

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00687-CV**

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**In the Matter of K. B.**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT  
NO. JV 33737, HONORABLE RHONDA HURLEY, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Appellant K.B., a minor who was at the time of the order fifteen years old, appeals from the trial court's disposition order imposing a ten-year determinate sentence with a minimum of three years' confinement in a secure correctional facility. K.B. raises two issues on appeal: (1) that the trial court abused its discretion in entering the ten-year sentence, noting that the sentence he received was more severe than the sentences imposed on his co-respondents and arguing that the trial court did not comply with progressive-sanctions guidelines set out in the family code; and (2) that the disposition order did not include a finding that the deadly weapon used or exhibited during the offense was a firearm. We modify the disposition order and, as modified, affirm.

**Factual and Procedural Summary**

K.B. and his two co-respondents, O.P. and Z.P., were charged with two counts of aggravated robbery (paragraphs III and IV) and one count of aggravated assault (paragraph V). K.B. and O.P. pled true to aggravated robbery under paragraph III, Z.P. pled to aggravated robbery under paragraph IV, and the State waived the other counts as to each juvenile. The trial court found true

the allegations in the paragraphs each respondent pled to and adjudicated the three juveniles delinquent. For the disposition hearing, the juveniles and the State agreed that the trial court could consider all of the allegations in the State's petition instead of limiting its consideration to the paragraphs to which each boy had pled true. The court then heard testimony related to the juveniles' criminal histories, their family circumstances, their behavior since being detained for the subject offenses, and services provided to the minors following earlier adjudications.

The witness testimony was that the offenses in question were two robberies and an aggravated assault that occurred within minutes of each other on June 18, 2016. In one robbery, which also included the aggravated assault, one of the victims testified that K.B. and his co-respondents pointed a pistol at a husband and wife and stole the husband's wallet; the testimony did not disclose which juvenile held the gun. In the other offense, the victim testified that K.B. approached him in a parking lot, pointed a revolver at him, and demanded his car keys. K.B.'s co-respondents stood nearby and encouraged the victim to listen to K.B. and give him the keys. The victim complied, and the juveniles drove off in the victim's car. The victim testified that he "absolutely" believed K.B. would have killed him if he had not handed over the keys. He also said K.B. is "going to kill somebody. There's no doubt in my mind, and he needs to be locked away."

Maggie Dworaczyk, a casework manager for the intensive supervision probation unit of the juvenile probation department, testified that she was familiar with K.B.'s file, although she was not his probation officer. Dworaczyk said the department "approved" K.B. for level 5 of the Intermediate Sanctions Center (ISC), which she explained would involve a nine- to twelve-month term. She testified that she thought that a commitment to the Local Commitment Program (LCP)

would be for two years.<sup>1</sup> She testified that if K.B. successfully completed an ISC term under a determinate sentence, her department would stay involved with him during probation and that, if he violated any rules of probation, he could be committed to LCP. Dworaczyk believed K.B. would benefit from the ISC because he could work on himself and his behavior, as well as his relationship with his mother, to whom he had been disrespectful, assaultive, and bullying.

Dworaczyk testified that at the time of the subject offenses, K.B. was on “two different probations.” In discussing K.B.’s criminal history, Dworaczyk said that although he was not adjudicated until 2015, K.B. had been involved with the juvenile system since 2013, when he was given therapy, mentoring, and other services. After that successful placement ended, however,

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<sup>1</sup> The LCP is a post-adjudication secure correctional facility that Travis County uses for juvenile commitments instead of a facility run by the Texas Juvenile Justice Department. *See* Tex. Fam. Code §§ 51.02(13) (“secure correctional facility” is residential facility designed to restrict juveniles’ movements and activities and is used for placement of juvenile adjudicated as having committed offense), .125 (describing “post-adjudication secure correctional facility”), .126 (describing “nonsecure correctional facility for juvenile offenders”); 54.04(d) (addressing disposition options when trial court determines juvenile should be placed outside of child’s home), .04011 (explaining when court may commit child to post-adjudication secure correctional facility).

