

Review of Recent Juvenile Cases (2009)

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

Evidence was legally sufficient to establish that respondent engaged in organized criminal activity, "as a member of a criminal street gang." [In the Matter of I.A.G.](09-4-7A)

On October 1, 2009, the Beaumont Court of Appeals held that respondent was a member of the Norte 14 street gang and members of the Norte 14 street gang were involved in criminal activity on a regular basis, thus respondent was a member of a criminal street gang under the code.

¶ 09-4-7A. **In the Matter of I.A.G.**, No. 09-08-00430-CV, ___ S.W.3d ___, 2009 WL 3126241 (Tex.App.-Beaumont, 10/01/09).

Facts: On the afternoon of May 7, 2008, I.A.G., and others, were involved in an altercation that occurred in the front yard of the complaining witness's home (hereinafter referred to as "the homeowner"). While attempting to stop the altercation, the homeowner, who had not initially been involved in the fight, and I.A.G., who had been a party in the fight, exchanged blows. During the altercation, the homeowner heard I.A.G. say "North Side" several times, which the homeowner explained he understood to be gang-related. According to the homeowner, "North Side" [FN2] is a gang in Port Arthur, and the homeowner had seen that name written on walls throughout the city. Ultimately, the homeowner told the group to leave, and they left. The homeowner called the police, who then sent an officer.

Later that day, the homeowner, while away from his home, was notified that some individuals had thrown rocks and tire irons in his yard. The homeowner returned to his house and called the police. Before the police arrived, an Explorer stopped in front of the home. I.A.G., along with three others got out. I.A.G. and one of the others held tire irons while standing near the Explorer. The homeowner explained that under the circumstances, including the earlier altercation, he felt threatened and he feared serious bodily injury. The homeowner also stated that despite the fact that I.A.G. and the other person only displayed the tire irons, he felt threatened.

Shortly after exiting the Explorer, the driver asked the homeowner, "Why you hitting little kids?" While standing behind the Explorer, the driver then pointed a pistol at the homeowner. At that point, the homeowner instructed his father to go inside, after which the gunman said, "I'm going to kill you. I'm going to kill you." The homeowner testified that this also caused him to fear imminent danger of serious bodily injury and to believe that the gunman was going to kill him. After he was threatened with being killed, the homeowner turned around, entered his house, and heard I.A.G. say, "Go, go, go, go, he's going to get his gun." I.A.G. and the others then left. The homeowner, once again, called the police.

The homeowner testified that he felt the two youths holding the tire irons acted in concert with the gunman. With respect to whether any gang was specifically mentioned during the confrontation involving the gun, the homeowner acknowledged that the gunman never mentioned any gang.

A Port Arthur police officer with the "street crimes unit with a specialty in gangs, street gangs" also testified at trial. The officer indicated that I.A.G. and the other minor that participated in the gunman's confrontation with the homeowner had previously been wounded in a drive-by shooting while at a known Norte 14 gang hangout. Additionally, the officer testified that I.A.G. told him that he was a member of the North Side 14 gang. The officer stated that the gunman, who owned the Explorer, was also a member of the Norte 14 gang. The officer added that the other minor who participated in the confrontation that involved the gunman also held membership in the Norte 14 gang, which he based on the minor's admission as well as tattoos on that minor's wrists that together read "North Side 14." The officer expressed his opinion that on May 7, 2008, the gunman and two minors had acted in concert as members of their gang in threatening the homeowner.

A second Port Arthur police officer that also investigated the confrontation testified at trial. According to the second officer, the homeowner told him that he felt threatened and feared being shot. The second officer confirmed that he was familiar with the participants in the confrontation, and he knew them all to be members of the Norte 14 gang.

The petition alleges that I.A.G. committed the offense of engaging in organized criminal activity, "as a member of a criminal street gang," by committing the offense of "deadly conduct" when he, by his reckless conduct, placed the homeowner in imminent danger of serious bodily injury by pointing a firearm in the homeowner's direction. Engaging in organized criminal activity occurs if, "with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, [the defendant] commits or conspires to commit one or more of the following: ... deadly conduct[.]" [Tex. Pen.Code Ann. § 71.02\(a\)\(1\)](#) (Vernon Supp.2008).

Held: Affirmed

Opinion: I.A.G. argues that the evidence is legally insufficient to show that, as a member of a street gang, he engaged in organized criminal activity by way of deadly conduct. Because "organized criminal activity" as alleged by the State in this case was based on I.A.G.'s participation in a "criminal street gang," we also consider the definition of "criminal street gang." The Legislature defines a "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." [Tex. Pen.Code Ann. § 71.01\(d\)](#) (Vernon 2003).

Focusing on the frequency of criminal activity that suffices to constitute a "criminal street gang," I.A.G. asserts that one criminal act is not sufficient to prove that a person has engaged in organized criminal activity. I.A.G. relies on [Nguyen v. State, 1 S.W.3d 694 \(Tex.Crim.App.1999\)](#), to support this argument. In *Nguyen*, the Court of Criminal Appeals affirmed the acquittal of a defendant who had been jointly involved in only a single crime, a murder, where no evidence indicated that the group intended to commit more than the one crime. *Id.* at 697-98.

In this case, however, the criminal activity identified by the homeowner and by the Port Arthur officers included multiple criminal incidents. The officers described criminal activity connected to members of the Norte 14 gang that included vandalism, assault, and specific instances of terroristic threats. The second officer's testimony further indicated that the gang's activities resulted in numerous police calls to locations where the gang frequently gathered.

While I.A.G. argues that there was no evidence that he committed or conspired to commit further criminal activities, the definition of organized criminal activity involving members of street gangs requires criminal street gang membership and the commission or the conspiracy to commit one of the laundry-list crimes involving the gang. See [Tex. Pen.Code Ann. § 71.02\(a\)\(1\)- \(13\)](#) (Vernon Supp.2008). I.A.G. cites *Nguyen* for the proposition that [section 71.02](#) cannot "be understood to include an agreement to jointly commit a single crime." However, the participants to the crime in *Nguyen* were not members of a street gang; therefore, to prove that those participants had engaged in an organized criminal activity, the State was required to prove that the participants in that case had established, maintained or participated "in a combination" under the first portion of the statute. [Nguyen, 1S.W.3d at 697](#). In this case, the State does not rely on the statute's "in a combination" language addressed in *Nguyen*, as the State alleged and proved that I.A.G. was a member of the same gang as the other two participants to the confrontation with the homeowner. See [Tex. Pen.Code Ann. § 71.02\(a\)\(1\)](#); [Nguyen, 1S.W.3d at 696-97](#). Thus, *Nguyen* is not controlling authority because the State, by showing that I.A.G. was a member of a "criminal street gang" sufficiently met the statute's implied requirement of regular criminal activity.

Conclusion: In summary, when viewed in the light most favorable to the judgment, we find the evidence legally sufficient to establish that gang members of Norte 14 were involved in criminal activity on a regular basis. There is also legally sufficient evidence that at the time of the offenses in May 2008, I.A.G. was a member of the gang. Consequently, we do not agree with I.A.G.'s contention that the frequency of I.A.G.'s criminal activity is insufficient on this record.