Juvenile has no right of confrontation at a discretionary transfer hearing.[In the Matter of H.C., III](16-2-4)

On January 28, 2016, the Fort Worth Court of Appeals held that section 54.11 was not unconstitutional even though trial court was allowed to consider hearsay statements contained within a written record.

¶ 16-2-4. **In the Matter of H.C., III**, MEMORANDUM, No. 02-15-00149-CV, 2016 WL 354297 (Tex.App.-Fort Worth, 1/28/2016).

**Facts:** After a plea bargain, a visiting judge adjudicated Appellant H.C. Ill delinquent and committed him to the Texas Juvenile Justice Department (TJJD) for five years with a possible transfer to the Texas Department of Criminal Justice Correctional Institutions Division (TDCJ–CID). Less than three years later, upon the recommendation of the TJJD and after a hearing, the trial court ordered that Appellant be transferred to the TDCJ–CID to serve the remainder of his sentence. In three issues, Appellant complains of the trial court’s transfer order. He contends that (1) section 54.11 of the Texas Family Code is unconstitutional because in its operation, it violated his right to confront and cross-examine adverse witnesses, (2) his right to cross-examination and confrontation of multiple adverse witnesses was violated when the trial court was allowed to consider hearsay statements contained within a written record, and (3) the evidence is insufficient to support a finding of transfer. Because we hold that Appellant had no right of confrontation at the transfer hearing and that the trial court did not abuse its discretion by ordering his transfer to the TDCJ–CID, we affirm the trial court’s order.

**Held:** Affirmed

**Memorandum Opinion:** Section 54.11(d) of the family code allows a trial court faced with the issue of transferring a youth from the TJJD to the TDCJ–CID to “consider written reports and supporting documents from probation officers, professional court employees, professional consultants, employees of the [TJJD], or employees of a post-adjudication secure correctional facility in addition to the testimony of witnesses” and expressly provides that “[a]ll written matter is admissible in evidence at the hearing.” In his first issue, Appellant contends that section 54.11 is unconstitutional because in its operation, it violated his right to confront and cross-examine adverse witnesses. In his second issue, he complains that his right to the cross-examination and confrontation of multiple adverse witnesses was violated when the trial court was allowed to consider hearsay statements contained within a written record. This court, however, has repeatedly held that a juvenile has no right of confrontation at a discretionary transfer hearing. We therefore overrule both issues.

In his third issue, Appellant challenges the sufficiency of the evidence supporting the transfer. Initially, he contends that his transfer was unauthorized because the evidence did not meet both prongs of the test for transfer set out in human resources code section 244.014(a). That section provides that the TJJD may refer a juvenile offender aged sixteen to nineteen years old serving a determinate sentence to the committing court for approval of transfer to the adult prison system if “the child has not completed the sentence” and his “conduct ... indicates that the welfare of the community requires the transfer.” The statute does not address the trial court’s decision to transfer the child to the adult prison system. Instead, it concerns the TJJD’s decision to refer the child for transfer. We overrule this part of Appellant’s issue.

Appellant also contends that the evidence is insufficient to support the trial court’s transfer order. We review the trial court’s transfer order for an abuse of discretion. In appropriate cases, legal and factual sufficiency of the evidence are relevant factors in assessing whether the trial court abused its discretion. In determining whether the trial court abused its discretion, we review the entire record.

A trial court abuses its discretion when it acts without reference to any guiding rules or principles, that is, when the act is arbitrary or unreasonable. An appellate court cannot conclude that a trial court abused its discretion merely because the appellate court would have ruled differently in the same circumstances. A trial court also abuses its discretion by ruling without supporting evidence. But an abuse of discretion does not occur when the trial court bases its decision on conflicting evidence and some evidence of substantive and probative character supports its decision.

Section 54.11(k) of the family code provides a list of nonexclusive factors that a trial court may consider in reaching its transfer decision:

the experiences and character of the person before and after commitment to the [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim’s family, the recommendations of the [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Within its discretion, the trial court may assign different weights to the factors it considers, and the court need not consider every factor.

Appellant points to some positive evidence: he had completed some vocational courses while confined that would make him more employable; if released on parole, he would live with his father under strict conditions; and he was compliant with his psychiatric medication. Further, most of his behavioral problems occurred before he received psychiatric treatment.

But the trial court also was privy to the facts of the conduct for which Appellant had been adjudicated. Along with an adult, Appellant committed three aggravated robberies in a period of three days in August 2012, using a firearm in each. Appellant shot one of the complainants; his accomplice shot another.

Further, according to Leonard Cucolo, the TJJD court liaison, after his commitment to the TJJD, Appellant performed poorly behaviorally while he[ was] confined. He[ was] involved in 120 documented incidents of misconduct. Of the 120, 62 of the incidents were actual referrals to the security unit. The security unit is basically [the] detention center within a highly structured facility, high-restriction facility, and of the 62, he had 24 admissions into the security unit. He engaged in over 20 major rule violations, which are basically new offenses that a youth can commit while confined.

There’s major and minor rule violations. Major rule violations are basically ... offenses that a youth would be arrested for if they were committed in the free, such as assault, which he was involved in, assault on staff, assault on youth, fleeing apprehension.

Additionally, less than three months before the transfer hearing, Appellant, along with six other confined youths, sought out a teacher who Appellant had announced was “his girl” and from whom Appellant had been ordered to stay away. The pack of youths went to the wrong classroom.

Cucolo also testified about Appellant’s lack of progress while confined. Cucolo stated that twelve to eighteen months is a reasonable period of time for a confined youth to reach Stage 5, which indicates “parole readiness.” After twenty-nine months of confinement, Appellant was on Stage 1, the entry stage of the TJJD’s treatment program. Cucolo reported that Appellant’s “risk to ... students and staff within TJJD appear[ed] high and his prognosis for a successful treatment outcome appear[ed] low.”

The prosecutor and the TJJD both recommended Appellant’s transfer to the TDCJ–CID. The complainants of Appellant’s three aggravated robberies did not appear at the transfer hearing.

**Conclusion:** Given the evidence, particularly the nature of the delinquent conduct and Appellant’s major violations while at the TJJD facility, we cannot conclude that the trial court abused its discretion by ordering Appellant’s transfer to the TDCJ–CID. We overrule his third issue. Having overruled Appellant’s three issues, we affirm the trial court’s transfer order.