Discretionary transfer to adult court upheld where juvenile court addressed each of the factors set out in section 54.02(f). [In the Matter of R.D.G., Jr.] (16-4-3)

On September 12, 2016, the Dallas Court of Appeals concluded that the juvenile court made a “reasonably principled application of the legislative criteria” in determining that the statutory factors enumerated by the code all weighed in favor of transfer and that transfer was appropriate due to both the serious nature of the alleged offense and the background of the appellant.

¶ 16-4-3. **In the Matter of R.D.G., Jr.**, MEMORANDUM, No. 05-16-00678-CV, 2016 WL 4743698 (Tex.App.—Dallas, 9/12/2016).

**Facts:** Appellant, who was fifteen years old at the time of the offense, was charged with the delinquent conduct of capital murder. The State filed a petition asking the juvenile court to waive jurisdiction and transfer the case to criminal district court. On the State’s motion, the trial court ordered a psychological examination of appellant and ordered the probation department to prepare an investigation of appellant and the circumstances of the offense, a diagnostic study and social evaluation. Once the reports were completed, the trial court conducted an evidentiary hearing. The State and defense each called three witnesses to testify. The evidence showed that the Kaufman County Sheriff’s Office responded to a call at a house in Forney at 11:30 a.m. on November 28, 2015. On arrival, a deputy found the homeowner lying face down in the doorway. He had been shot in the neck and had no pulse. The front door was wide open and the doorframe smashed as if kicked or forced open. The scene was consistent with a home invasion burglary.

Kaufman County Sheriff’s Deputy Forest Frierson was the lead investigator on the case. Frierson said a neighbor reported seeing a black car with a broken back passenger window parked in front of the residence that morning. Frierson obtained a license plate number for the car from surveillance recordings installed in a nearby new construction site. The car had been reported stolen nine days earlier and recovered by Dallas police the day after the offense. The FBI searched the vehicle and recovered potential DNA evidence as well as .38-caliber and .22-caliber rounds.

Investigators passed out Crime Stoppers fliers in the area where the car was found. A tipster came forward identifying appellant, Jarvis “Big Bro” Kimbel, Henry Davis, and Deion Young as persons involved in the crime. The tipster said appellant told him he was sleeping in the car and “woke up in the middle of everything happening” and saw a “puddle of blood.”

Based on the tip, law enforcement officers spoke to appellant and the three men. Davis, appellant’s cousin, told the officers he “rented” the car and picked up appellant, who then drove and to pick up Young and Kimbel. According to Davis, Kimbel wanted to go “hit a lick,” or “commit a theft or a burglary.” Although Davis said no one else wanted to “hit a lick,” Kimbel drove from Dallas to a Buc-ees store in Terrell and then to the house in Forney. Frierson also talked to Young, who said appellant was in the car at the time of the murder and was not asleep.

Frierson and another deputy interviewed appellant at the middle school where he was a student. Appellant initially denied any knowledge of the crime but later told deputies he was sleeping in the car when it happened. He also said Kimbel had a .38 Special. Four days later, law enforcement talked to appellant again. This time, appellant said he was in the car with the other three men, went to sleep and woke up when they stopped at a Buc-ees store in Terrell. Appellant said he went inside to get a sandwich, returned to the car, and went back to sleep. He woke up right before being dropped off, and Kimbel told him he would “ be okay.”

After talking to appellant, Frierson went to Buc-ees and viewed a surveillance video, which showed Davis and appellant entering the store about fifteen minutes before the murder, appellant buying a sandwich, and Davis at the checkout counter. The two returned to the car seen in the construction site video. Frierson said although the view of the car on the Buc-ees video was partially obscured by a truck, he believed appellant got in the car on the driver’s side and was driving when the group left Buc-ees for the Forney residence. He said fifteen minutes would have been enough time to drive to the location. After viewing the video, Frierson arrested appellant. At the time of his arrest, appellant had marijuana in his pocket.

Frierson acknowledged no evidence shows appellant had a “leadership role” in the offense, exited the vehicle at the scene, or knew anyone was likely to be harmed. He agreed it appeared to be “nothing more than a burglary plot” and that the suspects believed no one was home. And while he testified appellant knew Kimbel had a gun, he did not know whether appellant had that knowledge before the incident. But, Frierson said appellant was in the car when Kimbel suggested they go “hit a lick.”

