

## Review of Recent Juvenile Cases (2008)

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

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### **Juvenile does not have the right to testify and the trial court is not required to admonish him of said right.[In the Matter of J.W.P.](08-1-6)**

**On December 20, 2007, the Eastland Court of Appeals held that the Texas Code of Criminal Procedure Ann. Art. 1.05, granting an accused adult the right to be heard, does not apply to juveniles.**

¶ 08-1-6. **In the Matter of J.W.P.**, No. 11-06-00221-CV, 2007 Tex.App.Lexis 10022 (Tex.App.— Eastland, 12/20/07).

**Facts:** Appellant, J.W.P., was on formal probation for sexual assault. The State filed a motion to modify, and the trial court found that appellant violated three conditions of his probation and sentenced him to confinement in the Texas Youth Commission until his 21st birthday. Appellant filed a motion for new trial that the trial court overruled after an evidentiary hearing. We affirm.

Appellant contends initially that his due process rights were denied when his trial counsel refused to allow him to testify. Appellant argues that he was only thirteen years old at the time of his trial, that his trial counsel was an authority figure to him, and that his counsel unduly influenced him to abstain from testifying. The State responds that we should construe this as an ineffective-assistance-of-counsel argument and that, because there is no evidence that appellant's testimony would have produced a different result, no error is shown. We agree.

**Held:** Affirmed

**Opinion:** Because the State was proceeding on a motion to modify disposition, the trial court needed to find only one allegation true by a preponderance of the evidence to order appellant's confinement. *TEX. FAM. CODE ANN. § 54.05(f)* (Vernon Supp. 2007). Appellant admitted that his mom transported him to a public swimming pool and dropped him off. That left him around young children without any adult supervision - contrary to the conditions of his probation. He also admitted to taking a pocket knife with him to the pool - another probation violation. Appellant, therefore, admitted to two violations. His testimony on the third was equivocal. He told the trial court that he recalled the pool manager accusing him of touching a little girl. He acknowledged that he bumped into people while swimming, but he told the trial court that he would have denied touching the seven-year-old girl. However, he also acknowledged giving a statement where he admitted to touching her. He attempted to clarify that statement by saying that he accidentally touched her.

The trial court specifically found that, if appellant had testified at trial, his testimony would not have changed the outcome. The record clearly supports this conclusion. Appellant could be confined upon proof of one violation of the conditions of his probation. If he had testified at trial, he would have admitted to two

violations. Furthermore, his testimony about touching the seven-year-old girl is so equivocal that it falls far short of establishing any error by the trial court. Issue one is overruled.

Appellant next contends that the trial court denied his due process right to testify on his own behalf. Appellant argues that he had a right to testify and that the trial court was required to admonish him of this right and then to confirm his waiver of this right. Appellant relies upon *TEX. FAM. CODE ANN. § 51.09* (Vernon 2002) and *TEX. CODE CRIM. PROC. ANN. art. 1.05* (Vernon 2005). *Section 51.09* allows a child to waive any right granted to him by law if (1) the waiver is made by the child and the child's attorney, (2) the child and the child's attorney are fully informed, (3) the waiver is voluntary, and (4) the waiver is expressed in writing or in recorded court proceedings. *Article 1.05* lists several rights that an accused has in a criminal prosecution, including the right to be heard. Appellant acknowledges that the trial court admonished him that he had the right to remain silent but contends that the trial court was also required to advise him that he had the right to testify on his own behalf. The State responds that, because juvenile proceedings are civil in nature, *Article 1.05* does not apply. See *Robinson v. State*, 707 S.W.2d 47, 49 (Tex. Crim. App. 1986) (the Code of Criminal Procedure does not apply to juvenile proceedings).

Neither party has cited and we have been unable to locate a case discussing whether the trial court has a duty to admonish a juvenile of his right to be heard. Courts have, however, held that other rights listed in *Article 1.05* do not apply to juvenile proceedings. For example, *Article 1.05* provides that an accused has the right to a speedy public trial before an impartial jury. If appellant is correct, this speedy trial provision would apply to juvenile proceedings. That proposition, however, was rejected in *Ex parte Brosky*, 863 S.W.2d 775, 777 (Tex. App.--Fort Worth 1993, no pet.). The court held that, because the Code of Criminal Procedure does not apply to juvenile proceedings, the requirement that a defendant be tried or released on a personal bond or reduced bail within ninety days from the commencement of his detention did not apply to a juvenile. Consequently, we cannot agree with appellant that *Article 1.05* applied to this proceeding.

We also note that the legislature has specifically provided a list of admonishments that must be given to juveniles and that this list does not include the right to testify. *TEX. FAM. CODE ANN. § 54.03(b)* (Vernon Supp. 2007) requires trial courts to admonish a juvenile defendant at the beginning of the adjudication hearing of his privilege against self-incrimination, his right to trial and to confrontation of witnesses, and his right to an attorney.<sup>1</sup> The trial court gave appellant each of these admonishments and confirmed his understanding of them on the record. We cannot conclude that it was required to do more.

<sup>1</sup> The statute also requires the trial court to advise a juvenile of his right to a jury trial. Because this was a motion to modify proceeding, that provision was inapplicable. See *TEX. FAM. CODE ANN. § 54.05(c)* (Vernon Supp. 2007).

Even if we are incorrect, appellant has not shown any harm. Appellant provided the trial court with the testimony that he would have given at trial. As we have previously noted, this testimony supports the trial court's decision to modify because he admitted to two probation condition violations. In the absence of any harm, we cannot say that the trial court erred. *TEX. R. APP. P. 44.2*. Appellant's second issue is overruled.

**Conclusion:** The judgment of the trial court is affirmed.