K.B.’s attorney referred to the LCP as the “Long Term Commitment Program or the Local Commitment Program,” and it seems that the LCP is a fairly new program in Travis County, but there is no explanation in the record of how the two programs differ. In fact, Dworaczyk was asked if she could explain the differences between the ISC and the LCP, and she said, “I cannot. I did attempt to find that out if there was any difference. I do know that the units are housed together, and I do know that typically they—the behavior interventions or the therapeutic parts of the program are very individualized. So I would think they could receive the same services because it’s the same.” She believed that both programs offered “very individualized therapeutic services,” and she hoped that the LCP was more in-depth “[g]iven the length of stay.” Dworaczyk agreed that “before the LCP existed[,] juveniles that went to [the Texas Department of Juvenile Justice] or [the Texas Youth Commission] needed a higher level of care or they were a danger and risk to the community beyond what” Travis County could provide, but she had not yet formed an opinion of what LCP could provide. She agreed that “someone who’s in the LCP program is somebody who’s more of a danger to the community.”

“he started having problems again” and was referred to another program for further mentoring and therapy services. He was re-referred to juvenile probation in October 2015, when he was adjudicated for two separate charges of burglary of a habitation. The probation department asked that K.B. be placed outside of his home for those charges, but the trial court ordered that he should be “released home with Day Enrichment,” which consists of a half-day of school and a half-day of drug treatment. K.B. did not do well, and in June 2016, the department asked that K.B. be sent to a residential treatment program. Instead, he was placed a second time on probation at home with Day Enrichment, and two days later, he was arrested on the subject charges. K.B. was also adjudicated for theft in March 2016 and for assault with bodily injury in June 2016, but neither adjudication resulted in a disposition.

Dworaczyk testified that K.B. was removed from his biological parents as an infant and placed with a foster mother, who eventually adopted him. Dworaczyk said that she would not be surprised to learn that K.B. suffered trauma and had probably been abused before being placed with his adoptive mother. She also testified that K.B.’s mother reported that in the last year, K.B. had started spending time with a man “who has purported to be his father” and who has been a bad influence in K.B.’s life. Dworaczyk testified that K.B. was “fairly unpredictable” and that she believed he was a danger to himself and the community.

K.B.’s adoptive mother testified that K.B.’s behavior had begun to worsen when he was thirteen years old, shortly after her brother died, and that it worsened further “when his so-called daddy came into his life.” She hoped that K.B. would return to school, and she said that if he was imprisoned for ten years, “[t]hat would never happen.” She asked that K.B. be placed on probation and “put in a confined facility,” where he could get counseling and other assistance.

Crystal Pena, a juvenile probation officer for O.P.,<sup>2</sup> testified that O.P. was on probation for a “discharge firearm misdemeanor” and was on a waiting list for services when he was arrested for the subject offenses. Pena said O.P. had a supportive and involved family and had recently become a father and “expressed wanting to change for his children.” Finally, Pena said that O.P. had been diagnosed with bipolar disorder and prescribed medication to address his “conduct disorder/depression” and his behavior had since changed for the better.

Ebony Simmons, Z.P.’s probation officer, testified that at the time of the subject offenses, Z.P., like O.P., was on probation for burglary of a habitation but had not yet started his services. A theft-of-property charge from June 2016 was still pending. She said “since January he has seven offenses, so each month he did something. And it escalated into severe and dangerous behavior.” Simmons testified that Z.P.’s parents were very cooperative and involved. Since being detained for the subject offenses, Z.P. had been prescribed medications by a psychiatrist, and his behavior, which had been disrespectful and belligerent, had improved. Z.P.’s father testified that Z.P. had not been in trouble with the law until the last year, when he fell in with “negative peer[s],” and that he had hoped Z.P. would be detained after his earlier disposition hearing so that he could be thoroughly evaluated “to try to see what was going on in his head.” Z.P.’s father said that Z.P.’s behavior and attitude have greatly improved since he started taking his medications.

