

## Juvenile Law Case Summaries

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### ***Transfer hearing under old determinate sentence law was timely [In re A.M.] (01-3-21).***

On July 25, 2001, the Dallas Court of Appeals held that a transfer hearing that began more than 30 days before the juvenile's 18th birthday was timely even though the hearing was not concluded before the 30 day period.

¶ 01-3-21. In the Matter of A.M., UNPUBLISHED, No. 05-99-00432-CV, 2001 WL 832364, 2001 Tex.App.Lexis \_\_\_\_ (Tex.App.—Dallas 7/25/01) [Texas Juvenile Law (5th Edition 2000)].

Facts: A.M. appeals the trial court's order transferring him from a youth facility to the Texas Department of Criminal Justice (TDCJ). In three points of error, appellant contends the trial court (1) abused its discretion in deciding to transfer him rather than recommit him to the Texas Youth Commission (TYC); (2) failed to make a factual finding required by section 54.11 of the Texas Family Code; and (3) erred in considering evidence outside the record. In a fourth point of error, appellant contends he is entitled to a new hearing because an original exhibit from the transfer hearing is missing from the appellate record.

On July 22, 1995, appellant was involved in the shooting death of Mario Vara. A friend of appellant had parked his Toyota automobile in an alley. A pickup truck attempted to pass through the alley, but was blocked by the Toyota. In attempting to move the Toyota, appellant's friend backed into the pickup truck. While the owners of the pickup truck and Toyota were discussing the damage, Mr. Vara walked up and interceded on behalf of the pickup truck owner. Appellant and T.H., another juvenile, interceded on behalf of the Toyota owner. A heated argument erupted in which appellant and T.H. produced handguns and each "emptied their clips" into Vara, killing him. Appellant was fourteen years old at the time of the offense.

A jury found appellant guilty of murder and delinquent conduct in juvenile court, and the jury assessed a forty year determinate sentence. On November 8, 1995, the trial court ordered appellant committed to the TYC for forty years with a possible transfer at age eighteen to the TDCJ. See Tex.Fam.Code Ann. § 54.04 (Vernon 1996). [FN2] After serving approximately three years of his determinate sentence at the Giddings State Home and School, and just prior to appellant's eighteenth birthday, the trial court conducted a release hearing pursuant to the family code. See id. at § 54.11.

FN2. Because the conviction occurred in 1995, the trial court and parties all assumed that the 1995 version of the law controlled the 1998 transfer hearing. Because no one disputes this assumption, we likewise will apply the 1995 version of the law. However, in this opinion we will cite to the current version of the statute unless it has materially changed since 1995.

At the hearing, a therapist and two psychologists from TYC recommended that appellant be recommitted to the TYC. The basis for this recommendation was appellant's "excellent" behavior while at TYC, "successful" progress made in counseling programs, and the conclusion he was a low-to-moderate risk to re-offend. All TYC witnesses stated that appellant had made great strides and had taken responsibility for his actions. However, one of the programs at Giddings was a capital offender group treatment program, which has a goal of having the offender accept responsibility for his actions. Appellant had to re-take this five-to-sixth-month-long program at Giddings because he had difficulty expressing regret for his actions the first time.

Appellant's master file and three psychological evaluations made during his time at Giddings were admitted into evidence without objection. The documentary evidence reveals that prior to his conviction for murder, appellant had

been referred to the juvenile authorities for five offenses committed when he was thirteen: two burglaries, a theft, carrying an unconcealed weapon, and failure to identify. In addition, appellant confessed to stealing candy from stores as early as age five, setting grass fires and throwing rocks at stray animals at age seven, vandalizing houses at age eight, and stealing bicycles at age eleven or twelve. After joining a gang at age twelve and a half, appellant broke into or stole more than 50 automobiles. At age fourteen, appellant participated in six drive-by shootings, including two into crowds of people and four into houses at night while the occupants slept. During his time as a gang member, appellant was often truant from school, intoxicated almost daily, regularly used marijuana, and experimented with other illegal drugs.

