

NO. 12-10-00159-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

<i>IN THE MATTER</i>	§	<i>APPEAL FROM THE</i>
<i>OF J.M.,</i>	§	<i>COUNTY COURT AT LAW #3</i>
<i>A JUVENILE</i>	§	<i>SMITH COUNTY, TEXAS</i>

MEMORANDUM OPINION

J.M. appeals from a juvenile court order requiring him to register as a sex offender in a nonpublic database. In three issues, J.M. argues that the juvenile court lacked jurisdiction to enter the registration order and that the juvenile court judge should have recused himself. The State did not file a brief. We affirm.

BACKGROUND

As part of a delinquency hearing held in January 2008, J.M. admitted that he engaged in delinquent conduct, specifically that he committed what would have been, had he been an adult, the felony offense of aggravated sexual assault. The juvenile court found that he engaged in delinquent conduct and ordered that he be committed to the Texas Youth Commission. The same day, the juvenile court entered an order deferring a determination of whether J.M. would be required to register as a sex offender until he had “completed a sex offender treatment program as a condition of probation.”

On September 15, 2009, the Texas Youth Commission notified the juvenile court that J.M. failed to complete “treatment for the sex offense.” On September 16, 2009, the Texas Youth Commission formally notified the court that J.M. would be discharged from the Youth Commission on September 22, 2009, because he would soon turn nineteen.

According to J.M.'s trial counsel, the State filed a motion to require J.M. to register¹ as a sex offender in February 2010.² The court held hearings on the State's motion in March and May 2010. At the conclusion of the May hearing, the court ordered J.M. to register in a nonpublic law enforcement database. This appeal followed.

JURISDICTION

In his first issue, J.M. argues that the juvenile court lacked jurisdiction to order him to register as a sex offender.

Applicable Law

Generally, a person convicted of, or a child adjudicated as a delinquent for, a serious sexual offense is required to register with the law enforcement authority in the community where the person lives. *See* TEX. CODE CRIM. PROC. ANN. art. 62.051(a) (West Supp. 2010). For a child adjudicated as a delinquent, the juvenile court may leave the registration requirement in place, it can exempt the respondent from registration, or it may defer a decision as to whether registration is required. *See* TEX. CODE CRIM. PROC. ANN. art. 62.352(a), (b) (West 2006). If the court defers its decision, that decision is deferred "until the respondent has completed treatment for the respondent's sexual offense as a condition of probation or while committed to the Texas Youth Commission." TEX. CODE CRIM. PROC. ANN. art. 62.352(b)(1). Under the statute, the court retains discretion and jurisdiction to require, or to exempt the respondent from, registration "at any time during the treatment or on the successful or unsuccessful completion of treatment." *Id.*, art. 62.352(c). If the treatment is successful, "the respondent is exempted from registration . . . unless a hearing . . . is held on motion of the state, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration." *Id.* The treatment provider is required to notify the juvenile court and the prosecuting attorney of the successful completion of the treatment "[n]ot later than the 10th day after the date of the . . . successful completion of treatment." *Id.*

¹ In its letter to the court, the Texas Youth Commission represented to the court that J.M. "will be required to register as a sex offender" pursuant to Article 62.13(j), code of criminal procedure." Article 62.13 was repealed by the legislature in 2005. Act of June 18, 2005, 79th Leg. R.S., ch. 1008, § 1.01, 2005 Tex Gen. Laws 3385, 3411.

² The motion is not in the appellate record.

Argument

J.M. argues that the juvenile court lacked jurisdiction to revisit its decision not to require him to register as a sex offender because it lost jurisdiction of this case when he reached the age of majority. In support of his argument, he cites as examples the decisions in *In re T.E.* No. 03-09-00148-CV, 2010 Tex. App. LEXIS 8312 (Tex. App.–Austin, October 14, 2010, no pet.) (mem. op.), and *In re J.D.G.*, 141 S.W.3d 319 (Tex. App.–Corpus Christi 2004, no pet.). In those cases, the State filed to require the child to register prior to the child aging out of the juvenile system. *In re T.E.*, 2010 Tex. App. LEXIS 8312, at *2; *In re J.D.G.*, 141 S.W.3d at 321.

However, these cases do not stand for the proposition that such a motion must be filed before the child ages out. Implied, though unstated, in J.M.’s brief is the general rule that a juvenile court’s jurisdiction ends when the child reaches the age of eighteen or nineteen. *See, e.g., In re N.J.A.*, 997 S.W.2d 554, 555-56 (Tex. 1999). This rule is premised on the juvenile court’s exclusive and original jurisdiction over proceedings involving a “child” who has committed delinquent conduct. *See* TEX. FAM. CODE ANN. § 51.04(a) (West 2008). A child is defined by the family code as a person ten years of age or older and under the age of seventeen or a person who is under the age of eighteen but who committed or is alleged to have committed delinquent conduct before turning seventeen years of age. *See* TEX. FAM. CODE ANN. § 51.02(2) (West Supp. 2010). At the time of juvenile court’s ruling in this case, a child was also defined as a person ten years of age or older and under twenty-one years of age who had been committed to the youth commission. *See* TEX. HUM. RES. CODE ANN. 61.001(7) (West Supp. 2010) *repealed and recodified by* Act of May 19, 2011, 82nd Leg., R.S., ch 85, § 1.007, 2011 Vernon’s Texas Session Law Service 366, 366. For children like J.M. who are not placed on determinate sentences, their commitment ends on their eighteenth birthday if they were placed on community supervision or their nineteenth birthday if they were committed to the youth commission. *See* TEX. FAM. CODE ANN. § 54.05(b) (West 2010), TEX. HUM. RES. CODE ANN. 61.084 (e) (West Supp. 2011) *repealed and recodified by* Act of May 19, 2011, 82nd Leg., R.S., ch 85, § 1.007, 2011 Vernon’s Texas Session Law Service 366, 427.

