YEAR 2006 CASE SUMMARIES

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

In assault of public servant, teacher in lawfully discharge of "an official duty" when physically restraining student. [In the Matter of P.N.](06-4-1B)

On August 4, 2006, the Austin Court of Appeals held that, in assault on public servant, teacher was considered to be lawfully discharging "an official duty" when physically restraining student whose behavior was unruly and potentially threatening.

¶ 06-4-1B. **In the Matter of P. N.**, MEMORANDUM, No. 03-04-00751-CV, 2006 Tex.App.Lexis 6878 (Tex.App.— Austin, 8/4/06).

Facts: Jeffrey Dunlap testified that he was a "substitute teaching assistant . . . assigned to work with [P.N.] as a one-on-one shadow." The initial purpose of this role was to reward P.N. for completing his work; *i.e.*, to "play a game" with him and "to be his companion." But Dunlap was also assigned to "observe" P.N. and, if "any restraint [was] needed for P.N., you know, as a last resort, I would [] be the one to do it." Prior to taking on this role, Dunlap received two days' training in aggression management, wherein he was taught to use the Satori Alternative to Managing Aggression (SAMA) technique for restraint. Also present at this training class were Dobie security staff, the administrators, and "teachers that would be directly involved on a day-to-day basis with [P.N.]."

On the morning at issue, both divisions of the special education department were together in the "breakfast room" n1 at Dobie. This included P.N.'s "behavioral unit," comprised of students with behavioral problems, and the "life skills unit," comprised of mentally disabled students. Around 8:30 a.m., all members of the behavioral unit exited to go to class, except P.N., who refused. Dunlap testified that P.N. began running around, causing Dunlap to worry that P.N. would knock over one of the life-skills students, who were "not physically adept" to protect themselves. Dunlap attempted "to corral P.N. . . . trying to separate him and get him out of the [breakfast room]." P.N. continued running around the room with his arms and fists "flailing" and making "verbal outbursts." At one point, Dunlap observed that two of the life-skills students were "within [P.N. 's] immediate vicinity," and Dunlap "thought [they] would be struck by [P.N.'s] fists. And so that's when [Dunlap] placed [P.N.] in a restraint." At this point in Dunlap's testimony, the prosecutor asked Dunlap to demonstrate how P.N. was behaving, and the district court described for the record that the demonstrated "movements were violent, rapid. He ran some ten feet, swerving, gesticulating wildly. The Court was frightened during the demonstration as he approached and went back into the area where the audience was and as he almost knocked down the easel." n2

> n1 Apparently, this is a classroom style facility where the students in the special education department gather for meals before classes begin.

n2 The court also stated that it "found Mr. Dunlap to be very credible as a witness, both in his physical demonstrations as well as in his testimony."

Dunlap described the restraint he used on P.N. as a "bear hug . . . which consisted of both his arms crossed, with my hands grabbing on to his hands. " Dunlap's intention was to get P.N. out of the breakfast room and into a "cool-down room." He was able to get P.N. to the hallway and, as Dunlap was about to open the classroom door, P.N.'s "legs reared up, and he kicked off--off the wall," causing both Dunlap and P.N. to go "hurling backwards." Dunlap testified that P.N.'s action caused him to be "knocked off balance" and fall to the ground. As a result, Dunlap sustained a "sprained ankle with a possible hairline fracture, along with several bruised vertebrae."

On cross-examination, Dunlap testified that he was trained to use restraint only "if there was anybody in direct physical jeopardy . . . or if there is a possibility of any property damage occurring." When asked whether this meant that he was "not to use force unless there was a threat of imminent, serious, physical harm," Dunlap responded, "I would have to look at the exact wording of the law, but I would assume that's accurate."

