tried to the court or jury at the adjudication hearing. *TEX. FAM. CODE ANN. § 55.51(c)* (Vernon 2002). Applying the plain language of subsection (c) and considering *section 55.51* as a whole,

we conclude the statute clearly and unambiguously applies only to adjudication hearings, not to modification hearings. *Id*.; *cf*. *T.P.S. v. State, 620 S.W.2d 728, 729 (Tex. Civ. App.-Dallas 1981, no writ.)* (in discretionary transfer proceeding, child not entitled to hearing to determine child's lack of responsibility due to mental illness other than in adjudication hearing).

Here, appellant was adjudicated a child engaged in delinquent conduct and placed at the Village on May 28, 2003. On December 29, 2003, appellant was unsuccessfully discharged from the Village for violating the terms of his probation. Although there was testimony during the hearing to modify disposition concerning appellant's mental status at the time of the probation violations, nothing in the record shows appellant brought the issue of lack of responsibility to the trial court during the adjudication hearing. We resolve appellant's first issue against him.

SUFFICIENCY OF EVIDENCE TO SUPPORT MODIFICATION

In his second issue, appellant argues the trial court abused its discretion in committing him to TYC when all that was required was an adjustment to appellant's medication to control his aggressive behavior. The State responds that the trial court properly modified disposition with commitment to TYC because the evidence showed appellant did not lack the capacity to appreciate the wrongfulness of his conduct.

Juvenile courts are vested with broad discretion in determining the suitable disposition of children found to have engaged in delinquent conduct. *See In re C.J.H., 79 S.W.3d 698, 702 (Tex. App.-Fort Worth 2002, no pet.)*. Abuse of discretion does not occur as long as some evidence of substantive and procedural character exists to support the trial court's decision. *See id*. An abuse of discretion also does not occur where the trial court bases its decisions on conflicting evidence. *Id*. Absent an abuse of discretion or actions without reference to any guiding rules and principles, we will not disturb the trial court's determination. *See In re L.R., 67 S.W.3d 332, 338 (Tex. App.-El Paso 2001, no pet.)*.

When reviewing the legal sufficiency of the evidence to support a modification, we consider only the evidence that tends to support the findings of the trier of fact and disregard all evidence and inferences to the contrary. *See In re C.J.H., 79 S.W.3d at 703*. If more than a scintilla of evidence exists to support the questioned finding, the point fails. *Id*.

The trial court found that appellant violated the conditions of probation by engaging in conduct which caused him to be discharged unsatisfactorily from his court-ordered placement and for failing to obey all the rules of his placement. During the hearing to modify disposition, three staff members at the Village testified about the incident that led to the discharge. At about 7:00 p.m. on December 29, 2003, appellant became upset and yelled at and cursed staff members. James Montgomery, a juvenile residential officer, began writing an incident report. Appellant snatched the report from Montgomery's desk and tore it up. Appellant grabbed several files from a drawer and tore them up. Appellant hit Montgomery in the leg when he grabbed the drawer. Montgomery got up from the desk. In his attempt to get the report from Montgomery, appellant bumped Montgomery's shoulder. Appellant was discharged from the Village the next day. Staff members at the Village testified appellant had about 150 negative incident reports, and they knew appellant took medication for his behavioral problems but did not know appellant had a mental illness.

Dr. Louis Calderon, who supervised appellant's medication, and the doctors who saw appellant, testified appellant had a mental illness and was diagnosed with and received medication for Attention Deficit Hyperactivity Disorder (ADHD). At the time of the hearing, appellant's diagnosis had been changed to psychotic order NOS. n1 Calderon testified that one week before the incident, appellant's medication was increased, not changed. Calderon testified he did not believe appellant's behavior at the

time of the incident was due to appellant's mental illness because aggression was not per se a part of ADHD. Calderon believed that, at the time of the incident, appellant knew the consequences of his actions. Dr. Tanya Zielinski, appellant's expert witness, testified she spent a lot of time with appellant and believed appellant had more problems than ADHD. Zielinski testified appellant should be diagnosed as having a psychotic disorder, paranoia, depressive symptoms, and a formal thought disorder that can drive aggression. When appellant is under the influence of his paranoia, he does not understand the consequences of his actions.

n1 There is nothing in the record that explains the meaning of NOS.

Appellant does not challenge the trial court's determination that he violated a reasonable and lawful order of the court. Appellant argues the evidence shows he was mentally ill at the time he violated a reasonable and lawful order of the court. We have already concluded lack of responsibility was not a proper issue in the modification hearing.

If a trial court finds beyond a reasonable doubt that a child violated a reasonable and lawful order of the court, a disposition based on that finding may be modified to commit the child to TYC. *See TEX. FAM. CODE ANN. § 54.05(f)*. We conclude the evidence is sufficient to show appellant violated the conditions of his probation and that the trial court did not abuse its discretion in committing appellant to TYC. *See C.J.H., 79 S.W.3d at 702-3*. We resolve appellant's second issue against him.

REFORM ORDER MODIFYING DISPOSITION

Appellant argues the order modifying disposition should be modified to correct citations to the family code to properly reflect the proceedings. The State concedes the order modifying disposition should be modified to correct the referred-to sections of the family code.

The trial court's order modifying disposition incorrectly recites *family code section 54.04(s)* whereas *section 54.05* is the operative section. *See TEX. FAM. CODE ANN. § § 54.04*, *54.05* (Vernon Supp. 2004-05). The order also incorrectly states the court considered reports referred to in *section 54.05(f)* of the Juvenile Justice Code, whereas *section 54.05(e)* refers to written reports that the court may consider. *See id. § 54.05(e)*, *(f)*. Thus, the trial court's judgment is incorrect. We resolve appellant's third issue in his favor.

We modify the trial court's order modifying disposition to show the court considered the reports referred to in *Section 54.05(e)* of the Juvenile Justice Code and that appellant is eligible for commitment to TYC pursuant to *section 54.05(f)* of the Juvenile Justice Code. *See TEX. R. APP. P. 43.2(b)*; *Bigley v. State, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993)*; *Asberry v. State, 813 S.W.2d 526, 529-30 (Tex. App.-Dallas 1991, pet. ref'd)*.

Conclusion: As modified, we affirm the trial court's order modifying disposition.