

## Review of Recent Juvenile Cases (2007)

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

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### **In order for a child to waive his rights under TFC §51.09, both the child and the attorney for the child must waive the right.[In the Matter of A.G.P.](07-3-5)**

**On May 24, 2007, the Beaumont Court of Appeals held that where the record does not show that the juvenile himself waived his right to jury on disposition, and understood his right, waiver by the child's attorney alone is insufficient.**

¶ 07-3-5. **In the Matter of A.G.P.**, MEMORANDUM, No. 09-06-396CV, 2007 Tex.App.Lexis 4079 (Tex.App.—Beaumont, 5/24/07)

**Facts:** A.G.P., a juvenile, was charged with four counts of aggravated sexual assault of a child and two counts of indecency with a child. A jury returned a verdict of "true" on all six allegations, and the trial court adjudicated A.G.P. as having engaged in delinquent conduct. The trial court ordered A.G.P. "committed to the Texas Youth Commission for a fifteen (15) year determinate sentence with possible transfer to the Texas Department of Criminal Justice Institutional Division pursuant to §53.045 of the Texas Family Code."

Abandoning issues one and three, A.G.P. relies solely on issue two on appeal. He contends the record does not establish he waived his right to have a jury decide disposition of his sentence, and asks that the case be remanded for further proceedings. The State concedes error on issue two, and states the case should be remanded to the trial court "for disposition purposes only."

**Held:** Affirmed in Part, Reversed in Part, and Remanded for a New Disposition Hearing.

**Memorandum Opinion:** *Section 54.04(a) of the Family Code* provides that "[t]he disposition hearing" "shall be separate, distinct, and subsequent to the [juvenile's] adjudication hearing." *Tex. Fam. Code Ann. § 54.04(a)* (Vernon Supp. 2006). The statute further provides that "[t]here is no right to a jury at the disposition hearing unless the child is in jeopardy of a determinate sentence under Subsection (d)(3) or (m), in which case, the child is entitled to a jury of 12 persons to determine the sentence." *Id.* Here, the juvenile was in jeopardy of a determinate sentence and was entitled to a jury at the disposition hearing. *See Tex. Fam. Code Ann. § 54.04(d)(3)* (Vernon Supp. 2006); *Tex. Fam. Code Ann. § 53.045(a)(5)* (Vernon 2002).

*Section 51.09 of the Family Code* governs waiver of rights under the Juvenile Justice Code and provides as follows:

#### *§ 51.09. Waiver of Rights*

Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:

- (1) the waiver is made by the child and the attorney for the child;
- (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
- (3) the waiver is voluntary; and
- (4) the waiver is made in writing or in court proceedings that are recorded.

*Tex. Fam. Code Ann. § 51.09* (Vernon 2002).

At the beginning of the disposition hearing, the following occurred:

(Open court, juvenile-respondent present, no jury)

[THE COURT]: The Juvenile-Respondent's attorney has approached the Court and indicated that he wished to waive the jury in deciding disposition and the State has indicated that they have no objection to that election.

For the purposes of the record, is that correct, Mr. [Attorney for A.G.P.]?

[A.G.P.'s ATTORNEY]: It is, Judge.

[THE COURT]: And, [Prosecutor], does the State agree with that decision?

[PROSECUTOR]: State agrees.

[THE COURT]: All right. Thank you. Ask the jury in.

The Clerk's Record does not contain a written waiver by A.G.P. of jury disposition of the sentence, and although the colloquy before the trial court reveals the juvenile's attorney waived jury disposition, there is no record the juvenile himself did. The statute requires that both the child and the attorney for the child waive the right. *See id.* The State concedes the trial court erred by not complying with *section 51.09*. Where there is no record showing that the juvenile himself waived jury disposition, and understood his right, waiver by the child's attorney alone is insufficient under the statute. *See id.*

The Supreme Court has stated that juvenile proceedings are quasi-criminal in nature. *In re D.I.B.*, 988 S.W.2d 753, 756 (Tex. 1999). The lack of a waiver of a jury disposition of the juvenile's sentence has not been labeled structural error by the United States Supreme Court. *See Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005). Unless the error is structural, generally an appellate court must conduct a harm analysis of the trial court's error. *See Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997); *see also Mendez v. State*, 138 S.W.3d 334, 339-40 (Tex. Crim. App. 2004) (list of structural errors). In the juvenile context, the Texas Supreme Court in *In re D.I.B.* analyzed two Court of Criminal Appeals cases, *Cain v. State* and *Matchett v. State*, n1 and stated that the decisions in those cases "thoughtfully explain why a harm analysis should be applied even in cases in which the trial court fails to give statutorily mandated explanations or admonishments." *In re D.I.B.*, 988 S.W.2d at 758; *see also In re C.O.S.*, 988 S.W.2d 760, 765-69 (Tex. 1999) (harm analysis conducted). The Court in *D.I.B.* conducted a harm analysis. n2 *In re D.I.B.*, 988 S.W.2d at 759.

n1 *See Cain*, 947 S.W.2d at 264; *Matchett v. State*, 941 S.W.2d 922 (Tex. Crim. App. 1996).

n2 The court stated, "We are not called upon to decide, and do not decide, whether the failure to give one or more of the other explanations required by *section 54.03(b)* [at the adjudication hearing] . . . might be a 'structural defect . . . , which def[ies] analysis by 'harmless-error' standards.'" *In re D.I.B.*, 988 S.W.2d at 759 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). However, as we noted, the United States Supreme Court has not labeled the error in this case as structural.

**Conclusion:** Here, the trial court was required to implement A.G.P.'s right to a jury disposition of his sentence unless he affirmatively waived that right. See §§ 51.09, 54.04(a). When error occurs, a harm analysis would normally be required. See *Tex. R. App. P. 44.1, 44.2*. Given the circumstances of this case, the nature of the error, the insufficiency of the record for harmless error analysis, the State's concession of error, and both the juvenile's and the State's requests for remand, we resolve any doubt concerning harm in the juvenile's favor. We reverse the disposition only and remand for a new disposition hearing. See *In re D.I.B.*, 988 S.W.2d 753; *In re J.H.*, 150 S.W.3d 477, 485-86 (*Tex. App.--Austin 2004, pet. denied*). We sustain issue two.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW DISPOSITION HEARING.