

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18389  
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Submitted - February 5, 2008

ROBERT A. LIFSON, J.P.  
DAVID S. RITTER  
ANITA R. FLORIO  
EDWARD D. CARNI, JJ.

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2007-06243

DECISION & ORDER

In the Matter of Tanasia Elanie E. (Anonymous),  
appellant.

(Docket No. D-18029-06)

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Steven Banks, New York, N.Y. (Tamara Steckler and John A. Newbery of counsel),  
for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart and  
Tahirih M. Sadrieh of counsel), for respondent.

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, the appeal is from an order of disposition of the Family Court, Queens County (Hunt, J.), dated June 19, 2007, which, upon a fact-finding order of the same court dated May 8, 2007, made after a hearing, finding that the appellant committed acts which, if committed by an adult, would have constituted the crimes of robbery in the second degree (two counts), grand larceny in the fourth degree (two counts), criminal possession of stolen property in the fifth degree (two counts), and menacing in the third degree (two counts), adjudged her to be a juvenile delinquent and placed her on probation for a period of 12 months. The appeal brings up for review the fact-finding order dated May 8, 2007.

ORDERED that the order of disposition is modified, on the law, by vacating the provision thereof adjudicating the appellant a juvenile delinquent based upon the finding that she committed acts which, if committed by an adult, would have constituted the crimes of menacing in the third degree, and substituting therefor a provision dismissing those counts of the petition; as so modified, the order of disposition is affirmed, without costs or disbursements, and the fact-finding order is modified accordingly.

March 11, 2008

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As the presentment agency correctly concedes, the petition was facially insufficient as to the menacing in the third degree counts because it failed to set forth sworn nonhearsay allegations of fact sufficient to establish, if true, the physical menace element of that crime (*see* Family Ct Act § 311.2; *Matter of Michael M.*, 3 NY3d 441; *Matter of Neftali D.*, 85 NY2d 631, 635; *Matter of Jermaine G.*, 38 AD3d 105; *Matter of Akheem B.*, 308 AD2d 402; *contra Matter of Monay W.*, 33 AD3d 809; *Matter of Willie W.*, 32 AD3d 479). Thus, those counts of the petition must be dismissed.

Viewing the evidence in the light most favorable to the presentment agency (*Matter of David H.*, 69 NY2d 792; *Matter of Charles S.*, 41 AD3d 484), we find that it was legally sufficient to support the findings that the appellant committed acts which, if committed by an adult, would have constituted the crimes of robbery in the second degree (*see* Penal Law § 160.10[1]; *Matter of Laquan H.*, 29 AD3d 582, 582-583), grand larceny in the fourth degree (*see* Penal Law § 155.30[5]; *People v Haynes*, 91 NY2d 966), and criminal possession of stolen property in the fifth degree (*see* Penal Law § 165.40; *Matter of Laquan H.*, 29 AD3d 582). Resolution of issues of credibility is primarily a matter to be determined by the finder of fact, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see Matter of Charles S.*, 41 AD3d 484; *Matter of Gabriel A.*, 12 AD3d 666, 667). Upon the exercise of our factual review power (*cf.* CPL 470.15[5]), we are satisfied that the findings of fact with regard to the foregoing acts were not against the weight of the evidence.

LIFSON, J.P., RITTER, FLORIO and CARNI, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court