

NO. 12-10-00287-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*LYLE THORN,
APPELLANT*

§

APPEAL FROM THE 114TH

V.

§

JUDICIAL DISTRICT COURT

*THE STATE OF TEXAS,
APPELLEE*

§

SMITH COUNTY, TEXAS

MEMORANDUM OPINION

Lyle Thorn appeals from his conviction for the felony offense of indecency with a child. In four issues, Appellant argues that the juvenile court lacked jurisdiction to transfer his case to adult court and that there was insufficient evidence for the juvenile court to transfer his case to adult court. We affirm.

BACKGROUND

The State filed a petition in April 2009 alleging that Appellant, who was then seventeen years of age, had committed a delinquent act. Specifically, the State alleged that he committed the felony offense of aggravated sexual assault. In June 2009, the State filed a petition requesting the juvenile court to waive its original jurisdiction and transfer this matter to district court where Appellant could be prosecuted as an adult.

The juvenile court held a hearing on the State's petition in August 2009. At the conclusion of the hearing, the juvenile court waived its jurisdiction and transferred the matter to district court. In the district court, Appellant pleaded guilty to the felony offense of indecency

with a child.¹ There was no plea agreement, and the trial court assessed a sentence of imprisonment for twelve years. This appeal followed.

JURISDICTION OF THE JUVENILE COURT

In his first and second issues, Appellant argues that the juvenile court lacked jurisdiction to transfer his case to district court because it failed to serve his mother in advance of the transfer hearing and because all of the relevant documents were not provided to him prior to the transfer hearing.

Applicable Law

There are a number of procedural requirements that must be met before a juvenile court may waive its jurisdiction and transfer a child to district court. Two of those requirements are at issue here. The first requirement is that a juvenile court must issue a summons to the child and the child's parent, guardian, or custodian before holding a hearing. *See* TEX. FAM. CODE ANN. § 53.06(a), 54.02(b) (West 2008 & Supp. 2010). This requirement is placed on the juvenile court, and the court lacks jurisdiction to transfer the matter to district court if it does not comply with the summons requirement. *See Carlson v. State*, 151 S.W.3d 643, 645-46 (Tex. App.–Eastland 2004, no pet.) (citing *Grayless v. State*, 567 S.W.2d 216 (Tex. Crim. App. 1978); *Ex parte Burkhardt*, 253 S.W. 259, 260 (Tex. Crim. App. 1923) (op. on reh'g)).

The second requirement is that the court must provide to the child any written material it may consider at the hearing. The present law requires that this material be provided at least five days prior to the transfer hearing. *See* TEX. FAM. CODE ANN. § 54.02(e) (West Supp. 2010). The previous requirement had been that the materials be provided one day in advance, and the law amending the statute continued in effect the previous law for adjudications of conduct that occurred before September 1, 2009. *See* Act of June 16, 1973, 63rd Leg., R.S., ch. 544, 1973 Tex. Gen. Laws 1460, 1476, *amended by* Act of Sept. 1, 2009, 81st Leg., ch. 1354, § 1, 2009 Tex. Gen. Laws 4287, 4287-88.

Analysis

The record does not show that Appellant's mother was served with a summons for the

¹ The State agreed to allow Appellant to plead guilty to the lesser offense after further investigation raised questions as to whether Appellant's actions amounted to an aggravated sexual assault as defined by statute.

transfer hearing.² However, the record does show that she appeared at the transfer hearing. The statute allows that a party other than the child can waive service by appearing voluntarily at the hearing. See TEX FAM. CODE ANN. § 53.06(e). Courts have concluded, based on Section 53.06(e), that a court has jurisdiction when a parent appears at the hearing even if the parent had not been served with a summons. See *K.M.P. v. State*, 701 S.W.2d 939, 941 (Tex. App.–Fort Worth 1986, no writ) (father waived requirement of service by appearing and voluntarily submitting to jurisdiction of court); *R.M.R. v. State*, No. 01-01-00347-CV, 2001 Tex. App. LEXIS 8099, at *3-4 (Tex. App.–Houston [1st Dist.] Dec. 6, 2001, no pet.) (mem. op., not designated for publication) (no complaint preserved when mother appeared at hearing and juvenile did not raise an objection to lack of a summons of guardian ad litem); *c.f. Carlson v. State*, 151 S.W.3d 643, 645 (Tex. App.–Eastland 2004, no pet.) (court lacked jurisdiction because parent not served and did not appear or otherwise waive service).

