

Juvenile Law Section

STATE BAR OF TEXAS



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[Juvenile Law Section Website](#)
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Dear Juvenile Law Section Members:

Welcome to the e-newsletter published by the Juvenile Law Section of the State Bar of Texas. Your input is valued so please take a moment to [email us](#) and tell us what you think of the new format.

The "Review of Recent Cases" includes cases that are hyperlinked to Casemaker, a free service provided by [TexasBarCLE](#). To access these opinions, you must be a registered user of the [TexasBarCLE](#) website, which requires creating a password and log-in. If you do not wish to receive emails from TexasBarCLE, you can opt-out of their email list.



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EDITOR'S FOREWORD By Associate Judge Pat Garza

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Today I would like to extend a message to a very dear friend. In fact, she is more than a just a friend, she is also a confidant and advisor to me professionally.

For those who haven't heard, Kristy Almager has decided to leave her position with the Texas Juvenile Justice Department. She leaves as the Director of their Juvenile Justice Training Academy. It also appears that she will be leaving us as an ad-hoc member of the Juvenile Law Council. As many of you know, Kristy worked for the Texas Juvenile Justice Department and the Texas Juvenile Probation Commission for about 23 years combined. And as many of you also know, she was a big part of our Juvenile Law Section during most of that time. Kristy Almager has earned the respect of the most accomplished individuals in the field of juvenile law. And I want her to know how important she has been to the Section, to the members of the Council and to the children of Texas.

Kristy, to the Juvenile Law Section of the State Bar of Texas and to the children of Texas you are and will always be our unsung hero. For the past 20 years you have been the backbone of almost every decision made and action taken by the Juvenile Law Council. Every Council has relied on your knowledge, expertise and hard work to get whatever needed to be done, done. Your friendly face, experience and ability to get to the task at hand and then carry it out made the rest of us look like we knew what we were doing.

From our conferences at the Texas Law Center with 20 people and a rush to get donuts for the attendees, to our current outstanding conferences with meals, snacks and 400 attendees as the norm, you have been with us every step of the way. And while you may be under the radar for the Section members, who have enjoyed and experienced the fruits of your labors, those of us on the Juvenile Law Council, and those of us who have been on the Council in the past, know how valuable you have been to our success. There is not a Council Chair you haven't helped or touched. And while the council members are presented as the face of the Section, you have been the constant throughout the years that have made it work. Few people know of the actual time and sacrifice you have had to make from your job and family to insure the success of our Section. But I want you to know, that we do know. And I can't express how appreciative we are of your dedication to our cause. You should be very proud of the work you have done, the respect and admiration you have earned, and the service you have provided the children of the State of Texas. If the goal was to make us better, not just as a Section, but also as individuals and professionals, you have succeeded. In closing, I dedicate these words to you, my friend:

*To laugh often and much;
to win the respect of intelligent people and the affection of children;
to earn the appreciation of honest critics and to endure the betrayal of false friends.
To appreciate beauty;
to find the best in others;
to leave the world a bit better whether by a healthy child,
a garden patch, or a redeemed social condition;
to know that even one life has breathed easier because you have lived.
This is to have succeeded.*

-Ralph Waldo Emerson

32nd Annual Robert Dawson Juvenile Law Institute. The Juvenile Law Section's 32nd Annual Juvenile Law Conference will be held February 24 thru February 27, 2019, at the Doubletree Hotel in Austin, Texas. Topics will include alcohol, drug, and concealment trends, myths v. reality regarding adolescent drugs, human trafficking, police interactions, fitness to proceed, and juvenile records. Sunday afternoon will include a nuts and bolts mini-conference for anyone interested in learning more about juvenile law basics.

As always, social events will highlight the afternoons and evenings. This year we will have a Trivia Contest on Sunday night and a Casino Night on Monday night. So, bring your lucky charms (no, not the cereal) and show us what kind of gambling skills you really have. The conference flyer has been sent electronically and is also available online at www.juvenilelaw.org.

Officer and Council Nominees. The Annual Juvenile Law Section meeting will be held in the Doubletree Hotel in Austin, Texas on February 26, 2019, in conjunction with the Juvenile Law Conference. The Juvenile Law Section's nominating committee submitted the following slate of nominations:

Officers

Mike Schneider, Chair (not a nomination because automatic)
Patrick Gendron, Chair Elect
Bill Cox, Treasurer
Cindy Porter Gore, Secretary
Kaci Singer, Immediate Past Chair (not a nomination because automatic)

Council Positions Ending 2022

Maggie Ellis, Austin, Texas
Robin Houston, Waco, Texas
Elizabeth Henneke, Austin, Texas

Nominations from the floor during the meeting will be accepted. If you have someone that you would like to nominate from the floor, contact the Chair of the Nominations Committee, Kameron Johnson (512) 854-4128 or Kameron.Johnson@traviscountytexas.gov

*Success isn't about how much money you make;
It's about the difference you make (and can make) in people's lives.*

-Hilary Clinton

CHAIR'S MESSAGE By Kaci Singer

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I can't believe it's already February. The Juvenile Law Conference is quickly approaching. It will be February 24 – 27, 2019, in Austin. There is a half-day Nuts and Bolts on Sunday followed by 2 ½ days of advanced material Monday – Wednesday. There will be a trivia night social Sunday evening at 7:30 and a Casino Night and Raffle fundraiser with live music and food Monday evening from 7 – 10. Registration information is [here](#). I hope to see many of you there.

In other news, the legislative session is in full swing. Several different bills have been filed to change the age of juvenile court jurisdiction in a variety of ways. Bills have also been filed to create procedures that must be followed for the juvenile court to be closed to the public and for physical and mechanical restraints to be used in court. You can search for bills [here](#).

The Section is working on being more active on our Facebook page. You can follow us at [@juvenilelawsectionpage](#).

