Affirmed and Opinion filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00564-CV

IN THE MATTER OF T.W., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Brazoria County, Texas
Trial Court Cause No. 6970G

O P I N I O N

Appellant, T.W., a minor, was adjudicated for delinquent conduct on four counts of burglary of a vehicle. The trial court ordered that T.W. be committed to the Texas Youth Commission ("TYC") for an indeterminate period of time not to exceed his twenty-first birthday. T.W. appeals both the adjudication and the disposition order. In his first two points of error, he contends he has been punished twice for the same offense in violation of the double jeopardy protections of the Texas and United States Constitution. In his third point of error, he argues he should have been released on probation into his grandmother's custody. We affirm.

I. BACKGROUND

On December 5, 1997, the trial court adjudicated T.W. as a child engaged in delinquent conduct for three counts of engaging in organized criminal activity as follows: participation in two burglaries of vehicles and unauthorized use of one motor vehicle. The court placed him on probation in his mother's custody for twelve months.

In March 1998, before his probation ended, police apprehended T.W. at the scene of yet another burglary of a vehicle. Eventually, police implicated T.W. in three other such crimes and made a total of four referrals for burglary of a vehicle to the Brazoria County Juvenile Probation Department.

During the time of these additional four vehicle burglaries, T.W. was attending school in the Alvin Independent School District's alternative education program,"ADAPT." In April 1998, the school superintendent expelled T.W. until November 1998 for "non-compliance with ADAPT rules." On May 5, 1998, the trial court ordered T.W. to participate in the Brazoria County Juvenile Justice Alternative Education Program ("county boot camp") throughout the duration of his school expulsion. On October 2, 1998, the trial court ordered that T.W. be released from county boot camp after successful completion of the program.

On October 26, 1998, the State filed a petition and alleged that T.W. had engaged in delinquent conduct by committing the additional four counts of burglary of a vehicle. In April 1999, T.W. pleaded true to the allegations, and the trial court again adjudicated him as a child engaged in delinquent conduct. This time, the trial court ordered T.W. committed to TYC for an indeterminate period of time not to exceed his twenty-first birthday.[1]

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[1] On December 4, 1998, the State filed a motion to modify disposition, alleging that T.W. had violated his "December 5, 1998" probation by committing the additional four counts of burglary of a vehicle. Because this was the incorrect year of his probation, the State soon filed an amended motion and changed the date from December 5, *1998* to December 5, *1997*. Ultimately, the State informed the trial court that it wished to dismiss the amended motion to modify disposition and, instead, would prosecute T.W. under the petition alleging delinquent conduct for the four additional counts of burglary to a vehicle. On May 24,

II. DOUBLE JEOPARDY

In his first and second issues, T.W. claims the trial court's order that he attend county boot camp and the subsequent order committing him to TYC were multiple punishments for the same offenses, i.e., four counts for burglary of a vehicle, in violation of state and federal constitutional prohibition against double jeopardy.

The Double Jeopardy Clause protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Ex parte Broxton*, 888 S.W.2d 23, 25 (Tex. Crim. App. 1994). Because delinquency proceedings may result in deprivation of liberty, a juvenile is guaranteed the same constitutional rights an adult would have in a criminal proceeding. *In re R.S.C.*, 940 S.W.2d 750, 751 (Tex. App.—El Paso 1997, no writ); *In re J.R.*, 907 S.W.2d 107, 109 (Tex. App.—Austin 1995, no writ). A review of the record establishes that T.W. did not raise the issue of double jeopardy in the trial court.

In *Gonzalez v. State*, the court clarified the circumstances under which a double jeopardy claim may be raised for the first time on appeal. 8 S.W.3d 640, 643-45 (Tex. Crim. App. 2000). A double jeopardy claim may be raised for the first time on appeal: (1) when the undisputed facts show the double jeopardy claim is clearly apparent on the face of the record *and* (2) when enforcement of the usual rules of procedural default serves no legitimate state interests. *Id.*[2]

We have examined the record and conclude that a double jeopardy claim is not clearly apparent. Moreover, we conclude that the facts of this case do not implicate double jeopardy

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1999, the trial court entered an order dismissing the amended motion to modify.

