

## Review of Recent Juvenile Cases (2008)

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

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### **Certification and Transfer statute is not unconstitutional even though it exposes juvenile to adult punishments.[Rivera v. State](08-1-2)**

**Findings by juvenile judge to transfer juvenile to adult court does not expose juvenile to a greater punishment even though the potential sentence in the adult criminal system is greater than that in the juvenile system.**

¶ 08-1-2. **Rivera v. State**, No. 05-06-00026-CR, No. 05-06-00027-CR, 2007 Tex.App.Lexis 8807 [Tex.App.—Dallas (5<sup>th</sup> Dist.), 11/5/07].

**Facts:** On January 30, 2005, Gilbert Garza and his fourteen-year-old stepson, Ruben Juarez, were shot with a rifle while in the family vehicle. Although Garza survived, Juarez died shortly after the shooting. Appellant, who was implicated in the offenses, was referred to the juvenile court. Thereafter, the State filed a motion for discretionary transfer to criminal district court. Following a hearing, the juvenile judge granted the motion, certified appellant as an adult, and transferred the case to the criminal district court. Appellant was subsequently tried and convicted of both murder and aggravated assault with a deadly weapon. These appeals followed. *See TEX. CODE CRIM. PROC. ANN. art. 44.47(a), (b)* (Vernon 2006) (defendant may appeal order certifying him as adult and transferring case to criminal court only in conjunction with appeal of conviction).

In his first two issues, appellant contends the evidence is legally and factually insufficient to support the juvenile judge's decision to waive juvenile court jurisdiction and transfer him to criminal district court for trial as an adult. Under these issues, appellant argues the evidence does not support a finding that appellant should be transferred for "the welfare of the community."

**Held:** Affirmed

**Opinion:** The Texas Family Code provides that a juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate criminal court for criminal proceedings if the child is alleged to have violated a penal law of the grade of felony and the child is either (i) fourteen years of age or older "at the time he is alleged to have committed the offense, if the offense is a capital felony, an aggravated controlled substance felony, or a felony of the first degree, and no adjudication hearing has been conducted concerning that offense or (ii) fifteen years of age or older "at the time the child is alleged to have committed the offense, if the offense is a felony of the second or third degree or a state jail felony, and no adjudication hearing has been conducted concerning that offense." *TEX. FAM. CODE ANN. § 54.02(a)(1), (2)* (Vernon 2002). In addition, the juvenile judge must determine, after a full investigation and a hearing, that there is probable cause to believe "the child before the court committed the offense alleged and that because of the seriousness of the offense alleged or the background of the child the welfare of the community requires criminal proceedings." *TEX. FAM.*

*CODE ANN. § 54.02(a)(3)* (Vernon 2002). The juvenile judge "shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings." *TEX. FAM. CODE ANN. § 54.02©* (Vernon 2002).

In making the determination to waive jurisdiction and transfer a child, the judge shall consider, among other matters:

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (2) the sophistication and maturity of the child;
- (3) the record and previous history of the child; and
- (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

*TEX. FAM. CODE ANN. § 54.02(f)* (Vernon 2002).

While the juvenile judge must consider all of the above numerated factors, the judge is not required to give each factor equal weight nor is she required to find that each factor is established by the evidence. *In re J.J.*, 916 S.W.2d at 535; *McKaine*, 170 S.W.3d at 291; *Faisst*, 105 S.W.3d at 11; *In the Matter of D.D.*, 938 S.W.2d 172, 176 (Tex. App.--Fort Worth 1996, no pet.).

At the discretionary transfer hearing, Detective Robert Ermatinger testified he investigated the Juarez murder and the Garza aggravated assault. According to Detective Ermatinger, he received an anonymous tip that appellant was "the one" involved in the offenses. Although the caller did not have appellant's complete name, he did have appellant's mother's name, Lynn Lara. Detective Ermatinger was able to track appellant down using his mother's name and locate an address. He dispatched officers to the house where they observed appellant and Lara loading luggage into their vehicle. Because the officers believed the two were "trying to head out of town," the officers detained and interviewed them. Appellant admitted to being at the scene but claimed it was a friend who committed the offenses. Appellant's mother, however, admitted her son committed the offenses. Officers then took appellant to a magistrate at the youth division to be read his rights by a judge. Appellant later admitted to the officers that he committed the offenses. Detective Ermatinger testified there was probable cause to believe that appellant committed the offenses and that appellant's conduct was willful, violent, and directed against a person. He also testified a rifle is a deadly weapon and that, in his opinion, the public needed protection from appellant.

