Review of Recent Juvenile Cases (2008)

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

Juvenile enhancement allegations need not be included in an adult indictment.[Gamble v. State](08-3-11)

On June 26, 2008, the Houston Court of Appeals (1 Dist.) held that thirty days notice to introduce juvenile adjudication as an enhancement in adult trial was sufficient.

¶ 08-3-11. **Gamble v. State**, MEMORANDUM, No. 01-06-01028-CR, 2008 WL 2548512 [Tex.App.-Hous. (1 Dist.), 6/26/08].

Facts: A jury convicted appellant, Quinston Gamble, of indecency with a child, enhanced by a prior juvenile offense. Tex. Penal Code Ann. § 21.11 (Vernon 2005). The jury assessed appellant's punishment at 20 years' confinement.

In nine issues, appellant contends that: (1) the evidence is legally insufficient to sustain appellant's conviction, (2) the evidence is factually insufficient to sustain appellant's conviction, (3) the trial court erred when it allowed the State to introduce evidence of a prior juvenile adjudication during the punishment phase of trial, (4) the use of appellant's juvenile disposition order for enhancement violated appellant's constitutional right against cruel and unusual punishment, (5) the State failed to give appellant timely and proper notice of the juvenile enhancement, (6) the trial court erred when it admitted the complainant's outcry statement into evidence through the testimony of the complainant's babysitter, (7) the trial court erred when it admitted an additional statement of the complainant into evidence through the testimony of the complainant's babysitter, (8) the trial court erred when it admitted into evidence medical records identifying appellant as complainant's abuser, and (9) the trial court erred when it allowed expert testimony, including references to the complainant's medical records.

Held: Affirmed.

Memorandum Opinion: In his third, fourth, and fifth issues, appellant attacks the use of his February 18, 2000, juvenile adjudication for burglary of a habitation as an enhancement with respect to the instant offense. First, appellant contends the juvenile adjudication should not have been used to enhance appellant's conviction because it did not show on its face a jury waiver by appellant. Second, appellant urges this court to find that the use of a juvenile adjudication to enhance punishment for offenses committed as an adult violates the Eighth Amendment's prohibition against cruel and unusual punishment. Third, appellant contends the State did not give appellant written notice of the enhancement and that there was no enhancement paragraph pleaded in the indictment, therefore appellant was harmed.

1. The Law Pertaining to Juvenile Enhancements

In 1995, the Legislature provided that under certain circumstances a felony adjudication in juvenile court can be used as a prior felony conviction for enhancement of punishment in subsequent criminal proceedings. *See* Tex. Penal Code Ann. § 12.42(f) (Vernon Supp.2007); Tex. Fam.Code Ann. § 51.13(d) (Vernon Supp.2007). The provision applies only if the juvenile received a commitment or sentence to the Texas Youth Commission (TYC) for the felony adjudication. *Id.* It does not apply if the felony adjudication was for a state jail felony. *Id.*

The juvenile judgment against appellant for burglary of a habitation was a conviction of a second degree felony for enhancement purposes. Tex. Penal Code Ann. § 30.02(a)(1), (c)(2) (Vernon 2003). Therefore, when the jury found the alleged juvenile enhancement to be true, the range of punishment for the second degree felony of indecency with a child became a first degree offense with a punishment range of imprisonment for life or a term of not more than 99 years or less than five years. Tex. Penal Code Ann. § 21.11(d) (Vernon 2003); Tex. Pen.Code Ann. § 12.42(b) (Vernon Supp.2007). The jury set appellant's punishment at confinement for 20 years.

2. Failure to Show Jury Waiver on Juvenile Disposition Order

Appellant claims that because the juvenile disposition order used to enhance his punishment did not contain evidence that the appellant gave a written jury waiver, the disposition order was a void judgment and should not have been admitted into evidence over his objection.

Texas Family Code section 54.03 states that, in juvenile proceedings, "Trial shall be by jury unless jury is waived in accordance with Section 51.09." Tex. Fam.Code Ann. § 54.03(c) (Vernon Supp.2007). Section 51.09 provides that "any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if ... the waiver is made in writing or in court proceedings that are recorded." Tex. Fam.Code Ann. § 51.09(4) (Vernon 2003).

As appellant notes, the juvenile adjudication relied on for enhancement in this case contains no indication that a jury was waived before the hearing and appellant's subsequent commitment to TYC by the juvenile judge. Appellant cites *Boyd v. State,* 660 S .W.2d 820 (Tex.Crim.App.1983) and *Ex parte Felton,* 590 S.W.2d 471 (Tex.Crim.App.1979), for the proposition that "an enhancement without a valid jury waiver is a void judgment." However, appellant has cited no authority indicating that the failure of a *judgment* to reflect waiver of a jury trial renders it void. *Basurto v. State,* No. 14-05-00419- CR, 2006 WL 2560272, at *3 (Tex.App.-Houston [14th Dist.] September 7, 2006, pet. ref'd) (memo op., not designated for publication). Rather, where the trial record (not the judgment, as appellant contends) is silent, waiver of trial by jury cannot be presumed on direct appeal. *Id.* (citing *Samudio v. State,* 648 S.W.2d 312, 314 (Tex.Crim.App.1983)). Appellant has not argued or provided evidence that the complete record from his 2000 juvenile adjudication is silent regarding waiver, nor has he otherwise established that the 2000 adjudication is void. *Id; see also Johnson v. State,* 72 S.W.3d 346, 349 (Tex.Crim.App.2002) (holding burden rests with appellant to offer evidence that error occurred regarding jury waiver). Thus, appellant has not shown that the trial court committed error in overruling his objection to the introduction of the juvenile disposition order on that ground. *See* Basurto, 2006 WL 2560272 at *3 (citing *Ex parte White,* 160 S.W.3d 46, 53 (Tex.Crim.App.2004)).

