TEXAS LAWYER

EXPERT OPINION

Juvenile sex offender registration: Applying the 'learned treatise' exception to the hearsay rule

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More than 15 years ago, the Sex Offender Registration and Notification Act was passed. Also known as the Adam Walsh Child Protection and Safety Act, the law requires registration on an official sex offender registry of any juveniles aged 14 years or older who commit certain sexual offenses. Prior to that, Megan's Law was enacted. It too authorizes law enforcement agencies to publicize the names of convicted sex offenders who are living or working in a local community.

According to the Juvenile Law Center, "approximately 200,000 people in 38 states are currently on the sex offender registry for crimes they committed as children. Some were put on the registry when they were as young as eight years old."

Texas, like many other states, has opted for courts to have some latitude in deciding which specific offenses and circumstances will result in registration. In a recent appellate decision from the 8th District, the El Paso Court of Appeals dealt with an appeal by R.F., who had been adjudicated delinquent based on burglary of a habitation with an attempted or actual commission of a felony—that felony being sexual assault. After a transfer and registration hearing, the district court (sitting as a juvenile court) assessed a 12-year determinate sentence, placing R.F. into the custody of the Texas Juvenile Justice Department, with a potential transfer to the Institutional Division of the Texas Department of Juvenile Justice. The district court also ordered R.F. to register independently as a sex offender.

Does burglary of a habitation with attempted sexual assault constitute an offense for which a determinate sentence may be imposed on a juvenile offender? The El Paso Court looks to the holding in *In Matter of A.C.*, where the Austin Court of Appeals held that:

"Because sexual assault was listed as one of the offenses under former article 42.12, Section 3g(a)(1) … a juvenile who was found to have committed delinquent conduct that 'included the offense of attempted sexual assault' could receive a determinate sentence under the plain language of Section 54.04."

While that statute has been recodified at Tex. Code. Crim. Pro. Ann. art. 42A.054, sexual assault remains listed as an offense under the new statute. The 8th Circuit therefore rejected the contention that R.F. could not receive a determinate sentence for the adjudication for burglary of a habitation with sexual assault. The 8th Circuit then turned to the issue of whether the exclusion of certain evidence was harmful. Before a court may require a juvenile offender to register as a sex offender, a juvenile court must assess whether public interest would be served by mandating that the juvenile offender register. At this hearing, the juvenile must show by preponderance of the evidence that:

1. The protection of the public would not be increased by registration of the juvenile.
2. Any potential increase in the protection of the public resulting from the registration of the respondent (sic) is clearly outweighed by the anticipated substantial harm to the juvenile and the juvenile's family that would result from registration.

Generally speaking, the Texas Rules of Evidence apply during registration hearings. The juvenile court may review (1) exhibits, (2) witness testimony, (3) representations by attorneys for the parties, and (4) a juvenile probation department social history report, which can include results of psychological testing and psychological examination of the juvenile. Pursuant to Tex.R.Evid. 803(18), also known as the "learned treatise exception" to the hearsay rule:

"A statement contained in a treatise, periodical, or pamphlet is admissible if: (1) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (2) the publication is established as a reliable authority

by the expert's admission or testimony, by another expert's testimony, or by judicial notice."

During the underlying juvenile court hearing, R.F. offered exhibits, a series of published articles discussing the impact of sex offender registration on juveniles. The state objected to the admission of those articles on the basis of hearsay, while counsel for R.F. argued that the articles fell within the learned treatise exception to the hearsay rule. The state argued that no expert had been questioned about those exhibits on direct exam nor on cross exam, no expert had relied on said articles in the expert's testimony, and finally, that the court had not taken judicial notice of said articles. R.F.'s counsel responded that he had not laid a predicate through an expert as the State failed to request a list of his expert witnesses. The court sustained the state's objection, refusing to admit any of the articles into evidence. R.F. did not attempt to introduce the articles at the registration hearing, instead relying on testimony from his case manager, despite the fact that the court allowed R.F. the opportunity to present evidence in addition to the favorable testimony elicited from his case manager.

In contrast to the situation in *Matter of B.J.H.B.*, where "it was undisputed that the juvenile court did not permit the juvenile to present testimony from witnesses to satisfy his burden of proving that he was exempt from registration," the 8th Circuit noted that the juvenile court allowed R.F. to present testimony from his case manager, and also afforded R.F. the opportunity to call additional witnesses. The 8th Circuit therefore concluded that the juvenile court did not abuse its discretion in refusing to admit the learned treatises:

"The court did not commit procedural error by excluding the proffered articles, and because the court allowed R.F. to present evidence to meet his burden of proof, we further hold that the exclusion of the articles did not amount to a constitutional violation by entirely precluding him from presenting a defense."

What have we learned? If you want to rely on a learned treatise as an exception to the hearsay rule, lay a proper predicate by proffering the publication either through direct or cross-examination of an expert witness. How to lay the predicate?

1. Authenticate the document through an expert witness, who testifies that the book or article is generally regarded as authoritative or reliable by those in a certain field.
2. Authentication of the document does not mandate that the expert has read the particular article or passage.
3. On cross-exam, a learned treatise that has been properly authenticated can be used for impeachment purposes in state court.
4. As established by TRE 803(18):

(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.*** A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

What's "fair" for a juvenile offender who is over the age of 14 and who may be required to register as a sexual offender? The juvenile court wields great power in such cases, and a juvenile offender may carry the onus of being a predator long into adulthood, when warranted.

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