

## Review of Recent Juvenile Cases (2009)

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

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### **In ineffective assistance of counsel, deficient performance must damage defense such that there was a reasonable probability that the result of the trial would have been different.[In the Matter of J.T.B.](09-3-2)**

**On May 27, 2009, the Texarkana Court of Appeals held that in determining whether juvenile received ineffective assistance of counsel, failure to satisfy either prong of the two-pronged *Strickland* test (1. Counsel's performance fell below an objective standard of reasonableness; 2. Such performance damages the defense such that there was a reasonable probability that the result would have been different) renders the argument flawed.**

¶ 09-3-2. **In the Matter of J.T.B.**, MEMORANDUM, No. 06-09-00006-CV, 2009 WL 1459610 (Tex.App.-Texarkana, 5/27/09).

**Facts:** After previously receiving deferred adjudication for stealing bicycles from Wal-Mart, and completing probation for attempted theft of a Powerline BB pistol, twelve-year-old J.T.B. pled true to violating [Section 30.02\(c\)\(2\) of the Texas Penal Code](#) after he entered a habitation on August 31, 2003, and stole an X-Box video game and cell phone. On February 12, 2004, J.T.B. was placed on probation in the custody of his mother for three years. The rules of all of his probations required that he commit "no offense against the laws of this or any other state," "[r]emain in the home ... from 6:00 p.m. until 6:00 a.m. seven days a week, unless ... given permission," and "[p]erform 160 hours of community service." The rules further provided that J.T.B. was to attend school as scheduled without causing problems and obey the rules and regulations of the school.

In March 2004, the first petition to modify disposition was filed, citing the February 13 incident and two other incidents which involved J.T.B. hitting another boy "in the face with a closed fist" and "assaulting ... a public servant of the Jacksonville Texas Public School system; hitting her in the left shoulder and arm with a closed fist." After a hearing, the juvenile court ordered that J.T.B. be placed on probation at Azleway Boys' Ranch in Tyler, Texas. In addition to the rules of probation already recited in the first order, the court required J.T.B. to obey the instructions and rules of the residential placement program and prohibited J.T.B. from participating in gang activity.

On October 4, 2004, the Azleway Boys' Ranch program director contacted the probation department and advised that J.T.B. was being discharged due to pending sexual assault charges. The charges were later dropped, and J.T.B. was allowed to return home and enroll in Rusk Junior High School. However, J.T.B. "got kicked out of regular school," was placed in an alternative education program, and was suspended from that program three times. He also took his grandmother's car for a joyride and evaded arrest after a peace officer attempted to stop him. An evaluation completed by Trinity Counseling Associates of East Texas revealed that

J.T.B. admitted that he was a member of the Northside Bloods gang in Jacksonville and that the joyride was "an effort to show off for gang members at the Alternative Education Program."

Citing these alleged offenses, subsequent petitions to modify disposition resulted in further orders of detention, and on August 4, 2005, a modification order was entered placing J.T.B. in the Southwest Key Program residential placement facility. In addition to the same rules of probation implemented previously, J.T.B. was to obey the rules of the Southwest Key Program, participate in electronic monitoring, and attend and complete all juvenile service programs.

The next petition to modify disposition, filed in January 2007, alleged that J.T.B.: (1) was suspended from school for eight days from October to December 2006; 2) failed to meet curfew; 3) had twice entered the property of Greg Ray without consent; 4) fraudulently attempted to possess or obtain hydrocodone by adding the words "Hydrocoden 600mg" to a prescription form that had already been filled out by his doctor; and 5) with the specific intent to commit the offense of sexual assault, placed a girl:

over his shoulders, carried her to the bedroom, placed her on a bed, removed her pants and underwear, lowered his shorts and took a position over [her], which amounted to more than mere preparation that tended but failed to effect the commission of the offense intended.

A summary filed by the Cherokee County Juvenile Department listed eight violations of court orders from February 2004 to March 2007, unsuccessful discharges from the Azleway Boys' Ranch and Project Aspect Program, and unsuccessful completion of intensive probation and electronic monitoring. Since J.T.B. had been referred to the probation department, he had been "placed in detention nine different times totaling 231 days," and had been arrested six times.

On April 26, 2007, the juvenile court cited J.T.B.'s history and procedural background, found that he entered Ray's property in violation of [Section 30.05 of the Texas Penal Code](#),

violated [Section 481.129 of the Texas Health and Safety Code](#) by attempting to fraudulently obtain hydrocodone, was suspended from school, violated curfew, and ordered him committed to TYC.

On May 5, 2008, a petition for determinate sentencing alleged J.T.B. had shot another person with a firearm on April 21, prior to the juvenile court's order committing J.T.B. to TYC. After waiver of a jury trial and right to appeal on the issue, the juvenile court found J.T.B. had committed the offense and sentenced J.T.B. to

ten (10) years confinement with the first portion of the confinement being in the Texas Youth Commission and the remaining confinement to be served in the Texas Department of Criminal Justice, Institutional Division; however, this confinement is suspended and [J.T.B.] shall be placed on probation and committed to the supervision of the Juvenile Probation Office of Cherokee County, Texas for ten (10) years, and the said supervision will be transferred to Cherokee County Adult Probation for the remainder of the ten year period upon approval.

