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NO. PD-1215-13
IN THE CRIMINAL COURT OF APPEALS
AUSTIN, TEXAS

NO. 01-10-00341-CR
IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS

IN THE 178th DISTRICT COURT
HOUSTON, TEXAS

THE STATE OF TEXAS

Petitioner

v.

CAMERON MOON

Respondent
RECEIVED IN
COURT OF CRIMINAL APPEALS

RESPONSE TO PETITION FOR
DISCRETIONARY REVIEW

DEC 12 2013

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None of the State's points supports review by this Court.

I. The State Waived Its First Point Below and There is No Conflict in the Case Law for This Court to Resolve.

The State first argues that the Court of Appeals applied a "civil" rather than "criminal" standard in reviewing the sufficiency of the evidence to support the juvenile court's ruling and that there are conflicting decisions as to the appropriate standard of review to be applied. First, the State waived this point by failing to raise it in the court of appeals. Second, there is no conflict in the case law regarding the standard of review.

A. The State waived this point in the Court of Appeals.

In its brief in the Court of Appeals, the State stated only that the standard of review was "abuse of discretion" and cited *Faisst v. State*, 105 S.W.3d 8, 12 (Tex. App. – Tyler 2003, no pet.). After the Court of Appeals questioned the parties about the standard during oral argument and requested post-argument supplemental briefing on the standard of review, the State failed to file anything. The State's first point therefore presents nothing for review by this Court.

In discussing the standard of review, the Court of Appeals relied on *Faisst*, which the State cited in its brief as stating the correct standard of review. Given that the Court of Appeals applied the standard advocated by the State, the State has waived any argument for a different standard. See TEX. R. APP. P. 38.1(i).

B. There is no conflict in the case law regarding the standard of review.

Every case has applied exactly the same standard, recognizing that an abuse of discretion occurs when there is insufficient evidence. In *Bleys v. State*, 319 S.W.3d 857, 861 (Tex. App. – San Antonio, 2010, no pet.), which the State cites as applying the “criminal” standard of review, the court stated:

An appellate court reviews a juvenile court’s decision to certify a juvenile defendant as an adult and transfer the proceedings to criminal court under an abuse of discretion standard.

* * *

In determining whether the trial court abused its discretion, the reviewing court considers the sufficiency of the evidence.

* * *

Here, *Bleys* challenged only the factual sufficiency of the evidence to support the trial court’s findings relating to rehabilitation and community welfare. We will, therefore, 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.**

(Emphasis added, citations omitted). In *Faisst v. State*, 105 S.W.3d at 12, which the State cites as applying the “civil” standard of review, the court applied exactly the same standard:

The standard of review for an appellate court in reviewing a juvenile court’s decision to certify a juvenile defendant as an adult is abuse of discretion.

* * *

Relevant factors to be considered when determining if the court abused its discretion include legal and factual sufficiency of the evidence.

* * *

[W]hen 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.**

(Emphasis added, citations omitted). Notably in its brief to the Court of Appeals, the State cited both *Bleys* and *Faisst* as stating the appropriate standard of review. It never contended those cases were wrong or in any way inconsistent or conflicting. Nor are they; in fact, *Bleys* relies on *Faisst*. See *Bleys*, 319 S.W.3d at 861.¹

In short, the State cannot now contend that the Court of Appeals erred in applying the very case law that the State itself cited as correctly stating the standard of review, nor is there any conflict in the jurisprudence of the State that is necessary for this Court to resolve.

II. The Court of Appeals Did Not Fail to Consider Whether One Factor was Sufficient to Support the Juvenile Court's Transfer Order.

The State argues that this Court should determine whether a juvenile court, in weighing the statutory factors for waving jurisdiction, could find that one factor

¹ No case reviewing whether a juvenile court has abused its discretion in granting a transfer order has applied the standard of review in *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010), which, by its terms, applies only to jury findings beyond a reasonable doubt.

alone is sufficiently strong to support waiver, even where the other factors do not. However, the sufficiency of a “one factor” waiver presents no issue for review here because the juvenile court never gave any indication that it would have waived its jurisdiction based solely on one factor: the circumstances of the offense. The juvenile court based its exercise of discretion to waive its jurisdiction on a combination of §54.02(f) factors. For this reason, the State’s second point does not warrant discretionary review by this Court.

Further, even assuming *arguendo* that the juvenile court *could* have exercised its discretion to transfer jurisdiction based solely on the seriousness of the offense, there is still nothing for this Court to review. Neither the Court of Appeals, nor this Court, can substitute its own judgment based on speculation as to what the juvenile *would* have done had it found that the seriousness of the crime *was* the only factor that supported a waiver of its jurisdiction.²

This Court has instructed that a reviewing court must exercise judicial restraint so as not to usurp a discretionary function assigned exclusively to a trial court. *See Montgomery v. State*, 810 S.W.2d 372, 392 (Tex. Crim. App. 1991) (op.