This general grant, and limitation, of jurisdiction is subject to a number of exceptions, most owing to the fact that the proceedings involving a child may not be resolved before the child ages out. For example, a juvenile court retains jurisdiction over a person when certain

proceedings are pending and were initiated before the child aged out of the juvenile justice system. *See generally* TEX. FAM. CODE ANN. § 51.0412 (West 2008).

There is such an extension of jurisdiction for juvenile courts who defer a decision on whether a juvenile must report. Specifically, Article 62.352, code of criminal procedure, provides that if a court enters a deferral order, “the court retains discretion and jurisdiction” to address the reporting issue “at any time during the treatment or on the successful or unsuccessful completion of treatment.” TEX. CODE CRIM. PROC. ANN. art. 62.352(c). The article further provides that following successful completion of the treatment, the respondent is exempted from registration unless a hearing is held on the motion of the state, “regardless of whether the respondent is 18 years of age or older,” and the court determines the interests of the public require registration. *Id.* As the attorney general has noted, the statute does not specifically address the unsuccessful completion of treatment. *See* Op. Tex. Att’y Gen. No. GA-772 (2010).

J.M. unsuccessfully completed treatment on or about September 15, 2009. The Texas Youth Commission discharged him on September 22, 2009. It is reasonable, at least in some scenarios, that a child would work on treatment until the end of his commitment to the youth commission or until the end of his community supervision. Therefore, whether the child can be said to have completed treatment or not completed treatment would not be known until the end of the child’s commitment, which in at least some cases would be when the child reached the age of eighteen or nineteen. In such a situation, under J.M.’s reading of the statute, a juvenile court would be empowered to address the issue of registration only until the last day of the child’s commitment.³ Or as applied to this case, because J.M. was not determined to have been unsuccessful with his treatment until approximately a week before the youth commission released him, the court would have been able to address the registration issue only within the very narrow window between the determination that he had failed to complete treatment and his nineteenth birthday.

The legislature could have written the statute to require that result. However, the legislature would not have expanded or provided jurisdiction for the juvenile court to act if it intended the court to act only during a time when it already had jurisdiction. Instead, with Article 62.352, the legislature provided that the juvenile court’s jurisdiction extended for the

³ Texas Code of Criminal Procedure Article 62.353 provides an independent basis for an adult to ask the court to relieve him of a reporting requirement imposed for the adjudication for a delinquent act.

duration of treatment or to the end, successful or unsuccessful, of treatment. *See* TEX. CODE CRIM. PROC. ANN. art. 62.352(c). In this case, this additional grant of jurisdiction was sufficient to allow the juvenile court to address the State's motion following J.M.'s unsuccessful completion of treatment. Accordingly, we overrule J.M.'s first issue.

RECUSAL OF THE JUVENILE COURT

In his second and third issues, J.M. argues that the juvenile court judge erred in failing to recuse himself and that he was denied due process because the juvenile court judge lacked impartiality.

J.M. filed a motion to recuse on May 10, 2010. As J.M. acknowledges, a motion to recuse in a civil cases is governed by Rule 18a, Texas Rules of Civil Procedure. Rule 18a imposes certain requirements on a motion to recuse, including that the motion be verified and that it be filed more than ten days in advance of the hearing. TEX. R. CIV. P. 18a(a) (West 2003, amended 2011).⁴

J.M.'s motion did not comply with these requirements. It was not verified, and it was filed three days in advance of the hearing. Nevertheless, the juvenile court judge ruled on the motion, declining to voluntarily recuse himself and referring the matter to the regional presiding judge. *See* TEX. R. CIV. P. 18a(c), (d), (f)(1). J.M. does not complain of this action. Instead, he argues that the juvenile court erred when it overruled what he characterizes as an oral motion to recuse made at the hearing on May 13, 2010.

At the hearing, J.M.'s counsel stated that

I received the transcript from our last hearing[,] and I noticed in that transcript a statement from [the assistant district attorney] regarding that he and [another employee of the district attorney's office] had spoken with this Court in January prior to filing the motion. And based on that additional information, I would ask the Court to reconsider the request to recuse.

The juvenile court judge stated that he had not considered the request to recuse but, as required by Rule 18a, had referred the motion to the administrative judge. There was some more discussion, which ended with J.M.'s counsel asking the court "to reconsider voluntary recusal

⁴ References are to the Rules of Civil Procedure in effect at the time of this hearing. The Texas Supreme Court revised Rule 18a in 2011. *See* Supreme Court Order, Misc. Docket No. 11-9128 (July 5, 2011).

based on ex parte communication described in the transcript of the last hearing.” The juvenile court denied that request.

