
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Trial court did not abuse it's discretion in committing child to TYC for violating conditions of probation by leaving home without permission.[In the Matter of A.G.] (06-1-14)

Trial court did not abuse it's discretion in committing child to TYC where child left his residence without permission in violation of his probation and child had left because he was concerned about his and his family's safety, due to threats on his life.

¶ 06-1-14. **In the Matter of A.G.**, MEMORANDUM, No. 04-05-00398-CV, 2006 Tex.App.Lexis 375 (Tex.App.— San Antonio, 1/18/06).

Facts: On May 24, 2004, A.G. was charged with delinquent conduct, specifically, burglary of a building with intent to commit theft, a felony. Subsequently, on June 18, 2004, A.G. waived his right to a jury trial and pled true pursuant to a plea bargain, resulting in the court placing A.G. on probation.

On August 17, 2004, the State filed a motion to modify disposition alleging that A.G. violated conditions 6 and 7 of his probation, requiring him to remain at his residence absent permission from his probation officer, parent or guardian and abide by a 7 p.m. curfew. A disposition hearing was held on May 11, 2005, wherein the State introduced the testimony of Raul Ureste, A.G.'s probation officer. During his testimony, Ureste stated he did not give A.G. permission to leave home on June 24, 2004. Ureste discovered A.G.'s absence on June 25, 2004 during a home visit. Ureste conducted a second home visit on June 28, 2004 and A.G. had not returned. Ureste further testified that on July 6, 2004, having not returned to his home, a warrant was issued for A.G.'s arrest.

A.G.'s mother, also testified stating that she spoke to Ureste around June 24, 2004 about her son's safety. According to A.G.'s mother, A.G. told her he was concerned about his safety and his family's due to threats on his life. Nonetheless, his mother testified she did not give A.G. permission to leave the residence on June 24, 2004.

As a result, the juvenile court found that A.G. violated conditions 6 and 7 of his probation. During the placement phase, the State presented additional factors for the court to consider in deciding placement, such as A.G.'s gang activity, drug history, and that commitment to TYC could provide a safer accommodation if in fact his life was in danger. The juvenile court revoked probation and committed A.G. to TYC.

Held: Affirmed

Memorandum Opinion: We review the trial court's modification of a juvenile disposition for an abuse

of discretion. *In re H.G.*, 993 S.W.2d 211, 213 (Tex. App.--San Antonio 1999, no pet.). The juvenile court abuses its discretion when it acts arbitrarily or unreasonably--that is without reference to guiding rules and principles. *Id.*

After a hearing, a court may modify its disposition of a juvenile found to have engaged in a felony or multiple misdemeanors, including transferring to TYC, if the juvenile subsequently violates a reasonable and lawful order of the court. *TEX. FAM. CODE ANN.* § 54.05(f) (Vernon 2002); *H.G.*, 993 S.W.2d at 213. There is no dispute that A.G. did not comply with conditions 6 and 7 of his probation. Instead, A.G. brings forth three points of error alleging the trial court erred in modifying his disposition and committing him to TYC because (1) considering the circumstances the probationary conditions were unreasonable; (2) a necessity defense exonerated A.G. from violating conditions 6 and 7; and (3) there was insufficient evidence that he posed a threat to the public.

In his first point of error, A.G. claims conditions 6 and 7 were reasonable when imposed, however, became unreasonable once his life was threatened. Notably, A.G. fails to provide any relevant authority in support of his claim of error. In *In re D.E.P.* the court addressed a similar argument when D.E.P. violated his probation for failing to attend the prescribed school. 512 S.W.2d 789, 792 (Tex. App.--Houston [14th Dist.] 1974, no writ). Due to the residency of his parents and uncle, D.E.P. was not eligible to attend the school the court had ordered. *Id.* at 791-92. Thus, the court held the order was unreasonable because the juvenile could not comply with the order due to circumstances beyond his control. *Id.* at 792.