Did you know that if you are having a local juvenile law seminar, we will publish it for you on the Events page of our website? If you have one scheduled, email me so we can add it. Council has voted to host social events throughout the state in coordination with such seminars, so let us know if you have interest in that.

As always, if you have ideas of things the Section can do or if you want to be involved, please let us know.

REVIEW OF RECENT CASES

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RECENT CASES

APPEALS

APPEAL OF JUVENILE TRANSFER TO ADULT COURT CAN BE RAISED AFTER DEFERRED ADJUDICATION OR CONVICTION.

¶ 19-1-4. **Bell v. State**, No. 01-15-00510-CR, 2018 WL 6177292 [Tex.App.—Houston (1st Dist.), 11/27/18].

Facts: When Kendall Bell was 16, the State filed a petition in a Harris County juvenile court alleging that he had engaged in delinquent conduct by committing aggravated robbery with a deadly weapon. On the State’s motion, the juvenile court concluded that, because of the seriousness of Bell’s offense, the welfare of the community required criminal proceedings. The juvenile court waived its jurisdiction and transferred the case to criminal district court, where Bell pleaded guilty without an agreed recommendation. The criminal district court deferred a finding of guilt and placed him on community supervision for six years. The State later moved to adjudicate, alleging that Bell had violated the terms of his supervision. Following a hearing, the district court granted the motion, found Bell guilty, and sentenced him to 20 years’ imprisonment.

On appeal, Bell contended that, under *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014), the juvenile court abused its discretion by waiving jurisdiction without making sufficient case-specific findings supporting its conclusion that the welfare of the community required criminal proceedings. Our Court agreed that the juvenile court did not provide sufficient case-specific findings, vacated the district court’s judgment, dismissed the criminal case, and remanded to the juvenile court for further proceedings.

The State filed a petition with the Court of Criminal Appeals, arguing for the first time that this Court lacked jurisdiction to hear Bell’s complaint because he did not contest the juvenile transfer when the trial court entered its order of deferred adjudication. The Court of Criminal Appeals remanded the case so that we could consider the jurisdictional issue in the first instance. *Bell v. State*, 515 S.W.3d 900 (Tex. Crim. App. 2017) (per curiam).

Held: Prior Opinion adopted

Opinion/Conclusion: We conclude that we have jurisdiction to hear Bell’s complaint. The Court of Criminal Appeals refused with prejudice the State’s petition for discretionary review as to the remaining issues in the case. We therefore adopt this court’s prior opinion, *Bell v. State*, 512 S.W.3d 553 (Tex. App.—Houston [1st Dist.] 2016).

DISPOSITION PROCEEDINGS

CONDUCT IN DETENTION MAY BE USED AS GROUNDS FOR COMMITMENT TO TJJD.

¶ 19-1-3. **In the Interest of Y.N.L.**, MEMORANDUM, No. 01-18-00269-CV, 2018 WL 6175320 [Tex.App.—Houston (1st Dist.), 11/27/18].

Facts: The State’s petition charged 15-year-old Y.N.L. with delinquent conduct, alleging that he had committed aggravated robbery with a firearm. The Harris County Juvenile Probation Department’s Hearing Report summarized the incident that led to this charge. The youth and three friends decided to rob someone because they wanted cash. At an apartment complex, they saw a woman wearing headphones leave her apartment. With two of the accomplices acting as lookouts, the youth walked past the woman, grabbed her from behind, and restrained her with a chokehold. He then held a gun to her head and ordered her to stay still. The third accomplice rummaged through the woman’s purse and took her cell phone and iPad. The youth took the woman’s headphones from her as he fled.

The apartment complex’s security camera recorded the incident. The woman released the video to a local news outlet. The video’s publication led to information that identified the youth and the other assailants.

The State alleged that on or about the 24th day of November of 2017, in Harris County and State of Texas, did then and there while in the course of committing theft of property owned by [the complainant] and with the attempt to obtain and maintain control of the property, intentionally, knowingly threaten and place [the complainant] in fear of imminent bodily injury and death and [Y.N.L.] did then and there use and exhibit a deadly weapon, to wit: A FIREARM.

The youth and his counsel waived the right to present the petition to the grand jury. The youth agreed to be sentenced under the Family Code’s determinate sentencing provisions. See TEX. FAM. CODE §§ 51.09, 53.045. The youth also signed a no-contest stipulation to the State’s allegations, without a recommendation as to punishment.

The juvenile court admonished the youth that a finding of delinquency under the determinate sentencing act meant that he would have a permanent record. It further informed the youth of the sentencing range: no punishment at all, probation for a serious length of time, or up to 40 years’ confinement, beginning with confinement at TJJD and followed with a later transfer to the Texas Department of Corrections—Institutional Division.

The youth had no history of criminal conduct. The mother reported that he had behavioral problems in the home. He did not follow any rules or directions. He ignored her or became aggressive when he was upset. She described his behavior to include throwing things, slamming doors, and punching walls.

Despite testing at an average to superior range of intellectual function, the youth was failing his classes at school. He had a history of excessive tardiness, truancy, curfew violations, suspensions for fighting, and general misbehavior. The youth admitted that he tended to get into trouble with his friends. During the three months the youth spent in a juvenile detention facility awaiting disposition, he was disciplined 11 times for misbehavior.

The youth denied using drugs or alcohol. Psychological testing and evaluation showed that the youth had unspecified disruptive, impulse-control, and conduct disorders. The psychologist concluded that the youth is at moderate risk of recidivism. Citing the youth's behavioral problems in school, at home, and in the community, the psychologist recommended residential placement, so that the youth would be in a controlled environment with clear rules and strong consequences for not following them. The Juvenile Probation Department Hearing Report similarly recommended that the court assess a sentence of confinement.

When the judge asked the youth to describe the incident underlying the aggravated robbery charge during the hearing, the youth said that he wanted money but went about getting it in the wrong way. The youth denied using a real gun and a chokehold to restrain the complainant during the robbery.