In addition to the witnesses’ testimony, the trial court also admitted the psychological evaluation prepared by Dr. Kennedy, who concluded appellant’s level of maturity and sophistication and his past history indicate he is capable of functioning in the adult criminal justice system. Based on the seriousness of the alleged offense and appellant’s ability to understand the charges at a “mature level,” Kennedy concluded appellant met the “minimum standards” necessary to be transferred to criminal district court. In addition to Kennedy’s evaluation, the court had the written social evaluation and investigative report and addendum prepared by the Kaufman County Juvenile Department. After considering the testimony and the various documents, the trial court granted the petition to waive jurisdiction and transfer appellant’s case to the criminal district court. This appeal followed.

Because children 10 years of age or older and under 17 years of age are not subject to prosecution in adult court for criminal offenses, the juvenile court has exclusive original jurisdiction over cases involving what would otherwise be criminal conduct. See TEX. FAM. CODE ANN. §§ 51.02(2), 51.03(a)(1), 51.04(a) (West Supp. 2015). But if a juvenile court determines after a full investigation and hearing that certain conditions are met, it may waive jurisdiction and transfer a child to the district court for criminal proceedings. See id. § 54.02(a), (c) (West 2014); Matter of S.G.R., No. 01-16-00015-CV, 2016 WL 3223675, at \*1 (Tex. App.–Houston [1st Dist.] June 9, 2016, no pet.). The State initiates this process by filing a petition and meeting the notice requirements. See TEX. FAM. CODE ANN. § 54.02(b).

At the transfer hearing, the State bears the burden of proving, by a preponderance of the evidence, that waiver of the juvenile court’s jurisdiction is appropriate. Moon v. State, 451 S.W.3d 28, 40–41 (Tex. Crim. App. 2014). The hearing is not a trial on the merits, and the court does not consider guilt or innocence; rather, it considers only whether the juvenile’s and society’s best interests would be served by maintaining custody of the child in the juvenile system or by a transfer to a district court for trial as an adult. Lopez v. State, 196 S.W.3d 872, 874 (Tex. App.–Dallas 2006, pet. ref’d).

To transfer a child who is alleged to have committed a capital felony to the criminal district court, a juvenile court must first find (1) the child was 14 years of age or older at the time of the alleged offense, (2) probable cause exists to believe the child committed the alleged offense and (3) because of the seriousness of the offense or the background of the child, the welfare of the community requires criminal rather than juvenile proceedings. TEX. FAM. CODE ANN. § 54.02(a); Lopez, 196 S.W.3d at 874.

When determining whether there is a preponderance of the evidence to satisfy the third requirement, the juvenile court shall consider, among other matters: (1) whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court. See TEX. FAM. CODE ANN. § 54.02 (f); Lopez, 196 S.W.3d at 874. All four of these factors need not weigh in favor of transfer for the juvenile court to waive its jurisdiction; any combination may suffice. Moon, 451 S.W.3d at 47 & n.78.

On appeal, in evaluating a juvenile court’s decision to waive jurisdiction, we first review the juvenile court’s specific findings of fact regarding the section 54.02(f) factors under “traditional sufficiency of evidence review.” Moon, 451 S.W.3d at 47. But, we review the juvenile court’s ultimate waiver decision under an abuse of discretion standard. Id. As the court of criminal appeals has explained:

... in deciding whether the juvenile court erred to conclude that the seriousness of the offense alleged and/or the background of the juvenile called for criminal proceedings for the welfare of the community, the appellate court should simply ask, in light of its own analysis of the sufficiency of the evidence to support the Section 54.02(f) factors and any other relevant evidence, whether the juvenile court acted without reference to guiding rules or principles. In other words, was its transfer decision essentially arbitrary, given the evidence upon which it was based, or did it represent a reasonably principled application of the legislative criteria?

Id.

In his second issue, appellant contends he was improperly certified as insufficient evidence supports the section 54.02(f) factors. We review section 54.02(f) factors for “traditional” sufficiency but then review the ultimate waiver decision for an abuse of discretion. Moon, 451 S.W.3d at 47.

The trial court’s order contained the following specific findings under section 54.02(f):

1. The offense alleged to have been committed was against the person of another.

2. The sophistication and maturity of the Respondent are sufficient to transfer the child to the appropriate district court for criminal proceedings.

