



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-17-00029-CV

IN THE MATTER OF A.M.

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-100797-14

MEMORANDUM OPINION¹

I. INTRODUCTION

Appellant A.M. perfected this appeal from the trial court's order transferring him from the Texas Juvenile Justice Department (TJJD) to the Institutional Division of the Texas Department of Criminal Justice (TDCJ). See Tex. Fam. Code Ann. § 56.01 (West Supp. 2016). In a single issue, Appellant argues that

¹See Tex. R. App. P. 47.4.

the trial court abused its discretion by transferring him to the TDCJ instead of placing him on parole.² We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2014, when Appellant was sixteen years old, he and two adult companions burglarized a home at around 5:00 a.m. One of the adults carried a “machine gun,” and the other carried a shotgun; Appellant carried a pellet rifle³ he had found in the home’s yard. While the adults confiscated items from the home, Appellant pointed his gun at the victims to scare them so that they would not move. The adults grabbed televisions, cell phones, tools, and \$2,200 in cash.

The trio left the home and unloaded the stolen property into a shed on a nearby street. There they saw four Hispanic men loading a truck and decided to rob them as well. They took cash and tools from the Hispanic men. Appellant told a police detective that he was paid \$250 for his participation in the robberies.

The State filed a petition alleging that Appellant had engaged in delinquent conduct by committing nine counts of aggravated robbery with a deadly weapon.⁴

²Appellant’s brief does not include a list of issues presented on appeal. See Tex. R. App. P. 38.1(f) (“The brief must state concisely all issues or points presented for review”). We broadly construe portions of Appellant’s argument as his issue on appeal.

³Appellant stipulated at the adjudication hearing “that a deadly weapon was used during the commission of these offenses, to wit: a FIREARM.”

⁴See Tex. Penal Code Ann. § 29.03(a) (West 2011); see also Tex. Fam. Code Ann. § 51.03(a)(1) (West Supp. 2016), § 53.04(a) (West 2014).

A grand jury approved the prosecutor’s determinate sentencing referral.⁵ After a hearing, the trial court adjudicated Appellant delinquent on six of the nine counts charged, found that Appellant had used or exhibited a deadly weapon during the commission of the offense, and committed Appellant to the TJJD for a term of ten years subject to a possible transfer to the TDCJ.⁶ In November 2016, TJJD notified the court that Appellant would turn nineteen years old before completing his three-year statutory minimum period of confinement.⁷ The executive director of TJJD wrote a letter to the trial court requesting a hearing to determine whether Appellant would be transferred to TDCJ or released on parole.⁸ The letter states in part,

⁵See Tex. Fam. Code Ann. § 53.045(a)(7), (b) (West Supp. 2016); *In re L.G.*, No. 02-07-00418-CV, 2008 WL 4053024, at *3 (Tex. App.—Fort Worth Aug. 28, 2008, no pet.) (mem. op.) (“A trial court lacks the authority to impose a determinate sentence unless the State presents its petition to the grand jury, and the grand jury approves it.”).

⁶See Tex. Fam. Code Ann. § 54.03(a), (f) (West 2014); Tex. Fam. Code Ann. § 54.04(d)(3) (West Supp. 2016) (stating that a court may sentence a child to commitment in TJJD with possible transfer to TDCJ if the child engaged in certain criminal conduct and a grand jury approved the State’s petition).

⁷See Tex. Hum. Res. Code Ann. § 245.051(c)(2) (West 2013) (providing that if a child is committed to TJJD for a determinate sentence under family code section 54.04(d)(3), he may not be released to parole without approval of the court imposing sentence if he has not completed three years of his sentence in TJJD).

⁸See Tex. Hum. Res. Code Ann. § 244.014(a) (West Supp. 2016) (stating that after a juvenile who is serving a determinate sentence becomes sixteen years old, TJJD may refer the child to the juvenile court for approval of the child’s transfer to TDCJ if the child has not completed the sentence and “the child’s conduct . . . indicates that the welfare of the community requires the transfer”).

