



COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

CARLOS SORIA PAZ,	§	No. 08-15-00354-CR
	§	
Appellant,	§	Appeal from
	§	
v.	§	243rd District Court
	§	
THE STATE OF TEXAS,	§	of El Paso County, Texas
	§	
Appellee.	§	(TC # 20150D02411)
	§	

**OPINION**

In this appeal from a conviction following a guilty plea, we are asked to determine if claimed jurisdictional error was preserved, whether a supplemental clerk's record can be considered, and if so, whether it shows that a juvenile court properly waived jurisdiction and transferred a case to the district court. We conclude that the issue was not timely urged or ruled upon by the trial court below, but that in any event, a supplemental reporter's record answers each of Appellant's assertions. Accordingly, we affirm.

**FACTUAL SUMMARY**

The State indicted Appellant on two counts of aggravated sexual assault of a child. He pled guilty and the trial court sentenced him to ten years' confinement. As the chronology below indicates, Appellant was a juvenile at the time of the offense, but the indictments were handed

down when he was an adult. The issues all revolve around whether a juvenile court properly waived its jurisdiction to hear the matter. The relevant sequence of events follows

- January 1, 2008. “On or about” this date, Appellant committed the aggravated sexual assaults on a three year old child. Appellant was at least fourteen years old at the time.
- February 20, 2011. Appellant turned eighteen years old.
- September 4, 2012. Investigators met with the child on a CPS caseworker’s request, but the child did not make any outcry of any sexual abuse.
- August 27, 2013. The child victim, after almost a year of counseling, gave a recorded interview claiming that Appellant sexually assaulted him two times, likely in 2008.
- October 22, 2014. The El Paso County Attorney’s Office filed a petition to waive the juvenile court’s jurisdiction for the alleged delinquent conduct and to transfer the case to a criminal court.
- February 18, 2015. The 65th District Court for El Paso County (a designated juvenile court), heard the motion to transfer, and after taking evidence and making findings, transferred the case to the district court.
- May 20, 2015. A grand jury indicted Appellant on two counts of aggravated sexual assault.

During the pendency of the criminal case, Appellant filed a motion to dismiss for want of jurisdiction. The motion recited the date of the alleged offense, Appellant’s age as of the date of the offense, and made this single claim: “Counsel could find no paperwork in his review of the Court’s (or District Clerk’s) electronic file indicating that [Appellant] has been certified as an Adult for purposes of the present prosecution.” From our record, the motion was never set for a hearing. Appellant pled guilty to the charges, and the trial court sentenced him to ten years’ confinement.

## **ISSUES ON APPEAL**

In his opening brief, Appellant raises a single issue that claims that there is insufficient evidence to show that a juvenile court waived its exclusive jurisdiction over the offense. The argument has four sub-parts, claiming there is no evidence that: (1) Appellant was fourteen years or older at the time of the offense; (2) there was probable cause to believe that he committed the offense; (3) the State exercised due diligence in pursuing the case before Appellant turned eighteen years of age; and (4) a petition, notice, and summons were properly issued. This issue was raised before a supplemental reporter's record was filed which contains a transcribed hearing of the juvenile court hearing that resulted in that court's waiver of jurisdiction.

The State replied to Appellant's principle brief, claiming that the challenge to the jurisdiction was not preserved for review because Appellant never obtain a timely ruling on his motion to dismiss. The State also argues that we cannot consider the supplemental transcript, and that without any record of the juvenile proceedings, we must affirm. Finally, the State alternatively contends that the transcript answers all of Appellant's challenges. Appellant's reply brief responds to the waiver assertions, and seemingly narrows his challenge solely to the purported lack of evidence of a proper petition, notice, and summons.

## **APPLICABLE LAW AND STANDARD OF REVIEW**

Texas juvenile courts have the exclusive jurisdiction to adjudicate "delinquent conduct" committed by a "child." TEX.FAM.CODE ANN. § 51.04(a) (West Supp. 2016). Delinquent conduct includes that which "violates a penal law of this state . . . punishable by imprisonment or by confinement in jail." *Id.* at § 51.03(a)(1). A "child" as defined by the Juvenile Justice Code is any "person . . . ten years of age or older and under 17 years of age[.]" *Id.* at § 51.02(2)(A). Unless a juvenile court properly waives its exclusive jurisdiction over the delinquent conduct, no other court

may entertain a prosecution for any offense committed by a child. TEX.PENAL CODE ANN. § 8.07(b)(West Supp. 2016); *Moon v. State*, 451 S.W.3d 28, 37 (Tex.Crim.App. 2014).