This court has held that a party does not preserve a complaint about a ruling on a motion to recuse if it makes an oral motion to recuse that does not comply with Rule 18a. *See Barron v. State Attorney Gen.*, 108 S.W.3d 379, 382-83 (Tex. App.–Tyler 2003, no pet.); *see also Rammah v. Abdeljaber*, 235 S.W.3d 269, 274-75 (Tex. App.–Dallas 2007, no pet.) (“Texas courts have consistently held that the procedural requirements of Rule 18a are mandatory.”) (citing *Carson v. Serrano*, 96 S.W.3d 697, 698 (Tex. App.–Texarkana 2003, pet. denied) (movant could not complain on appeal about trial judge's refusal to recuse himself because motion was procedurally defective); *Gill v. Tex. Dep't of Criminal Justice*, 3 S.W.3d 576, 579 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (movant waived right to complain of denial of recusal motion because he did not file verified motion)).⁵

Neither J.M.'s written motion nor his oral motion complies with the requirements of Rule 18a. Furthermore, J.M.'s oral request was not so much a formal motion to recuse as it was a request for the juvenile court judge to voluntarily recuse himself from the case. As to the written motion, the administrative judge declined to hold a hearing, finding that the written motion was “facially insufficient to warrant a hearing.” J.M. does not appeal from that determination. *See* TEX. R. CIV. P. 18a(f).

Because the orally made request for recusal did not comply with the requirements of Rule 18a that existed at the time, J.M.'s complaint about it is not preserved for our review. We overrule J.M.'s third issue.

J.M.'s bare due process complaint is similarly frustrated by his failure to properly raise the issue. J.M. argues that the juvenile court engaged in ex parte communication with the State's attorneys and, therefore, was not an impartial judge as required by our laws.

Under Texas Code of Judicial Conduct, Canon 3(B), a judge is prohibited from initiating, permitting, or considering ex parte communications concerning the merits of a pending case. TEX. CODE JUD. CONDUCT, Canon 3(B), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 1997). An ex parte communication is one that involves fewer than all parties who are legally entitled to be present during the discussion of any matter. *See Erskine v. Baker*, 22

⁵ The newly promulgated rule overrules this principle and requires a judge to rule on a motion that does not comply with the rule. *See* TEX. R. CIV. P. 18a(f)(1).

S.W.3d 537, 539 (Tex. App.–El Paso 2000, pet. denied). The purpose behind prohibiting ex parte communications is to ensure that all legally interested parties are given their full right to be heard under the law and to ensure equal treatment of all parties. *Abdygapparova v. State*, 243 S.W.3d 191, 207 (Tex. App.–San Antonio 2007, pet. ref’d). At a minimum, due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Campbell v. Stucki*, 220 S.W.3d 562, 570 (Tex. App.–Tyler 2007, no pet.). This court has held that a trial court violates the nonmoving party’s procedural due process right to be heard if the court grants a motion before the scheduled hearing date on the motion. *See id.*

Because of the procedural posture of J.M.’s claim, we cannot determine that the juvenile court judge predetermined an outcome in this case or discussed the matter with the assistant district attorney in an inappropriate manner. At the second hearing on the State’s motion, J.M.’s counsel objected to proceeding on the basis of the statement made at the first hearing that two of the State’s lawyers had spoken to the court. However, the statement made by the State is less than a full account of what occurred. One of the State’s lawyers, in describing the procedural timeline of the case, stated that he “did not know” that a motion was required by the court and said, “I think I spoke to you [the juvenile court judge].” Shortly thereafter, he stated that he thought that he and another lawyer “spoke to [the court] sometime in late January about this and [then] filed that motion.” The court, filling in the timeline, said “[a]sking if you need to file a motion before I could take action.” The State’s attorney responded, “Sure, and that’s what we did.”

This appears to establish that the juvenile court judge spoke to counsel for the State, although it is not clear whether J.M.’s counsel was present at that meeting. However, it does not establish, as J.M. asserts, “that the trial judge lacked [the] impartiality that due process requires.” In fact, the most plausible reading of the exchange is that the State’s attorney asked the juvenile court judge how to get relief, and the judge did not address the merits of the matter but told him to make a formal request, that is, to file a motion. This course of action would serve to provide due process to J.M., specifically, an opportunity to be heard on the issue. There are other constructions of the exchange that are plausible. However, without a hearing or a developed record as to exactly what occurred, we cannot reach a conclusion that the juvenile court judge did anything other than tell an attorney to make a formal request and allow the other party to be heard if he wanted something from the court. Accordingly, we hold that this record does not

show that J.M.'s right to due process was compromised because the juvenile court judge lacked impartiality. We overrule Appellant's fourth issue.

DISPOSITION

Having overruled Appellant's four issues, we *affirm* the judgment of the juvenile court.

SAM GRIFFITH
Justice

Opinion delivered November 23, 2011.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)