We agree that a parent can waive service of process by appearing at the hearing, and we hold that Appellant’s mother did so when she appeared at the hearing. Accordingly, the juvenile court’s failure to serve Appellant’s mother did not deprive it of jurisdiction to consider the State’s motion to transfer. We overrule Appellant’s first issue.

With respect to the requirement that a juvenile be provided with written material in advance of the hearing, Appellant argues that there is nothing in the record to indicate that he was provided with the written material in advance of the hearing as required by statute.

The documents considered by the court consist of reports from Child Protective Services, a report from the juvenile probation department, and a report and two addenda to that report from James Brown. Appellant is correct that there is no formal showing that the juvenile court provided the documents to his counsel as required by the statute. But there is also no showing that the documents were not provided, and Appellant did not object when the documents were introduced.

As the State notes, Appellant’s counsel submitted a bill for her services in which she records that she received and reviewed the report and the two addenda from “Jim Brown” on June 25, 2009, July 24, 2009, and August 4, 2009, and that she met with Brown on July 20, 2009. Her billing also shows that she received and reviewed other items of discovery during the summer of

² The record shows summonses for both Appellant and his mother. The record also shows that Appellant was served with both summonses, but does not show that his mother was served.

2009. In addition, Appellant's counsel appeared to have reviewed Brown's reports and specifically directed the court to the "last report from Mr. Brown" and to some of his conclusions that were helpful to Appellant's position during her presentation.

After considering all of the evidence, we cannot conclude that the juvenile court violated Section 54.02(e) by not providing written documents at least a day before the hearing. It appears that the documents were provided. Because Appellant did not object to the admission of the documents, and because there was no hearing on the issue, there is no basis on which we can conclude that the juvenile court did not comply with its responsibility to provide the documents at least a day before the hearing. We overrule Appellant's second issue.

JUDGMENT OF THE JUVENILE COURT

In his third and fourth issues, Appellant argues that the evidence is legally and factually insufficient to support the juvenile court's decision to waive jurisdiction and transfer this case to district court.

Standard of Review

An appellate court reviews a juvenile court's decision to waive jurisdiction and transfer a juvenile to the adult criminal justice system for an abuse of discretion. *See Faisst v. State*, 105 S.W.3d 8, 12 (Tex. App.—Tyler 2003, no pet.); *see also State v. Lopez*, 196 S.W.3d 872, 874 (Tex. App.—Dallas 2006, pet. ref'd.). In making the decision to transfer a juvenile to adult court, the court must find that there is probable cause to believe that the juvenile committed the offense alleged in the petition, and that the welfare of the community requires criminal prosecution because of the seriousness of the offense alleged or the background of the child. *See* TEX. FAM. CODE ANN. § 54.02(a)(3).

Specifically, the court is to consider

- (1) whether the alleged offense was against a 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.

TEX. FAM. CODE ANN. § 54.02(f).

Not every factor must be given equal weight. See *In re J.J.*, 916 S.W.2d 532, 535 (Tex. App.–Dallas 1995, no writ); *In re C.C.G.*, 805 S.W.2d 10, 15 (Tex. App.–Tyler 1991, writ denied). And a court does not abuse its discretion by finding the community’s welfare requires transfer due to the seriousness of the crime alone, despite the background of the juvenile. See *In the Matter of D.D.*, 938 S.W.2d 172, 177 (Tex. App.–Fort Worth 1996, no pet.); *C.C.G.*, 805 S.W.2d at 15.

When the legal sufficiency of the evidence supporting a certification and transfer order is challenged, we view the evidence in the light most favorable to the court’s findings and determine whether there is any evidence to support the findings. *Faisst*, 105 S.W.3d at 12 (citing *J.J.*, 916 S.W.2d at 535). We do not second guess the fact finder unless only one inference can be drawn from the evidence, and a no evidence challenge fails if there is more than a scintilla of evidence to support the juvenile court’s finding. *Faisst*, 105 S.W.3d at 12.