Relevant to this case, the Code makes provision for a person presently eighteen years of age, but who committed the crime as a child. A juvenile court may waive its exclusive original jurisdiction and transfer such a person to an appropriate district court if: (1) the defendant is presently eighteen years of age or older; (2) was fourteen years of age or older but under seventeen years of age at the time the offense (so long as the offense was a qualifying first degree felony); (3) the matter has not been previously adjudicated; and (4) there is probable cause to believe the child committed the offense. TEX.FAM.CODE ANN. § 54.02(j)(1),(2)(B),(3),(5)(West 2014). In addition, the juvenile court must address the reasons for delay in prosecuting the charges, and must find, based on 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;

*Id.* at § 54.02(j)(4).

The juvenile court makes this determination following the filing and service of a petition, both of which must meet several procedural requirements. TEX.FAM.CODE ANN. § 53.04 (West 2014)(technical requirements for the petition); *id.* at §53.05 (timing of the hearing); *id.* at § 53.06 (contents of the summons); *id.* at § 53.07 (requirements for service of the summons). The juvenile court then conducts a hearing to decide these issues. *Id.* at § 54.02 (1).

Texas law has changed as to when the juvenile court's decision might be challenged. In this case, the law required any challenge to take place during the criminal proceeding:

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

TEX.CODE CRIM.PROC.ANN. art. 4.18(a)(West Supp.2016).<sup>1</sup> Relevant here, the Code of Criminal Procedure also dictates that the challenge must be raised by motion that must be presented to the court before entry of a guilty plea:

- (b) The motion must be filed and presented to the presiding judge of the court:
  - (1) if the defendant enters a plea of guilty or no contest, before the plea;

*Id.* at (b)(1). Upon doing so, the trial court “shall promptly conduct a hearing without a jury and rule on the motion.” *Id.* at (c). Appellant would have carried the burden to establish by a preponderance of the evidence any fact necessary to prevail on the motion. *Id.* Failure to follow this procedure as set out in Article 4.18 denies the defendant the right to contest jurisdiction. *Id.* at 4.18(d)(“A person may not contest the jurisdiction of the court on the ground that the juvenile court has exclusive jurisdiction if: (1) the person does not file a motion within the time requirements of this article.”).

In turn, we review the juvenile court’s decision under a hybrid abuse of discretion standard. *Moon*, 451 S.W.3d at 47. Under that standard, we first determine if the juvenile court had sufficient information before it to exercise its discretion, and next decide if the juvenile court acted without

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<sup>1</sup> Effective on September 15, 2015, Article 4.18 was amended to make discretionary transfers appealable as directed by the Family Code. Act of May 22, 2015, 84th Leg., R.S. ch. 74, 2015 Sess. Law Serv. 1065 (West)(codified at TEX.CODE CRIM.PROC.ANN. art. 4.18§(g) and TEX.FAM.CODE ANN. § 56.01(c)). Those revisions make the juvenile court’s order directly appealable to the courts of appeals and then the Texas Supreme Court.

reference to any guiding rules or principles in its application of that discretion. *Id.* at 47, quoting *In re J.R.C.S.*, 393 S.W.3d 903, 914 (Tex.App.--El Paso 2012, no writ).

### **PRESERVATION OF ERROR**

Before addressing the merits of Appellant's complaint, we first determine if error was preserved. *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex.Crim.App. 2014) ("Because preservation of error is a systemic requirement on appeal, a court of appeals should review preservation of error regardless of whether the issue was raised by the parties."). We conclude that whether viewed under the requirements of Article 4.18 or the Texas Rules of Appellate Procedure, the complaint was not preserved. At the trial court, Appellant filed a motion to dismiss for lack of jurisdiction but it was never set for hearing. That failure leads to three problems. First, Appellant never obtained a ruling on the motion before he pled guilty. Second, even if there was an implied ruling, it came too late. Third, the issues he urges now on appeal do not comport with the complaint in the motion to dismiss.