Appellant's three psychological evaluations were dated December 1995, September 1997, and October 1998, and each diagnosed appellant with "Conduct Disorder, Adolescent-Onset, Severe." The evidence showed persons with this disorder have little empathy or concern for others and a significant portion of these persons develop an antisocial personality disorder. There was testimony at this November 1998 transfer hearing that appellant was not currently suffering from any disorder. However, the testimony also indicated that appellant had been mis-diagnosed because TYC failed to take into account the childhood activities recounted above and the proper diagnosis should have been "Conduct Disorder, Childhood-Onset, Severe." The evidence indicted individuals with this earlier onset are more likely to develop an antisocial personality disorder than those with an adolescent onset. The record also reflects that from his general knowledge and experience, the trial judge indicated a concern appellant may be a sociopath. The two TYC psychologists emphatically testified appellant was not a sociopath in their opinion. In addition to the TYC witnesses, the mother and brother of appellant's murder victim testified that they did not want the court to recommit appellant to TYC because he needed more time to realize what he did. During the hearing, the trial judge indicated he had difficulties explaining to the victim's relatives why someone could take their brother and son from them and only be incarcerated three years.

At the conclusion of the hearing, the trial court transferred appellant to the TDCJ to serve the remainder of his determinate sentence, and then made the following comment: "Everything in his background and everything in his conduct indicates the diagnosis of [Conduct Disorder] is correct and I am not going to turn a sociopath loose on society." This appeal ensued.

Held: Affirmed.

Opinion Text: Appellate Record

We first address the status of the appellate record. Appellant's brief was filed April 4, 2000, subject to a "plea in abatement" because of a missing exhibit. In his fourth point of error, appellant contends he is entitled to a new hearing because Exhibit No. 1 from the transfer hearing, the Texas Youth Commission's master report concerning appellant, is missing from the appellate record through no fault of his own. See Tex.R.App.P. 34.6(f). However, on June 7, 2000, the district clerk filed a supplemental clerk's record containing the missing exhibit. By order dated August 9, 2000, this Court provided appellant twenty days to file another brief. Appellant neither filed an amended brief nor requested additional time. The missing exhibit is now part of the appellate record and appellant had an opportunity to amend his arguments in light of the complete appellate record. Accordingly, we conclude appellant's fourth point of error is moot and decline to consider it.

Extraneous Evidence

In his third point of error, appellant argues the trial court erred in considering evidence outside the record in determining whether to transfer appellant to TDCJ. Specifically, during the trial court's own questioning of the psychologists, the trial judge referred to knowledge acquired from other experts and literature the trial judge had read concerning sociopathic behavior. Appellant, however, did not object to the trial judge's comments or otherwise indicate any concern regarding the trial court's reliance on outside materials or knowledge. To preserve error for appellate review, the complaining party must make a timely, specific objection and obtain a ruling, either expressly or implicitly, on the objection. See Tex.R.App.P. 33.1. Accordingly, we decline to consider appellant's third point of error because appellant failed to preserve the alleged error. See *Broxton v. State*, 909 S.W.2d 912, 918 (Tex.Cr.App.1995).

Hearing Date Finding

The statute in effect for appellant's transfer hearing stated that the release hearing "must be held before 30 days before the person's 18th birthday." See Act of June 17, 1987, 70th Leg., R.S., ch. 385, § 13, 1987 Tex.Gen. Laws 1896 (current version at Tex.Fam.Code Ann. § 54.11(h) (Vernon 1996)). In his second point of error, appellant argues the trial court failed to make a specific finding that the transfer hearing was conducted at least thirty days before

appellant's eighteenth birthday.