When the factual sufficiency of the evidence to support a certification and transfer order is challenged, we consider all of the evidence to determine if the court’s finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.* (citing *C.M. v. State*, 884 S.W.2d 562, 563 (Tex. App.–San Antonio 1994, no writ)).

Analysis

Appellant argues that the juvenile court erred in waiving jurisdiction and transferring this case to district court because “[b]oth experts regularly used by the juvenile court disagreed with the certification and believed that the appropriate measure would be to maintain [Appellant] in the juvenile justice system.” Appellant further argues that he was harmed by this error because the State argued in the juvenile court that the juvenile system was inadequate to offer rehabilitation and supervision but then argued in district court that he should be imprisoned.

James Brown was one of the experts who compiled a report for the juvenile court. He concluded, with some reservations, that his testing indicated a “low probability of future sexual offenses.” He recommended that Appellant be treated in an outpatient program if he were to continue in the juvenile system. Brown did not make a specific recommendation that Appellant be continued in the juvenile system.³ Judith Stewart completed a social evaluation and investigative report for the court. When asked about Brown’s conclusions as to Appellant’s level

³ Appellant asserts that Brown was concerned that if Appellant “were transferred to the adult system that he has an immature understanding of the legal system and possible consequences.” Brown did express a conclusion the Appellant had “an immature understanding of the legal system and of the possible consequences” but did not differentiate between the juvenile and adult adjudication systems.

of sophistication, Stewart agreed that he seemed to have an immature understanding of the legal system and possible consequences. And Stewart agreed that Appellant's lack of sophistication would be a concern to her if Appellant were to be transferred to adult court. Stewart testified that her initial recommendation had been that Appellant be on "intensive supervision with sex offender treatment." In the end, however, she testified that she prepared her report "both ways" and "really had no recommendation." In her written report, Stewart stated that it was the opinion of Smith County Juvenile Services that the resources available to them were "not adequate to ensure the rehabilitation of [Appellant]" and recommended that he be transferred to district court.

The juvenile court is not bound to follow the recommendations of experts, and the recommendations given in this case are not as unequivocal as Appellant asserts. These experts' reports acknowledged the same salient facts: Appellant came from a troubled home. He had an undistinguished school record and no previous instances of committing sexual offenses against children.⁴ The implication of Appellant's age was important to the court's decision-making process. Appellant was nearing his eighteenth birthday. This limited the court's flexibility because most of the provisions of the juvenile law expire on the child's eighteenth birthday. Appellant had not yet been adjudicated nor had the State sought a grand jury petition pursuant to Texas Family Code Section 53.045, which would have allowed the court to assess a sentence that extended beyond Appellant's eighteenth birthday. *See* TEX. FAM. CODE ANN. § 54.04(d)(3) (West Supp. 2010); *Bleys v. State*, 319 S.W.3d 857, 863 (Tex. App.—San Antonio 2010, no pet.) (juvenile court lacks jurisdiction to impose determinate sentencing if state does not refer petition to grand jury). The experts agreed that Appellant needed counseling, but the juvenile court could have ordered Appellant to participate in counseling only for a very short period of time.

In balancing these facts, we hold that the juvenile court did not abuse its discretion. With respect to the legal sufficiency of the evidence, Appellant does not challenge the juvenile court's probable cause determination, and there is some evidence that the welfare of the community required criminal prosecution. Specifically, there is evidence that Appellant was in need of rehabilitative treatment and that the juvenile system, because of his age and the statutory limitations, was unable to provide that treatment. With respect to the factual sufficiency of the evidence, after considering all of the evidence, we hold that the juvenile court's determination was

⁴ At the time of Brown's June 2009 report, Appellant had a child who was four months old. There is no information in the record as to the age of that child's mother.

within its discretion. The offense alleged was serious. The child's level of sophistication was commensurate with his age, and he did not have a previous record. The likelihood of rehabilitation in the juvenile system was low because Appellant was about to age out of the system. The court's decision is not against the great weight of the evidence nor does it represent a manifest injustice. We overrule Appellant's third and fourth issues.

DISPOSITION

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

SAM GRIFFITH

Justice

Opinion issued November 23, 2011.

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

(DO NOT PUBLISH)