

Juvenile Law Case Summaries

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State did not justify delay in seeking certification of 18 year old [Webb v. State] (01-4-46).

On October 25, 2001, the El Paso Court of Appeals held that the State did not justify its delay in seeking certification of an 18-year-old respondent, that the defect is jurisdictional, and that a showing of harm is not required.

01-4-46. Webb v. State, UNPUBLISHED, No. 08-00-00161-CR, 2001 WL 1326894, 2001 Tex.App.Lexis ____ (Tex.App.-El Paso 10/25/01) [Texas Juvenile Law (5th Ed. 2000)].

Facts: The sole issue before us is whether the juvenile court improperly waived jurisdiction and transferred the case to a criminal district court. Appellant was indicted for the offense of capital murder. He filed a motion to quash the indictment alleging that the State had failed to comply with the statutory requirements for the transfer. Upon denial of his motion, and pursuant to a negotiated plea agreement, Appellant entered a plea of guilty for the lesser-included offense of murder. The trial court accepted the plea of guilt, made an affirmative finding that a deadly weapon was used or exhibited during the commission of the offense, and pursuant to the plea agreement, assessed punishment at thirty years' confinement and a fine of \$10,000. Finding error, we vacate the conviction and dismiss the juvenile proceedings.

Terrence Glen Webb, Appellant, was born on September 17, 1980. On January 20, 1997, when he was sixteen years old, Appellant and four others went to South Lamar Street in Dallas with the intention of committing a robbery. They saw a Borden's Milk tanker truck stopped on the side of the road; three of the boys remained at the back of the milk truck while Appellant and Dewayne Anderson made their way to the cab. Both Appellant and Anderson were armed. Appellant walked to the passenger side, opened the door, and attempted to rob the complainant. After gunshots were fired, they all took off running. The victim died from his wounds.

Due to conflicting witness statements and fabricated stories, the police were initially unable to identify the shooter. Cheryl Ayala told police she had seen Appellant, known to Ayala as "Temp" or "Tamp," running with a gun in the vicinity of the crime scene. When investigators first interviewed Appellant, he denied any involvement in the robbery. Cathy Washington then came forward and reported that two adults she knew as "Tall Man" and "Poor Boy," whose real names are Adonis Baxter and Reginald Wheeler, had approached the truck and "Tall Man" had shot the victim. Charges were brought against Baxter and Wheeler, but both passed polygraph tests. On September 26, 1997, an investigator employed by Baxter's defense counsel interviewed Appellant at the Texas Youth Commission [FN1] and obtained a statement in which Appellant claimed the shooter was Reno Polk. Polk passed a polygraph and police determined he had not been involved. The police then "basically started from scratch." They talked with Washington again, and she ultimately admitted she had lied when she identified Baxter and Wheeler as the individuals who had approached the truck. Officers then "located and interviewed everyone that we could find who had been present and in the area when the offense occurred." Through their investigation, the officers learned that Appellant, Anderson, Brandon McQueen, Edward Williams, and Tarvarius Bradford committed the robbery, that Appellant and Anderson were armed, and that Appellant was the shooter. Detective Linda Irwin interviewed Appellant, who told her "for the most part" the same story he told the investigator—Reno Polk was the shooter. Appellant failed a polygraph, and in a subsequent interview, admitted that he made up the story about Polk. He was arrested for capital murder and later confessed to shooting the driver.

FN1. Appellant was committed to the Texas Youth Commission on March 15, 1997, on a thirty-year determinate sentence for the offenses of aggravated robbery, aggravated assault with a deadly weapon, and misdemeanor

possession of marijuana.

The Dallas Police Department officially filed the case with the District Attorney's office on either July 14 or 15, 1998. The original petition for discretionary transfer was filed July 17 and set for hearing on October 5. The first amended petition was filed on September 17, Appellant's eighteenth birthday.

At the hearing, the Honorable Harold C. Gaither, Jr. found that Appellant was sixteen at the time of the offense, but because he was now eighteen, and for reasons beyond the control of the State, it was not practicable to proceed in juvenile court before his eighteenth birthday. The court reasoned that the offense was so serious that the transfer to a district court with criminal jurisdiction must be granted. The court then waived jurisdiction and granted the transfer. The court further concluded that there was probable cause to believe Appellant committed the offense.

Held: Convicted vacated and proceedings dismissed.

Opinion Text: WAIVER OF JURISDICTION

In his sole issue for review, Appellant contends that the district court never acquired jurisdiction because there was never a valid waiver of jurisdiction by the juvenile court. This jurisdictional complaint is premised on the argument that the State failed to establish by a preponderance of the evidence that it was not practicable to proceed in the juvenile court before Appellant's eighteenth birthday. We begin with the standard of review.