The State asked the juvenile court to impose an eight-year determinate sentence, with incarceration, because of the seriousness of the youth's conduct in committing the crime, his history of noncompliant behavior at school, and his poor conduct during detention. Defense counsel suggested that the youth be given probation and a placement to address his anger management, emphasizing that the youth had no prior history of delinquent behavior.

The trial judge postponed disposition, telling the youth, "I'm going to see how you [behave in detention] for another 30 days" At the reset disposition hearing, defense counsel reiterated the request for probation and a placement to address the youth's anger management. The State confirmed the trial judge's recollection that it had recommended an eight-year determinate sentence. The juvenile court then pronounced a disposition to commit the youth to eight years' confinement.

Held: Affirmed

Memorandum Opinion:

The youth contends that the juvenile court abused its discretion and violated his due process rights by imposing an eight-year determinate sentence committing the youth to TJJD. The State responds that the youth waived his due process complaint by failing to object in the juvenile court. Thus, we first consider whether waiver precludes our review of this issue on its merits.

As evidence of the juvenile court's predisposition, the youth points out that in response to the State's recommendation of an eight-year sentence, the juvenile court remarked, "eight years was not enough for people who do this," and that "ten or fifteen [years] is more like it." Read in context, this remark was directed at the seriousness of the youth's misconduct. The youth was subject to a disposition of commitment for up to 40 years in the custody of TJJD and the state prison system. The juvenile court followed the State's recommendation and did not impose the longer sentence referenced in its remark. In light of the entire record, the trial court's remark does not demonstrate that the trial court failed to act in accordance with the youth's due process rights.

The youth does not identify any other statement or action by the juvenile court that would support a finding that it failed to consider the full range of punishment or ruled in a biased manner. Because the youth failed to rebut the presumption that the juvenile court acted properly, we reject his due process challenge to the disposition.

The youth next complains that the juvenile court abused its discretion in committing him to an eight-year sentence. The juvenile court may commit the child to TJJD only if it finds, among other things, that

- it is in the child's best interests to be placed outside of his home;
- reasonable efforts were made to prevent or eliminate the need for removal and return of the child to his home; and
- the child, in his home, cannot be provided the quality of care, and level of support and supervision that he needs to meet the conditions of probation.

TEX. FAM. CODE § 54.04(i).

The youth emphasizes that he had no prior record of delinquent behavior. The trial court, however, could have weight this evidence against other evidence before the juvenile court showing that the youth

- committed a serious crime that put the complainant in fear for her life and used physical force and a deadly weapon in the course of committing that crime;
- despite agreeing to a no-contest stipulation of evidence, later denied the conduct that made the crime so serious, namely, putting the complainant in a chokehold and holding a gun to her head; and
- frequently acted out of aggression and failed to properly manage his behavior at home, in school, and in detention.

Conclusion: Given the gravity of the offense and his inability to control his behavior under the restrictions of detention, we hold that the juvenile court acted within its discretion in concluding that the youth's best interests, as well as those of the community, warranted committing the youth to TJJD. We affirm the judgment of the juvenile court.

WAIVER AND DISCRETIONARY TRANSFER TO ADULT COURT

PREEMPTIVE MOTION TO SET ASIDE DISCRETIONARY TRANSFER ORDER BASED ON NONCOMPLIANCE WITH MOON, CONSIDERED SUFFICIENT PART OF DUE DILIGENCE BY THE STATE.

¶ 19-1-5. **In the Matter of D.J.M.**, MEMORANDUM, No. 03-18-00476-CV, 2019 WL 190535 (Tex.App.—Austin, 1/14/19).

Facts: On July 13, 2013, the State filed an original petition in Fayette County alleging that D.J.M., who was then sixteen years old, had engaged in delinquent conduct, “to wit: Capital Murder ... by intentionally or knowingly causing the death of an individual” while “in the course of attempting to commit and committing robbery.”¹ See Tex. Penal Code § 19.03. The petition was supported by the sworn affidavit of an investigator with the Fayette County Sheriff's Office, who stated that on June 17, 2013, D.J.M. was apprehended in connection with the death of a woman in La Grange, Texas. According to the investigator's affidavit, D.J.M. admitted to law enforcement that he had stabbed the victim multiple times with a knife in the course of a physical altercation at her residence, took her car keys, and then drove the victim's vehicle to Smithville, Texas, where he was later apprehended.

The record shows that in July 2013, one month before D.J.M.'s seventeenth birthday and within a month of the alleged delinquent conduct, the State filed its original petition in Fayette County Court, acting as juvenile court, alleging that D.J.M. had engaged in delinquent conduct, namely, causing the death of the victim. That same month, the parties filed an agreed motion for a finding of probable cause of unfitness to proceed, which the trial court granted. See *id.* § 55.31 (“Unfitness to Proceed Determination; Examination”). On October 1, 2013, following psychological examinations, but before a hearing on D.J.M.'s fitness to proceed, the juvenile court transferred venue to Victoria County on the State's motion. D.J.M. filed a petition for writ of mandamus in this Court challenging the juvenile court's transfer order, which we conditionally granted. See *In re D.J.M.*, No. 03-13-00713-CV, 2013 Tex. App. LEXIS 15191, at *9 (Tex. App.—Austin Dec. 19, 2013, orig. proceeding) (mem. op.). In compliance with our opinion, the juvenile court vacated its transfer order on December 19, 2013, and the juvenile proceedings were transferred back to

Fayette County. On April 30, 2014, at D.J.M.'s request, the proceedings were then transferred from county court in Fayette County to district court on the ground that the presiding judge of the county court was not a licensed attorney. See Tex. Fam. Code § 51.04(d). A hearing to determine D.J.M.'s fitness to proceed was then scheduled for May 2014 but postponed at D.J.M.'s request for June, July, and eventually reset to August.