3. Violation of Eighth Amendment's Prohibition Against Cruel and Unusual Punishment

In his fourth issue, appellant asks this court to apply the United States Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183 (2005), to the law in Texas concerning juvenile enhancements.

In *Roper,* the Court forbade the imposition of the death penalty on offenders who were under the age of 18 when their capital crime was committed. As appellant correctly notes, the Court's ruling recognized "three general differences between juveniles under 18 and adults" which "demonstrate that juvenile offenders

cannot with reliability be classified among the worst offenders." *Roper,* 543 U.S. at 569; 125 S.Ct. at 1195. These characteristics are:

(1) A lack of maturity and an underdeveloped sense of responsibility;

(2) Increased vulnerability to negative influences and outside pressures, including peer pressure; and

(3) More transitory and less fixed personality traits and character.

Id. at 569-70; 125 S.Ct. at 1195.

Appellant urges that the same considerations which influenced the Supreme Court in *Roper* to forbid the execution of persons for offenses committed when they were younger than 18 apply when juvenile offenses are later used to enhance the range of punishment. However, we decline to extend the reasoning of *Roper* to the instant case.

We note initially that *Roper* operates only to prohibit the imposition of the *death penalty* on offenders who were under the age of 18 when their crimes were committed. *Id.* at 578, 125 S.Ct. at 1200. The Supreme Court has recognized that, "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability." *Harmelin v. Michigan,* 501 U.S. 957, 995-96, 111 S.Ct. 2680, 2702 (1991) (quoting *Furman v. Georgia,* 408 U.S. 238, 306, 92 S.Ct. 2726, 2760 (1972) (Stewart, J., concurring)). In contrast, Texas's enhancement scheme is not the type of "unique" and "irrevoca[ble]" type of punishment that the Supreme Court addressed in *Roper.*

When an appellate court reviews the constitutionality of a statute, it is to presume the statute is valid and that the Legislature has not acted unreasonably or arbitrarily in enacting it. *Ex parte Flores,* 130 S.W.3d 100, 106 (Tex.App.-El Paso 2003, pet. ref'd). The burden rests on the appellant to establish the statute to be unconstitutional. *Id.* Moreover, as an intermediate appellate court, we must follow binding precedent of the Court of Criminal Appeals. *McKinney v. State,* 177 S.W.3d 186, 192 (Tex.App.-Houston [1st Dist.] 2005), *aff'd,* 207 S.W.3d 366 (Tex.Crim.App.2006).

The Court of Criminal Appeals has long upheld the enhancement statute against all constitutional challenges, including cruel and unusual punishment claims. *See Thomas v. State,* 543 S.W.2d 645, 647 (Tex.Crim.App.1976); *Armendariz v. State,* 529 S.W.2d 525, 527 (Tex.Crim.App.1975). Appellant cites no cases holding that the use of a juvenile adjudication as an enhancement is unconstitutional, or explaining why *Roper* applies in a non-death penalty context. Thus, appellant has failed to show that the use of a juvenile adjudication for enhancement purposes violates the Eight Amendment.

4. Failure to Give Written Notice of the Enhancement

Finally, appellant contends that the State failed to give written notice of its intent to proffer the 2000 juvenile adjudication for enhancement purposes and that there was no enhancement paragraph pleaded in the indictment.

We first note that enhancement allegations need not be included in an indictment. *Brooks v. State,* 957 S.W.2d 30, 32 (Tex.Crim.App.1997) (concluding that indictment is merely State's primary pleading in criminal action and certain matters, such as enhancements, may be plead apart from indictment). Again, this Court is bound by the precedent of the Court of Criminal Appeals, and the appellant fails to explain how the law has changed

since *Brooks* or to provide sufficient reason why we should deviate from precedent. *McKinney,* 177 S.W.3d at 192.

Additionally, our review of the record reveals that the State gave over thirty days notice of its intent to introduce the 2000 juvenile adjudication as an enhancement with respect to both the aggravated sexual assault charge and the indecency charge. [FN1] We conclude that such notice was adequate in the instant case. *See Villescas v. State,* 189 S.W.3d 290, 294 (Tex.Crim.App.2006) (holding enhancement notice was not untimely where received by appellant six days before trial).

> FN1. The certificate of service attached to the instrument entitled "Notice of State's Intent to Introduce Prior Felony Convictions for the Purpose of Enhancement of Punishment in Present Offense" indicates that the notice was faxed to appellant's trial attorney on August 25, 2006, the same day it was filed with the district clerk. Additionally, appellant's trial counsel acknowledged on the record that he received notice of the State's intent to use the enhancement.

Conclusion: In light of the foregoing discussion, we overrule appellant's third, fourth, and fifth issues.