Standard of Review

Pure jurisdictional complaints arising under the Juvenile Justice Code are questions of law which we review de novo. In re A.D.D., 974 S.W.2d 299, 302 (Tex.App.--San Antonio 1998, no pet.). Here, however, the jurisdictional complaint springs directly from an evidentiary challenge. An evidentiary attack to a trial court's findings in a transfer case are reviewed for an abuse of discretion. In re J.C.C., 952 S.W.2d 47, 49 (Tex.App.--San Antonio 1997, no pet.). In applying this standard, we defer to the trial court's factual determinations while reviewing its legal determinations de novo. Id. Absent an abuse of discretion, the findings of the juvenile court in a transfer proceeding will not be disturbed. In re N.M.P., 969 S.W.2d 95, 98 (Tex.App.--Amarillo 1998, no pet.). We will review the entire record and set aside a juvenile court's decision to waive jurisdiction and transfer a matter only if the court acted without reference to guiding rules and principles. Id. Stated differently, the appropriate inquiry is whether the ruling was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Company*, 665 S.W.2d 439, 443 (Tex.1984); *Landry v. Travelers Insurance Co.*, 458 S.W.2d 649, 651 (Tex.1970).

Transfer Proceedings

The juvenile court has exclusive, original jurisdiction over all proceedings involving a defendant who is a "child" at the time of the offense. Tex.Fam.Code Ann. § 51.04(a)(Vernon Supp.2001); In re N.J.A., 997 S.W.2d 554, 554 (Tex.1999). The Family Code defines a "child" as one who is:

(A) ten years of age or older and under 17 years of age; or (B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Tex.Fam.Code Ann. § 51.02(2)(A)(B). It is undisputed that Appellant was a juvenile at the time of the murder.

Section 54.02 of the Texas Family Code governs the waiver of the juvenile court's exclusive original jurisdiction and transfer to the appropriate criminal district court. Tex.Fam.Code Ann. § 54.02. Before conducting the transfer hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. Tex.Fam.Code Ann. § 54.02(d); In re D.L.N., 930 S.W.2d 253, 255 (Tex.App.--Houston [14th Dist.] 1996, no pet.). The purpose of the hearing is not to determine guilt or innocence but to establish whether the best interests of the child and society are furthered by maintaining jurisdiction in the juvenile court or by transferring the child to district court for adult proceedings. Id. The juvenile court then determines whether there is probable cause to believe that the child committed the offense alleged, and whether because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal proceedings. Id. Unlike the delinquency adjudication hearing, a transfer proceeding is dispositional in nature. In re A.A., 929 S.W.2d 649, 653 (Tex.App.--San Antonio 1996, no writ). It is a nonadversarial preliminary hearing rather than a criminal accusation or adversarial trial on the merits. Id.

The Court of Criminal Appeals has determined that juvenile court jurisdiction is terminated by law at age eighteen. Ex parte Mercado, 590 S.W.2d 464, 465 (Tex.Crim.App.1979). While the juvenile court does not lose exclusive original jurisdiction when the juvenile turns eighteen, its jurisdiction is limited to either transferring the case or dismissing the case; it does not include the power to adjudicate a juvenile who is eighteen or older. Id. Such were the choices of the trial court below.

Transfer When Offender is Eighteen or Older

Subsection (j) of Section 54.02 is triggered when the individual is over eighteen years of age. In re M.A.V., 954 S.W.2d 117, 119 (Tex.App.--San Antonio 1997, pet. denied). Under Subsection (j), a juvenile court may waive its jurisdiction if:

(1) the person is 18 years of age or older; (2) the person was: (A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony, or an offense under Section 19.02, Penal Code; (B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code; or (C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony; (3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted; (4) the juvenile court finds 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; and (5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

Tex.Fam.Code Ann. § 54.02(j).

The Trial Court's Findings

As required by Section 54.02(h), the trial court made written findings specifying its reason for the transfer. Pertinent to this appeal, the court found that for a reason beyond the control of the State, it was not practicable to proceed in the juvenile court before Appellant's eighteenth birthday. And it is this finding which Appellant challenges on appeal.

In the first amended petition for discretionary transfer, the State specifically pled:

Petitioner alleges that after exercising due diligence, it was not practicable for the State to proceed in juvenile court before the Respondent's 18th birthday, to wit: The Respondent could not be found, and in the alternative, the State did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the Respondent.

