



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON POWELL, Appellant

No. 05-07-01078-CR V.

THE STATE OF TEXAS, Appellee

Appeal from the 194th Judicial District Court
of Dallas County, Texas. (Tr.Ct.No. F06-
19400-UM).

Opinion delivered by Justice Richter, Justices
Bridges and Mazzant participating.

Based on the Court's opinion of this date, the judgment of the trial court is **VACATED** and the case is **REMANDED** to the juvenile court for further proceedings consistent with the opinion.

Judgment entered April 1, 2009.

A handwritten signature in cursive script, appearing to read "Martin Richter".

MARTIN RICHTER
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BRANDON POWELL, Appellant

No. 05-07-01079-CR V.

THE STATE OF TEXAS, Appellee

Appeal from the 194th Judicial District Court
of Dallas County, Texas. (Tr.Ct.No. F06-
19401-UM).

Opinion delivered by Justice Richter, Justices
Bridges and Mazzant participating.

Based on the Court's opinion of this date, the judgment of the trial court is **VACATED** and
the case **REMANDED** to the juvenile court for further proceedings consistent with this opinion.

Judgment entered April 1, 2009.

A handwritten signature in cursive script, appearing to read "Martin Richter", written over a horizontal line.

MARTIN RICHTER
JUSTICE



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-07-01078-CR
No. 05-07-01079-CR

BRANDON POWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F06-19400-UM & F06-10401-UM

MEMORANDUM OPINION

Before Justices Bridges, Richter, and Mazzant
Opinion By Justice Richter

These appeals from judgments of conviction for two aggravated sexual assaults committed by Brandon Powell at age fifteen concern the due diligence requirement of Texas Family Code section 54.02 which authorizes a juvenile court to waive and transfer its jurisdiction over a child to district court for prosecution as an adult. *See* TEX. FAM. CODE ANN. § 54.02(j) (Vernon 2008). Specifically, the question before us is whether the State's efforts to serve Powell before his eighteenth birthday with the petitions to adjudicate him for the assaults constituted due diligence. We conclude they did not, vacate the judgments, and remand the cases to the juvenile court for further proceedings consistent with this opinion.

Background

The State filed its two petitions on July 20, 2004, after Powell confessed to Mesquite detective Michael Holley that he had sexually assaulted a six-year old boy several times. *See* TEX. FAM. CODE ANN. §§ 53.01(a), 53.012(a), 53.04(a). The offenses occurred in 2003, before Powell and his family moved from Mesquite to Vernon Parish, Louisiana. Although the State knew Powell's Louisiana address and could have served Powell and his parents with the petition by certified mail, return receipt requested, *see id.* § 53.07(a), the State served the Vernon Parish sheriff instead, expecting his staff to personally serve Powell and his parents.¹ The sheriff's office received the petition but, for reasons not explained, never served Powell or his parents.

On December 13, 2004, after the court had reset the "announcement setting" three times because Powell had not been served, the court issued an "at large" bench warrant for Powell's arrest. The warrant was faxed to the Vernon Parish sheriff in May 2005, and when Powell still had not been served and arrested by December 2005, the warrant was faxed again. Powell was finally arrested on February 22, 2006. By then, Powell, who was born in December 1987, had turned eighteen.

Because it had not been able to proceed in juvenile court before Powell's eighteenth birthday, the State petitioned the juvenile court to transfer the case to district court so that Powell could be prosecuted as an adult. *See id.* § 54.02(j). The State argued as its basis for being unable to proceed before Powell's eighteenth birthday that, despite its due diligence, Powell "could not be found." *See id.* § 54.02(j)(4)(B)(ii).

At the transfer hearing, the State elicited testimony concerning the specific efforts undertaken to ensure Powell was served and arrested. *Id.* § 54.02(j)(4)(B)(ii). Those efforts consisted of (1)

¹ In its brief, the State notes that it "sent a letter to [Powell's] family in Louisiana on July 13, 2004, notifying them that a prosecution report had been filed" and cites to a certain volume of the record where the letter can be found. Our review of that particular portion of the record leads us to a copy of the return of service of the petition to transfer filed in March 2006. We have reviewed the entire record and cannot find the letter to which the State refers.

the sending of the petition and the warrant, each containing Powell's address, to the Vernon Parish sheriff's office in July 2004, May 2005, and December 2005, (2) four follow-up phone calls—between May 2005 and February 2006—by detective Holley to the sheriff and his staff providing again Powell's address and “impressing upon them” the importance of serving and arresting Powell, and (3) a phone call to Powell's house in December 2005 to confirm he still lived there. According to Holley, the sheriff's staff informed him they knew where Powell lived, had “been out [to Powell's house] several times,” but had not found him. Each time Holley called though, the staff “assured” him that they were continuing their efforts “to locate . . . and apprehend [Powell].” Holley testified that throughout the nineteen months between the filing of the petitions and Powell's arrest, Powell remained in Vernon Parish.

Based on the testimony, the State argued it had done “everything in [its] power” to ensure Powell was timely served and arrested and that any “fault” in not serving and arresting Powell lay with the Vernon Parish sheriff and his staff, not the State. Persuaded by the argument, the juvenile court granted the State's petition and transferred the case to district court. *Id.* §54.02(j). A jury subsequently convicted Powell of the lesser included offenses of indecency with a child and assessed punishment in each case at ten years' confinement and a \$5000 fine, both probated for five years. In a single issue, Powell now challenges the transfer order. Maintaining the State's efforts to locate him did not amount to due diligence, Powell asserts the transfer order was not proper and, because the transfer order was not proper, the district court did not acquire jurisdiction over the case, rendering the judgments of conviction void.

