

Review of Recent Juvenile Cases (2007)

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

Lack of grand jury certification in clerk's record did not warrant dismissal of State's appeal of Motion to Reduce Determinate Sentence thirteen years later.[In the Matter of F.M.](07-2-10)

On February 28, 2007, the El Paso Court of Appeals held that in appeal by the state of Respondent's Motion to Reduce Determinate Sentence thirteen years after transfer to TDCJ, was not affected by the fact that the grand jury certification was not included in the clerk's record.

¶ 07-2-10. **In the Matter of F.M.**, No. 08-06-00194-CV, 2007 Tex.App.Lexis 1471 (Tex.App.— El Paso, 2/28/07).

Facts: After a trial on the merits, a jury found that F.M. had engaged in delinquent conduct by committing the offenses of aggravated kidnaping and aggravated sexual assault. The trial court entered its order of disposition and sentenced F.M. to a twenty-year determinate sentence at the Texas Youth Commission, with the possibility of transfer to the Institutional Division of the Texas Department of Criminal Justice ("TDCJ"). On October 1, 1993, the trial court ordered that F.M. be transferred to TDCJ for the remainder of his sentence. In 2006, F.M. filed several motions in the trial court, including a motion to reduce his sentence. After a hearing, the trial court granted F.M.'s motion to reduce sentence, reducing his sentence from twenty to fourteen years, and the State filed its notice of appeal.

Held: Motion to Dismiss State's Appeal denied.

Opinion: On August 25, 2006, F.M. filed a motion to dismiss the State's appeal, which this Court denied without written order. On December 8, 2006, F.M. re-urged his original motion to dismiss. In addition to the ground set forth in his original motion to dismiss, F.M. argued that the State could not appeal from the trial court's order reducing F.M.'s sentence, because nothing in the record indicated that the grand jury had approved the petition seeking a determinate sentence. *See TEX. FAM. CODE ANN. § 56.03(b)* (Vernon Supp. 2006).

The State filed a response which alleged that the grand jury had approved the petition seeking a determinate sentence, but that the grand jury certification was not included in the clerk's record and the State's file had been destroyed due to age. Several documents were attached to the State's response. The first was an affidavit by Marcos Lizarraga ("Lizarraga"), custodian of grand jury records, indicating that, on November 3, 1992, the grand jury had returned a true bill of indictment for F.M.; the second was a partially redacted copy of the specific page in the grand jury records, showing that the grand jury returned a true bill of indictment for F.M.

In addition, the State submitted a partial transcript, which included excerpts from the original trial, indicating that the grand jury had approved the petition. Specifically, prior to the start of the jury trial, the trial court

noted on the record that it had received "a piece of paper that is entitled Grand Jury Approval of Petition for Determinate Sentencing, and it indicates that the Grand Jury has, in fact, approved that [F.M.] be tried under the Determinate Sentencing Act"

Conclusion: This Court previously denied the first ground raised in Appellant's second motion to dismiss without written order on September 7, 2006, and we again do so here. Further, from the evidence submitted by the State, it appears the grand jury approved the petition seeking a determinate sentence. Accordingly, F.M.'s motion to dismiss is denied in its entirety.