A final petition to modify disposition resulted in the court revoking probation and instituting the sentence imposed above. The juvenile court found J.T.B. violated the conditions of his probation because he was issued a citation for minor in possession of a tobacco product, violated curfew on June 28, 29, and July 5, 2008, tested positive for marijuana and benzodiazepine in a random urinalysis, and was unsuccessfully discharged from Summer II Program. In its order, the court did not find that J.T.B. failed to perform community service hours or that he stole money from Mike's Muffler Shop as alleged in the modification for disposition.

Nevertheless, J.T.B. contends "the result of the modification hearing was unreliable because [he] received ineffective assistance of counsel," when counsel failed to object to hearsay evidence related only to the theft allegation at Mike's Muffler Shop. The second issue on appeal deals with language in [Section 54.05\(i\) of the Texas Family Code](#), requiring the court to "specifically state its reasons for modifying the disposition."

**Held:** Affirmed.

**Memorandum Opinion:** J.T.B. first contends his counsel was ineffective because he failed to object to hearsay evidence. J.T.B. bears the burden of proof on this matter by a preponderance of the evidence. [Thompson v. State, 9 S.W.3d 808, 813 \(Tex.Crim.App.1999\)](#); see [Goodspeed v. State, 187 S.W.3d 390, 392 \(Tex.Crim.App.2005\)](#). Any allegation of his counsel's ineffectiveness must be firmly founded in the record. [Goodspeed, 187 S.W.3d at 392](#); [Thompson, 9 S.W.3d at 813](#); [Cannon v. State, 668 S.W.2d 401, 403 \(Tex.Crim.App.1984\)](#).

We apply the two-pronged *Strickland* test handed down by the United States Supreme Court to determine whether J.T.B. received ineffective assistance of counsel. [Strickland v. Washington, 466 U.S. 668 \(1984\)](#). The first prong requires J.T.B. to show counsel's performance fell below an objective standard of reasonableness when considering prevailing professional norms. *Id.* at 687-88. To meet the second prong of the *Strickland* test, J.T.B. must show that the deficient performance damaged his defense such that there is a reasonable probability the result of the trial would have been different. *Id.*; [Tong v. State, 25 S.W.3d 707, 712 \(Tex. Crim App.2000\)](#). Failure to satisfy either prong of the *Strickland* test is fatal. [Jaubert v. State, 74 S.W.3d 1, 9 \(Tex.Crim.App.2002\)](#). Thus, we need not examine both *Strickland* prongs if one cannot be met. [Strickland, 466 U.S. at 697](#).

J.T.B. complains that trial counsel did not object to the testimony of Officer Anthony Forson concerning the October 8, 2008, incident at the muffler shop when Forson testified Officer Eric Dawes told him that he thought J.T.B. was in possession of tobacco products. It is not clear that this evidence is hearsay. A police officer's testimony is not hearsay when it is offered for the purpose of explaining how a defendant became a suspect, rather than for the truth of the matter asserted. [Dinkins v. State, 894 S.W.2d 330, 347 \(Tex.Crim.App.1995\)](#). In addition, an officer's testimony is not hearsay when it is admitted, not for the truth, but to establish the course of events and circumstances leading to a defendant's arrest. [Thornton v. State, 994 S.W.2d 845, 854 \(Tex.App.-Fort Worth 1999, pet. ref'd\)](#) (citing [Reed v. State, 794 S.W.2d 806, 809 \(Tex.App.-Houston \[14th Dist.\] 1990, pet. ref'd\)](#)). Additionally, since J.T.B. admitted possession of tobacco on that date it appears the defense made a strategic decision not to contest this issue. Counsel's performance in this regard was not deficient.

J.T.B. alleges his counsel failed to present evidence that a GPS device placed him at some other location at the time of the incident at Mike's Muffler Shop, but the record shows such evidence was presented by J.T.B. in his testimony. J.T.B. also alleges that counsel was deficient in failing to object to a statement by J.T.B.'s girlfriend at the muffler shop. However, nothing in the record suggests J.T.B.'s sentence was due to a theft allegedly occurring at Mike's Muffler Shop. In fact, the juvenile court did not base its decision to revoke probation based on this allegation. Therefore, as to the incident occurring at the muffler shop, J.T.B. cannot meet the second prong of the *Strickland* test.

**Conclusion:** In view of this juvenile's extensive delinquency history, there is no indication of a reasonable probability the juvenile court would have imposed a different sentence had counsel objected to this alleged hearsay evidence. From the record, it appears the trial court had already exhausted the lesser alternative sanctions. The trial court aptly observed that J.T.B. had "worn the system out." This point of error is overruled.