

Review of Recent Juvenile Cases (2007)

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

Failure to enter a plea at the modification hearing does not render the juvenile proceedings a nullity.[In the Matter of T.J.H.T.](07-3-4)

On May 16, 2007, the San Antonio Court of Appeals held that except for discovery and evidentiary matters, the trial of a juvenile case is governed by the Texas Rules of Civil Procedure, and neither the Rules of Civil Procedure nor the Family Code require a plea to be entered in a juvenile modification hearing.

¶ 07-3-4. **In the Matter of T.J.H.T.**, MEMORANDUM, No. 04-06-00805-CV, 2007 Tex.App.Lexis 3727 (Tex.App.—San Antonio, 5/16/07).

Facts: T.J.H.-T. was placed on juvenile probation on June 20, 2006 resulting from the misdemeanor offense of possession of a prohibited weapon. T.J.H.-T. plead true to this charge and was placed on probation in the custody of his mother until his eighteenth birthday. Among the conditions of his probation was that he was to have no contact with Mary Rumage.

On September 19, 2006, the State filed a motion to modify disposition alleging that T.J.H.-T. violated three conditions of his probation: (1) he violated the laws of Texas by committing the offense of terroristic threat against Mary Rumage; (2) he failed to avoid the use of illegal drugs; and (3) he violated the condition ordering him to have no contact with Mary Rumage.

At the hearing on the motion to modify, T.J.H.-T. was not asked to enter a plea to the charges, and therefore he did not enter a plea. The case proceeded as if a "not true" plea had been entered. Mary Rumage, the State's first witness, testified that she was outside her home between 10:30 and 11:00 p.m. on August 27, 2006, and T.J.H.-T., who resided across the street from her home, called her a "bitch" and said "I'll get you, bitch." Rumage stated that she was afraid of T.J.H.-T. and that the confrontation occurred on the day before a hearing on T.J.H.-T.'s brother's case regarding an incident in which Rumage's grandson was stabbed.

Juvenile Probation Officer Scott Pool also testified for the State and the court admitted business records from T.J.H.-T.'s file into evidence. The records indicated that T.J.H.-T.'s probation officer discussed his probation conditions with him, but that T.J.H.-T. nonetheless failed a random drug test and admitted to his probation officer that he smoked marihuana.

T.J.H.-T.'s mother, Charlotte Rangel, testified on his behalf and said that she was home with T.J.H.-T. on the evening of August 27, 2006. Rangel stated that T.J.H.-T. was not in the front yard of their house that evening unsupervised and that the outfit she recalled T.J.H.-T. wearing that evening was different from the clothing described by Ramage. Rangel did admit, however, that she was not home that evening between 6:00 and

10:25 p.m. T.J.H.-T. testified on his own behalf and denied threatening Ramage or going to her home, but he admitted to using marihuana after being placed on probation.

T.J.H.-T.'s cousin and aunt both testified that they were willing to take custody of T.J.H.-T. and supervise him. Both T.J.H.-T. and his mother testified that they would agree to this arrangement. He stated that he had stopped using marihuana and had been focusing on his school work and testified that he would not return to his mother's home if he remained on probation.

Following the testimony, the trial judge expressed her concern regarding T.J.H.-T.'s potential threat of harm to the community. The court concluded that based on his probation violations and past assault charges, T.J.H.-T. should be committed to TYC based on his need for rehabilitation and for the public's protection.

On appeal, T.J.H.-T. argues that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. T.J.H.-T. also contends the trial court abused its discretion when it committed him to TYC because the record indicates that the continuation of probation would have been a more appropriate disposition.

Held: Affirmed

Memorandum Opinion: In his first issue, T.J.H.-T. contends that the trial court committed fundamental error when it failed to require him to enter a plea to the allegations in the motion to modify disposition. In order to properly preserve a complaint for appeal, a party must make the complaint to the trial court by a timely request, objection, or motion. *See TEX. R. APP. P. 33.1(a)*. Except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties. *In the Interest of B.L.D., 113 S.W.3d 340, 350-52 (Tex. 2003)*. Fundamental error occurs when error directly and adversely affects the interest of the public generally or when the record conclusively shows that the court rendering the judgment was without jurisdiction. *Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 577 (Tex. 2006)*.

T.J.H.-T. admits that his defense counsel did not object to the trial judge's failure to ask him to enter a plea to the charges in the motion to modify and T.J.H.-T. does not argue that the court was without jurisdiction. Instead, T.J.H.-T. argues that the failure to require him to enter his plea to the charges against him adversely affects the public interest as defined by the laws of Texas and argues that this court should look to the Code of Criminal Procedure when deciding this issue.

T.J.H.-T. is correct in stating that the Code of Criminal Procedure requires a plea to be entered in every criminal case and if one is not entered, the trial is a nullity. *See TEX. CODE CRIM. PROC. ANN. art. 26.12, 26.13* (Vernon Supp. 2006); *Lumsden v. State, 384 S.W.2d 143, 144 (Tex. Crim. App. 1964)*. However, except for discovery and evidentiary matters, the trial of a juvenile case is governed by the Texas Rules of Civil Procedure. *See TEX. FAM. CODE ANN. § 51.17* (Vernon Supp. 2006); *In re D.I.B., 988 S.W.2d 753, 756 (Tex. 1999)*. Neither the Rules of Civil Procedure nor the Family Code require a plea to be entered. We therefore conclude that T.J.H.-T.'s argument that his failure to enter a plea at the modification hearing rendered the proceedings a nullity lacks merit and we thus overrule T.J.H.-T.'s first issue. *See In the Matter of C.C., No. 05-01-01882-CV, 2002 Tex. App. LEXIS 4384, 2002 WL 1340319 (Tex. App.-Dallas June 20, 2002, no pet.)* (concluding that neither the Family Code nor the Rules of Civil Procedure require a plea to be entered and therefore appellant's argument that his failure to enter a plea at the adjudication and modification hearings rendered the proceedings a nullity lacks merit.)

T.J.H.-T. argues in his second issue that the trial court abused its discretion when it committed him to TYC because the record indicates that a continuation of probation would have been a more appropriate disposition. A trial court may modify a juvenile's disposition if the court, after a hearing to modify disposition,

finds by a preponderance of the evidence that the child violated a reasonable and lawful order of the court. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2006); *In re H.G.* 993 S.W.2d 211, 213 (Tex. App.-San Antonio 1999, no pet.). The trial judge has broad discretion to determine a suitable disposition of a child found to have engaged in delinquent conduct; this is especially true in hearings to modify a disposition. *In re D.R.A.*, 47 S.W.3d 813, 815 (Tex. App.-Fort Worth 2001, no pet.). In reviewing a trial court's modification of a juvenile's disposition on appeal, the controlling issue is whether the evidence is sufficient to support the trial court's finding, by a preponderance of the evidence, that the juvenile violated a condition of probation. *Id.*

In the instant case, the court had before it an admission by T.J.H.-T. that he violated Condition 2 of his probation by using illegal drugs. Likewise, there was sufficient testimony to conclude that T.J.H.-T. also violated Conditions 1 and 13 of his probation by threatening Ramage. Because the record supports the trial court's findings that T.J.H.-T. violated several conditions of his probation, the trial court acted well within its discretion in committing T.J.H.-T. to TYC. *See id.* We therefore overrule T.J.H.-T.'s second issue.

Conclusion: Based on the foregoing, the judgment of the trial court is affirmed.