Review of Recent Juvenile Cases (2008)

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

Respondent not entitled to blood test of victim in sexual assault case to determine sexually transmitted disease.[In the Matter of C.B.](08-1-13)

On February 7, 2008, the Dallas (5th Dist) Court of Appeals held that *Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist.

¶ 08-1-13. **In the Matter of C.B.**, MEMORANDA, No. 05-05-00064-CV, 2008 Tex.App.Lexis 953 [Tex.App.—Dallas (5th Dist.), 2/7/08].

Facts: A jury found C.B., a juvenile, was a child engaged in delinquent conduct by committing aggravated sexual assault of a child and indecency with a child by contact. The trial court ordered C.B. committed to the Texas Youth Commission with possible transfer to the institutional division of the Texas Department of Criminal Justice for a term not to exceed ten years. In three points of error, C.B. argues the evidence is legally and factually insufficient to support the jury's findings and the trial court erred by denying his *Brady v. Maryland, 373 U.S. 83 (1963)*, motion requesting blood testing of the victim for herpes. The background of the case and the evidence adduced at trial are well known to the parties; thus, we do not recite them here in detail. Because all dispositive issues are settled in law, we issue this memorandum opinion. *TEX. R. APP. P. 47.2(a)*, *47.4*.

Held: Affirmed

Memorandum Opinion: Except for the burden of proof on the State for an adjudication and when the rules conflict with the family code, juvenile cases are civil cases governed by the Texas Rules of Civil Procedure. *TEX. FAM. CODE ANN. §§ 51.17, 54.03(f)* (Vernon Supp. 2007). The State must prove the juvenile's delinquent conduct beyond a reasonable doubt. *Id. § 54.03(f)*. In juvenile cases, we apply the standards used in criminal cases to determine the legal and factual sufficiency of the evidence. *In re A.B., 133 S.W.3d 869, 871 (Tex. App.-Dallas 2004, no pet.)* (legal sufficiency); *In re Z.L.B., 115 S.W.3d 188, 190 (Tex. App.-Dallas 2003, no pet.)* (factual sufficiency). In a legal sufficiency review, the relevant question is whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319 (1979)*; *In re A.B., 133 S.W.3d at 871*. In a factual sufficiency review, we view all the evidence in a neutral light and ask whether a trier of fact was rationally justified in finding guilt beyond a reasonable doubt. *Watson v. State, 204 S.W.3d 404, 415 (Tex. Crim. App. 2006)*; *In re Z.L.B., 115 S.W.3d at 190*.

The State argues C.B.'s factual sufficiency point is not preserved for appeal because it was not raised in a motion for new trial. *See TEX. R. CIV. P. 324(b)(2)* (point in motion for new trial prerequisite to factual sufficiency complaint on appeal in jury case); *In re M.R., 858 S.W.2d 365, 366 (Tex. 1993)*. We agree. Although

the family code has been amended since the decision in *M.R.,* it still requires application of the rules of civil procedure in juvenile cases unless they conflict with the family code juvenile justice code. *TEX. FAM. CODE ANN. § 51.17*; *see In re D.J.H., 186 S.W.3d 163, 166 (Tex. App.-Fort Worth 2006, pet. denied)* (concluding motion for new trial is prerequisite to factual sufficiency complaint); *In re J.B.M., 157 S.W.3d 823, 827-28 (Tex. App.-Fort Worth 2006, no pet.)* (en banc) (same); *but see In re J.L.H., 58 S.W.3d 242, 245-46 (Tex. App.-El Paso 2001, no pet.)* (concluding motion for new trial not required because of changes to family code and rules of appellate procedure since *M.R.*). We overrule C.B.'s factual sufficiency point of error.