Officer Craig Rigtrup with the Austin Independent School District Police testified that he interviewed Dunlap twenty minutes after this incident. According to Rigtrup's report, Dunlap had described P.N. as being "disruptive" and "up and about the room, wouldn't be quiet, . . . making inappropriate comments to female students," and exhibiting "unruly behavior," which was "escalating." Rigtrup's report further reflected that P.N. resisted Dunlap's initial efforts to get him out of the room. In so doing, "P.N. began to slightly push against Dunlap. Dunlap then applied a lawful, policy-approved restraint, to wit: a bear hug." But, as highlighted on cross-examination, Rigtrup's report contained no indication of Dunlap stating that P.N. had physically threatened or harmed other students or that Dunlap, the teachers, or the students "were in fear or danger of any physical harm." When asked whether or not Rigtrup believed P.N.'s behavior constituted "an assault on a public servant," Rigtrup responded, "I felt like it was."

Following this incident between P.N. and Dunlap, a detention hearing was held at which the court ordered that P.N. be removed from his grandmother's custody and placed in the care of the Juvenile Justice Center at the Gardner-Betts Juvenile Detention Facility. While there, P.N.'s probation officer, Creschenda Shuler, came to his dorm room to "check on his well being." Shuler testified that part of her job as P. N.'s probation officer was to "make a recommendation about disposition on his case" and "come into court and testify as to what the Department's recommendation is for him." Shuler testified that P.N. knew these functions were part of her job. Shuler further testified that, when she met with P.N. in his dorm room, they began discussing some of his behavioral problems and what "the consequences [could be] of his continued negative behavior." At that point, P.N. told Shuler "that if [she] sent him to the Texas Youth Commission, that when he went and came back, that he would be waiting in the parking lot to shoot [her]." Shuler testified that she "didn't take him seriously" and she "was not in fear."

The State filed a petition against P.N. alleging that he had engaged in delinquent conduct by committing the offenses of assault on a public servant and retaliation, as well as four other allegations not at-issue in this appeal. Adjudication and disposition hearings were held before an associate judge, at which the State called four witnesses (including Dunlap, Rigtrup, and Shuler), and appellant offered no evidence. The associate judge determined the assault on a public servant and retaliation charges to be true beyond a reasonable doubt and, accordingly, recommended that P.N. be committed to the Texas Youth Commission. The district judge signed a final judgment of delinquency and order of commitment adopting this recommendation October 18, 2004, from which P.N. now appeals.

In four issues, P.N. attacks the factual and legal sufficiency of the evidence to support the judgment regarding assault on a public servant and the legal sufficiency of the evidence to support the judgment

regarding retaliation. We will address each in turn.

Held: Affirmed

Memorandum Opinion: Factual and Legal Sufficiency

We review adjudications of delinquent conduct in juvenile proceedings under the same standard of review we employ to review the sufficiency of the evidence supporting a jury's verdict in a criminal case. *See In re L. M., 993 S.W.2d 276, 284 (Tex. App.--Austin 1999, pet. denied)*; *see also In re B.M., 1 S.W.3d 204, 206 (Tex. App.--Tyler 1999, no pet.)*. The State must prove beyond a reasonable doubt that the juvenile committed an offense, thus engaging in delinquent conduct. *Tex. Fam. Code Ann. § § 51.03*, *54.03(f)*.

To evaluate the legal sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict and determine whether from that evidence any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*; *Sanders v. State, 119 S.W.3d 818, 820 (Tex. Crim. App. 2003)*; *In re L.M., 993 S.W.2d at 284*; *see also Tex. Fam. Code Ann. § 54.03(f)*. The trier of fact is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. *See Jones v. State, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996)*. The standard of review is the same for both direct and circumstantial evidence. *Green v. State, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992)*.

In reviewing the factual sufficiency of the evidence, we consider and weigh all of the evidence in a neutral light and determine whether the fact-finder was rationally justified in finding guilt beyond a reasonable doubt. *Zuniga v. State, 144 S.W.3d 477, 484 (Tex. Crim. App. 2004)*. Evidence may be found factually insufficient when the evidence supporting the verdict, considered alone, is too weak to support the finding of guilt beyond a reasonable doubt, or when the evidence contrary to the verdict is so strong that the standard of beyond a reasonable doubt could not have been met. *Johnson v. State, 172 S.W.3d 6, 10 (Tex. App.--Austin 2005, pet. ref'd)*. In a juvenile case, if the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust, we set aside the disposition order and remand the case for a new disposition hearing. *In re C. C., 13 S.W.3d 854, 859 (Tex. App.--Austin 2000, no pet.)*.

