NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA IN THE INTEREST OF T. S.	*	**NO. 2007-CA-0255**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

APPEAL FROM
JUVENILE COURT ORLEANS PARISH
NO. 2006-254-01-DQ-E, SECTION "E"
Honorable Louis F. Douglas, Judge
* * * * * *

CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray and Judge David S. Gorbaty)

MURRAY, J., CONCURS IN PART, DISSENTS IN PART

DERWYN D. BUNTON
JUVENILE JUSTICE PROJECT OF LOUISIANA
1600 ORETHA CASTLE HALEY BOULEVARD
NEW ORLEANS LA 70113

-AND-

BARRY JAMES GERHARZ
JUVENILE REGIONAL SERVICES
1600 ORETHA CASTLE HALEY BOULEVARD
NEW ORLEANS, LA 70113

COUNSEL FOR APPELLANT, T. S.

EDDIE J. JORDAN, JR., ORLEANS PARISH DISTRICT ATTORNEY
ALYSON GRAUGNARD, ORLEANS PARISH ASSISTANT DISTRICT ATTORNEY
1340 POYDRAS STREET, SUITE 700
NEW ORLEANS, LA 70112

COUNSEL FOR APPELLEE

ADJUDICATION VACATED.
REMANDED.

T. S., an adjudicated juvenile delinquent, appeals his adjudication, the juvenile court's finding of non-indigency, and its placement of T. S. in the custody of the Department of Public Safety and Corrections, Office of Youth Development (OYD). He also seeks a refund of the costs of the transcripts of the juvenile court proceedings.

On September 11, 2006, T. S. was charged in the above captioned case with one count each of illegal possession of a handgun by a juvenile (La. R.S. 14:95.8), the illegal carrying of weapons (La. R.S. 14:95A(4)), and possession of marijuana (La. R.S. 40:966). The court declared T. S. indigent and appointed a public defender to represent him. Trial commenced on November 8, 2006, and was recessed to December 19, 2006. On that date, the court adjudicated T. S. a delinquent as to all three counts. The court ordered a pre-disposition investigation and reset the matter for disposition. On January 18, 2007, the court committed T. S. to the Department of Public Safety and Corrections for six months on all three counts, and it suspended all but ninety days with respect to the first count and suspended the commitment in full as to the second and third counts, the sentences to run concurrently. New counsel subsequently enrolled and moved for an appeal,

which was duly granted.

Officer Reynolds Rigney testified that on September 10, 2006, he received information from T. S.' mother that T. S. had been at her house, had argued with her and her boyfriend, and had left in a truck with some friends. He stated that the mother told him that T. S. did not have a driver's license and did not have permission to use the truck, which she indicated belonged to her mother. Officer Rigney testified that the mother told him that T. S. was fifteen years old and that she had seen a gun in T. S.' waistband. Officer Rigney stated that later that evening the mother called again to inform him that T. S. could be found under the 1-10 overpass in the 900 block of N. Claiborne Avenue.

Officer Rigney testified that he went to that location and saw a truck matching the description given by T. S.' mother. He testified he approached the truck and saw several juveniles sitting inside, including T. S., who was sitting behind the wheel of the truck. Officer Rigney stated that he ordered T. S. to exit, and as T. S. did so, he kicked a gun that was sitting on the floorboard, moving it into the officer's line of sight. Officer Rigney testified that he handcuffed T. S. and searched him, finding a bag of marijuana in T. S.' pocket. Officer Rigney stated that he then searched the truck and found a machete behind the driver's seat. Officer Rigney formally advised T. S. of his rights and transported him to the Juvenile Bureau. Officer Rigney also seized $220.00 in $20.00 bills from T. S.

T. S.' mother testified that T. S. lived with his grandmother, but she collected his SSI checks and then gave the money to him. She testified that on the night of the arrest, T. S. had come by her house with a few friends of whom she was afraid. She stated that T. S. had gotten into an altercation with her boyfriend and then had left in her mother's truck. She denied seeing T. S. with a gun, but she

insisted that she then went to the police station to notify them of T. S.' departure so that the police could determine if he had a gun. She stated that she later followed the police to the area where T. S. was found, and she testified that an officer beat T. S. when he exited the truck. She insisted that she did not see the officer seize the gun, nor did she see a gun when T. S. exited the car. She stated that the money seized at T. S.' arrest was the proceeds of his SSI check that she had given him to buy new school clothes.

T. S.' grandmother testified that T. S. had lived with her for some time prior to his arrest, but at the time of his arrest she was in the hospital, and he was staying with other relatives. She testified that she knew T. S. sometimes used her truck, but he only had permission to use it for emergency situations. She stated that she thought that his use of the truck to go to his mother's house to get the money from his SSI check constituted an emergency. She identified the machete found in the back of the truck as a garden tool she used to cut high grass, but she denied all knowledge of the gun found in the truck. She admitted that she allowed T. S. to use her truck even though he did not have a driver's license or a learner's permit. She also stated that out of the SSI check, T. S.' mother would pay his cell phone bill, which she stated was $173.00 a month.