3. The record and previous history of the Respondent indicate a higher degree of supervision is indicated and that transfer to the appropriate district court is required.

4. The prospects of adequate protection of the public and the likelihood of the rehabilitation of the Respondent by use of the procedures, services, and facilities currently available to this Court are remote.

**Held:** Affirmed

**Memorandum Opinion:** When reviewing the legal sufficiency of the evidence, we credit evidence favorable to the challenged finding and disregard contrary evidence unless a reasonable factfinder could not reject the evidence. Matter of B.C.B., 2016 WL 3165595, at \*3. If there is more than a scintilla of evidence to support the finding, the no evidence challenge fails. Faist v. State, 105 S.W.3d 8, 12 (Tex. App.–Tyler 2003, no pet.). Under a factual sufficiency review, we consider all the evidence presented to determine if the court’s finding is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Id.

Beginning with the first factor, appellant agrees the offense alleged to have been committed was against a person. With respect to the second factor, appellant asserts insufficient evidence establishes he has the sophistication and maturity appropriate for transfer. Here, he relies on the testimony of Jackson, Smith, and Ambers to show he lacked sophistication and maturity. Ambers did not give an opinion on appellant’s level of sophistication and maturity at the time of the hearing; he testified only that appellant lacked sophistication while in his facility months earlier. To the extent Jackson and Smith testified as such, the juvenile court had other evidence establishing the contrary. Moss testified at length about appellant’s attempt to escape during his four months under her supervision and the sophistication of the plan he hatched. Likewise, Gardner believed appellant’s conduct in planning the escape was sophisticated. He believed, after reviewing all the information, that appellant’s sophistication level for his age was elevated and his maturity level was “age appropriate.” Although appellant asserts no evidence shows he developed the escape plan, the record belies his claim. The juvenile court could have reasonably inferred appellant concocted the plan because detailed written notes were found in his possession. A witness identified appellant as the “master mind behind the escape.” Having reviewed the record, we conclude the evidence was legally and factually sufficient to support the trial court’s finding that appellant’s sophistication and maturity justified transfer.

The third factor is the record and previous history of the child. Here, appellant acknowledges he has a criminal history but asserts it is “non-violent.” He argues that when in an environment with access to his medications, his criminal activities decreased.

Gardner testified at length about appellant’s criminal history and we disagree with appellant’s assertion that it is non-violent. Prior to this offense, from September 2011 to October 2014, appellant had many run-ins with the law: age 11, resisting arrest; age 13, assault; age 13, unlawfully carrying a weapon; age 14, robbery; and age 14, theft from a person. As a result, he had been ordered to attend many non-residential programs and had previously been placed at the Dallas County Youth Village. While in the juvenile system, officials tried family therapy, electronic monitoring, substance abuse treatment, intensive supervision, and detention alternative daily reporting, all without any apparent lasting effect. At the time of this offense, he was on probation for theft from a person. Then, after his arrest, he was placed in the Hunt County juvenile facility, where he picked up additional charges related to an assault of a younger, smaller boy, attempted escape, and assault on a public servant. Finally, both Gardner and Dr. Kennedy believed transfer was appropriate. Considering the evidence, we conclude it is legally and factually sufficient to support the juvenile court’s finding that appellant’s record and previous history indicate a “higher degree of supervision” is required.

The last factor is “the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.” Here, appellant relies on testimony from Ambers that appellant did well in his program, followed the rules, and presented no problems. He argues Ambers was the “most informed person” to provide an assessment and directs us to his testimony that if a juvenile has the history that appellant does and had been through other programs, he would look to the “most least restrictive” well-structured environment possible. However, Ambers also acknowledged some situations merit transfer to the adult system. And, as stated previously, while appellant had established an extensive criminal history, his efforts at rehabilitation were littered with failure. Legally and factually sufficient evidence support the court’s finding that the prospects of protecting the public and rehabilitating appellant through the juvenile system are remote.

**Conclusion:** The juvenile court addressed each of the factors set out in section 54.02(f) in deciding to waive its jurisdiction and transfer appellant to criminal court. Having reviewed the record, we conclude the juvenile court made a “reasonably principled application of the legislative criteria” in determining the statutory factors all weighed in favor of transfer and that transfer in this case is appropriate due to both the serious nature of the alleged offense and the background of the appellant. We overrule the second issue. We affirm the trial court’s order waiving jurisdiction and transferring appellant to criminal district court.