[Appellant] will not complete his statutory minimum period of confinement of three years for this offense[] by the time of his 19th birthday, which will occur on January 26, 2016. . . . According to Section 245.051(c) of the Human Resources Code, “If a child is committed to the department under a determinate sentence under Section 54.04(d)(3), Section 54.04(m), or Section 54.05(f), Family Code, the department may not release the child under supervision without approval of the juvenile court that entered the order of commitment unless the child has served at least: . . . 3 years, if the child was sentenced to commitment for conduct constituting a felony of the first degree.”^[9]

The trial court conducted an evidentiary hearing to determine whether Appellant should be transferred to TDCJ. The State offered the testimony and report of Leonard Cucolo, the TJJD court liaison, and numerous documentary exhibits. Appellant offered the testimony of his grandfather, his brother, and his aunt.

Cucolo explained that Appellant had been confined in TJJD for twenty-three months. During that time period, Appellant had 123 incidents on record, and ninety-eight of those incidents resulted in referrals to the security unit, where Appellant had been admitted thirty-three times. Appellant had committed over twenty major rule violations,¹⁰ including eight assaults involving offensive contact with other youth, three assaults involving offensive contact against staff, four fights not resulting in bodily injury, and twelve instances of aggressive

⁹See Tex. Hum. Res. Code Ann. § 245.051(c) (West 2013).

¹⁰The record reflects that major rule violations “are basically new offenses that a youth can engage in while confined in [TJJD] and actually could be arrested for: assault, possession of prohibitive items, tattooing, exposure, things of that nature.”

misconduct involving verbally threatening others. From January 2016 through June 2016, Appellant had six Level II Hearings for incidents that included exposure,¹¹ “[a]ssault [u]nnecessary [p]hysical [c]ontact,” and tattooing; during those hearings, five of the six incidents alleged were proven.

Appellant’s progress in TJJD’s general rehabilitation program was assessed monthly and was measured by his work through stages of programming, called stage assessments. The stages are designated from 1 to 4 with a fifth and final stage of “Youth Empowerment Status” (“YES”), in which a youth is actively preparing to be released into the community on parole. A report prepared by Cucolo summarized Appellant’s progress at TJJD:

[Appellant] has had difficulty making progress in the general program. He promoted to Stage 2 in August 2015 and Stage 3 in April 2016. As the result of Level II Hearings on April 29, 2016 and May 20, 2016[,] he was demoted to Stage 2 and to Stage 1 respectively. [Appellant] regained Stage 2 in July 2016, Stage 3 in August 2016[,] and was recently promoted to Stage 4 on November 1, 2016. Unfortunately, his attainment of Stage 4 is questionable. As recently as November 9, 2016, [Appellant] was placed in the Security Unit for threatening others.

Cucolo also testified concerning psychological evaluations performed on Appellant by Amy Kegel in August 2016 and by Dr. Marks in December 2016. Kegel’s report indicated that Appellant struggled with his responsibility for committing the offense and with understanding the impact of the offense on the victims. Kegel determined that Appellant needed additional time in treatment

¹¹Appellant exposed himself to a female staff member by masturbating in front of her.

programs and was not ready to be paroled. Dr. Marks's report, prepared four months after Kegel's, noted that although Appellant's control over his behavior had improved, he still struggled to accept responsibility for the offense and to empathize with the victims of it. Because Appellant had successfully completed the Alcohol and Other Drug (AOD) program in September 2015 and was about to successfully complete the Violent Offender Program, Dr. Marks believed Appellant could be successfully paroled if certain parole conditions were imposed.

While in TJJD, Appellant had earned a Certificate of Training in Welding 1, had obtained his GED, and had held a job. Although Appellant required prescriptions for various medications, Cucolo testified that if Appellant were released to parole, a condition would be imposed requiring him to obtain a referral to MHMR to monitor his medications.

Cucolo testified that the committee at Appellant's facility responsible for deciding whether a particular resident should be released to parole or transferred to TDCJ were equally split in Appellant's case. Half of the committee members agreed that Appellant should be released to adult parole, and the other half believed that he should be transferred to TDCJ. Upon review of the committee's split decision, the assistant superintendent recommended Appellant's release to parole while the superintendent recommended Appellant not be released to parole. The Department of Sentenced Offender Disposition then reviewed all of the information and the recommendations concerning Appellant and did not

recommend Appellant's release to parole. All of the recommendations and decisions were then forwarded to the executive director of TJJD to make the final decision, and he decided that Appellant should be transferred to TDCJ for the remainder of his sentence. Cucolo expressed his opinion that the welfare of the community required that Appellant be transferred to TDCJ.

