

Opinion issued August 17, 2017



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-16-00802-CV

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**IN THE MATTER OF E. H.**

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**On Appeal from the County Court at Law No. 3  
Brazoria County, Texas  
Trial Court Case No. JV21037**

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**CONCURRING OPINION**

I concur in the Court’s disposition and join the majority opinion because it correctly applies the standard of review to determine that the trial court did not abuse its discretion in waiving jurisdiction over E.H.’s case. I write separately, however, to express my lack of confidence that the record sufficiently demonstrates that “because of the seriousness of the offense alleged or the background of the child the

welfare of the community requires criminal proceedings.” TEX. FAM. CODE § 54.02(a)(3). Specifically, the State’s failure to address why a determinate sentence would be inappropriate gives me pause in light of the strong public policy disfavoring certifying juveniles as adults unless necessary and the State’s burden to prove that the resources available to the juvenile court are not adequate.

The laws allowing a juvenile court to waive jurisdiction have their place. But the Court of Criminal Appeals has admonished that few circumstances justify transferring a child from juvenile to criminal court:

The transfer of a juvenile offender from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be “protected and rehabilitated rather than subjected to the harshness of the criminal system.”

*Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App. 2014).

The Legislature’s concern with serving the needs of children in the juvenile system whenever possible is also reflected in the stated purposes of the Juvenile Justice Code:

This title shall be construed to effectuate the following public purposes:

- (1) to provide for the protection of the public and public safety;
- (2) consistent with the protection of the public and public safety:
  - (A) to promote the concept of punishment for criminal acts;
  - (B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and

(C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;

(3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;

(4) to protect the welfare of the community and to control the commission of unlawful acts by children;

(5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and

(6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

TEX. FAM. CODE § 51.01.

This case involves a juvenile charged with sexually molesting his 7-year-old niece. In its petition to transfer the proceedings to criminal court, the State alleged that "the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the Juvenile Court" were "in serious doubt."

The evidence at the hearing established that E.H. was 16 years old at the time of the alleged offenses. There was evidence of a history of sexual abuse in his immediate family, as E.H.'s sister testified that their father was in prison for molesting her. E.H. does not have a criminal record. He has a history of some

marijuana use and acting out while confined in juvenile detention for the underlying offenses. He has exhibited an uncooperative attitude toward officials. He operates at a low average intellectual range and, possibly because of ADHD, he has had problems with school. He laughs when he is nervous, even in situations in which that reaction is inappropriate, demonstrating immaturity.

There was testimony at his transfer hearing that the juvenile probation department believes that participation in available rehabilitative programs for a minimum of two years is necessary for a “person to get what they need for a sexual charge.” Significantly, E.H.’s probation officer testified that general juvenile sex-offender probation conditions, coupled with participating in a drug-treatment program, would be appropriate for E.H.

But the juvenile probation office can only confine or supervise E.H. until he turns 18. Accordingly, by the time of the adult-certification hearing, there were only five months left until E.H.’s 18th birthday. Thus, E.H.’s probation office further testified that E.H. should be certified as an adult, as the period for which the juvenile probation office would continue to have jurisdiction over E.H. was far short of the minimum two years needed to provide rehabilitative services.

The juvenile court’s order waiving its jurisdiction recites that E.H. “is of sufficient sophistication and maturity to be tried as an adult,” and that “because of the records and previous history of the child and because of the extreme and severe

nature of the alleged offense(s), the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by use of the procedure, services and facilitates which are currently available to the Juvenile Court are in doubt.” But a review of the record actually reflects that the primary evidence supporting the juvenile court’s decision is the probation officer’s testimony that E.H. does not have time to complete appropriate juvenile rehabilitation services before his 18th birthday.<sup>1</sup>

There are provisions in the Family Code, however, that can extend the jurisdiction of the juvenile court beyond the age 18. Specifically, a habitual juvenile offender, or a juvenile accused of a laundry list of offenses (including sexual assault and aggravated sexual assault, the offenses for which E.H. was charged), may be referred by the prosecuting attorney to the grand jury for a determinate sentence.

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<sup>1</sup> The probation officer’s testimony that there was not a strong likelihood that juvenile services would allow for rehabilitation of E.H. was based on more than just the small amount of time that would pass before E.H. turned 18. It was also based on her view that E.H. “has not taken any responsibility for his actions” and “is not being remorseful” in a way that shows that he “wants to work the program” that the juvenile system offers for rehabilitation. The probation officer’s testimony suggests that a juvenile charged with a serious offense must, in effect, admit guilt to demonstrate an openness to rehabilitative services (and thus prevent transfer to criminal court). That is incorrect.

