Discretionary transfer statute determined by when certification hearing takes place.[In the Matter of D.L.C.](17-2-2A)

On March 21, 2017, the Texarkana Court of Appeals found that in Discretionary Transfer proceeding, the application of TFC § 54.02(a) [Under 18 Certification] or §54.02(j) [Over 18 Certification] is based on a person’s age at the time the Discretionary Transfer hearing begins not when it is filed by the State.

¶ 17-2-2A. **In the Matter of D.L.C.**, MEMORANDUM, No. 06-16-00058-CV, 2017 WL 1055680 (Tex.App.—Texarkana, 3/21/2017).

**Facts:** On November 4, 2015, Cindy and Joe Black arrived at the Hunt County Sheriff’s Office and spoke with Joel Gibson, an investigator. The purpose of the Blacks’ visit was to file a report alleging that D.L.C. had sexually assaulted their daughter, Jane,2 in July 2014. During their meeting, the Blacks provided Gibson with D.L.C.’s contact information, and Cindy prepared and signed an affidavit.3 Less than two weeks later, Jane met with Charlene Green, a forensic interviewer at the Hunt County Child Advocacy Center (CAC). Jane’s account of the incident was consistent with the facts contained in Cindy’s affidavit.

On December 2, Jane met with Kim Bassinger, a sexual assault nurse examiner, and she submitted to a sexual assault medical forensic examination. On that same day, Gibson attempted to contact D.L.C. for the purpose of interviewing him about the incident. Gibson also attempted to contact D.L.C. on December 11. After failing to contact D.L.C. by telephone, Gibson went to D.L.C.’s home to make contact and schedule an appointment with him. On January 6, 2016, Gibson spoke with D.L.C. at Gibson’s office. During the conversation, D.L.C. admitted he had had sexual relations with Jane but he claimed it was consensual.

On that same day, Gibson spoke with Seth Stevens, the young man who had received Jane’s text message explaining she had been sexually and physically assaulted.4 Stevens prepared an affidavit and provided it to Gibson on January 11. In addition to speaking with Stevens, Gibson interviewed Chad Cline on January 12, who also prepared an affidavit.5 Gibson concluded his investigation and, on January 14, submitted a paper referral to the Hunt County Juvenile Probation Office, alleging that D.L.C. had committed aggravated sexual assault. On January 27, the paperwork, along with a request for an adjudication petition, was sent to the County Attorney’s Office of Hunt County. Gibson conceded that he was aware at the time he began his investigation that D.L.C. was seventeen years old and would turn eighteen in three months.6

On February 18, 2016, the State filed its original adjudication petition against D.L.C., alleging that he had committed the offense of aggravated sexual assault.7 The petition stated that D.L.C. was sixteen years of age at the time of the alleged offense, but that he was seventeen years of age at the time the petition was filed. About a week later, the State filed its original adjudication petition seeking a determinate sentence setting forth substantially the same allegations as it had in its first petition; however, the offense charged was sexual assault.8 On April 16, 2016, the State filed its petition for discretionary transfer to criminal court, alleging that D.L.C. had committed aggravated sexual assault.9 The trial court then issued an order to complete a diagnostic study, a social evaluation, and a full investigation.

Approximately one month later, the trial court received the report of Robert Lackey, Ph.D., who had conducted a psychological evaluation of D.L.C. Lackey’s report stated, among other things,

With respect to [D.L.C.]’s Risk of Dangerous [sic], data collected in this evaluation revealed he is likely in the Moderate range of Risk as compared to other juvenile offenders. Results of this evaluation indicated [D.L.C] does not have a history of severe antisocial behavior. He noted that he has previously received “two or three” speeding tickets, a ticket for Disorderly Conduct –Fighting and was recently charged with possession of Alcohol and a “Marijuana pipe.” He noted that when he was younger, approximately twelve years of age, that he was placed in detention for “Assault. ... ”

[D.L.C] did not report a history of engaging in unprovoked violent behavior; however, records provided by Glen Oaks, a local psychiatric facility, noted [D.L.C.] was hospitalized for assaulting his father’s pregnant girlfriend by kicking her in the stomach. Throughout the psychiatric records are indications of “out of control behaviors, outbursts of anger, agitation and damage to property, reportedly “punching the walls of the home.”

....

[D.L.C.] appears to have demonstrated less serious violence toward individuals, noting the previous physical fight he was cited for and the previous “assault” which caused him to be placed in detention at twelve years of age. Reportedly these encounters were not serious and did not result in serious bodily injury. [D.L.C.] also appears to have previous minor criminal acts. Records revealed a history of reported suicidal and homicidal ideation and accompanying psychiatric hospitalization due to these thoughts of self [-]harm and intentions of harming others.

....

As compared to same aged peers who are also juvenile offenders or are also involved with the juvenile judicial system in some manner, [D.L.C.] is at the High range of Sophistication and Maturity.

....

As compared to other juvenile offenders, [D.L.C.] appears to be in the Low range as to his treatment amenability. [D.L.C.]’s responses to various questionnaires and other psychological tools revealed he currently is not reporting symptoms of any mental health disorder. ...