Appellant's Grandfather is a preacher at a church in Fort Worth. He testified that CPS had removed Appellant from his parents when Appellant was a baby. Grandfather became Appellant's guardian, and Appellant had lived with Grandfather and Grandmother from when Appellant was a few months old until the time he was placed in TJJD. Grandfather said that he had talked with Appellant every day while Appellant was at TJJD. Grandfather had visited Appellant every other Saturday. Grandfather had met with Appellant's counselors at TJJD and had kept in contact with them regarding how Appellant was doing. Grandfather testified that Appellant was very remorseful concerning the offense and said that he was not sure why Appellant's psychological evaluations showed otherwise.

Grandfather believed that Appellant could control his behavior if he were released into the community because he had completed his GED and anger management classes. Grandfather testified that he wanted Appellant to return to Grandfather's home and that he had a plan to help Appellant transition out of TJJD. Grandfather said he would help Appellant obtain MHMR services, would get Appellant back into church, and would help Appellant get a welding job.

Grandfather said that he had received calls from FedEx, Wal-Mart, and Tarrant County College with job opportunities for Appellant. Grandfather believed that Appellant would be successful on parole at his home.

Appellant's Brother testified that he was currently living with Grandfather and Grandmother and that he was working at Central Transport. Brother said that whenever his work schedule permitted, he had visited Appellant every other Saturday with Grandmother and Grandfather. Brother testified that he could help Appellant obtain employment at Central Transport. According to Brother, Appellant had shown remorse for the offense. Brother said that he had noticed a difference in Appellant's attitude and behavior since Appellant had been at TJJD; Brother explained that Appellant had calmed down and was "more humble than what he used to be."

Appellant's Aunt, a correctional officer at Mansfield Law Enforcement Center, testified that she had talked to Appellant on the phone and had visited him at TJJD when her work schedule had allowed. Aunt said that she had noticed a big change in Appellant since he was placed at TJJD; Appellant had shown remorse and had said that he was going to change everything about himself, including the people he hung around. Aunt testified that if Appellant were released into the community on parole, he would have a big support system from his grandparents and would have the transportation he needs to complete any programs he is required to attend while on parole.

At the conclusion of the hearing, the trial court stated:

[Appellant], you definitely have a very good and supportive family. You've had -- you have the benefit of that[,] and they've gone above and beyond what I typically see out here[,] which works to your benefit and sort of almost against you because that's the same family that you had when you committed this offense. You had the same support, same group of people, same good examples that were set out. I see that you've made progress and that's clearly reflected in the fact that the people at TJJD were split with what to do with you. But the real issue is whether or not you should be paroled having served less than what your minimum length of stay was required by law to be, and typically for that to happen, I need to see progress and behavior above and beyond just even average. It has to be exceptional, which in your case you've struggled. Now, you've been doing well in the last few months but haven't reached the stage that's typically necessary to be paroled which is Stage 5, the YES Stage, and like I said, depending on who you talk to, some of the folks there at TJJD say yes, some say no. I really can't say that I have a strong enough opinion to go against their recommendation. So[] I'm going to go ahead and grant the motion -- the transfer as requested. That'll be the order of the Court.

The trial court signed an order transferring Appellant to TDCJ. The trial court's order includes the following findings in accordance with section 54.11(k):

- 1) that the Respondent is 18 years of age, having been born on 01/26/98;
- 2) the Respondent has not completed his sentence; and
- 3) the Respondent's conduct indicates that the welfare of the community requires the transfer of the Respondent to the Institutional Division of the [TDCJ].
- 4) The Court affirmatively finds that the Respondent used or exhibited a deadly weapon, to-wit: a firearm, during the commission of the offense or during the immediate flight therefrom.
- 5) The Court finds that [Appellant] has been detained for this offense(s) from **SEPTEMBER 16, 2014 TO OCTOBER 31, 2014 AND FROM JANUARY 23, 2015 to present.**

6) The Court finds that this hearing was conducted not later than the 60th day after the Court received the referral for transfer.

Appellant perfected this appeal.