Whether a juvenile is to remain in the juvenile system or be certified for transfer to the adult criminal justice system should not be contingent on the juvenile shedding himself of the presumption of innocence. Whatever may inform the analysis of a juvenile’s “likelihood of rehabilitation,” it should not be whether he has admitted guilt.

TEX. FAM. CODE § 53.045. Determinate sentences allow the juvenile courts to maintain jurisdiction beyond a juvenile's 18th birthday, resulting in several possible outcomes, including release before completion of the juvenile's sentence, supervised release at the age of 19, transfer to the Texas Department of Criminal Justice (TDCJ) to serve the remainder of a sentence, or transfer to TDCJ jurisdiction to serve a remaining sentence on parole. *See, e.g., In re J.H.*, 150 S.W.3d 477, 480 n.1 (Tex. App.—Austin 2004, pet. denied) (“A determinate sentence places a juvenile under the custody and control of the Texas Youth Commission with several possible outcomes.”).<sup>2</sup> “In enacting the determinate sentencing statutes, the legislature has furthered a compelling state interest by striking a balance between the state's interest in providing for the care, protection and development of its children and its interest in providing protection and security for its general citizenry.” *In re S.B.C.*, 805 S.W.2d 1, 4 (Tex. App.—Tyler 1991, writ denied) (citation omitted).

Unlike in many adult certification cases, the State's own witnesses agreed in this case that the juvenile system has programs available that could appropriately address E.H.'s alleged sexual misconduct and his admitted substance abuse. E.H. thus argues that the juvenile court abused its discretion by waiving jurisdiction

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<sup>2</sup> The possible outcomes for determinate sentencing are set forth in various sections of the Texas Human Resources Code. *See, e.g.,* TEX. HUM. RES. CODE § 244.014 (“Referral of Determinate Sentence Offenders for Transfer”); § 245.151 (“Termination of Control”); § 245.152 (“Determinate Sentence Parole”).

because determinate sentencing could extend the juvenile court's jurisdiction so he could avail himself of those services and because the time constraints were the only circumstance supporting adult certification. In response, the State does *not* argue that determinate sentencing would be insufficient to meet the needs of E.H. and the community. Rather, the State contends that the prosecutor had the discretion to pursue a determinate sentence and simply chose not to do so. Thus, the State argues that the availability of a determinate sentence to rehabilitate E.H. and to protect the community is irrelevant to this Court's analysis of whether the juvenile court abused its discretion in waiving jurisdiction.

This argument is troubling because it is the State's burden to prove that the prospects of adequate protection of the public and likelihood of reasonable rehabilitation of the child by the use of the procedures, services, and facilities currently available to the juvenile court are in serious doubt. *Moon*, 451 S.W.3d at 40. Perhaps there is a reason that a determinate sentence would not be appropriate here, but the record does not reflect one.<sup>3</sup> The testimony that E.H. would turn 18 before he could adequately avail himself of services under the juvenile court system is sufficient to support the trial court's waiver under the applicable standard of

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<sup>3</sup> E.H.'s probation officer acknowledged on cross-examination that determinate sentencing could "significantly" extend the time the juvenile department had to work with E.H., but without explanation disagreed that it would give the department two years to work with E.H., and stated that she was unaware that the juvenile court could place a child on probation for up to ten years.

review. But when the facts of a case reflect that a determinate sentence may be feasible, and the juvenile argues that feasibility defeats the State's burden of proof in a waiver-of-juvenile-court-jurisdiction proceeding, the policies behind preserving juvenile court jurisdiction over children when possible are not served by allowing a prosecutor discretion to not avail itself of a procedure and offer no explanation for that decision.

While the State is the only party that can seek a determinate sentence, that does not mean that the State's decision not to do so when it would be appropriate should insulate it from inquiry. The State *should* seek a determinate sentence if aging out of the system is the only barrier to a juvenile's adequate punishment and rehabilitation. If the State chooses not to, it should be put to the burden—at a minimum—of establishing why such a choice is not appropriate unless it is otherwise obvious on the record that a determinative sentence and reasonable rehabilitation are not viable options in the case. Putting such information in the record will enable juvenile courts to make more informed decisions, decreasing the risk of juveniles being forced into criminal court simply because of their age in contravention of laws requiring that they be served in juvenile court when possible.



Harvey Brown  
Justice

Panel consists of Chief Justice Radack and Justices Brown and Lloyd.

Justice Brown, concurring in the judgment.

Do not publish. TEX. R. APP. P. 47.2(b).