[2] T.W. asserts double jeopardy may be raised for the first time on appeal. In support of this contention, T.W. relies on *Ex parte Pleasant*, 577 S.W.2d 256, 256 (Tex. Crim. App. 1979). *Pleasant*, however, is not applicable here because it stands for the proposition that a double jeopardy claim may be raised for the first time in a *post-conviction habeas corpus* proceeding. *Id.* at 257.

because the county boot camp order and referral to TYC were not punishment for the same offense. It was T.W.'s disciplinary problems at school and his initial placement in juvenile detention that resulted in expulsion from the school district's ADAPT program.[3] This expulsion precipitated placement in county boot camp. Pursuant to the trial court's order, T.W. was to remain in county boot camp for the duration of his expulsion from school.

Without citing any supporting authority, T.W. contends the county boot camp order was an informal disposition of the four burglaries. The Texas Family Code permits informal disposition of a juvenile by a *law enforcement officer* authorized to take a child into custody without a referral to the juvenile court.[4] The pivotal definition is found in section 51.02(7) of the Juvenile Justice Code, Title 3 of the Family Code: "law enforcement officer" means a peace officer as defined in article 2.12 of the Code of Criminal Procedure. Article 2.12 does not include county court judges among those listed as a peace officer. TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon Supp. 2001). The county boot camp order was signed by the trial court, not by a law enforcement officer. Therefore, it was not an informal disposition of a juvenile.

The police referred the four additional burglaries to the county juvenile probation department. T.W. was taken into custody and was held in juvenile detention because he had been previously adjudicated as engaging in delinquent conduct. Because the trial court's order that T.W. attend county boot camp was not a disposition of the four burglaries, we hold double jeopardy has not occurred. Consequently, we overrule T.W.'s first and second issues.

III. COMMITMENT TO TYC

In his third issue, T.W. claims the trial court erred in committing him to TYC rather

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[3] TEX. EDUC. CODE ANN. § 37.007(c) (Vernon Supp. 2001) (providing "student may be expelled if the student, while placed in an alternative education program for disciplinary reasons, continues to engage in serious or persistent misbehavior that violates the district's student code of conduct.").

[4] TEX. FAM. CODE ANN. §§ 52.03(a) & 52.031(d) (Vernon Supp. 2001).

than releasing him on probation into the custody of either his parents or maternal grandmother. The trial court has broad discretion to fashion an appropriate disposition when a child has been adjudicated to be a delinquent. *In re T.K.E.*, 5 S.W.3d 782, 784 (Tex. App.—San Antonio 1999, no pet.). In the absence of a finding that the trial court abused its discretion, the appellate court will not intervene. *In re A.S.*, 954 S.W.2d 855, 861 (Tex. App.—El Paso 1997, no writ). The trial court abuses its discretion if it acts arbitrarily or unreasonably, i.e., without reference to any guiding rules and principles. *In re T.A.F.*, 977 S.W.2d 386, 387 (Tex. App.—San Antonio 1998, no pet.).

Legal and factual sufficiency of the evidence are relevant factors in determining whether the trial court abused its discretion. *In re J.S.*, 993 S.W.2d 370, 372 (Tex. App.—San Antonio 1999, no pet.).[5] In reviewing legal sufficiency of the evidence, we consider only the evidence and inferences tending to support the trial court's finding and disregard all contrary evidence and inferences. *S.W. Bell Mobile Sys., Inc. v. Franco*, 971 S.W.2d 52, 54 (Tex. 1998) (per curiam). We will sustain a no evidence point if there is no more than a scintilla of evidence to support the finding. *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 588 (Tex. 1999). In conducting a factual sufficiency review, we examine the entire record and set aside a finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

A trial court may commit a child to TYC if: (1) it is in the child's best interests to be placed outside the home; (2) reasonable efforts have been made to prevent or eliminate the need for removal from the home and to make it possible for the child to return there; and (3) while in the home, the child cannot be provided the care, support, and supervision he needs

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[5] We apply the civil standard of review when addressing the legal and factual sufficiency of the evidence in support of a disposition order. *T.K.E.*, 5 S.W.3d at 785; *A.S.*, 954 S.W.2d at 861; *see In re J.S.*, 35 S.W.3d 287, 292 (Tex. App.—Fort Worth 2001, no pet.) (limiting application of criminal standard to review of adjudication phase); *Matter of K.L.C.*, 972 S.W.2d 203, 206 (Tex. App.—Beaumont 1998, no pet.) (applying civil standard to review of trial court's disposition order); *but see In re C.C.*, 13 S.W.3d 854, 858 (Tex. App.—Austin 2000, no pet.) (applying standard of review applicable in criminal proceedings).