The trial court ordered that O.P. should receive a disposition of eight years, probated for eight years with a minimum stay in ISC of eighteen months, and that Z.P. should receive a

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<sup>2</sup> We recite the evidence related to O.P. and Z.P. in summary form only to note the differences in testimony related to those juveniles and their circumstances as compared to K.B.

disposition of ten years, probated for ten years with a minimum eighteen-month stay in ISC. K.B. was given a ten-year sentence with a minimum of three years' confinement in the LCP and the possibility of parole or transfer to the Department of Criminal Justice on his nineteenth birthday.

### **Discussion**

K.B. argues that the trial court abused its discretion in sentencing him to a ten-year determinate sentence because the sentence did not comply with progressive-sanctions guidelines set out in the family code, *see* Tex. Fam. Code § 59.001(1), and because the sentence was “unreasonably disproportionate in comparison to the sentences received by his two co-respondents.” He argues that “the facts and circumstances surrounding [K.B.’s] adjudication did not differ substantially enough from his co-respondents to warrant such an inconsistent and severe consequence.”

We review a trial court’s disposition order for an abuse of discretion. *In re C.C.*, 13 S.W.3d 854, 859 (Tex. App.—Austin 2000, no pet.) (quoting *In re J.R.*, 907 S.W.2d 107, 110 (Tex. App.—Austin 1995, no writ) (per curiam)). Although K.B. emphasizes the similarities in the evidence related to him and to his co-respondents, who received more lenient sentences, the record reflects significant differences in K.B.’s history, his behavior, and his family circumstances. The evidence was that K.B.’s co-respondents had supportive and stable family environments, whereas K.B. had been abusive and assaultive toward his adoptive mother and had run off with his purported biological father. The evidence further was that O.P. and Z.P. had been prescribed medications for mental disorders and that their behavior had changed significantly since that time. Further, although all three juveniles had prior criminal histories, K.B. had more numerous and severe prior offenses. K.B. has not shown that the trial court abused its discretion in determining that he should be

sentenced to a ten-year determinate sentence, with three years at the LCP, while his co-respondents would be better served by less severe consequences. *See id.*

As for K.B.'s argument that the trial court erred in varying from the progressive sanctions model as set out in chapter 59 of the family code, *see* Tex. Fam. Code §§ 59.001-.015, a juvenile may not complain on appeal of the trial court's failure to make a sanction level assignment or its departure from the sanction level assignment, *id.* § 59.014(2), (3); *In re C.C.*, 13 S.W.3d at 857-58. We overrule K.B.'s first issue.

In his second issue, K.B. complains that the trial court's disposition order did not include a finding that the deadly weapon used or exhibited by K.B. was a firearm.

Section 54.04 of the family code provides:

If the court orders a disposition under Subsection (d)(3) or (m) and there is an affirmative finding that the defendant used or exhibited a deadly weapon during the commission of the conduct or during immediate flight from commission of the conduct, the court shall enter the finding in the order. If there is an affirmative finding that the deadly weapon was a firearm, the court shall enter that finding in the order.

Tex. Fam. Code § 54.04(g); *see also id.* § 54.04(d)(3) (providing that if trial court determines that juvenile engaged in certain kinds of delinquent conduct, including aggravated assault, and if petition is approved by grand jury, juvenile may be committed to post-adjudication secure correctional facility with possible transfer to Department of Criminal Justice), (m) (addressing when trial court may sentence juvenile adjudicated for habitual felony conduct to term prescribed by subsection (d)(3)). The trial court's order recites, "This Court Further makes an affirmative finding that the Respondent used or exhibited the deadly weapon," but does not include a finding that the deadly weapon was a firearm. K.B. asserts that the lack of the finding is a clerical error that we should

correct, and the State agrees both that it was error for the trial court to omit the finding and that we may, and should, modify the order and affirm as modified. *See* Tex. R. App. P. 43.2(b) (appellate court may modify trial court's judgment and affirm as modified). We therefore sustain K.B.'s second issue.

### **Conclusion**

We have overruled K.B.'s first issue and sustained his second issue. We thus modify the trial court's disposition order to include a specific finding that the deadly weapon used or exhibited by K.B. during the commission of the offense was a firearm. *See id.* As modified, we affirm the trial court's disposition order.

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David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

Modified and, as Modified, Affirmed

Filed: June 14, 2017