The record reflects appellant was born December 21, 1980; thus, December 21, 1998 was appellant's eighteenth birthday. The record further reflects that the hearing was begun on November 18, 1998, recessed, and concluded on November 24, 1998. Under the statute in effect, "held" has been interpreted to mean the hearing must begin more than thirty days before the potential transferee's eighteenth birthday. In *Re C.L.*, 874 S.W.2d 880, 884 (Tex.App.—Austin 1994, no writ). Because the hearing began thirty-three days before appellant's birthdate, we conclude the hearing was "held" in compliance with the applicable statute. See *id.* However, assuming this interpretation is incorrect, we fail to see how appellant was harmed by the alleged error because appellant was afforded a full hearing that concluded before his eighteenth birthday. See *id.*

Appellant attempts to distinguish *In re C.L.* by pointing out that in that case the trial court made a specific finding the hearing was conducted timely, *id.* at 883, but here the trial court made no similar finding. We conclude this distinction is meritless. First, the statute in effect did not require a specific finding, only that the hearing be held by a specific time. See Act of June 17, 1987, 70th Leg., R.S., ch. 385, § 13, 1987 Tex.Gen. Laws 1896. Second, we still fail to see how appellant was harmed by this alleged error because there is no dispute as to the dates the hearing was conducted. See Tex.R.App.P. 44.1. Moreover, appellant has provided neither argument nor authority demonstrating harm. We overrule appellant's second point of error.

#### Transfer to TDCJ

In his first point of error, appellant argues that the trial court abused its discretion in transferring him to the TDCJ rather than recommitting him to the TYC for further rehabilitative treatment because the decision was arbitrary and not supported by the evidence. The State responds that there was sufficient evidence to uphold the trial court's decision.

#### A. Applicable Law

Under the determinate sentencing law in effect when appellant was convicted, juveniles who have been adjudicated delinquent for one of six serious, violent offenses may receive a determinate sentence of up to forty years' confinement. *K.L.M v. State*, 881 S.W.2d 80, 83-84 (Tex.App.—Dallas 1994, no writ). The juvenile serves the first portion of his sentence at the TYC with a possible transfer to the TDCJ at age eighteen to serve the balance of the sentence. *Id.* at 84; see Tex.Fam.Code Ann. § 54.04(d)(3) (Vernon Supp.2001).

When a juvenile is sentenced under the determinate sentencing law, a release hearing occurs prior to the juvenile's eighteenth birthday. See Tex.Fam.Code Ann. § 54.11(h) (Vernon 1996). At the hearing, the trial court decides whether to discharge the juvenile, transfer him to the TDCJ, or remand him to the TYC without a determinate sentence. See Act of June 15, 1991, 72nd Leg., R.S., ch. 574, § 3, 1991 Tex.Gen. Laws 2053-54. At the release hearing, the trial court may consider written reports from probation officers, professional court employees, or professional consultants, in addition to the testimony of witnesses. See Tex.Fam.Code Ann. § 54.11(d) (Vernon 1996). In making its decision, the trial court may consider (1) the experiences and character of the person before and after commitment to the youth commission, (2) the nature of the penal offense that the person committed and the manner in which the person committed the offense, (3) the abilities of the person to contribute to society, (4) the protection of the victim of the offense or any member of the victim's family, (5) the recommendations of the youth commission and prosecuting attorney, (6) the best interests of the person, and (7) any other factor relevant to the issue to be decided. See *id.* at § 54.11(k) (formerly sub-section (j)).

We review the trial court's decision under an abuse of discretion standard. *K.L.M.*, 881 S.W.2d at 84; *J.R.W. v. State*, 879 S.W.2d 254, 257 (Tex.App.—Dallas 1994, no writ). In deciding whether the trial court abused its discretion, we review the entire record to determine if the trial court acted without reference to any guiding rules and principles. *K.L.M.*, 881 S.W.2d at 84; *J.R.W.*, 879 S.W.2d at 257. If some evidence supports the trial court's decision, there is no abuse of discretion. *K.L.M.*, 881 S.W.2d at 84; *J.R.W.*, 879 S.W.2d at 257. We do not substitute our opinion for that of the trial court. *K.L.M.*, 881 S.W.2d at 84. We reverse the trial court's decision only if the trial court acted in an unreasonable or arbitrary manner. *Id.*; *J.R.W.*, 879 S.W.2d at 257. We may not reverse for an abuse of discretion as long as the trial court's decision was within its discretionary authority. *K.L.M.*, 881 S.W.2d at 84; *J.R.W.*, 879 S.W.2d at 257.