On July 17, 2014, the State filed a petition for waiver of jurisdiction and discretionary transfer to criminal court under Section 54.02(a). On August 14, 2014, the juvenile court conducted an evidentiary hearing on the issue of D.J.M.'s fitness to proceed and the same day signed an order finding that D.J.M. was fit to proceed. On August 22, 2014, the juvenile court held a hearing on the State's July 2014 petition to transfer, during which the court received and approved D.J.M.'s waiver of a contested transfer hearing and D.J.M.'s stipulation of evidence relevant for a transfer. At the conclusion of the transfer hearing, the juvenile court granted the petition, waived its jurisdiction, and ordered transfer of the proceeding against D.J.M. to the criminal district court. Seven days later, on August 29, 2014, D.J.M. turned eighteen.

On December 10, 2014, the Court of Criminal Appeals issued its opinion in *Moon v. State*, holding that orders transferring juveniles to criminal district court under Section 54.02(a) must meet certain requirements. 451 S.W.3d at 28. Concerned that the August 2014 transfer order did not comply with the requirements set out in *Moon*, the State filed a motion to set aside the order on May 8, 2018, which was granted on May 21, 2018. That same day, the State filed an amended petition for waiver for jurisdiction and transfer to criminal court. It is the State's May 2018 amended petition that resulted in the June 21, 2018 transfer order that is the subject of this appeal.

Held: Affirmed

Memorandum Opinion: “Due diligence requires the State to ‘move ahead’ or ‘reasonably explain delays.’ ” *In re B.R.H.*, 426 S.W.3d at 168. It does not require the State “to ‘do everything perceivable and conceivable to avoid delay.’ ” See *id.* (quoting *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex. App.—Amarillo 1998, no pet.)). “Diligence is usually a question of fact that the trial court determines in light of the circumstances of each case.” *In re B.R.H.*, 426 S.W.3d at 168. Reviewing the evidence in this case under the applicable standards, and considering only the time period relevant to the determination, we conclude that the record supports the juvenile court's finding that the State exercised “due diligence” in attempting to transfer D.J.M. before his eighteenth birthday. See *Collins*, 516 S.W.3d at 521 (explaining that only delays before juvenile's eighteenth birthday are relevant in assessing due diligence under section 54.02(j)); *In re J.G.*, 495 S.W.3d at 371 (holding that four-month period of time

between State's initial petition and filing of petition to transfer was not unreasonable delay and satisfied due-diligence element of Section 54.02(j)); In re B.R.H., 426 S.W.3d at 168 (holding that five-month delay in bringing charges and two-month delay in setting hearing was not unreasonable and due-diligence finding was supported by sufficient evidence). In addition, the record supports the juvenile court's findings that "no adjudication hearing has been conducted," see Tex. Fam. Code § 54.02(j)(3), "a previous transfer order was set aside by a district court," see id. § 54.02(j)(4)(B)(iii), and, consequently, "it was not practicable to proceed in juvenile court before the [eighteenth] birthday of [D.J.M.]," see id. § 54.02(j)(4)(B).

Next, we address D.J.M.'s arguments regarding notice requirements under Section 54.02(k). See id. § 54.02(k). During the hearing on the State's May 2018 amended petition to transfer, counsel for D.J.M. objected to the proceedings on the ground that D.J.M. had not received proper notice. Specifically, counsel asserted that notice was improper because the State's petition and the summons failed to identify Section 54.02(j) as the applicable discretionary transfer procedure. When asked by the court whether he was seeking a postponement of the proceedings on this ground, counsel indicated that he was not seeking postponement but was instead requesting that the court dismiss the State's petition for discretionary transfer and that it dismiss the underlying juvenile proceedings entirely. The trial court overruled the objection and denied his request for a dismissal.

Section 53.06 provides that a juvenile court "shall direct issuance of a summons" to the child named in the petition, among others, and a "copy of the petition must accompany the summons." Tex. Fam. Code § 53.06(a), (b). In addition, when applicable, "the summons must state that the hearing is for the purpose of considering waiver of jurisdiction under Subsection (j)." Id. § 54.02(k). The record in this case includes a copy of a summons directed to D.J.M., and the return of service on the summons states that it was hand delivered to D.J.M. by an officer with the Fayette County Sheriff's Office. See *Sanchez v. State*, Nos. 13-02-00170-CR, 13-02-00175-CR, 2004 Tex. App. LEXIS 5841, at *4 (Tex. App.—Corpus Christi July 1, 2004, no pet.) (mem. op.) ("In a juvenile proceeding, an officer's return of service which is valid on its face carries a presumption of the truth of the facts stated on the return and that service and return were true and regular." (citing *Suave v. State*, 638 S.W.2d 608, 610 (Tex. App.—Dallas 1982, pet. ref'd))). In addition, the summons states on its face that: (1) on May 21, 2018, the State filed a petition seeking discretionary transfer to the criminal court; (2) D.J.M. was "over the age of ten years and younger than seventeen years of age at the time of the delinquent conduct"; (3) D.J.M. was twenty-one years old at the time of the filing of the State's petition; (4) allegations of D.J.M.'s delinquent conduct are "more fully set out in the petition seeking discretionary transfer ... which is attached herewith and

reference to which is hereby made"; and (5) a hearing on the petition seeking discretionary transfer will occur on June 21, 2018, at 10:00 a.m., at the Fayette County Courthouse. The State's May 2018 amended transfer petition includes the allegation that "after due diligence of the State it was not practicable to proceed in juvenile court before the [eighteenth] birthday of [D.J.M.] because a previous transfer order was set aside by a district court since the [eighteenth] birthday of [D.J.M.]."

