
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

[2005 Summaries](#) [2004 Summaries](#) [2003 Summaries](#) [2002 Summaries](#) [2001 Summaries](#) [2000 Summaries](#) [1999 Summaries](#)

***Crawford v. Washington* does not apply to determinate sentence transfer hearings. [In the Matter of S.M.](06-4-8)**

On October 19, 2006, the Fort Worth Court of Appeals held that since a determinate sentence transfer hearing was not considered a stage of a criminal prosecution, the Supreme Court's holding in *Crawford v. Washington* did not apply.

¶ 06-4-8. **In the Matter of S.M.**, No. 2-05-262-CV, 2006 Tex.App.Lexis 9056 (Tex.App.— Fort Worth, 10/19/06).

Facts: On December 21, 2001, Appellant n1 entered a negotiated plea of true to engaging in delinquent conduct by committing the felony offense of manslaughter with a deadly weapon. The trial court sentenced Appellant to twenty years' confinement in TYC, subject to a possible transfer to IDTDCJ. On July 18, 2005, pursuant to TYC's request, the trial court conducted a transfer hearing and transferred Appellant from TYC to IDTDCJ. *See TEX. FAM. CODE ANN. § 54.11* (Vernon Supp. 2006). Appellant appeals from the transfer order.

Appellant argues that the admission into evidence of Exhibit Number Two, the TYC report, violates his right of confrontation under *Crawford v. Washington* because the persons who gave information described in the report were not present to testify at the transfer hearing. *See 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. Appellant complains of Exhibit Number Three, which contains an eight-page report signed by Cuculo, because his testimony and recommendation was solely based upon the testimonial reports in TYC records. The records contained numerous incidents of misconduct. n2

n2 *Section 54.11(d) of the Texas Family Code* provides that at a transfer hearing "the court may consider written reports from probation officers, professional court employees, professional consultants, or employees of the Texas Youth Commission, in addition to the testimony of witnesses. At least one day before the hearing, the court shall provide the attorney for the person to be transferred or released under supervision with access to all written matter to be considered by the court." *TEX. FAM. CODE ANN. § 54.11(d)* (Vernon Supp. 2006). There is no complaint in the instant case that Appellant's attorney was not given timely access to the complained-of exhibits.

Held: Affirmed

Opinion: Under *Crawford*, the admission of testimonial hearsay violates the *Confrontation Clause* unless the declarant is shown to be unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford, 541 U.S. at 68, 124 S. Ct. at 1374*. Appellant relies upon a recent

holding of the Texas Court of Criminal Appeals applying *Crawford* to the introduction of prison incident reports and disciplinary reports, and concluding that the reports violated the *Sixth Amendment's Confrontation Clause*. See *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982 (2006).

The *Confrontation Clause of the Sixth Amendment* explicitly applies to "criminal prosecutions." U.S. CONST. amend. VI. The reports in question in *Russeau* were admitted at the punishment stage of the defendant's criminal trial. *Id.* at 880. Clearly, this was a "criminal prosecution." In comparison, a transfer hearing under *family code section 54.11* is not a stage of a criminal prosecution for purposes of the *Sixth Amendment*. *In re D.L.*, 198 S.W.3d 228, 230 (Tex. App.--San Antonio 2006, pet. denied). Under Texas law, a transfer hearing is not a trial; a juvenile is neither being adjudicated nor sentenced. *Id.*; *In re J.M.O.*, 980 S.W.2d 811, 813 (Tex. App.--San Antonio 1998, pet. denied); *In re D.S.*, 921 S.W.2d 383, 387 (Tex. App.--Corpus Christi 1996, writ dismissed w.o.j.). Rather, the transfer hearing is a "second chance hearing" after the juvenile has already been sentenced to a determinate number of years. *In re D.S.*, 921 S.W.2d at 387. Because the juvenile is already being punished for his original conduct in which he was adjudged delinquent, in making this "second chance" determination the trial court should be able to consider the juvenile's behavior since commitment. *Id.* As such, the hearing does not need to meet the same stringent due process requirements as a trial in which a person's guilt is decided. *In re J.M.O.*, 980 S.W.2d at 813; *In re D.S.*, 921 S.W.2d at 387; see also *In re T.D.B.*, 2006 Tex. App. LEXIS 1491, No. 10-05-00015-CV, 2006 WL 408417, at *1 (Tex. App.--Waco Feb. 22, 2006, no pet.) (mem. op.) (holding that a juvenile challenging TYC records at transfer hearing has no right of confrontation). Because a transfer hearing is not a stage of a criminal prosecution, we hold that *Crawford* does not apply. Accordingly, we overrule Appellant's two points.

Conclusion: Having overruled each of Appellant's two points, we affirm the trial court's judgment.

Concurring Opinion (by Justice Livingston): I join in the majority's opinion and result but respectfully write this concurring opinion only to address the conflict I see between the family code provision that allows the State to introduce written reports from probation officers, professional court employees, and professional consultants at a juvenile's transfer hearing, and the *Sixth Amendment confrontation clause* rights. See U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); TEX. FAM. CODE ANN. § 54.11(d) (Vernon Supp. 2006). I do not believe *section 54.11(d)* comports with the Supreme Court's directives set forth in *Crawford* regarding a defendant's *Sixth Amendment* right of confrontation against prosecution witnesses or our Court of Criminal Appeal's opinion in *Russeau*, which held such incident reports to be testimonial in nature, thereby requiring a right to cross-examine those witnesses. *Crawford*, 541 U.S. at 36, 124 S. Ct. at 1354; *Russeau v. State*, 171 S.W.3d 871, 880 (Tex. Crim. App. 2005), cert. denied, 126 S. Ct. 2982 (2006)

A transfer hearing determines whether a juvenile who has received a determinate sentence is released from the Texas Youth Commission's custody and released or transferred into the adult system for the remainder of his sentence. TEX. FAM. CODE ANN. § 54.11(i),(j). Despite this, another intermediate court has already held that juvenile transfer hearings, like revocation hearings, are not "criminal prosecution[s]" entitling juveniles to *Crawford* protections. *In re D.L.*, 198 S.W.3d 228, 230 (Tex. App.--San Antonio, 2006, pet. denied). However, I am unable to reconcile the potential magnitude of the result of a transfer hearing with the lack of protection for a juvenile's right to cross-examine the witnesses who testify against him via untested written reports. For this reason, I respectfully concur.