Assault on a Public Servant

In relevant part, *penal code section 22.01* provides that "a person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another," which constitutes "a felony of the third degree if the offense is committed against . . . a person the actor knows is a public servant while the public servant is lawfully discharging an official duty." *Tex. Pen. Code Ann. § 22.01(a)(1)*, *(b)(1)*. P.N. contends that the district court erroneously determined that he committed this offense because the evidence was legally insufficient to establish the requisite *mens rea* or to establish that Dunlap was a "public servant," and was factually insufficient to establish that Dunlap was "lawfully discharging an official duty." *See id*.

Lawful discharge of official duty

For an offense under *section 22.01(b)(1)* to constitute a felony, the assault must be committed against a public servant "while the public servant is lawfully discharging an official duty." *Tex. Pen. Code Ann. § 22.01(b)(1)*. P.N. claims that the evidence is factually insufficient to establish this element because Dunlap was acting in excess of his lawful authority by holding P.N. in a "bear hug" restraint. We disagree.

Dunlap testified that part of his job function was to physically restrain P.N. if necessary and that the school district provided him, as well as other employees who would be working with P.N., specialized training about how to exercise such force; namely, using the SAMA "bear hug" technique for restraint. Dunlap further testified that, pursuant to his training, he was authorized to use restraint "if there was anybody in direct physical jeopardy . . . or if there is a possibility of any property damage occurring." Regarding the incident at issue, Dunlap stated that, after non-physical attempts to remove P.N. were unsuccessful, the use of restraint became necessary when two of the life-skills students were "within [P.N.'s] immediate vicinity," and Dunlap "thought [they] would be struck by [P.N.'s] fists." Dunlap's demonstration of P.N.'s behavior satisfied the district court that P.N.'s "movements were violent, rapid" and "frighten[ing]," and included running and "swerving, gesticulating wildly."

Even taking as true that Dunlap was authorized to use restraint only when "there was a threat of imminent, serious, physical harm," the above evidence satisfies this criteria. Just because Officer Rigtrup's report did not expressly include a statement by Dunlap that teachers or students were physically threatened or in fear of harm by P.N. does not disprove the existence of imminent harm that Dunlap testified about. Furthermore, Rigtrup's report noted that P.N. was engaging in "unruly behavior" that was "escalating." And based on the account Dunlap provided him, Rigtrup's report described Dunlap's action as "a lawful, policy-approved restraint, to wit: a bear hug." *See In re J. L. O. , 2002 Tex. App. LEXIS 5730, at *10* (teacher lawfully discharging official duty when physically restraining student whose behavior was "unruly and potentially threatening," where non-physical attempts to defuse situation had been unsuccessful, because "teachers must have the authority to establish rules and maintain discipline within their classrooms"). n4

> n4 *See also Johnson v. State, 172 S.W.3d 6, 11 (Tex. App.--Austin 2005, pet. ref'd)* (in context of police officer, "lawful discharge" of official duties means "officer is acting within his capacity as a peace officer" and "is not criminally or tortiously abusing his office as a public servant").

Considering all the evidence presented on this issue, which consisted of only Dunlap's and Rigtrup's testimony, we conclude that the district court, as the fact-finder in this case, was rationally justified in determining that Dunlap was "lawfully discharging an official duty" at the time P.N. assaulted him. *See Zuniga, 144 S.W.3d at 484*; *see also Tex. Pen. Code Ann. § 22.01 (b)(1)*. This finding is not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See In re C. C., 13 S.W.3d at 859 (Tex. App.--Austin 2000, no pet.)*. Rather, the finding was supported by factually sufficient evidence.

P.N.'s third issue is overruled.

Other Issues Omitted.

Conclusion: We affirm the district court's judgment.