

## Review of Recent Juvenile Cases (2008)

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

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### **In adult aggravated sexual assault trial, defendant was not required to file motions objecting to jury charge which did not restrict convictions to actions occurring after defendant's 17<sup>th</sup> birthday.[Alberty v. State](08-2-12)**

**On April 9, 2008, the Texas Court of Criminal Appeals held that defendant was not required to file a motion objecting to the jury charge and therefore reverse and remand for consideration of whether a jury charge was erroneous because it did not limit the "on or about" language to any date prior to the date of the filing of the indictment, and on or after the appellant's seventeenth birthday, thus permitting the jury to convict him on the basis of testimony about numerous offenses alleged to have been committed while appellant was a juvenile.**

¶ 08-2-12. **Alberty v. State**, \_\_\_S.W.3d\_\_\_, Nos. PD-0822-07, PD-0823-07, 2008 WL 942050 (Tex.Crim.App., 4/9/08).

**Facts:** The state indicted appellant for aggravated sexual assault of a child in two indictments that alleged that those offenses were committed on or about July 7, 2001, appellant's 17th birthday, and June 1, 2003. The indictments therefore alleged two offenses that were committed when appellant was an adult and were properly filed in the district court. Much of the testimony, however, dealt with allegations of an ongoing series of assaults on the complaining witness that began when appellant was 13 years of age and continued until the dates alleged in the indictments.

The jury charge contained the usual language in regard to the time frame to be considered:

You are instructed that the State is not required to prove the exact date alleged in the indictment. The term "on or about the 1st of June, 2003" means any date prior to the date of the filing of the indictment, August 27, 2003, and within the Statute of Limitations. The Statute of Limitation for this type of alleged offense is 10 years past the child's 18th birthday.

Appellant made no objection to this instruction.

The jury convicted appellant of the charged offenses, and the judge sentenced him to fifteen years' confinement in each case.

**Held:** Reversed and remand.

**Opinion:** On appeal, appellant brought three points of error, the second of which is relevant to the issues presented for our review.

The jury charges in these cases were erroneous in that they instructed the jury that they could convict appellant of any offense anterior to presentment of the indictment and within the statute of limitations, when in fact he could only be convicted of offenses occurring on or after his seventeenth birthday, July 7, 2001, since jurisdiction over offenses before that date had never been waived by the juvenile court.

In ruling on appellant's second point of error, the court of appeals construed the complaint, not as jury-charge error, but as a jurisdictional claim and then ruled that appellant had waived the issue because he had failed to file a written motion challenging the jurisdiction of the district court as required by [Tex.Code Crim. Proc. art. 4.18\(a\)](#). *Alberty v. State*, Nos. 05-05-01687- CR and 05-05-01688-CR (Tex.App.-Dallas, delivered February 9, 2007)(not designated for publication).

Thus, appellant claims he could only be convicted of offenses occurring on or after his seventeenth birthday because the trial court lacked jurisdiction over any offenses which occurred prior to his seventeenth birthday. For the reasons that follow, we conclude appellant waived this issue.

The Texas Code of Criminal Procedure provides

A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under [Section 8.07\(a\) Penal Code](#), or did not waive jurisdiction under [Section 8.07\(b\), Penal Code](#), must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

[Tex.Code Crim. Proc. Ann. Art. 4.18\(a\)](#) (Vernon 2005). If the defendant's guilt or punishment is being tried or determined by a jury, the written motion must be filed and presented to the presiding judge of the court before selection of the jury. [Tex.Code Crim. Proc. Ann. art. 4.18\(b\)\(2\)](#)(Vernon 2005). If a defendant does not file a motion within the applicable time requirements of [article 4.18\(b\)](#), he may not contest the jurisdiction of the trial court on the ground that the juvenile court has exclusive jurisdiction. [Tex.Code Crim. Proc. Ann. Art. 4.18\(d\)\(1\)](#) (Vernon 2005).

In this case, appellant did not file a motion claiming the criminal district court lacked jurisdiction. Because he did not file an [article 4.18](#) motion, he may not complain on appeal that the trial court lacked jurisdiction. Nevertheless, appellant contends the trial court erred in submitting a jury charge allowing his conviction for acts that occurred before his seventeenth birthday because the trial court lacked jurisdiction to do so.

*Alberty*, slip op. at 1-2. The court of appeals affirmed appellant's convictions.

Appellant's actual complaint was not lack of jurisdiction, but that the jury charge permitted the jury to convict appellant of offenses committed before his seventeenth birthday. It is clear from the record that a significant portion of the testimony at trial was about incidents of abuse that occurred before appellant's seventeenth birthday and that some of the testimony appears to be about at least two incidents that occurred after his seventeenth birthday. Because the indictment alleged assaultive conduct that occurred after appellant became an adult, jurisdiction was properly in the district court, and appellant did not challenge jurisdiction.

Because of age restrictions on criminal prosecution, appellant could not be held criminally responsible for the sexual assaults allegedly committed while he was 15 or 16 years of age unless the juvenile court waived

jurisdiction and certified appellant for criminal prosecution as an adult, and he could not be held criminally responsible at all for the sexual assaults allegedly committed while he was under the age of 15 years. [Tex. Penal Code § 8.07](#)(a), (b). Appellant asserts error in that the jury charge did not set out that distinction and did not instruct the jury that it could not convict appellant of any offense unless it found beyond a reasonable doubt that the offense of conviction occurred on or after July 7, 2001. He further alleges harm because much of the testimony was about an incident when he was thirteen and that the testimony described that assault in graphic detail.

[Art. 4.18](#), by its plain language, applies only if jurisdiction is "exclusively in the juvenile court." The record indisputably shows that the evidence supported jurisdiction in both the juvenile and district courts, thus jurisdiction in the juvenile court was not exclusive. Because the district court also had jurisdiction, art. 4.18 does not apply, and appellant was not bound to file any motion in regard to the earlier assaults. The court of appeals erred in holding that appellant waived his complaint.

**Conclusion:** We reverse and remand these cases to the court of appeals for consideration of whether the jury charge was erroneous because it did not limit the "on or about" language in regard to the statute of limitations to any date prior to the date of the filing of the indictment, August 27, 2003, and on or after the appellant's seventeenth birthday on July 7, 2003, thus permitting the jury to convict him on the basis of testimony about numerous offenses alleged to have been committed while appellant was a juvenile. If the instruction is found to be erroneous, the court of appeals shall then consider whether appellant was harmed by that error. [Almanza v. State, 724 S.W.2d 805 \(Tex.Crim.App.1986\)](#).