² The actual multi-factored findings of the juvenile court undermine the State’s reliance on a footnote in *Hidalgo v. State*, 983 S.W.2d 746, 754 n. 16 (Tex. Crim. App. 1999) and on *Bleys v. State*, 319 S.W.3d 857,862 (Tex. App. – San Antonio 2010, no pet.). The *Hidalgo* footnote clearly states that a transfer may be ordered “on the strength of any *combination*” of factors. (emphasis added). *Bleys* merely states that each statutory factor must be considered, not all factors must be established, and the factors need not be weighed equally. *Bleys* does not hold, however, that seriousness alone, or even any other factor alone, is sufficient to waive jurisdiction.

on reh'g). Here, the Court of Appeals had no power to assume that the juvenile court would have found it appropriate to waive jurisdiction based solely on the circumstances of the crime in the absence of the other reasons the juvenile court identified as supporting waiver. *See, e.g., Roberts v. West*, 123 S.W.3d 436, 442-43 (Tex. App. – San Antonio 2003, pet. denied) (where two of three findings on which trial court based its order unsealing record were at least partially incorrect, court of appeals could not presume trial court would have reached same decision to unseal entire record); *State v. Rowan*, 927 S.W.2d 116 (Tex. App. – Houston [1st Dist.] 1996, no pet.) (where defendant's sentence was void because he was punished using range for a Class A misdemeanor rather than Class B misdemeanor, but actual sentence was in permissible range for both misdemeanors, court of appeals held it could not reform sentence: "We cannot presume that the trial court would have sentenced appellee to 180-days confinement if the trial court had correctly used the punishment range for a Class B misdemeanor."); *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App. – Houston [1st Dist.] 1995, writ denied) (holding that appellate court could not "presume that the trial court would have made the same [marital property] division despite the mischaracterization [of the marital property]," because under Family Code § 3.63, "[o]nly the trial court may make a just and right division of community property. The appellate court's

role is to determine only if the trial court abused its discretion in making the division.”) (citations omitted).

While the State does its best to portray the circumstances of the crime in a particular light, much of that evidence was controverted during the certification hearing. Among other things, there was evidence that Moon was being dragged from the front of the car and beaten by the decedent at the time of the shooting [RR 37-38] and that the individual who fired the gun was someone else who, at the time, was in the back seat of the car. [RR 8, 25-27] Notably, that other person, Manny Ramirez, was later arrested in possession of the weapon, tested positive for gunshot residue and confessed to being the shooter. [RR 10-11, 41-43] In light of that controverting evidence, there is no reason to believe that the juvenile court would have found the circumstances of the offense alone sufficient to waive its jurisdiction, even if the Court of Appeals had the power to speculate what the court below *might* have done, but did not. The State’s second point therefore does not invoke this Court’s discretionary review of the court of appeals’ order vacating the conviction and restoring the original exclusive jurisdiction of the juvenile court.

Finally, the cases decided under the prior version of the statute offer no support for discretionary review. The State relies upon old cases which stated in *dicta* that, where only two of the six factors were challenged on appeal, that was insufficient to support reversal. However, those cases also went on to find that the

evidence did support the factors challenged on appeal. Subsequent cases are clear that it is not necessary to overcome every factor of an applicable balancing test to require reversal where the balancing test was incorrectly applied. The non-dispositive statements in old cases to the effect that a transfer could be supported on factually sufficient evidence of three of the six factors in the former statute does not warrant discretionary review here to determine whether only one factually sufficient finding out of four factors can support a transfer.

III. The Court of Appeals Did Not Refuse to Consider Oral Findings

The statute requires the juvenile court to state its reasons for waiver and findings in its written order. The State argues that the juvenile court's oral statement that at the time of the offense Moon was on probation for scratching a car might support a finding that Moon's record and previous history would have supported certification. The juvenile court, however, made no such conclusion; it declined to state in its written order that Moon's record and previous history would support waiver of jurisdiction.

Moreover, the written transfer order controls over other conflicting portions of the record, including any oral statements from the bench. *See Flores v. State*, 524 S.W.2d 71, 72 (Tex.Crim.App. 1975) (judgment controls over docket entry); *Hubbard v. State*, 896 S.W.2d 359, 361 (Tex. App. – Houston [1st Dist.] 1995, no pet.) (signed judgment controls over oral rendition).

The State's argument that there is some evidence considered by the juvenile court that could potentially support findings that the juvenile court declined to make is no basis for review by this Court.

IV. The Court of Appeals Did Not Limit Its Evaluation of the Evidence to the Evidence Cited by the Juvenile Court.

In its supplemental point of error, the State argues that the Court of Appeals limited its evaluation of the evidence to "the evidence described in the juvenile judge's written finding." That is incorrect. The juvenile judge did not describe particular evidence. It stated its "reasons for waiver" of jurisdiction and its findings as the statute requires. The Court of Appeals considered all the evidence potentially supporting the juvenile judge's stated reasons for waiver and findings.

The statute requires the juvenile judge to "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court...". Family Code § 54.02(h). The purpose of this requirement is to allow the court of appeals to engage in "meaningful review" of the lower court's reasons for waiving jurisdiction. *Kent v. U.S.*, 383 U.S. 541, 561 (1966). *Cf State v. Cullen*, 195 S.W.3d 696, 698-99 (Tex. Crim. App. 2006). The Court of Appeals is not permitted to substitute different reasons for waiver of jurisdiction that the juvenile judge, as fact finder, declined to make.

The State's real complaint is that the Court of Appeals failed to substitute a different finding on sophistication and maturity for the one the juvenile judge

actually made. Doing so would have been error. Even assuming that the type of evidence relied on by the State could potentially have supported some other sophistication and maturity finding, there is no basis for assuming that the juvenile court, as fact finder, would have been persuaded by that evidence. The fact that the juvenile court did not make the finding now advocated by the State demonstrates that the juvenile court was not so persuaded.

V. Conclusion

For the reasons stated above, Respondent Cameron Moon respectfully requests that the Petition for Discretionary Review be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this computer-generated document has a word count of 2160 words, based upon the representation provided by the word processing program that was used to create the document.

Certified to this the 10th day of December, 2013.

/s/ David Adler

David Adler

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on counsel for the State of Texas, Dan McCrory, by certified mail, return receipt requested, on this 10th day of December, 2013.

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