Thus, the State relied upon Section 54.02(j)(4)(B) in seeking a transfer after Appellant's eighteenth birthday. However, the trial court in its waiver of jurisdiction and order of transfer, premised its ruling on Section 54.02(j)(4)(A):

[F]or a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person.

During the transfer hearing, the court and the assistant district attorney engaged in a vigorous debate concerning the status of the case and the reasons why the transfer hearing was not held prior to Appellant's eighteenth birthday:

COURT: 54.02(j) indicates that the juvenile court may waive its exclusive original jurisdiction if the person is eighteen years of age or older and the person was--and it goes through the same requirements for someone under the age of eighteen. Then you've got the additional requirements for a reason beyond the control of the State it was not practicable to proceed in juvenile court before the eighteenth birthday of the person, so that's one issue you've got to-- you've got to resolve. Or after due diligence it was not practicable for the State to proceed in juvenile court before the eighteenth birthday of the person because you did not have probable cause and new evidence has been found since the eighteenth birthday, or the person could not be found or a previous transfer order was reversed by an appellate court which doesn't apply. So, I have not heard any evidence at all of new evidence being acquired after his eighteenth birthday. STATE: That's correct. COURT: So, Subsection (b) [sic] does not apply, because you've not

found any new evidence since the eighteenth birthday. So that means you're going to have to show some reason beyond the control of the State that it was not practicable to proceed in juvenile court before the eighteenth birthday of the person; that's the issue you have to resolve. * * * COURT: Because the law says 54.02(j) capital A, 'for reason beyond the control of the State, it was not practicable to proceed in juvenile court before the eighteenth birthday of the person.' Or B, 'After due diligence of the State it was not practicable to proceed in juvenile court before the eighteenth birthday of the person because--'i', little 'i', one 'i', 'The State did not have probable cause to proceed in juvenile court'--that's not the case, because you had probable cause before his eighteenth birthday--and new evidence has been found since his eighteenth birthday--and that's not the case, because everybody agrees that you already had the evidence before his eighteenth birthday--or the person could not be found--and that's not true, he was at TYC, so he could be found. And the last one has to do with an order of appeal that was reversed, and that's not the case. So, it looks to me like you're going to be limited to show that there's some reason beyond the State's control it was not practicable to proceed in juvenile court before the eighteenth birthday of the person. And I don't take that to mean merely filing a petition. I take that to mean concluding the hearing. Because we lose jurisdiction at age eighteen.

Although the State did not rely upon Section 54.02(j)(4)(A) in its petition, the issue was raised sua sponte by the trial court. Once Judge Gaither indicated that Section 54.02(j)(4)(B) was inapplicable, he invited the State to present evidence and argument on why it was not practicable to proceed before Appellant's eighteenth birthday.

Was the Delay Beyond the State's Control?

In response to the court's inquiry, the State articulated only one reason for the delay--the failure of the court staff to set a prompt hearing. We detail here the timeline of pertinent events. On July 14 or 15, the Dallas Police Department officially filed the case with the District Attorney's office. On July 17, the State filed a petition for discretionary transfer. The clerk's office set an announcement hearing for August 31. Prior to the scheduled hearing, the State sought a bench warrant to have Appellant brought from TYC but was advised instead to have the warrant issued on August 31. On August 31, the warrant was issued, counsel was appointed, and a pretrial rather than an announcement hearing was set for September 15 to "proceed as quickly as possible." At the time of the pretrial, the State notified defense counsel that it would be filing an amended petition because of Appellant's upcoming eighteenth birthday. A hearing on the petition was scheduled for October 5.

Judge Gaither inquired why the State had done nothing between July 17 and August 31:

COURT: Why didn't you do something between July 17th and August 31st? STATE: I came and asked for a bench warrant to be issued. COURT: Did you say at that time, 'We've got to put this on a fast track, because this kid is going to be eighteen in the middle of September'? STATE: I said that the kid was in TYC and we were bringing him back and I wanted to get him back for August the 31st. COURT: Well, even with August the 31st, if somebody had indicated that you needed a hearing before September 17th, that could have been done; we've done it many times before. So ... STATE: Well, my request to bench him back for August the 31st, I was told to wait and issue the warrant on the 31st. COURT: And who told you to do that? STATE: You did, Your Honor. COURT: Did you tell me at that time-- STATE: I did not tell you he was going to be eighteen. I told you that the young man was in TYC and that we needed to get him back here for a certification hearing, and that I wanted to have the warrant issued so that he would be in court on August the 31st. COURT: Well, all of that would have been well and good for somebody that wasn't fast approaching the eighteenth birthday. Why is it that I wasn't told that we had to put it on the fast track because he was going to be eighteen soon? STATE: I don't recall whether or not I told you that; I don't think that I did. I said, 'He's in TYC, it's a capital murder, we want to get him here so we can proceed.' COURT: Well-- STATE: And I advised you who had represented him on his prior offenses. COURT: I am one hundred percent certain that the staff of this Court would not have set a hearing after his eighteenth birthday if they were told that that was an issue in the case and we needed to have the hearing before September the 17th. Now, I don't--I don't think anybody on this Court's staff would have waited until after the eighteenth birthday to have a hearing if they knew that that was going to be an issue in the case. Well, I'll tell you what I'm going to do. I'm going to grant your motion for discretionary transfer, but I'll give you a hundred to one odds it will be turned around on that issue, because I don't think you--I don't think you acted appropriate--and I don't mean you personally, I mean the D.A.'s office in this case. If you had--you, the D.A.'s office--had said that there was a reason to get this thing heard before September 17th, given the fact that we had sixty days, that would have been done. I know that, you know that, everybody else knows that. One of the things we do in here is give fast settings.

On appeal, the State contends that it has demonstrated due diligence for two reasons. First, it argues that the delays were the product of scheduling by the court clerks. Yet the State admitted that it had not told either the clerks or the judge that Appellant's eighteenth birthday was looming, nor had it requested an earlier expedited hearing. And

although we do not have a reporter's record of the September 15 pretrial hearing, we can discern from the colloquy that Judge Gaither was not advised even at that late date that Appellant would turn eighteen a mere two days later. Second, the State contends that neither the diagnostic study nor the psychological evaluation, both of which were ordered by the court, were completed prior to Appellant's eighteenth birthday. This theory was not even presented to the trial court for its consideration. The social evaluation and investigative report compiled by the Dallas County Juvenile Department was prepared on October 1 and filed October 2. The file stamp on the report of psychological evaluation and diagnostic study is illegible but the study itself indicates the evaluation was conducted on September 28. The clerk's record does not indicate the date these evaluations were ordered by the court. Nor does it indicate that the State took any steps to expedite preparation of the reports. Indeed, the State presented no evidence whatsoever that the reports could not have been prepared and filed earlier, particularly had the court been apprised in July that Appellant would turn eighteen in two months.

We first note that the State once again confuses Section 54.02(j)(4)(A) with Section 54.02(j)(4)(B). Subsection (A) requires the State to establish that the delay was attributable to "a reason beyond the control of the state." Subsection (B) requires a showing of due diligence. Because of the factual context presented here, the two concepts, while distinct, overlap considerably. Texas courts have not specifically defined due diligence as used in Section 54.02(j)(4). See *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex.App.--Amarillo 1998, no pet.). In general, due diligence requires that a party cannot simply sit on their rights or duties. *Id.* The Court of Criminal Appeals has determined that due diligence is not shown where delays are within the prosecutor's control. *McClellan v. State*, 742 S.W.2d 655, 656 (Tex.Crim.App.1987)(due diligence discussed in context of speedy trial violation). This Court has stated that the State fails to carry its burden of showing due diligence if there are unexplained delays. *Sessions v. State*, 939 S.W.2d 796, 798 (Tex.App.--El Paso 1997, no pet.)(discussing failure of State to explain delays in apprehending appellant and proceeding with revocation hearing).

We agree with Judge Gaither that the onus is upon the State "to get the thing set in a timely manner." We also agree with his assessment that "there was a period of six weeks that went by where apparently nothing was done on this case." Consequently, the State did not establish that the delay was beyond its control. In fairness, it does appear that the assistant district attorney may have believed she had "proceeded in the juvenile court" prior to Appellant's eighteenth birthday merely by filing the amended petition for discretionary transfer. At one point, the court pressed the issue:

COURT: And if you can give me some reason why it was not practicable for you to proceed prior to his eighteenth birthday, then we can move on. STATE: Judge, our petition--again, our petition was filed prior to the eighteenth birthday-- COURT: I don't think that means that you filed the petition before his eighteenth birthday. I think it means you concluded the hearing before the eighteenth birthday.

We conclude, sadly, that Judge Gaither's prediction has come true. Further, we conclude that no harm analysis need be conducted. Non-compliance with Section 54.02 deprived the juvenile court of jurisdiction such that the district court never acquired jurisdiction. *Light v. State*, 993 S.W.2d 740, 750 (Tex.App.--Austin 1999), vacated and remanded on other grounds, 15 S.W.3d 104 (Tex.Crim.App.2000). We vacate the conviction and dismiss the juvenile proceedings for want of jurisdiction.

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