During cross-examination, Detective Ermatinger conceded appellant claimed Garza had a handgun and that he shot Garza in self-defense. However, the officer also testified that no gun was found in the Garza vehicle and Garza told him he did not have a weapon in the vehicle that day. Detective Ermatinger also testified that, when checking appellant's background, he did not discover any prior history of arrest or convictions for violent offenses. When asked if appellant was a gang member, Detective Ermatinger testified, "The gang people believe he's a gang member." He also testified that appellant's tattoos were further evidence of gang membership.

Thomas King, a probation officer for Dallas County, testified he generated a social evaluation and investigative report on appellant. In addition, he had read both the psychological evaluation and diagnostic study and the psychological assessment of appellant, both of which were admitted as evidence. King recommended

appellant be transferred to criminal district court. King based his opinion that appellant should be transferred on numerous factors. First, he considered "the offense itself, committed in a violent manner with use of a deadly weapon . . . the fact that one complainant received injury, another complainant dies as a result of [appellant's] action." He also testified there was probable cause appellant committed the offenses. King testified appellant's sophistication and maturity were age appropriate. At the time of the offenses, appellant lived with his grandparents and had not attended school for the last two and one-half to three years. Appellant occasionally used alcohol and drugs, primarily marijuana. He admitted to having owned a knife and handgun, although he traded the gun for a pitbull which he bred. According to King, approximately fifty percent of appellant's body was covered in tattoos; however, King was not aware of any particular tattoo that indicated gang involvement or membership. Finally, King testified he did not believe there were any services within the juvenile court that would help in appellant's rehabilitation and that appellant's background indicated the welfare of the community required criminal prosecution.

On cross-examination, King testified that although appellant did not have any prior arrests for any violent type of offense, he did have a "deferred prosecution in 2002 for burglary of a motor vehicle and contempt." King further testified that since his arrest, appellant had cooperated with him, had done all that was asked of him, had not fought while in detention, and was in the honors dormitory. Nevertheless, he reiterated that he did not believe there were services within the juvenile system to rehabilitate appellant.

After a complete review of the record, we conclude there is legally and factually sufficient evidence to support the juvenile judge's decision to waive jurisdiction and transfer appellant to criminal district court. In particular, we note there was legally and factually sufficient evidence to support the judge's findings that (i) appellant was alleged to have committed two felony offenses; (ii) appellant was sixteen years of age at the time he committed the offenses; and (iii) there was probable cause to believe appellant committed the offenses alleged and that because of the seriousness of the offenses alleged--murder and aggravated assault with a deadly weapon--the welfare of the community requires criminal proceedings. *See TEX. FAM. CODE ANN. § 54.02(a); In the Matter of D.D., 938 S.W.2d at 177* (seriousness of offenses sufficient to support transfer despite defendant's background). We cannot conclude the juvenile judge abused her discretion in granting the State's motion, waiving jurisdiction, and transferring appellant to criminal district court. We overrule appellant's first and second issues.

In his third issue, appellant claims the trial judge erred in denying his motion to return these causes to the juvenile court. Under this issue, appellant contends *section 54.02 of the family code* is unconstitutional because "it denies juveniles, who may thereafter be treated as adults, due process and the right to a jury trial under the United States and Texas Constitutions as applied in *Apprendi*." *See Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*. Appellant argues that the finding by the juvenile judge exposes him "to a greater punishment by virtue of the transfer" to criminal district court because the "potential sentence in the adult criminal system is greater than that in the juvenile system."

We have previously addressed this argument. *See State v. Lopez, 196 S.W.3d 872, 875 (Tex. App.--Dallas 2006, pet. ref'd), cert. denied, 127 S.Ct 1380, 167 L. Ed. 2d 168 (2007)*. The appellant in *Lopez*, a sixteen-year-old who allegedly committed murder, likewise argued his constitutional rights were violated because the judge, not a jury, determined jurisdiction should be transferred from the juvenile court to the criminal district court. *Lopez, 196 S.W.3d at 875*. In considering *Lopez's* claim that *family code section 54.02* was unconstitutional, we noted that the "transfer proceeding establishes the basis for the district court's jurisdiction over a defendant," and while a result of transfer is that the individual is tried as an adult, "the transfer itself does not involve any increase in penalty." *Lopez, 196 S.W.3d at 875*. We concluded that, because the transfer from the juvenile court system to the criminal district court does not increase a penalty beyond the prescribed statutory maximum for the charged offense, the Supreme Court's holding in *Apprendi* did not require the jury find the facts allowing for the transfer of a juvenile case to criminal district court. *Lopez, 196 S.W.3d at 875*. Appellant's

argument in this case likewise challenges the constitutionality of *section 54.02*, claiming the finding by the juvenile judge exposes him to greater punishment and he should therefore be entitled to a jury determination regarding the transfer of jurisdiction. Because we have previously considered and rejected this argument in *Lopez*, we conclude appellant's argument lacks merit. We overrule appellant's third issue.

**Conclusion:** We affirm the trial court's judgments.