

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1864

TOMMY EUGENE BROWN,

Petitioner-Appellee,

versus

JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:89-CV-3256-R)

October 4, 1993

Before KING and JOLLY, Circuit Judges, and PARKER¹, District Judge.

PER CURIAM²:

Petitioner-Appellee, Tommy Eugene Brown (Brown) filed a petition pursuant to the provisions of 28 U.S.C. § 2254, seeking relief from a 65 year prison term which was imposed on him in 1980 by the 195th Judicial District Court of Dallas County, Texas following his conviction for the felony offense of aggravated

¹ Chief Judge of the Eastern District of Texas, sitting by designation.

² Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

robbery. The conviction was affirmed by the Texas Court of Criminal Appeals in 1983, and Brown thereafter sought writs of habeas corpus in the state courts under Article 11.07 of the Texas Code of Criminal Procedure on five occasions without success. There is no dispute that Brown has exhausted all available state remedies. The district court granted the writ, and the respondent, James A. Collins, Director of the Texas Department of Criminal Justice, Institutional Division (the State) appealed.

FACTS

Brown's conviction resulted from an incident in which he and three accomplices robbed three people and shot and killed a fourth. Brown was fifteen years old at the time of the commission of the crime. The State petitioned the juvenile court to waive its jurisdiction and certify Brown to be tried as an adult on three aggravated robbery charges and one murder charge. The certification petition was granted, and Brown was tried and convicted in the district court on one of the aggravated robbery charges.

BASIS FOR DISTRICT COURT'S GRANT OF THE WRIT

Brown alleged in his §2254 Petition that he was denied his federal constitutional right to due process of law because the trial court was without jurisdiction to try his case, and that the judgment and sentence are therefore void. Specifically, he argued that the order of the juvenile court which purported to waive jurisdiction and transfer criminal charges to a state criminal court was not effective because it waived jurisdiction and

transferred only two of the four charges which the state had alleged against Brown.

Section 54.02(g) of the Texas Family Code provides:

If the juvenile court retains jurisdiction, the child is not subject to criminal prosecution at any time for any offense alleged in the petition or for any offense within the knowledge of the juvenile court judge as evidenced by anything in the record of the proceedings.

When a petition to waive jurisdiction alleges multiple offenses, the juvenile court must either waive or retain jurisdiction as to all offenses alleged, at one time. Absent a complete waiver, the juvenile court retains jurisdiction over all offenses alleged in the petition, and the district court does not obtain jurisdiction over any offense alleged in the petition. *Richardson v. State*, 770 S.W.2d 797, 799 (Tex. Crim. App. 1989).

The Findings, Conclusions and Recommendation of the United States Magistrate Judge, which were adopted as the findings and conclusions of the court, found that "since the juvenile court purported to transfer fewer than all of the charges against petitioner to the criminal district court, it necessarily follows that the trial court did not obtain jurisdiction over the charge upon which petitioner was convicted, and that the judgment and sentence are therefore void." (citing *Richardson, supra*).

DID THE JUVENILE COURT ORDER TRANSFER ALL COUNTS?

After reciting findings that justified the certification of Brown to be tried as an adult, the juvenile court entered the following order:

THEREFORE, by reasons of the foregoing, I, Judge Craig Penford, Judge of the 304th Judicial District Court

of Dallas County, Texas, Juvenile Court, hereby waive jurisdiction of this cause and transfer said child, Tommy Eugene Brown, to the appropriate Criminal District Court or District Court of Dallas County, Texas, for proper criminal proceedings and hereby certify said action.

Included herein and made a part of the waiver of jurisdiction, transfer, and certification is this written Order, the same being the findings of the Judge of the 304th Judicial District Court of Dallas County, Texas, and said certification, transfer, and waiver is accompanied by complaints against the said child accusing him of felony offenses, to-wit: Aggravated Robbery, occurring on or about the 5th day of July, 1979, in Dallas County, Texas, complainant being Katy Parrish; Aggravated Robbery, occurring on or about the 5th day of July, 1979, in Dallas County, Texas, complainant being Elbert Thomas; and all criminal offenses occurring in said criminal episodes of which said offenses the said Court has jurisdiction.

The docket sheet notation reads "Motion for Discretionary Transfer is granted as to paragraphs III and IV only."

Brown's position, adopted by the District Court, is that the juvenile court retained jurisdiction over the murder charge and the third robbery charge, thereby depriving the state district court of jurisdiction. Brown, as petitioner, bears the burden of proving these factual allegations in a federal habeas corpus proceeding. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756 (1963). In our view he has not met his burden. The record does not contain any information concerning the disposition of these two charges. The State contends that any charges not dismissed prior to the transfer, are included in the transfer language of the juvenile court's order, which purports to transfer "all criminal offenses occurring in said criminal episodes of which said offenses the Court has jurisdiction." The district court rejected this argument, because "the Texas courts have interpreted *Richardson* to

require that an order of transfer from a juvenile court make express reference to each charge which is transferred," citing *Mason v. State*, 778 S.W.2d 487, 488 (Tex. App. 1989). Mason was a juvenile at the time of his alleged crimes. The State petitioned the juvenile court to transfer two counts of aggravated robbery, one count of attempted aggravated sexual assault, and one count of felony theft. The juvenile court transferred both aggravated robbery counts and the attempted aggravated sexual assault to the district court. The order did not encompass the felony theft count. The Texas Court of Appeals, Fourteenth District, held: "*Richardson* holds that the juvenile court must expressly dispose of each offense alleged when the State requests transfer of multiple offenses. Because the juvenile court's transfer in this case made no mention of the felony theft offense alleged in the State's petition for transfer, the juvenile court retained jurisdiction over all offenses alleged in the petition pursuant to Tex.Fam.Code Ann. §54.02(g)."

We believe that the district court misinterpreted Texas law on this point. A transfer order referring only to the two aggravated robbery counts and silent as to the others would indeed have violated §54.02(g) and *Richardson*. However, the juvenile court's transfer order purports to transfer not only the enumerated counts, but also "all criminal offenses occurring in said criminal episodes of which said offenses the said Court has jurisdiction." It is our view that this language transferred and waived jurisdiction as to all offenses alleged, at one time, as required by Texas law under

§54.02(g) and *Richardson*.

CONCLUSION

Because we conclude that the juvenile court properly waived jurisdiction as to all counts mentioned in the petition to transfer, it is unnecessary to address the State's other arguments that attack the propriety of the district court's decision.

The district court's order granting Brown's Writ is REVERSED.