#### B. Discussion

The trial court's December 8, 1998 nunc pro tunc transfer order states that in making his decision, the trial court considered all the factors required by statute. The record shows no evidence appellant is a threat to the victim's

family. Two of the relevant factors are the recommendations of the TYC and the prosecutor. Although all the TYC witnesses recommended that appellant be recommitted to the TYC, the trial court does not have to follow the TYC's recommendations. K.L.M., 881 S.W.2d at 84; J.R.W., 879 S.W.2d at 258. The TYC's recommendations are but one factor the trial court may consider in a release hearing. K.L.M., 881 S.W.2d at 85. Moreover, the testimony indicated an error in the diagnosis of appellant's disorder that justifiably could have impacted the credibility of the TYC's witnesses. The prosecutor, on the other hand, recommended commitment to the TDCJ.

Two more permissible factors are the nature of the offense and the manner of committing the offense. Here, appellant committed the offense of murder, an extremely serious crime in an extremely callous manner. The trial court heard testimony that appellant did not indicate regret for his crime for more than two years afterward. Appellant argues the trial court cannot use the crime as the sole factor to justify a transfer to the TDCJ, but there is no evidence that was the trial court's sole criteria. Further, the determinate sentencing law is designed to subject violent juveniles who commit serious crimes to longer sentences than they would have served under the conventional juvenile system. K.L.M., 881 S.W.2d at 85. The victim's mother and brother questioned the relatively short period of incarceration for the seriousness of the crime and the magnitude of their loss. A consideration of the length of the determinate sentence, the length of time the offender has served in the TYC, and the total amount of time the offender may serve if recommitted to the TYC is consistent with the statutory purpose of the determinate sentencing law. *Id.* At the time of the release hearing, appellant had served only three years in the TYC of a forty year determinate sentence. If recommitted to the TYC, the evidence showed that appellant might be released in one and a half years. The maximum time appellant would be required to serve at the TYC was three more years, until he reached age twenty-one. In considering these facts, the trial court could have determined that the possibility of appellant being released from the TYC after only four and a half years, or even the maximum of six years, was insufficient in relation to the nature of his offense and the length of his determinate sentence.

Other factors the court may consider are appellant's character and experience before and after commitment to TYC. The overwhelming evidence was that since his commitment, his conduct had been exemplary. Appellant had not violated any rules and, as a result, had earned many privileges. Ultimately, the testimony showed appellant had finally accepted responsibility for his actions. However, during a significant portion of his time at TYC, appellant had refused to accept responsibility or to show remorse for his crime. More significantly, appellant had a long history of criminal and anti-social behavior, including arson, vandalism, burglary, and half a dozen drive-by shootings. See *In Re D.W.*, 933 S.W.2d 353, 357 (Tex.App.--Beaumont 1996, writ denied) (trial court did not abuse discretion in ordering transfer to TDCJ despite evidence juvenile was rehabilitating himself when record also reveals significant criminal and anti-social activities before commitment to TYC).

Appellant also contends the trial court's concluding reference and questioning during the trial regarding appellant's "sociopath" behavior indicates an unsupported reason for transferring appellant because the undisputed testimony was that appellant was not a sociopath. However, in light of the written judgment indicating the trial court took every statutory-permitted factor into account, we do not construe the court's concluding comment as indicating the trial judge's belief appellant is or may become a sociopath was the only reason for its decision.

After reviewing the entire record, we conclude that the trial court did not abuse its discretion in deciding to transfer appellant to the TDCJ. We overrule appellant's first point of error.