Our record contains no express ruling on Appellant's motion to dismiss for lack of jurisdiction. Yet a complaining party must generally obtain an adverse ruling on an objection. *See Martinez v. State*, 17 S.W.3d 677, 686 (Tex.Crim.App. 2000) (failure to obtain ruling on admission of evidence); *Dunavin v. State*, 611 S.W.2d 91, 97 (Tex.Crim.App. 1981) (failure to obtain ruling on suppression motion). Appellant responds that after he had already admitted guilt and the judge had passed sentence, his counsel had this exchange with the trial court:

[Appellant's Counsel]: Just one other matter, Your Honor, something that I've discussed with opposing counsel. And that is, Your Honor, my client was 14 years old when these events allegedly occurred. As the Court is well aware, I'm not allowed to challenge that during the pendency of the case up to trial, only afterwards. I've discussed the matter with opposing counsel. They've basically -- I believe that the two counsel have agreed the Court could decide whether my client can still appeal the certification, Your Honor, which apparently was a waiver. And so we're asking the Court -- I understand that he signed a certification of right of

appeal. We're asking the Court just to let him appeal on those grounds since he was only 14, and that was basically eight years ago, Your Honor.

THE COURT: Yes, sir.

There are circumstances when the trial court implicitly denies a motion. In *Montanez v. State*, 195 S.W.3d 101, 105 (Tex.Crim.App. 2006), for instance, the Texas Court of Criminal Appeals held that a suppression issue was not waived even though the record lacked a formal ruling. Nonetheless, in that case the trial court actually conducted a hearing on the matter, stated that he would rule, and the docket sheet in the record showed that the court had considered the suppression issue. Given those circumstances, the certification of that defendant's right to appeal a pretrial ruling "unquestionably indicated" that the trial court had denied the motion to suppress. *Id.* at 105. The record here is a bit different. There is no indication there was ever a hearing on the motion to dismiss. In the above quoted exchange, counsel never expressly mentioned the motion. There were no arguments made in support of, or against, the motion. Unlike *Montanez*, the record does not "unquestionably" reflect that the trial court specifically denied Appellant's motion. See *Collins v. State*, 08-15-00103-CR, 2017 WL 192913, at \*11 (Tex.App.--El Paso Jan. 18, 2017, pet. filed)(not designated for publication)(no implied ruling on motion to disqualify counsel).

Even were there an implied ruling, Appellant never presented his motion to dismiss to the trial court *before* the guilty plea as required by Article 4.18. Because Article 4.18 requires *both* that the motion be filed *and* presented to the judge before the guilty plea, we view either failure as fatal to preservation. Certainly, the failure to file a motion at all waives the error. *Adams v. State*, 161 S.W.3d 113, 114 (Tex.App.--Houston [14th Dist.] 2004, pet. ref'd)(failure to file motion contesting basis of transfer order waived complaint); *Miller v. State*, 981 S.W.2d 447 (Tex.App.--Texarkana 1998, pet. ref'd)(failure to comply with the statutory requirements of

Article 4.18 forfeits claim that the juvenile court's waiver of jurisdiction was void); *Mays v. State*, 01-03-01345-CR, 2005 WL 1189676, at \*3 (Tex.App.--Houston [1st Dist.] May 19, 2005, no pet.)(not designated for publication)(failure to raise any objection prior to guilty plea waived challenge to clerical error in transfer order); *but see Light v. State*, 993 S.W.2d 740, 747 (Tex.App.--Austin 1999), *vacated*, 15 S.W.3d 104 (Tex.Crim.App. 2000)(arguing that Article 4.18 was limited to unique situations when the age of the juvenile precluded prosecution).

Similar to any motion or objection raised at the trial court, a party must obtain a *timely* adverse ruling from the trial court. *Lankston v. State*, 827 S.W.2d 907, 909 (Tex.Crim.App. 1992)(“all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him *at a time when the trial court is in a proper position to do something about it.*”)[emphasis added]; *In the Matter of M.L.M.*, 459 S.W.3d 120, 125 (Tex.App.--El Paso 2015, no pet.)(tardy objection to construction of statute waived complaint). Any implied ruling here came after the trial court already exercised jurisdiction and passed sentence.

Finally, the motion below only complained that counsel had not found a notation that there was a transfer order. On appeal, that challenge has morphed into arguments over whether the record supports three specific statutory prerequisites to transfer, and a challenge to the technical requirements of the petition, citation, and service of process. To preserve a complaint for appellate review, a defendant must make a timely and specific objection to the trial court. TEX.R.APP.P. 33.1(a); *Lovill v. State*, 319 S.W.3d 687, 691-92 (Tex.Crim.App. 2009). An objection stating one legal basis may not be used to support a different legal theory on appeal. *See Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex.Crim.App. 2004)(objection based on Fifth Amendment did not preserve state constitutional ground); *Goff v. State*, 931 S.W.2d 537, 551 (Tex.Crim.App. 1996)(variance



