



In The

Eleventh Court of Appeals

No. 11-18-00135-CV

IN THE MATTER OF A.V., A JUVENILE

On Appeal from the County Court at Law
Brown County, Texas
Trial Court Cause No. J00010

MEMORANDUM OPINION

This is an appeal from a dispositional order in which the trial court ordered that A.V. be transferred from the custody of the Texas Juvenile Justice Department (TJJD) to the custody of the Institutional Division of the Texas Department of Criminal Justice (TDCJ) to serve the remainder of his 30-year determinate sentence. The trial court entered the order pursuant to Section 54.11 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 54.11 (West Supp. 2019). On appeal, A.V. presents a single issue challenging the constitutionality of Section 54.11. We affirm the trial court's order.

Background Facts

In 2016, A.V. pleaded true to allegations that he had engaged in delinquent conduct by engaging in organized criminal activity and by committing the offenses of aggravated robbery. A jury subsequently determined the appropriate disposition, and the trial court entered a judgment of disposition in accordance with the jury's verdict—sentencing A.V. to the TJJD with possible transfer to the TDCJ for a determinate period of thirty years. In 2018, prior to A.V.'s 19th birthday and before his completion of the statutory minimum period of confinement, the TJJD requested that the trial court conduct a transfer/release hearing to determine whether A.V. should be released on parole or imprisoned. *See id.*; *see also* TEX. HUM. RES. CODE ANN. §§ 244.014, 245.051 (West 2013). The trial court conducted a hearing and ordered that A.V. be transferred to the TDCJ to serve the remainder of his sentence.

Analysis

In his sole issue on appeal, A.V. argues that the trial court's order is void because Section 54.11(d) of the Family Code is unconstitutional on its face and violates the due process rights of juveniles who receive determinate sentences. Section 54.11(d) permits a trial court at a transfer/release hearing to consider written reports and supporting documents from probation officers, professional court employees, professional consultants, employees of the TJJD, and employees of a correctional facility. FAM. § 54.11(d). A.V. also seems to challenge the constitutionality of Section 54.04(b), which provides for the juvenile court's consideration of similar evidence at a disposition hearing. *See id.* § 54.04(b).¹ A.V. argues that these provisions violate a juvenile's constitutional rights, including the right to counsel, the right to testify, and the right to confront witnesses.

¹We note that A.V. previously appealed from the judgment of disposition in which the determinate sentence was imposed and that this court affirmed that judgment. *See In re A.V.*, No. 11-16-00078-CV, 2017 WL 2484348, at *1 (Tex. App.—Eastland June 8, 2017, no pet.) (mem. op.).

The State did not file a brief in this appeal. We note, however, that we have reviewed the record in this case and can find nothing in the record to indicate that A.V. raised any constitutional challenge in the trial court. A claim that a statute is facially unconstitutional may be forfeited if not properly preserved. *See Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (holding that defendant may not raise facial challenge to constitutionality of statute for first time on appeal); *Wargocz v. Brewer*, No. 02-17-00178-CV, 2018 WL 4924755, at *5 (Tex. App.—Fort Worth Oct. 11, 2018, no pet.) (mem. op.). Because A.V. did not raise his complaints in the trial court, he failed to preserve them for appellate review. *See Karenev*, 281 S.W.3d at 434; *see also* TEX. R. APP. P. 33.1.

Moreover, this court and some of our sister courts have previously determined that Sixth Amendment guarantees, such as the right to confront witnesses, do not apply to a Section 54.11 hearing because the hearing is not a trial and is not part of a criminal prosecution. *In re V.M.S.*, No. 11-10-00357-CV, 2011 WL 2732581, at *1 (Tex. App.—Eastland July 14, 2011, pet. denied) (mem. op.); *In re F.D.*, 245 S.W.3d 110, 113 (Tex. App.—Dallas 2008, no pet.); *In re S.M.*, 207 S.W.3d 421, 425 (Tex. App.—Fort Worth 2006, pet. denied); *In re D.L.*, 198 S.W.3d 228, 230 (Tex. App.—San Antonio 2006, pet. denied); *In re D.S.*, 921 S.W.2d 383, 387 (Tex. App.—Corpus Christi–Edinburg 1996, writ dismissed w.o.j.). Rather, a transfer/release hearing conducted under Section 54.11 is a “second chance hearing” that gives juveniles—who have previously been sentenced to a determinate number of years—a second chance to persuade the court that they should not be imprisoned. *V.M.S.*, 2011 WL 2732581, at *1; *D.L.*, 198 S.W.3d at 230; *D.S.*, 921 S.W.2d at 387. Thus, “the hearing does not need to meet the same stringent due process requirements as a trial in which a person’s guilt is decided.” *S.M.*, 207 S.W.3d at 425. We do not believe that Section 54.11 is facially unconstitutional or that it violates a juvenile’s due process rights. *See D.L.*, 198 S.W.3d at 230–31 (Section 54.11 does not violate due

process); *D.S.*, 921 S.W.2d at 387 (statute providing for transfer/release hearing does not violate due process); *In re J.G.*, 905 S.W.2d 676, 683 (Tex. App.—Texarkana), *writ denied*, 916 S.W.2d 949 (Tex. 1995). Accordingly, we overrule A.V.’s sole issue on appeal.

This Court’s Ruling

We affirm the order of the trial court.

KEITH STRETCHER
JUSTICE

May 29, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.²

Willson, J., not participating.

²Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.