Where a summons in a juvenile proceeding attaches and incorporates by reference the State's petition, we may look to both to determine compliance with Section 54.02. See *In re A.M.V.*, No. 13-17-00317-CV, 2017 Tex. App. LEXIS 10283, at *5-6 (Tex. App.—Corpus Christi Nov. 2, 2017, no pet.) (mem. op.) (citing *Hardesty v. State*, 659 S.W.2d 823, 825 (Tex. Crim. App. 1983)). Here, the summons and the petition, which was attached and incorporated by reference, recite specific elements required for discretionary transfer under Section 54.02(j) that are not found in Section 54.02(a), including the fact that the State was proceeding against D.J.M. as a person over the age of eighteen and that after due diligence of the State it was not practicable to proceed in juvenile court before D.J.M. turned eighteen due to the setting aside of a prior transfer order. See Tex. Fam. Code § 54.02(j). Based on the record before us, we conclude that D.J.M. received a summons and petition and that the summons is in compliance with Section 54.02(k). See *In re A.M.V.*, 2017 Tex. App. LEXIS 10283, at *6 (holding that summons and incorporated petition satisfied Section 54.02(k), although neither document expressly cited Section 54.02(j)); see *Polanco v. State*, 914 S.W.2d 269, 271 (Tex. App.—Beaumont 1996, pet. ref'd) (summons notifying appellant to appear and to hear "petition for discretionary transfer" complied with Section 54.02(k)).

Conclusion: Having concluded that the evidence is sufficient to support the juvenile court's findings and considering the evidence upon which the juvenile court's decision is based, we cannot conclude that the court abused its discretion in granting the State's May 2018 amended petition for waiver of jurisdiction and discretionary transfer to criminal court. Having overruled D.J.M.'s issues on appeal, we affirm the juvenile court's order waiving jurisdiction and transferring D.J.M. to criminal district court.

IN DISCRETIONARY TRANSFER TO ADULT COURT, JUVENILE COURT CONSIDERED EACH OF THE SECTION 54.02(F) FACTORS AND PROVIDED SPECIFIC FINDINGS IN SUPPORT OF ITS DECISION TO WAIVE ITS JURISDICTION.

¶ 19-1-2. **In the Matter of M.G.**, MEMORANDUM, No. 13-18-00294, 2018 WL 6241036 (Tex.App.—Corpus Christi-Edinburg, 11/29/18).

Facts: Appellant appeals from the juvenile court's order waiving jurisdiction and transferring appellant to criminal district court.

The State filed a petition with the juvenile court seeking to transfer appellant to criminal district court to stand trial for the offenses of capital murder of Devin Davalos, aggravated robbery, and tampering with evidence. A hearing was conducted on the State's petition.

By written order, the juvenile court waived its jurisdiction and certified appellant to stand trial in criminal district court. The juvenile court supported its order with findings of fact and conclusions of law. This interlocutory appeal followed.

Held: Affirmed

Memorandum Opinion: Appellant maintains that the juvenile court's transfer order was an abuse of discretion because: (1) the classification of the offense alone is not enough to support the juvenile court's decision; (2) appellant's role in the murder was unclear; and (3) Dr. Ditsky's report recommended that the child be retained. We construe appellant's arguments as challenging the sufficiency of the evidence regarding the juvenile court's specific findings and that it abused its discretion in weighing the section 54.02(f) factors.

The juvenile court concluded that appellant "should be certified as an adult due to the 'sufficiently egregious character' of the alleged offense." The court found that "the other factors, to the extent they weigh in favor of ... retaining jurisdiction, do not weigh so heavily in that direction as to overcome the conclusion that the crime alleged is of such a sufficiently egregious character as to support waiver and certification."

In arguing that the juvenile court abused its discretion, appellant relies heavily on Dr. Ditsky's recommendation that appellant remain in the juvenile system. However, given Dr. Fuller's recommendation to the contrary, we believe that the juvenile court properly exercised its factfinding role in reconciling conflicting testimony. See *In re S.G.R.*, 496 S.W.3d at 239; see also *Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000) (explaining that reconciliation of the conflicts in the evidence is within the factfinder's exclusive province). Furthermore, we disagree with appellant's implicit argument that Dr. Ditsky's recommendation should usurp the trial court's statutory authority to determine whether to waive its jurisdiction by weighing the appropriate factors.

Appellant also argues that the juvenile court abused its discretion because "[t]he murder alone is not enough" to justify the court's order. We agree with appellant's general proposition, but his argument mischaracterizes the juvenile court's order.

The mere category of offense the juvenile is alleged to have committed, without more, will not serve to justify transfer. *Moon*, 451 S.W.3d at 48. If the only consideration informing the juvenile court's decision to waive jurisdiction is the category of the crime alleged, rather than the specifics of the particular offense, then "the transfer decision would almost certainly be too ill-informed to constitute anything but an arbitrary decision." *Id.* However, "the offense that the juvenile is alleged to have committed, so long as it is substantiated by evidence at the transfer hearing and of a sufficiently egregious character, will justify the juvenile court's waiver of jurisdiction regardless of what the evidence may show with respect to the child's background and other Section 54.02(f) factors." *Id.*

Contrary to appellant's contention, the juvenile court did not limit its consideration to the classification of the offense. Rather, the court cited particular actions that it found to be depraved and egregious. "[T]he juvenile court that shows its work should rarely be reversed." *Id.* at 49. "As long as the appellate court can determine that the juvenile court's judgment was based upon facts that are supported by the record, it should refrain from interfering with that judgment absent a scenario in which the facts in the transfer order, based on evidence produced at the transfer hearing ... bear no rational relation to the specific reasons the order gives" to justify transfer. *Id.* at 46.

Conclusion: The juvenile court considered each of the section 54.02(f) factors and provided specific findings in support of its decision to waive its jurisdiction. Its findings are supported by factually and legally sufficient evidence. In light of the juvenile court's findings and our review of the record, we conclude the juvenile court did not abuse its discretion by waiving jurisdiction and transferring appellant for trial as an adult. We overrule appellant's sole issue. We affirm the juvenile court's order waiving jurisdiction and transferring appellant to criminal district court.

IN DISCRETIONARY TRANSFER TO ADULT COURT, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATE SOUGHT DISCRETIONARY TRANSFER IN A TIMELY FASHION, SINCE PROBABLE CAUSE DID NOT DEVELOP UNTIL AFTER JUVENILE TURNED 18 AND NEW EVIDENCE WAS PROVIDED.