T. S. raises four assignments of error: (1) the trial court lacked jurisdiction over count one of the delinquency petition; (2) the trial court's adjudication of delinquency on all three counts was based on insufficient evidence; (3) the trial court erred by placing T. S. in the custody of the Department of Public Safety and Corrections, Office of Youth Development based upon its mistaken belief that such placement was mandated; and (4) the court erred in its finding that T. S. was not indigent and making him pay for the transcripts in this appeal. In its reply brief,

the State concedes that the evidence was insufficient to support any of the three counts, and it argues that such a finding renders assignments one and three moot.

It appears that T. S. and the State are correct in their assertions that the State failed to present sufficient evidence for any of the three counts. In State v. Brown, 2003-0897, p. 22 (La. 4/12/05*),* 907 So. 2d 1, 18, the Court set forth the standard for determining a claim of insufficiency of evidence:

> When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under this standard, the appellate court "must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Neal,* 00-0674, (La.6/29/01) 796 So.2d 649, *657* (citing *State v. Captville,* 448 So.2d 676, 678 (La.1984)).
>
> When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." *Neal,* 796 So.2d at 657. Ultimately, all evidence, both direct and circumstantial must be sufficient under *Jackson* to prove guilt beyond a reasonable doubt to a rational jury. *Id.* (citing *State v. Rosiere,* 488 So.2d *965,* 968 (La.1986)).

See also State v. Sykes, 2004-1199 (La. App. 4 Cir. 3/9/05*),* 900 So. 2d 156.

With respect to the possession of marijuana charge, the State had to prove that T. S. knowingly possessed marijuana. See La. R.S. 40:966; State v. Hall, 2002-1098 (La. App. 4 Cir. 3/19/03), 843 So. 2d 488; State v. Chambers, 563 So. 2d 579, 580 (La. App. 4 Cir. 1990). In this case, the evidence showed that the substance was seized from T. S.' pocket, but the State presented no evidence at trial that the substance was marijuana. Although the State gave pretrial notice that

it would introduce the criminalist's report identifying the substance, it failed to do so at trial. Thus, the evidence was insufficient as to that count.

The State also charged T. S. with possession of a handgun by a juvenile. La. R.S. 15:95.8 provides in pertinent part: "It is unlawful for any person who has not attained the age of seventeen years knowingly to possess any handgun on his person." The gun involved in this case was found by the officer on the floorboard of the truck where T. S. was sitting. Although the officer testified that T. S.' mother told him that T. S. had a gun in his waistband, the mother testified that she did not see a gun and only reported the incident to the police to get the officer to see if T. S. had a gun. In addition, the officer only saw the gun on the floorboard, not on T. S.' person. Thus, the evidence was insufficient to support the conviction for La. R.S. 14:95.8.

Likewise, the evidence was insufficient to support the remaining count. As per the charging document, the State charged T. S. with a violation of La. R.S. 14:95A(4) in connection with the machete found behind the driver's seat. However, a machete does not fit the definition of subpart A(4), which provides: "A. Illegal carrying of weapons is: . . . (4) The manufacture, ownership, possession, custody or use of any switchblade knife, spring knife or other knife or similar instrument having a blade which may be automatically unfolded or extended from a handle by the manipulation of a button, switch, latch or similar contrivance." The "knife" here was described as a machete, which T. S.' grandmother testified she bought to cut weeds at her property. There was no indication in the transcript that the blade retracted at all. Thus, the evidence did not prove a violation of La. R.S. 14:95A(4).

Because the evidence was insufficient as to all three counts, T. S.'

delinquency adjudications and dispositions as to all of the counts must be vacated, and T. S. must be released as to all counts. This finding effectively moots the assignments as to jurisdiction and disposition to the Department of Public Safety and Corrections.

T. S.' remaining assignment concerns the trial court's finding that he was not indigent for appeal purposes, mandating that he pay for the transcripts incidental to his appeal. T. S. argues that he was deemed indigent prior to trial, and appointed counsel represented him both at trial and sentencing. He notes that new counsel then enrolled and filed his motion for appeal, which the court granted, but the motion did not designate any transcripts to be prepared. After the record was lodged in this court without the transcripts, this court ordered the trial court to prepare the necessary transcripts. The trial court responded by forwarding this court a letter wherein the trial court indicated that it learned during trial that T. S.' residence had changed to that of his grandmother, and the court felt that the grandmother's resources, when added to T. S.' SSI check, were sufficient to show that T. S. was no longer indigent. This court then ordered T. S. to pay for the transcripts.

T. S. now argues that the trial court erred by changing his indigency status without holding a formal hearing on the matter, and he asks that the costs of the transcripts should be refunded to him because the court held no formal hearing on this issue. In response, the State cites to several factors listed in the trial court's letter to this court that supported the trial court's finding that T. S. was no longer indigent.[1]

---

[1] New counsel enrolled on appeal, but counsel is listed with the Juvenile Justice Project of Louisiana, and the motion to enroll indicated that counsel was working on a pro bono basis.

