

Review of Recent Juvenile Cases (2008)

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

Jury finding that the juvenile, in the juvenile's home, could be provided with the quality of care and level of support and supervision to meet the conditions of probation, did not preclude commitment to TYC.[In the Matter of T.A.W.](08-1-3)

On August 9, 2007, the Houston [14th] Court of Appeals held that the jury's answer of "We do not" to whether the jury believed that the Respondent, in his home, could not be provided the quality of care and level of support and supervision to meet the conditions of probation, did not effect jury's commitment to TYC.

¶ 08-1-3. **In the Matter of T.A.W.**, 234 S.W.3d 704; 2007 *Tex. App. LEXIS 6333* No. 14-05-00554-CV., 2007 *Tex.App.Lexis 1047*, *Tex.App.*— Houston [14th], 8/9/07).

Facts: T.A.W. was born on August 22, 1986. On April 15, 2001, the date of the alleged offense, T.A.W. was fourteen years old. The State filed its petition alleging delinquent conduct on May 21, 2004, when T.A.W. was seventeen. T.A.W.'s delinquency trial began in March 2005, when he was eighteen years old.

Held: Motion for Rehearing Overruled; Opinion of February 13, 2007, Withdrawn. Affirmed.

Concurring Opinion: To authorize placement outside the home or commitment to the TYC the court, not the jury, must make the findings required by 54.04(i).

Opinion: T.A.W.'s second issue contends that the jury's finding in answer to question 2 constitutes a finding in favor of probation:

Question No. 2: Do you find by a preponderance of the evidence that the Juvenile Respondent, [T.A.W.], in the Juvenile Respondent's home, cannot be provided the quality of care and level of support and supervision that the Juvenile Respondent needs to meet the conditions of probation?

Answer: We do not.

T.A.W. contends that this finding thereby supercedes, as a matter of law, the jury's finding of commitment to TYC for fourteen years because it was a finding that T.A.W.'s home was an appropriate place to meet the conditions of probation.

However, the court's charge on disposition authorized the jury to either sentence T.A.W. to commitment in the TYC or to place him on probation. An affirmative response to question 2 would have been required in order for

the jury to place T.A.W. on probation outside his home, n4 but was not a decision whether to place him on probation.

n4 See *TEX. FAM. CODE ANN. § 54.04(c)* (Vernon Supp. 2006).

In support of his position, appellant relies on *section 54.04(i)(1)(C)*, requiring a trial court to include in its order of determination an affirmative finding on the issue set forth in question 2 in order to place a child on probation outside the home or to commit the child to the TYC. See *TEX. FAM. CODE ANN. § 54.04(i)(1)(C)* (Vernon Supp. 2006). Although the court included an affirmative finding on this issue in its commitment order (contrary to the jury's negative finding in response to question 2), *section 54.04* does not expressly require this finding to be included in the determination order where a jury, rather than the trial court, sentences a defendant. See *id. § 54.04(d)(3)*.

More importantly, however, whether or not such a finding must be included in the order, its content bears only on the choice between probation inside the home versus probation outside the home, and not on the choice between probation and TYC commitment. In other words, it does not logically follow from the fact that a defendant's home is a suitable place for conducting probation that probation must be selected. If, as in this case, probation is found to be wholly inappropriate, the fact that it could have been provided in appellant's home, if it had been appropriate, is immaterial.

Conclusion: Because T.A.W.'s second issue does not, therefore, demonstrate that the jury's answer to question 2 precludes its sentence of commitment to the TYC, it is overruled, and the judgment of the trial court is affirmed.