¶ 19-1-1. **In the Matter of K.T.S.**, MEMORANDUM, No. 01-18-00778-CV, 2018 WL 6318515 [Tex. App.—Houston (1st Dist.), 12/4/2018]

Facts: On June 17, 2015, A.V. and his friend, Aaron Wilson, went to a Houston apartment complex to sell seven grams of marijuana to someone they knew as "Jay." A.V. had sold marijuana to Jay two or three other times in face-to-face transactions. To set up the drug deal, A.V. communicated with Jay on the telephone. Jay

selected the apartment complex as the location for the transaction.

Entrance into the complex required a gate code, which Jay provided to A.V. over the telephone. Using the code, A.V. and Wilson entered the apartment complex. Wilson was driving and A.V. was in the passenger's seat. Jay instructed A.V. to go to the back of the apartment complex and wait for him near a dumpster. A.V. and Wilson followed Jay's instructions, parking next to the dumpster and waiting in the car.

A.V. then saw Jay, whom he recognized from past drug transactions, walking toward the car. Wilson was sitting on the driver's side sending messages on his phone to his girlfriend. When Jay got to the car, A.V. showed him the seven grams of marijuana. The price of the marijuana was \$90, and Jay asked A.V. if he had change for a \$100 bill. As A.V. looked to see if he had change, Jay grabbed the marijuana, and two men came out from behind the dumpster; one of them had a gun. A.V. then realized that it was a setup for a robbery. Wilson pressed the car's accelerator to get away. As the car sped away, A.V. heard a gunshot, and the car crashed. Wilson had been hit in the head by a bullet and died from the injury.

Fearing for his life, A.V. ran from the scene. He then realized that the police would soon arrive, and he returned. A.V. waited at the scene and told the police what had happened. A.V. provided police with Jay's cell phone number, which had an 832 area code. A.V. also provided police with the gate code Jay had given him.

Detective Sergeant H. Garcia and Detective Sergeant S. Murdock of the Houston Police Department's Homicide Division were assigned to investigate the case. They researched the name "Jay" and developed a suspect, J.G. The day after Wilson was killed, the detectives showed A.V. a photo spread with J.G.'s picture in it. A.V. said that the person he knew as Jay was not in the pictures.

The detectives learned that the gate code given to A.V. by Jay was the code used by residents who live in Building 14. They also learned that the 832-phone number used by Jay belonged to a woman whose brother, C.H., lived in Building 14.

The detectives spoke with C.H. He permitted police to enter the 832 number into his phone. The phone showed that the contact associated with the number was Appellant, who is C.H.'s brother. C.H. told police that Appellant had not been to his apartment on the night of the shooting.

With his mother present, 16-year-old Appellant voluntarily gave a statement to the police. He admitted that he was at his brother's apartment complex when the shooting occurred. He said that he had played basketball with someone named Jay that day. Appellant claimed that Jay had asked him for a ride to the apartment complex where Appellant's brother lives.

Appellant claimed that Jay had borrowed his cell phone for about two hours and used it to text. Appellant also said that Jay had then erased all the text messages from the phone. Appellant said that, when they arrived at the complex, Jay already knew the gate code used for Building 14. Appellant told the police that he had dropped Jay off inside the apartment complex and, then, a short time later, he heard gunshots. Appellant said he went to his brother's apartment and came out to see the police and fire department when they arrived. Appellant denied that he was "Jay" and told the detectives that he had nothing to do with the shooting.

Appellant's mother signed a consent form, allowing police to search Appellant's cell phone. The search revealed only two text messages between Appellant's phone and A.V.'s phone. The subject matter of the texts appeared to relate to a drug transaction.

After Appellant spoke with police, Appellant's brother, C.H., admitted that Appellant had been at his apartment on the night of the shooting, saying that he had forgotten that Appellant was there. Detective Murdock also spoke with C.H.'s roommate. The roommate recalled that he had heard gunshots, tires squealing, and a car crash. Then, Appellant and his cousin had come running up the stairs to the apartment. They were upset and wanted to get inside the apartment. The roommate told Detective Murdock that Appellant had said that "somebody had just been shot."

To identify Jay, Detective Murdock showed A.V. another photo spread on July 1, 2015. The photo spread included Appellant's picture along with pictures of five other similar-looking males. Appellant's photo was in the first position. Detective Murdock noticed that A.V. stared at Appellant's picture for over one minute. However, A.V. did not choose Appellant's picture; instead, A.V. said that the person in the second photo "kind of" looked like Jay and indicated that the person in the fourth photo "really look[ed]" like Jay. Detective Murdock later testified that he could not question A.V. about his negative identification of Appellant, even though the detective believed that A.V. recognized Appellant, because that could taint the identification process.

The police also obtained a warrant to search the phone records for Appellant's and A.V.'s cell phones. The police received the phone records on September 1, 2015. The records showed that from 11:10 p.m. until 11:53 p.m. there were 32 contacts between the phones, including five phone calls and 27 text messages.²

The police learned of no additional evidence in 2015 or 2016. Appellant turned 18 on November 9, 2016.

On January 5, 2017, Wilson's mother, C. Baird, contacted Detective Garcia to inform him that she had

spoken with A.V. A.V. told her that he had recognized the person he knew as Jay in a photo spread shown to him by police. He said that he had not identified Jay in the photo spread because he feared retaliation. Baird said that she had implored A.V. to be honest with the police about the identification, and he had agreed to be truthful about Jay's identity.

Between January and May 2017, Detective Murdock attempted to contact A.V. numerous times and left messages for him. On May 8, 2017, the detectives met with A.V. and showed him the photo spread with Appellant's picture and five others. A.V. looked at the photos and immediately identified Appellant as being the person he knew as Jay. He circled Appellant's photo and initialed it. A.V. told the detectives that he had not identified Appellant when shown the photo spread in 2015 because he was scared and feared retaliation. He said, "I didn't want to get shot like my friend."