It appears that the trial court was unaware prior to trial that T. S. was living with his grandmother instead of his mother at the time the court first found him to be indigent. According to the testimony of both T. S.' mother and his grandmother at trial and apparently contrary to the trial court's understanding, T. S. was living with his grandmother at the time of the offense and at trial. The court was apparently also unaware that T. S. received a monthly SSI check, part of which his mother kept even though T. S. did not live with her. The record before this court is silent as to what information T. S. and his mother provided the court when it found him to be indigent, but apparently the court did not know of T. S.' living arrangements until his mother and grandmother testified at trial.

La. Ch.C. art. 335D provides: "If a child desires a transcript for appeal, he or his parents shall pay the cost of transcription of the record unless the court determines that the child and his parents lack means to pay such cost." The trial court originally found T. S. to be indigent based upon its assumption that T. S. resided with his mother, who apparently was not employed. During trial, the court learned that T. S. did not live with his mother; instead he lived with his grandmother who apparently has some assets. In addition, the court learned that T. S. received a monthly SSI check. The court did not, however, make any change of indigency status at that time. The record reflects that it was not until this court ordered the trial court to prepare the transcripts that the trial court found that T. S. was no longer indigent.

It is not clear, however, that the court could consider the grandmother's assets when determining if T. S. was entitled to free transcripts. Art. 335D refers to the child's parents. La. Ch.C. art. 114(17) defines a parent as "any living person who is presumed to be a parent under the Civil Code or a biological or adoptive

mother or father of a child." We could find no definition of "parent" in the Civil Code, but all references we found appear to be to a mother or father, not a grandmother with whom a child is living. In In re State in Interest of Garrison, 242 So. 2d 110 (La. App. 4 Cir. 1970), this court found that the trial court could not consider the resources of the mother's boyfriend and the boyfriend's father, both of whom lived with the mother, when considering whether the child would have to pay for transcripts for his appeal. A grandmother would at least have a family relationship to a child that a mother's paramour would not have. However, because art. 335D speaks only of the ability of the parent to pay for the transcripts and it is not clear that a grandmother would have the obligation to support a grandchild, it is arguable that the court could not consider her resources. Without her resources, T. S.' SSI check, the proceeds of which his mother gives him only a portion, would not by itself render him ineligible for indigency designation.

Another issue is whether T. S. was entitled to a formal hearing before the court could find that he could afford to pay for the transcripts. La. Ch.C. art. 335D is silent as to whether the child is entitled to a formal hearing before the court can find he is liable for the costs of transcription. T. S. cites to La. Ch.C. art. 320A, dealing with indigency determinations with respect to the appointment of counsel, but that provision merely states that the determination of indigency may be made at "at any stage of the proceedings." The article further provides: "If necessary, the person shall be allowed to summon witnesses to testify before the court concerning his financial ability to employ counsel." That article does not appear to mandate that a hearing be held; instead, it provides that if necessary the child shall be allowed to present witnesses to testify as to his indigency.

The cases cited by the State are not really pertinent. In State v. Frank, 1999-

0553 (La. 1/17/01), 803 So. 2d 1, the Court remanded the case to the trial court for a hearing to determine if the defendant was indigent for purposes of obtaining state-funded expert assistance with respect to the penalty phase of her first degree murder trial. In Frank, the trial court had refused pretrial to consider the defendant's indigency because she had retained counsel. In State in Interest of Dillard, 450 So. 2d 977 (La. App. 5 Cir. 1984), also cited by the State, the court found that the trial court in an abandonment case could not order DHHR to pay the costs of the child's attorney if the child was represented by an indigent defender.

While it is clear that the trial court may revisit the issue of a defendant's indigency at any time during the proceedings, it is unclear if the court must hold a formal hearing on indigency as argued by T. S. La. Ch.C. art. 335D is silent as to whether a hearing must be held when a trial court finds a defendant has the resources to pay for an appellate transcript. However, La. Ch.C. art. 320A, concerning the finding of indigency for the appointment of counsel purposes, appears to provide that a formal hearing to determine indigency is not mandatory, given that the article uses the phrase "if necessary" with respect to the child's presentation of witnesses on the issue.

Given the Children's Code definition of "parent," it appears that if the trial court could change T. S.' indigency status without holding a hearing, it erred by considering his grandmother's resources when it found that he could pay for the costs of his appellate transcripts. Without T. S.' grandmother's assets, it appears that he still could have been indigent at the time the court found that he could pay for the transcripts. However, it is unclear what factors the court considered when finding him indigent originally, therefore, we must remand this issue to the trial court.

For the foregoing reasons, we vacate T. S.' adjudication. We remand this matter for a hearing on T. S.' ability to pay for the transcripts.

ADJUDICATION VACATED.
REMANDED.