....

[D.L.C.]’s responses to the PAI-A revealed an interest in and motivation for treatment which is below average in comparison to adolescents who are not being seen in a therapeutic setting and his treatment motivation is a great deal lower than is typical of individuals being seen in treatment settings. His responses suggest that he is satisfied with himself as he is, that he is not experiencing marked distress, and that, as a result, he sees little need for changes in his behavior. However, [D.L.C.] does report a number of strengths, namely his family and boss; that augur well for a relatively smooth treatment process if he were willing to make a commitment to treatment. His responses revealed he may not be experiencing sufficient distress to feel that treatment is warranted.

On July 7, 2016, the State filed its first amended petition for discretionary transfer to criminal court alleging one count of aggravated sexual assault and one count of the lesser-included offense of sexual assault. On July 22, 2016, approximately six weeks after D.L.C.’s eighteenth birthday, the trial court held a hearing on the State’s first amended petition for discretionary transfer. The trial court considered, among other things, “written reports from the probation officer, professional court employees and professional consultants in addition to the testimony of witnesses ....” At the conclusion of the transfer hearing, the trial court granted the State’s amended petition, finding that, among other things, (1) “there [was] probable cause to believe that [D.L.C.] committed the offense as alleged based on testimony of Joel Gibson and Isaac Neal[10] and all the other evidence admitted during the hearing” and (2) “[f]or a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of [D.L.C.].” This appeal followed.

**Held:** Affirmed

**Memorandum Opinion:** Despite the fact that he was eighteen years of age at the time of the hearing, D.L.C. maintains that the juvenile court was required to consider the factors contained in Section 54.02(f) of the Family Code. Kent v. United States, 383 U.S. 541 (1966); Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).12 The State responds that the juvenile court was not required to consider the factors listed in Section 54.02(f) and that it properly considered the factors contained in Section 54.02(j). We agree.

Section 54.02 establishes two procedures for discretionary transfer of juvenile proceedings to district court. TEX. FAM. CODE ANN. § 54.02 (West 2014). Section 54.02(a) applies where the juvenile is less than eighteen years of age at the time of the transfer hearing. See TEX. FAM. CODE ANN. § 54.02(a). Section 54.02(j) applies where the juvenile is eighteen years old at the time of the transfer hearing. The factors listed in Section 54.02(f) are not applicable to a discretionary transfer under Section 54.02(j). TEX. FAM. CODE ANN. § 54.02(f) (In making the determination required by Subsection (a) of this section, the court shall consider ....”).

When an individual turns eighteen years of age pending resolution of a petition for discretionary transfer for a crime allegedly committed when he was sixteen years of age, the State is required to proceed under the statutory subsection applicable when the person to be certified is eighteen years of age or older (Section 54.02(j)), and not the subsection applicable when the person is under the age of eighteen (Section 54.02(a)). Matter of M.A.V., 954 S.W.2d 117, 118 (Tex. App.—San Antonio 1997, pet. denied). This is so whether or not the first petition for waiver of jurisdiction was brought when the person was under eighteen because the application of either subsection is not expressly tied to the age of the person at the time the State filed its petition for discretionary transfer. Id. at 119.

Section 54.02(j) allows transfer of a case to criminal court of a person who, as in this case, although eighteen years of age or older, committed an applicable felony between the ages of ten and seventeen. Section 54.02(j) states,

(j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

(1) the person is 18 years of age or older;

(2) the person was:

(A) 10 years of age or older and under 17 years of age at the time the person is alleged to have committed a capital felony or an offense under Section 19.02, Penal Code [murder];

(B) 14 years of age or older and under 17 years of age at the time the person is alleged to have committed an aggravated controlled substance felony or a felony of the first degree other than an offense under Section 19.02, Penal Code [murder]; or

(C) 15 years of age or older and under 17 years of age at the time the person is alleged to have committed a felony of the second or third degree or a state jail felony;

(3) no adjudication concerning the alleged offense has been made or no adjudication hearing concerning the offense has been conducted;

(4) the juvenile court finds from a preponderance of the evidence that:

(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or

(B) after due diligence of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person because:

(i) the state did not have probable cause to proceed in juvenile court and new evidence has been found since the 18th birthday of the person;

(ii) the person could not be found; or

(iii) a previous transfer order was reversed by an appellate court or set aside by a district court; and

(5) the juvenile court determines that there is probable cause to believe that the child before the court committed the offense alleged.

TEX. FAM. CODE ANN. § 54.02(j).

**Conclusion:** Because D.L.C. was sixteen years of age at the time the offenses were alleged to have occurred, seventeen years of age at the time the State filed its petition for discretionary transfer, and eighteen years of age at the time of the hearing on the State’s petition for discretionary transfer, the transfer was governed by Section 54.02(j), not Section 54.02(a). Accordingly, the factors listed in Section 54.02(f) did not apply, and the juvenile court considered the appropriate factors under Section 54.02(j).