Here, A.G. claims that his failure to comply with conditions 6 and 7 was due to the fact that his life was threatened. A.G. claimed that on June 19, 2004 he learned that his life was in danger. He also testified that there had been previous attempts on his life. Importantly, none of the attempts occurred while he was at home, rather when he was away from home. Unlike *D.E.P.*, the record fails to show that conditions 6 and 7 were unreasonable because A.G. could not comply with these conditions due to a legal impediment. Reviewing the evidence in the light most favorable to the trial court's ruling we are unable to say that the trial court abused its discretion in concluding conditions 6 and 7 were reasonable at the time A.G. committed the infractions. Accordingly, we overrule A.G.'s first point of error.

We turn next to A.G.'s necessity defense. The Texas Penal Code provides that the defense of necessity is available as justification for criminal conduct only if (1) the defendant reasonably believes his conduct is immediately necessary to avoid imminent harm, (2) the desirability and urgency of avoiding the harm clearly outweighs the harm sought to be prevented by the law prescribing the conduct, and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise appear. *TEX. PEN. CODE ANN.* § 9.22 (Vernon 2003); *McGarity v. State*, 5 S.W.3d 223, 227 (Tex. App.--San Antonio 1999, no pet.).

"Imminent," for purposes of a necessity defense, means something that is impending or on the point of happening, not pending or about to happen. *McGarity*, 5 S.W.3d at 227. Thus, the threshold issue here is whether A.G. reasonably believed his conduct was immediately necessary to avoid imminent harm. *Id.* A.G. testified that he received a threat on his life on June 19, 2004, and based on this information he left his home on the evening of June 24, 2004 in violation of his probation. A.G. testified that he contacted the police to inform them of the threat, but there is no record of such report. Ureste testified that he offered to provide a safe place for A.G., but A.G. refused desiring instead to live with his girlfriend. Significantly, A.G.'s mother knew of the threat and yet did not give him permission to leave his home. A.G. testified, after he left on June 24, 2004, he was "chilling and having a good time" with his friends at some apartments. An associate was called there by another gang. A.G. did not return home until after a warrant was sought on July 6, 2004.

While it is possible that A.G. was at some point in danger, there is some evidence indicating A.G.'s violations were not immediately necessary to avoid imminent harm as required by a necessity defense. *See Stefanoff v. State*, 78 S.W.3d 496, 501 (Tex. App.--Austin 2002, pet. ref'd) (stating "imminent harm contemplates a reaction to a circumstance that must be the result of a 'split-second decision [made] without time to consider the law'" (internal citations omitted)). It was within the trial court's discretion to determine A.G. unjustifiably violated a reasonable court order and the record demonstrates, in concluding so, the trial court did not act without reference to guiding rules and principles. As such, we overrule A.G.'s second point of error.

A.G.'s third point of error claims the trial court abused its discretion in committing him to the TYC because there was insufficient evidence that A.G. posed a threat to the public. Essentially, A.G. argues that despite the court's discretion to modify its disposition based on his admitted probation violations, the court lacked discretion to commit A.G. to TYC without sufficient evidence that he was a threat to the public. We disagree. A.G. was before the juvenile court on a motion to modify his prior disposition, which is governed by *Section 54.05(f) of the Texas Family Code*. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon 2002). *Section 54.05(f)*, which allows a transfer to TYC upon a modification of a disposition, only requires that the trial court find that the juvenile violated a reasonable and lawful order of the court. *H.G.*, 993 S.W.2d at 214. Consequently, the sole inquiry before this Court is whether the trial court abused its discretion in finding that A.G. violated a reasonable and lawful order of the court. *Id.* Having concluded that the trial court did not act arbitrarily or unreasonably in finding that A.G. unjustifiably violated his probation we overrule A.G.'s third point of error.

Conclusion: In light of the evidence considered by the trial court, we hold that the trial court did not abuse its discretion in committing A.G. to TYC. The trial court's judgment is affirmed.