to meet the conditions of probation. *See* TEX. FAM. CODE ANN. § 54.04(i) (Vernon Supp. 2001). The trial court made the following findings in support of its disposition order:

> The Court finds that the child is in need of rehabilitation, and the protection of the public and the child require that a disposition must be made committing said child to the Texas Youth Commission for the following reasons:
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> 1. The repeated nature of the delinquent conduct.
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> 2. Previous services through the Juvenile Probation Department have not been successful.
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> 3. Previous referrals to other agencies have not been successful.
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> 4. Seriousness of the offense(s).
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> 5. The Texas Youth Commission can provide a stricter environment more conducive to the child's needs.
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> 6. The Texas Youth Commission can provide the intensive counseling this child requires.
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> The Court further finds that the child should be placed outside the home and committed to the Texas Youth Commission for the following reasons:
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> 1. It is in the child's best interest to be placed outside the child's home;
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> 2. The child, in the child's home, cannot be provided the quality of care and level of support and supervision that the child needs to meet the conditions of probation;
>
> 3. The following reasonable efforts have been made to prevent or eliminate the need for the child to be removed from the child's home:
>
> a. Previous ongoing juvenile services prior to Court action.

We interpret T.W.'s argument to be that the state failed to show placement with either

T.W.'s mother or father was unsuitable.[6] To the contrary, the evidence established that while he resided in his mother's home, T.W. engaged in criminal conduct and developed problems at school. First, T.W. lived with his mother when he received probation for delinquent conduct in December 1997. Second, T.W. was on probation in his mother's custody when he was expelled from school in April 1998. Third, after he completed county boot camp in October 1998, T.W. failed to return to school despite a probation officer's warning to his mother that failure to attend school violated the law and conditions of probation.[7] Fourth, in February 1999, the principal at school recommended that T.W. be expelled again for numerous absences.[8] Fifth, T.W. tested positive for marijuana and cocaine while he lived in his mother's home. The evidence also shows that placement with his father would be unsuitable. A juvenile probation officer investigated placing T.W. with his father, but found his father "uncooperative" in developing a supervision plan for T.W.

The juvenile probation department recommended commitment to TYC for the following reasons: (1) because department services had been exhausted; (2) previous felony probation failed; (3) T.W. continued delinquent conduct, substance abuse, and gang affiliation; (4) his mother was a poor supervisor; (5) his father failed to cooperate; and (6) T.W. failed to attend school. T.W.'s probation officer testified that T.W. performed better in a stricter environment, which would be provided at TYC. Additionally, T.W. would receive counseling for substance abuse and emotional problems in TYC.

T.W. contends a suitable environment would be provided by his maternal grandmother, B.R., who lives in Iowa. B.R. testified she can offer T.W. the necessary supervision and stability because of her stable home, employment, and family life. B.R. has

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[6] The State argues T.W. has admitted that placement with his mother or his father would not be suitable. We do not agree with the State's assertion.

[7] T.W.'s mother justified the delay because she wanted to enroll him in regular classes, not the ADAPT program.

[8] T.W.'s mother explained that T.W. was absent because she did not have a car to take him to the ADAPT campus.

been married for over forty years; she has worked at the same company for nineteen years; her current position as a budget and contract specialist assures continued income; she attends church regularly; she lives near her other children; and she has room in her home for T.W. B.R. stated she would be willing to ensure T.W.'s compliance with conditions of probation.

The juvenile probation department, however, had not been asked to consider placement with B.R. before the disposition hearing. Indeed, B.R. testified the option was first raised just before she traveled to Texas for T.W.'s adjudication and disposition hearings. B.R. further said she is unaware of services in her community for juveniles on probation. Additionally, B.R.'s interaction with T.W. is limited, and she has contact with him only two or three times each year. Significantly, B.R. is not fully aware of the extent of T.W.'s problems:

> Q. What do you know [T.W.] has done?
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> A. I know based on the record that he has been with other youth that have broken into a car and stolen a radio, as I understand.
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> * * *
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> Q. Is that all you know about it?
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> A. Is that all I know about his problems?
>
> Q. Yes, ma'am.
>
> A. Are there others?

We find the evidence is both legally and factually sufficient to support the trial court's findings in support of its disposition order. Therefore, we hold the trial court did not abuse its discretion in committing T.W. to TYC. T.W.'s third issue is overruled.

Having overruled all three points of error, we affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

Do Not Publish — TEX. R. APP. P. 47.3(b).