Discussion

We review a juvenile court's waiver of jurisdiction and order of transfer under an abuse of discretion standard and will reverse only if, after reviewing the entire record, we conclude the court

acted without any reference to guiding rules and principles. *State v. Lopez*, 196 S.W.3d 872, 874 (Tex. App.–Dallas 2006, pet. ref'd); *J.R.W. v. State*, 879 S.W.2d 254, 257 (Tex. App.–Dallas 1996, no pet.). In applying this standard, we defer to the trial court's factual determinations while reviewing its legal determinations de novo. *In re J.C.C.*, 952 S.W.2d 47, 49 (Tex. App.–San Antonio 1997, no writ).

Although original jurisdiction over a child engaged in delinquent conduct lies exclusively with the juvenile court, *see* TEX. FAM. CODE ANN. § 51.04, family code section 54.02(j) allows a district court to acquire jurisdiction over a child alleged to have committed a felony if, as here,

- the offense was committed when the child was fourteen years of age or older but younger than seventeen,
- the child has turned eighteen, and
- no adjudication hearing has been conducted.

Before the district court may acquire jurisdiction, though, the juvenile court must

- waive its jurisdiction,
- determine probable cause exists to believe the child committed the offense, and
- find from a preponderance of the evidence “after due diligence of the state it was not practicable to proceed in juvenile court before the person’s eighteenth birthday because the person could not be found.”²

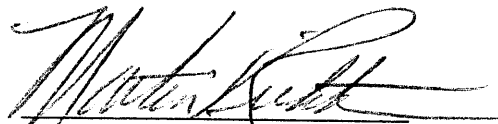
Id. § 54.02(j). The family code does not define “due diligence,” but courts have interpreted the term in general to require that a party do more than “sit on its rights or duties.” *In re N.M.P.*, 969 S.W.2d 95, 100 (Tex. App.–Amarillo 1998, no writ). In other words, the party must attempt to move ahead, or be able to reasonably explain delays. *Id.* at 101; *see also J.C.C.*, 952 S.W.2d at 49-50 (citing *McClellan v. State*, 742 S.W.2d 655, 656 (Tex. Crim. App. 1987) (no due diligence when delays within prosecutor’s control); *Sessions v. State*, 939 S.W.2d 796, 798 (Tex. App.–El Paso 1997, no

² Alternatively, the court could find after due diligence of the state it was not practicable to proceed because (1) the state did not have probable cause to proceed in juvenile court but new evidence has been found since the child’s eighteenth birthday or (2) a previous transfer order was reversed by an appellate court or set aside by a district court. *Id.* §54.02(j)(4)(B)(i),(iii). The court could also find, in the alternative simply that it was not practicable to proceed “for a reason beyond the control of the state.” *Id.* §54.02(j)(4)(A).

pet.) (no due diligence when delays unexplained)).

Viewing the record here under the appropriate standard, we conclude the State's efforts to serve and arrest Powell, whose location was known at all times, did not constitute due diligence. Although the State could have served Powell and his parents the petitions to adjudicate by mail, the State chose to rely on the Vernon Parish sheriff's office for service and mailed the petition there. The sheriff received the petition but took no action despite knowing where Powell lived. As a result, three court settings between July 20, 2004 and December 13, 2004 had to be rescheduled. Despite knowing the settings were rescheduled due to lack of service, the State did nothing and, when the court issued the arrest warrant on December 13, 2004 because of the lack of service, the State took no action for five months—until May 2005 when detective Holley faxed the warrant to the sheriff's office. Over the next nine months, until Powell was arrested February 22, 2006, the State followed-up with only four phone calls to the sheriff's office. Although the State might not have had control over the efforts the Vernon Parish sheriff and his staff exerted to serve and arrest Powell, we see no reason, and the State has not offered any, why it could not have "started the ball rolling" earlier by following-up with the service request made in July 2004 after the first, or even the second, "announcement setting" was rescheduled due to lack of service, or by sending the warrant to the sheriff upon its issuance instead of waiting five months. We also fail to see any reason, and again the State has not offered any, why the State could not have followed-up on the warrant with more than four phone calls over a nine month period. Given the record before us, we conclude the State failed to reasonably explain the nineteen month delay in serving and arresting Powell and as such, the juvenile court abused its discretion by waiving its jurisdiction and ordering the transfers. *See J.C.C.*, 952 S.W.2d at 49-50 (court abused its discretion in waiving its jurisdiction and transferring case to district court where State failed to serve child, but was able to serve twin brother, before

eighteenth birthday and the two lived together and appeared in court together); *see also Orand v. State*, 254 S.W.3d 560, 566-67 (Tex. App.—Fort Worth 2008, pet. ref'd) (in speedy trial context, State failed to exercise due diligence in arresting defendant; State knew where defendant lived and had his phone number, had arrest warrant issued, knew sheriff's office would serve it, but did "nothing to attempt to apprehend defendant for eleven years and eight months"); *State v. Jones*, 168 S.W.3d 339, 347-48 (Tex. App.—Dallas 2005, pet. ref'd) (in speedy trial context, State failed to exercise due diligence in arresting defendant; State knew of defendant's location, had arrest warrant issued, but sheriff's office took two years to arrest defendant without explanation). We sustain Powell's sole issue, vacate the trial court's judgments, and remand the cases to the juvenile court for further proceedings consistent with this opinion.



MARTIN RICHTER
JUSTICE

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