Juvenile Law Case Summaries

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No error in charging burglary with intent to commit assault following certification for aggravated assault [Jones v. State] (01-4-53).

On November 15, 2001, the El Paso Court of Appeals upheld a conviction for burglary with intent to commit aggravated assault in a case that was certified from the juvenile court for aggravated assault. There was no fatal variance since the same transaction was the subject of both the certification order and the indictment.

01-4-53. Jones v. State, UNPUBLISHED, No. 08-00-00021-CR, 2001 WL 1452206, 2001 Tex.App.Lexis ___ (Tex.App.-El Paso 11/15/01) [Texas Juvenile Law (5th Edition 2000)].

Facts: Appellant Freddy Tamon Jones pleaded guilty to burglary of a habitation with the intent to commit aggravated assault with a deadly weapon, and the trial court assessed his punishment at confinement for life in the Institutional Division of the Texas Department of Criminal Justice. On appeal, Appellant raises four issues: (1) the district court lacked jurisdiction over Appellant because the order waiving jurisdiction by the juvenile court was defective; (2) Appellant was denied due process of law because the indictment varied from the notice of charges in the petition for discretionary transfer; (3) Appellant's plea was involuntary due to ineffective assistance of counsel; and (4) Appellant's plea was involuntary because he was acting delusional and had mental impairment during the offense.

I. SUMMARY OF THE EVIDENCE

The State asked the juvenile court to transfer Appellant's case to the district court, and the petition was granted. At the trial, Appellant pleaded guilty to burglary of habitation with the intent to commit aggravated assault with a deadly weapon against Creshuna Crockett ("Creshuna") on March 19, 1999, and asked the trial court to assess the punishment in open court. The trial court admonished Appellant verbally and in writing on the consequences of the plea, including the length of the punishment and his right to a trial by jury.

Creshuna testified that she was six months' pregnant on March 19, 1999, and was bathing her son in the kitchen when she heard a loud bang on the front door. Appellant had burst through the locked and closed front door. When Creshuna ran to her front door, she saw Appellant's friends and asked them to come and get Appellant, but they drove away. Creshuna ran to her bedroom to get her gun, but Appellant kicked her in the back and took it from her. As a result of the kick, Creshuna's water broke.

Appellant next shot at Creshuna in front of her son, sitting on the couch. Appellant shot her a total of eight times then placed the gun on her head. Her son was screaming, and Appellant pointed the gun at him and told him to "shut up." He pointed the gun back at Creshuna's head and she heard it click, but no bullet fired. Creshuna got up and ran out of the door. Her neighbors would not respond to her calls for help because Appellant was chasing her with the gun. Appellant finally dropped the gun on the porch of the neighbor's house and ran away.

Creshuna ran back to her house to call the police and was taken to the hospital where her daughter was delivered prematurely with a "big, black" mark, like a bruise, on her arm. Creshuna also underwent several surgeries; one to remove her kidney and others to remove the bullets from her body. At the time of trial, she still had four bullets in her back.

Police Officer Forrest Smith testified that he and his partner, Officer Donald Whitsitt, arrived at 509 Wildrose--the

neighbor's house--and saw a gun, blood on the porch, the window, and a car parked in the driveway. A blood trail led to 523 Wildrose--Creshuna's house, where they found more blood on the front porch, on the glass door, in the living room, and in the hallway. They also found ten shell casings. Officer Smith identified the gun as a nine millimeter rifle, a semi-automatic weapon.

Officer F. Garcia testified that after receiving a call that there had been a shooting where a male was seen running toward the freeway, he went to Highway 35 south. He stated that the cars were at a dead stop, and a completely nude black male was trying to get into several vehicles. Officer Garcia identified the Appellant as the black male. After the Appellant was in custody, he was taken to the crime scene and identified as the shooter. Officer Garcia testified that Appellant appeared to be drugged and kept asking for Nee Nee (nickname of Creshuna Crocket). On cross-examination, Officer Garcia stated that he thought Appellant was on drugs because he was incoherent and mumbling.

Appellant took the stand and testified that he was seventeen. On the day of the offense, he had taken marijuana dipped in PCP late that night and early that morning. Appellant said he was hallucinating on the night of the incident, and he could only remember parts of that night.

He remembered shooting Creshuna, but he did not remember how he ended up on the freeway or what happened to his clothes.

Appellant testified that he had been taking drugs since he was fourteen years old. He explained that he smoked PCP six days a week, and he would stay high sometimes one to two days at a time. Appellant told the court that he thought he needed drug treatment and that he was very sorry for what happened.

On cross-examination, Appellant testified that he did not deal drugs. Appellant testified to a prior criminal record including two arrests for shoplifting, arrest for possession of marijuana, and aggravated robbery. In addition, he stated that the street he lived on had a gang, the 49 Kings, but that he was never initiated into the gang, although he had been identified as a member. Appellant reiterated that the crime he committed against Creshuna was unintentional because he was under the influence of drugs.

Finally, Officer Shane Iverson of the Dallas Police Department, testified concerning citizens' complaints at the Springdale Apartment Complex on October 13, 1998. After identifying Appellant in court, Officer Iverson stated that he asked to search an apartment belonging to a woman living in the complex. Officer Iverson and his partner were attempting to arrest the lady after finding a marijuana cigarette in her house when Appellant said that he placed the drugs there. Appellant was placed under arrest and taken to juvenile hall. Officer Iverson testified that he had seen Appellant wearing gang colors before, and Appellant was tagged as being a gang member. Officer Iverson knew Appellant's reputation as an avid drug user who had been involved in illegal activities.

