

Review of Recent Juvenile Cases (2009)

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

Criminal trial court is improper forum for review of due diligence question on order waiving jurisdiction to adult court after 18. [State v. Rhinehart](09-4-9)

On October 12, 2009, the Dallas Court of Appeals held that, in a discretionary transfer proceeding of a juvenile after he turns 18, the adult trial court is not the proper forum to review the sufficiency of the evidence regarding the lack of due diligence by the state in proceeding before 18.

¶ 09-4-9. **State v. Rhinehart**, UNPUBLISHED, No. 05-09-00155-CR, 2009 WL 3248270 (Tex.App.-Dallas, 10/12/09).

Facts: Forty-three days before his seventeenth birthday, appellee was charged with aggravated robbery. The State filed a petition for discretionary transfer from the juvenile court to the criminal district court, but was unable to locate appellee to effect service. After appellee turned eighteen, the juvenile court conducted a hearing on the State's petition for transfer. During the hearing, appellee challenged whether the State had exercised due diligence in moving the case through the juvenile system prior to his eighteenth birthday. The juvenile court made a specific finding that the State had exercised due diligence in its attempt to locate appellee and signed an order waiving its jurisdiction and transferring the case to the criminal district court.

Appellee was indicted after the case was transferred to the criminal district court. Appellee then moved to quash the indictment, arguing that the evidence was insufficient to support the transfer of the case under [Section 54.02\(j\) of the family code](#). Specifically, appellee argued the State failed to establish that after exercising due diligence, it was not practicable to proceed in juvenile court before appellee's eighteenth birthday. The trial court granted the motion and quashed the indictment. This appeal followed.

Held: Reversed and remanded

Opinion: Here, the motion to quash does not assert any of the statutory grounds for setting aside an indictment, nor does it challenge the indictment based on form or substance. Instead, the motion asserted that the indictment should be quashed because the elements requisite to transfer a case from juvenile court to district court had not been met. Despite appellee's attempt to characterize the motion otherwise on appeal, the motion constitutes a challenge to the evidence adduced in the juvenile court transfer proceedings.

Although original jurisdiction over a child engaged in delinquent conduct lies exclusively with the juvenile court, see [Tex. Fam.Code Ann. § 51.04 \(Vernon 2002\)](#), when certain conditions are met [family code section 54.02\(j\)](#) allows a district court to acquire jurisdiction over a child alleged to have committed a felony. However, before the district court may acquire jurisdiction, the juvenile court must waive jurisdiction. [Tex. Fam.Code Ann. § 54.02 \(Vernon 2002\)](#). To do so, the juvenile court must find from a preponderance of the evidence that:

A. for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or

B. after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:

(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;

(ii) the person could not be found; or

(iii) a previous transfer order was reversed by an appellate court or set aside by a district court....

Id. The family code no longer permits juvenile defendants to appeal from the certification proceedings prior to being finally convicted as an adult. [Small v. State, 23 S.W.3d 549, 550 \(Tex.App.-Houston \[1st Dist.\] 2000, pet. ref'd\)](#). Thus, issues relating to the transfer proceeding are properly raised in an appeal from a conviction after transfer. [Carlson v. State, 151 S.W.3d 643, 645 n. 1 \(Tex.App.-Eastland 2004, no pet.\)](#); [State v. Lopez, 196 S.W.3d 872, 875 \(Tex.App.-Dallas 2006, pet. ref'd\)](#).

Appellee acknowledges that a party may only appeal a transfer order in conjunction with a conviction or an order of deferred adjudication. See [Tex.Code Crim. Proc. Ann. art. 44.47\(b\)](#) (Vernon 2006). Nonetheless, appellee contends that an "appeal" differs from a "challenge," and insists the statute does not restrict a defendant's right to challenge a transfer order. Although we note that the construction appellee seeks to advance would effectively allow a defendant two bites at the proverbial appellate apple, we need not decide the issue here. Appellee's motion did not seek to set aside the transfer order; it sought to quash the indictment. Moreover, even if the statute afforded different treatment for a "challenge" than an "appeal," the distinction is without a difference in the present case. Appellee's motion concerned the sufficiency of the evidence in the transfer proceeding. And in the absence of a conviction or order of deferred adjudication, we have no jurisdiction to determine the propriety of a transfer. See [Tex.Code Crim. Proc. Ann. art. 44.47\(b\)](#) (Vernon 2006).

Conclusion: Because there is nothing before us to demonstrate that the indictment was not valid, we conclude the trial court erred in quashing the indictment. The State's second issue is sustained. Our resolution of this issue obviates the need to address the State's first issue. See [Tex.R.App. P. 47.1](#). We reverse the trial court's order and remand the case for further proceedings consistent with this opinion.