A person commits the offense of aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the child's anus by any means and the child is younger than fourteen years of age. *TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i), (iii)*; (2)(B) (Vernon Supp. 2007). A person commits indecency with a child if the person engages in sexual contact with a child or causes the child to engage in sexual contact and the child is younger than 17 years of age and not the person's spouse. *TEX. PEN. CODE ANN. § 21.11(a)(1)* (Vernon 2003). Sexual contact is defined as any touching by a person, including touching through clothing, of the anus, breast, or any part of the genitals of a child if the act is committed with the intent to arouse or gratify the sexual desire of any person. *Id. § 21.11(c)(1)*. Intent to arouse or to gratify the sexual desire of any person can be inferred from the defendant's conduct, his remarks, and all surrounding circumstances. *McKenzie v. State, 617 S.W.2d 211, 216 (Tex. Crim. App. 1981)*; *Branson v. State, 825 S.W.2d 162, 168 (Tex. App.-Dallas 1992, no pet.)*. A child victim's testimony alone is sufficient to support a conviction for aggravated sexual assault or indecency with a child. *TEX. CODE CRIM. PROC. ANN. art. 38.07(a)* (Vernon 2005); *Tear v. State, 74 S.W.3d 555, 560 (Tex. App.-Dallas 2002, pet. ref'd)*; *Empty v. State, 972 S.W.2d 194, 196 (Tex. App.-Dallas 1998, pet. ref'd)*; *Karnes v. State, 873 S.W.2d 92, 96 (Tex. App.-Dallas 1994, no pet.)*.

There is evidence in the record that, during the summer of 2003 the victim was eight years' old. During that summer C.B. was fifteen years' old and lived about a mile away from the victim's house. The victim's cousins were visiting her family that summer and were about the same age as C.B. C.B. came to the victim's house several times that summer to visit her cousins. After her cousin's had left for the summer, the victim testified C.B. came over to her house. They went to a secluded spot in the back yard, and C.B. pulled down the victim's pants and put his "private" inside her "butt." She testified it hurt and that he told her not to tell anyone.

There is also evidence in the record that C.B. has herpes type 1. In February 2004, the victim's mother took her to the doctor because she was complaining that her bottom hurt. The doctor testified she had lesions in the genital area and that he made a clinical diagnosis of herpes. He also consulted a gynecologist, who examined the victim and agreed with the diagnosis. A herpes culture from the lesions was negative, but the doctors explained it was very difficult to obtain a culture of herpes and that the negative result did not change their diagnosis. The victim did not undergo a blood test for herpes.

A CPS investigator testified the victim made an outcry to him and, using dolls and her words, she said he touched her buttock area with his private part. She also told the investigator that it hurt and that the person told her not to tell anyone or he would hurt her. In March 2004, the victim was examined by a sexual assault nurse. The nurse testified that when the victim was in a knee-chest position, her anus immediately dilated indicating trauma and penetration. She could not identify when the trauma occurred, except that it was more than 72 hours before the examine.

Having considered all of the evidence in the record including the above evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have found appellant guilty of all of the elements of the offenses beyond a reasonable doubt. *See Jackson, 443 U.S. at 319*; *In re A.B., 133 S.W.3d at 871*. We overrule C.B.'s legal sufficiency point of error.

In his third point of error, C.B. argues the State failed to disclose favorable evidence in violation of his due process rights. *See Brady, 373 U.S. at 87.* Specifically, C.B. argues the trial court erred in refusing his motion to require blood testing of the victim to determine whether she had herpes type 1 or type 2. He argues that a test result showing the victim had herpes type 2 would have been favorable to him because of the evidence that he had herpes type 1.

Under *Brady,* the State has an affirmative duty under the Due Process Clause of the Fourteenth Amendment to disclose evidence in its possession that is favorable to the defendant and that is material to a defendant's guilt or punishment. *Harm v. State, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006)*. However, *"Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist." *Harm, 183 S.W.3d at 407* (quoting *Hafdahl v. State, 805 S.W.2d 396, 399 (Tex. Crim. App. 1990))*.

The record indicates a blood test for herpes was not done on the victim. Thus, the test results requested by C.B. did not exist and were not in the State's possession. We overrule C.B.'s third point of error. *See id.*

Conclusion: We affirm the trial court's judgment.