The trial court ruled that Appellant waived the right to jury trial and pleaded guilty freely and voluntarily and that he was mentally competent. After finding Appellant guilty of the offense, the trial court sentenced him to life confinement.

II. DISCUSSION

A. Waiver of Jurisdiction

Appellant argues in Issue No. One that the order waiving juvenile court jurisdiction was defective and deprived the district court of jurisdiction over the case. Appellant has failed to preserve error by not making a timely objection to the trial court. See Tex.R.App. P. 33.1(a). Nothing in the record indicates Appellant made a written motion objecting to the trial court's assumption of jurisdiction, as required by Tex.Code Crim. Proc. Ann. art. 4.18(a) (West 1998) (amended 1999, effective September 1, 1999, current version in Tex.Code Crim. Proc. Ann. art. 4.18(a) (Vernon Supp.2001) which states:

(a) A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which criminal charges against the person are filed.

Id. The motion must be filed and presented to the presiding judge of the court if the defendant enters a plea of guilty. See Tex.Code Crim. Proc. Ann. art. 4.18(b)(1) (Vernon Supp.2001). We overrule Issue No. One.

B. Due Process

Appellant's Issue No. Two claims that he was denied due process of law because the petition for discretionary transfer alleged he committed aggravated assault whereas the indictment later alleged he committed burglary of a habitation with the intent to commit aggravated assault.

To determine whether the discretionary transfer by a juvenile court violated the due process rights of the accused, we look to the procedure to be followed as explained by the Texas Family Code section 54.02(h), which states that:

(h) If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court, and shall transfer the person to the appropriate court for criminal proceedings and cause the results of the diagnostic study of the person ordered under Subsection (d), including psychological information, to be transferred to the appropriate criminal prosecutor. On transfer of the person for criminal proceedings, the person shall be dealt with as an adult and in accordance with the Code of Criminal Procedure. The transfer of custody is an arrest.

Tex. Fam.Code. Ann. § 54.02(h) (Vernon Supp.2001). The transfer order need not apprize the juvenile of the specific crime he may be charged with. See Ex parte Allen, 618 S.W.2d 357, 358 (Tex.Crim.App.1981). The State may charge the juvenile in a criminal court with any offense or offenses that can be proven if the charges arose from acts constituting a crime alleged in the juvenile petition. See Castro v. State, 703 S.W.2d 804, 805-06 (Tex.App.--El Paso 1986, pet. ref'd).

In the petition for discretionary transfer, the State alleged that Appellant committed aggravated assault against Creshuna Crockett with a deadly weapon, a firearm, on March 19, 1999, in Dallas County, Texas. Appellant was then indicted for and convicted of burglary of Creshuna Crockett's habitation with the intent to commit aggravated assault with a deadly weapon, a firearm, on March 19, 1999. Clearly, the offense alleged in the indictment arose from the same set of events as charged in the petition for discretionary transfer.

The variance between the indictment and the petition for discretionary transfer did not deprive Appellant of due process. We overrule Issue No. Two.

C. Ineffective Assistance of Counsel

In Appellant's Issue No. Three, Appellant asserts that he received ineffective assistance of counsel when his trial counsel failed to investigate the variance between the indictment and the petition for discretionary transfer and also advised him to plead guilty.

The Texas Court of Criminal Appeals adopted the two-prong test for reviewing a claim for ineffective assistance of counsel as enunciated in Strickland v. Washington, 466 U.S. 668, 687, 104 S .Ct.2052, 2064, 80 L.Ed.2d 674, 693 (1984): a defendant claiming ineffective assistance of counsel must show by preponderance of evidence that (1) the counsel acted deficiently and (2) the counsel's deficient performance prejudiced the defense. See Stafford v. State, 813 S.W.2d 503, 505 (Tex.Crim.App.1991); Cannon v. State, 668 S.W.2d 401, 403 (Tex.Crim.App.1984). There is a strong presumption that counsel's action was within the wide range of reasonable professional assistance. See Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App.1994). The record must definitely and affirmatively support any allegations of ineffective assistance. See Thompson v. State, 9 S.W.3d 808, 813 (Tex.Crim.App.1999). A reviewing court defers to the judgment of the trial court and looks at the totality of the representation, being hesitant to declare a single error as per se ineffective assistance. See Thompson, 9 S.W.3d at 813. We have held that "ineffective assistance of counsel cannot be established by isolating or separating out one portion of the trial counsel's performance for examination. Consequently, allegations of ineffectiveness of counsel must be firmly founded in the record." Perrero v. State, 990 S.W.2d 896, 899 (Tex.App.--El Paso 1999, pet. ref'd).

Before we reach the question of whether the trial counsel's actions fell below an objective standard of reasonableness, the appellate record must establish the reasons behind the trial counsel's actions. See Thompson, 9 S.W.3d at 813-14. The record does not reveal why Appellant's trial counsel advised Appellant to plead guilty to the offense or object to the variance between the indictment and the petition for discretionary transfer. It may be that he had hoped to obtain a lesser punishment or not antagonize the trial court. All those reasons are speculative and not in the record; therefore, we will not decide whether Appellant's trial counsel's actions were reasonable. We overrule Issue No. Three.

[Discussion of remainder of issues omitted.]

[Editor's Comment: The Court of Appeals' reliance on article 4.18 was erroneous because that provision clearly applies only to a claim that there was no certification proceeding, not to a claim that there was an error in a certification proceeding.]

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