in charge objection with contention on appeal waived error); *Bell v. State*, 938 S.W.2d 35, 54 (Tex.Crim.App. 1996), *cert. denied*, 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997)(objection at trial regarding illegal arrest did not preserve claim of illegal search and seizure on appeal). “The purpose of requiring a specific objection in the trial court is twofold: (1) to inform the trial judge of the basis of the objection and give him the opportunity to rule on it; (2) to give opposing counsel the opportunity to respond to the complaint.” *Resendez v. State*, 306 S.W.3d 308, 312 (Tex.Crim.App. 2009). That last point is particularly germane here. Had Appellant raised concerns about the form of the petition, or the service of the citation below, relevant evidence and exhibits regarding those issues might have been admitted documenting what transpired. As it is, both Appellant and the State are arguing over a supplemental record from the juvenile proceeding that was never before the trial court.

We conclude that the error is waived. Appellant urges that even if there is a waiver, we should consider his issue in the interest of justice. But were we to do so, the supplemental reporter’s record contains a transcript of the juvenile court hearing that answers each of Appellant’s complaints.<sup>2</sup> At the hearing, Appellant stipulated that he was fifteen years old on the date of the offense, which answers his first sub-issue on appeal. The State called three of the investigators as witnesses who collectively explained the delay in bringing the indictment. Another person was

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<sup>2</sup> The State urges that we strike the supplemental reporter’s record because it comes from another cause (and thus we should affirm based on an absence of a complete record). In making this argument, the State cites cases such as *Solomon v. State*, 49 S.W.3d 356, 365 (Tex.Crim.App. 2001) which holds that a party cannot supplement the record with a docket sheet from a witness’s criminal case to show whether a plea deal was made or not. That line of cases is inapposite. Instead, we look to *Ellis v. State*, 543 S.W.2d 135 (Tex.Crim.App. 1976). There, the juvenile court’s transfer order was not filed with the trial court at the time of trial, but the trial court later directed the clerk to prepare and file a supplemental transcript containing the transfer order. While the court of criminal appeals strongly urged that the papers and proceedings from the juvenile court be filed and kept with the criminal proceeding, it refused to strike the supplemental transcript, preferring that “the true facts might be shown.” *Id.* at 137; *see also Rushing v. State*, 50 S.W.3d 715, 734 (Tex.App.--Waco 2001), *aff’d*, 85 S.W.3d 283 (Tex.Crim.App. 2002)(also considering supplemental transcript from juvenile proceeding filed during pendency of appeal). Accordingly, we would decline to strike the supplemental reporter’s record.

continuously sexually assaulting the child, and only during the investigation of that situation did Appellant's much earlier involvement come to light. Even at that, the child victim did not give a description of events until undergoing almost a year of counseling. At that time, the child detailed the allegations against Appellant that fit within the substance of the indictments. We easily conclude that the juvenile court had sufficient evidence before it to make the findings required under Section 54.02(j).<sup>3</sup>

Appellant continues to urge, however, that the record still lacks any showing that the procedural requirements for the petition and service of the petition were met. We disagree. The State admitted a diagnostic study as an exhibit that describes the petition to waive juvenile court jurisdiction and to transfer the matter to a criminal court. The record also shows that Appellant was present and appeared with counsel. While a juvenile's appearance at such a proceeding does not waive the technical service requirements, the same is not true for an adult. *Cf. In the Matter of M.W.*, 523 S.W.2d 513, 514-15 (Tex.Civ.App.--El Paso 1975, no writ)(service on juvenile's attorney ineffective and appearance by filing answer did not waive defect) *with* TEX.FAM.CODE ANN CODE § 53.06(e)(“A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.”) Appellant was an adult at the time of this hearing and thus his appearance waived any technical service deficiency. Thus even were we to reach the merits, we would overrule Appellant's argument. We overrule Issue One and affirm the conviction.

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<sup>3</sup> The trial court stated on the record:

The court finds that the respondent is 18 years of age or older. That he was 14 years of age or older and under 17 at the time that the offense was alleged to have been committed. That there was no adjudication concerning the alleged offense. The court finds from a preponderance of the evidence that the reason -- for a reason beyond the control of the state, it was not practical to proceed in a juvenile court before the 18th birthday of the person. The juvenile -- The court determines that there is probable cause to believe that the child before the court committed the alleged offense and so the court is going to transfer this case to district court.

May 31, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.  
Hughes, J., not participating

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