III. THE LAW CONCERNING TRANSFER ORDERS

When TJJD refers a juvenile who is serving a determinate sentence to a trial court for a possible transfer to TDCJ, the trial court must set a hearing. Tex. Fam. Code Ann. § 54.11(a) (West Supp. 2016). At the conclusion of the hearing, the trial court may either order the juvenile's return to TJJD or transfer the juvenile to TDCJ's custody for the completion of the sentence. *Id.* § 54.11(i). In making the decision of return or transfer, the trial court

may consider the experiences and character of the person before and after commitment to [TJJD] or post-adjudication secure correctional facility, the nature of the penal offense that the person was found to have committed and the manner in which the offense was committed, the abilities of the person to contribute to society, the protection of the victim of the offense or any member of the victim's family, the recommendations of [TJJD], county juvenile board, local juvenile probation department, and prosecuting attorney, the best interests of the person, and any other factor relevant to the issue to be decided.

Id. § 54.11(k); see *In re H.C.*, No. 02–15–00149–CV, 2016 WL 354297, at *2 (Tex. App.—Fort Worth Jan. 28, 2016, no pet.) (mem. op.) (explaining that under section 54.11(k), “the trial court may assign different weights to the factors it considers, and the court need not consider every factor”).

IV. STANDARD OF REVIEW

We review a trial court's decision to transfer a juvenile from TJJD to TDCJ for an abuse of discretion. *In re K.Y.*, 392 S.W.3d 736, 737 (Tex. App.—Dallas 2012, no pet.); *In re J.D.P.*, 149 S.W.3d 790, 792 (Tex. App.—Fort Worth 2004, no pet.). “We are to review the entire record to determine whether the trial court acted without reference to any guiding rules and principles. We may not reverse a trial court's decision merely because we disagree with that decision, so long as the trial court acted within its discretionary authority.” *J.D.P.*, 149 S.W.3d at 792 (citation omitted). An abuse of discretion does not occur when some evidence of substantive and probative character supports the trial court's decision. See *K.Y.*, 392 S.W.3d at 737.

V. NO ABUSE OF DISCRETION BY ORDERING APPELLANT TRANSFERRED TO TDCJ

Appellant—relying on his academic and vocational achievements, testimony from Grandfather and Brother, Dr. Marks's belief that Appellant could be managed in the community with certain parole conditions, and the members of the Special Services Committee that recommended parole—argues that “the testimonial and record evidence weighed heavily in favor of parole for [Appellant] instead of a transfer to the care and custody of the TDCJ.” As detailed above, however, Appellant's troubling behavior during his stay at TJJD prevented him from reaching the YES stage that is required for parole, and the superintendent, the Department of Sentenced Offender Disposition, and the executive director of TJJD—who had the final decision at TJJD—all recommended that Appellant be

transferred to TDCJ. The record before us thus contains some evidence to support the trial court's decision to transfer Appellant to TDCJ. See *In re L.G.G.*, 398 S.W.3d 852, 862–63 (Tex. App.—Corpus Christi 2012, no pet.) (holding some evidence—including seriousness of appellant's offense, short amount of time appellant had served, and protection of the community—supported trial court's decision to transfer appellant to TDCJ); see also *In re L.C.*, No. 02-16-00262-CV, 2017 WL 370959, at *4 (Tex. App.—Fort Worth Jan. 26, 2017, pet. filed) (mem. op.) (holding some evidence—including seriousness of appellant's offense, continuing pattern of aggressive criminal acts at TJJD while knowing that a transfer to TDCJ was possible, and recommendation of TJJD that transfer was warranted—supported trial court's decision to transfer appellant to TDCJ).

Considering the entire record, we cannot conclude that the trial court acted arbitrarily, unreasonably, or without reference to any guiding rules and principles when it ordered that Appellant be transferred to TDCJ. We therefore hold that the trial court did not abuse its discretion by ordering that Appellant be transferred to TDCJ. See Tex. Fam. Code Ann. § 54.11(i)(2), (k); *K.Y.*, 392 S.W.3d at 737; *L.G.G.*, 398 S.W.3d at 863; see also *L.C.*, 2017 WL 370959, at *4–5. We overrule Appellant's sole issue.

VI. CONCLUSION

Having overruled Appellant's sole issue, we affirm the trial court's order transferring Appellant to TDCJ to serve the remainder of his sentence.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, KERR, and PITTMAN, JJ.

DELIVERED: June 29, 2017