Once A.V. positively identified Appellant as Jay, the detectives presented the facts to the juvenile division chief of the district attorney's office. On May 15, 2017, the juvenile division chief filed a petition in Harris County juvenile court, alleging that Appellant, at age 16, engaged in delinquent conduct by committing capital murder in June 2015. The State requested the juvenile court to "consider discretionary transfer to Criminal Court, and [to] waive [] its exclusive original jurisdiction and transfer [Appellant] to the appropriate ... Criminal District Court for criminal proceedings."

Appellant moved to dismiss the State's petition on the basis that the State had not used due diligence in proceeding against Appellant in juvenile court before he turned 18. The juvenile court conducted an evidentiary hearing in January 2018 to consider (1) Appellant's motion to dismiss and (2) concomitantly the State's request that the juvenile court waive its jurisdiction and transfer Appellant to criminal district court for prosecution.

Held: Affirmed

Memorandum Opinion: At the hearing, the State offered the testimony of Detectives Garcia and Murdock. They testified about their investigation of Wilson's murder to show the State had exercised due diligence in the manner they handled the investigation before Appellant turned 18. Their testimony described the steps taken in the investigation, what information the detectives learned during the investigation, and when they learned it.

The detectives' testimony indicated that, while the circumstantial evidence discovered before Appellant turned 18 supported their belief that Appellant was Jay, A.V.'s negative identification of Appellant in July 2015 undermined their case against Appellant. A.V. told them that he knew Jay by sight because he had engaged in previous face-to-face drug transactions with

him. A.V.'s negative identification of Appellant served to support Appellant's story that he had loaned his phone to someone named Jay on the night of the shooting. The detectives indicated that, under the circumstances of this case, they did not have probable cause to proceed against Appellant because of A.V.'s negative identification of Appellant as Jay.

When asked "[h]ow harmful is it to a case of circumstantial evidence when you have an eyewitness that's not willing to identify a suspect," Detective Murdoch answered, "Kills it." Detective Garcia testified, "Once the surviving complainant [A.V.] said, 'No, I don't recognize him,' it put our investigation in jeopardy. If he would've recognized him as Jay, then I would've presented the case to the ADA." He testified that the case was not presented to the district attorney's office to pursue charges against Appellant until A.V. had positively identified Appellant as Jay.

To show that the State had not acted with due diligence in proceeding against Appellant before he turned 18, Appellant offered the testimony of D. Webber, a private investigator and retired police officer. Webber testified that, before retirement, he had worked 11 years for the Cut-N-Shoot Police Department as a patrol officer and had worked 20 years for the Houston Police Department as a patrol officer, an officer in the narcotics unit, and "for a brief time worked with the Vice Division on several projects." To prepare for testifying, Webber said that he reviewed the reports regarding the police's investigation of the case.

Webber suggested that, besides the steps taken in the investigation, the homicide detectives should have taken additional steps to link Appellant to the crime scene. He indicated that the police should have tested the outside of Wilson's car for fingerprints. Webber said, "In my experience with a hand-to-hand drug transaction from someone outside the car to inside the car, 99 percent of the time they lean into the car or they touch the car in some way." When asked by defense counsel whether the homicide detectives should have checked Appellant's clothes for gunshot residue, Webber stated, "[I]n my opinion it would have been something that would have been reasonable to check into."

Defense counsel elicited testimony from Webber about the circumstantial evidence discovered by the police, before Appellant turned 18, that linked Appellant to the murder. According to Webber, this included evidence that (1) Appellant and another person were seen immediately after the shooting with a gun and heard to say "someone was shot";³ (2) cell phone records showing that A.V. communicated with a cell phone used by Appellant on the night of the murder; (3) the gate code given by Jay to A.V. was the code used by residents of Building 14 where Appellant's brother lived; and (4) A.V. stared at Appellant's photo in the 2015 photo spread before claiming that Jay was not

there. The defense asked Webber, “Based on your review of this case do you believe in your opinion that the officers should have taken the case to the Harris County District Attorneys’ Office Juvenile Division in September of 2015 after they got the phone records?” Webber responded affirmatively. However, Webber also testified that he had no experience with long-term investigations, had never met with a prosecutor to discuss probable cause in a murder case, and had “never investigated a homicide case.”

Based on its findings, the juvenile court concluded:

2. Because probable cause did not exist in this case before [Appellant] turned 18 years of age on November 9, 2016; and, because any indications or suspicion that [Appellant] committed the capital murder which police knew existed before that [Appellant] turned 18 was defeated by [A.V.’s] negative identification of [Appellant] in the photo spread, this Court concludes that the State did not possess probable cause to charge [Appellant] by petition with this capital murder any time before May 8, 2017, when police learned in newly developed evidence that [Appellant] was in fact the person [A.V.] knew as “Jay.” [citation omitted.]

3. Because the investigation proceeded in a timely fashion before [Appellant’s] 18th birthday; and because, but for the fact that probable cause did not develop until May 8, 2017 (a date after [Appellant’s] 18th birthday), the court finds by a preponderance of the evidence that the State exercised due diligence to pursue the certification petition under Tex. Fam. Code Ann. § 54.02(j), but that for a reason beyond the control of the State, it was not practicable to proceed in juvenile court by petition before [Appellant’s] 18th birthday.

4. The Court concludes that until police obtained the new evidence after [Appellant’s] 18th birthday that resulted from [A.V.’s] positive identification of [Appellant] as the person he knew as Jay” and as the person that met with [A.V.] and the complainant on the night of the shooting, the police had no direct evidence that connected [Appellant] as the person who set up the drug deal and met in the parking lot with [A.V.] or as the person who set up the robbery.

On March 20, 2018, the juvenile court conducted a certification hearing on the State’s request to waive its jurisdiction and to transfer Appellant to criminal district court. The State reoffered all the evidence from the January 2018 hearing on Appellant’s motion to dismiss the petition, and the juvenile court took judicial notice of its file, including its findings of fact and conclusions of law supporting its denial of Appellant’s motion to dismiss.

On March 27, 2018, the juvenile court signed an order waiving jurisdiction and transferring Appellant to criminal district court for prosecution. In its order, the juvenile court made findings to support of waiver and

transfer. See TEX. FAM. CODE § 54.02(h). Relevant to the issue raised on appeal, the court found as follows: The Court finds the following facts support waiver of exclusive original jurisdiction and transfer of [Appellant] to criminal district court for criminal proceedings:

....

(5) That by a preponderance of the evidence after due diligence of the State it was not practicable to proceed in juvenile court before the 18th birthday of [Appellant] because the State did not have probable cause to proceed on the capital murder charge in 2015 or 2016. Instead, new evidence developed after [Appellant]’s 18th birthday. The following facts demonstrate when and how the new evidence developed that led to probable cause:

a. The Court incorporates by reference the Findings of Fact and Conclusions of Law issued on March 19, 2018 in response to [Appellant]’s Motion to Dismiss as factual and legal support for this Court’s decision to waive jurisdiction and transfer the matter to criminal district court. ...

b. The Court finds that after due diligence of the State it was not practicable to proceed in juvenile court before [Appellant’s] 18th birthday because:

i. On July 1, 2015, [Detective] Murdock showed [A.V.] a photo spread of [Appellant] and five other males with similar physical characteristics. [Detective] Murdock testified that [Appellant] was located in position number one of the photo spread shown to [A.V.]. [Detective] Murdock stated that [A.V.] stared at picture number 1 for a minute and then stated it could be number 2 or number 4. [A.V.] made a negative identification of [Appellant].

ii. [Detective] Murdock testified that it would have been impermissibly suggestive to challenge [A.V.] on the fact that he did not make an identification on the first picture, or to suggest that picture number one was a person present at the complex that night, even though [Detective] Murdock believed [A.V.] recognized the person in position number one.

iii. [Detective] Murdock could not suggest to a witness which photograph he should have identified without tainting any further investigation.

iv. [A.V.] was the only eyewitness to the capital murder, and the only direct evidence of Jay’s involvement and of Jay’s identity.

v. [A.V.’s] identification of the three men involved in the capital murder was the only evidence known or available to police that could have refuted [Appellant’s] claims to being present at the complex, but uninvolved in the shooting.

vi. The cell phone records alone linking [Appellant] and [A.V.] to communications near the time of the murder did not overcome [Appellant]’s statement to police. [Appellant] told police that he allowed Jay [to] use his phone. [A.V.] told police he had met Jay multiple times and he would recognize Jay if he saw him again. [A.V.]’s negative identification of [Appellant]’s photograph as the person he recognized and knew as Jay confirmed [Appellant]’s statement that someone else was Jay, not [Appellant].

vii. [Detective] Murdock testified that after September 1, 2015, the case remained open pending new information because the negative identification from witness [A.V.] defeated any circumstantial evidence that might have shown contact between [Appellant] and the complainant near the time of the complainant's death.

viii. On November 9, 2016, [Appellant] turned eighteen years old.

ix. Probable cause linking [Appellant] to the murder did not develop until police learned that [A.V.] had lied to police during the photospread identification based on his fears of retaliation.

x. On January 5, 2017, police first learned from [C.] Baird, the complainant's mother, about [A.V.'s] deliberate misidentification of Jay in the photo spread.

xi. During the conversation with Mrs. Baird, [A.V.] told her that he was now willing to be honest with investigators regarding Jay's identity.

xii. On May 8, 2017, [Detective] Murdock met with [A.V.] and again presented him with the photo spread of [Appellant] and five other males with similar physical characteristics originally shown to [A.V.] on July 1, 2015. Neither [Detective] Murdock nor [Detective] Garcia had told [A.V.] that he had or had not picked the correct person from the photospread in the past. [Detective] Murdock stated that [A.V.] looked at the photo spread and immediately identified [Appellant] in position number one as Jay.

xiii. [A.V.] admitted to [Detective] Murdock that he did not originally identify [Appellant] in 2015 because he felt scared.

xiv. Probable cause did not exist in this case before [Appellant] turned 18 years of age on November 9, 2016 because any indications or suspicion that [Appellant] participated in the capital murder, about which police knew before that [Appellant] turned 18, was defeated by [A.V.'s] negative identification of [Appellant] in the photo spread.

xv. This Court finds that the State did not possess probable cause to charge [Appellant] by petition with this capital murder any time before May 8, 2017, when police learned in newly developed evidence that [Appellant] was in fact the person [A.V.] knew as Jay, present during the murder, who lured [A.V.] to bring drugs to the scene, and who then took those drugs from him after one of his co-actors displayed a gun.

The juvenile court concluded its order as follows: Based on the above [findings], as well as the totality of the evidence presented in the clerk's record, at the hearing, in the written reports, studies, and investigations, this Court ORDERS and CERTIFIES that its jurisdiction sitting as a Juvenile Court, be WAIVED, and that [Appellant] be transferred to the Criminal District Court of Harris County, Texas, for criminal proceedings to be dealt with as an adult in accordance with the Code of Criminal Procedure.

Conclusion: The juvenile court denied Appellant's motion to dismiss the State's petition. In support of the denial, the trial court filed findings of fact and conclusions of law. Among the findings, the juvenile court found Detectives Garcia and Murdock to be "credible and reliable" witnesses. The court detailed the steps the detectives had taken in investigating the case and ultimately pursuing charges against Appellant. In its last finding of fact, the juvenile court found: "The State sought discretionary transfer in a timely fashion as soon as probable cause existed to believe [Appellant] committed the above capital murder, but that such probable cause did not develop until after [Appellant] turned 18 with the new evidence provided by [A.V.]."

Because we conclude that the juvenile court did not abuse its discretion, we affirm the order.

