Opinion filed September 8, 2017

In The

Eleventh Court of Appeals

Nos. 11-15-00223-CR & 11-15-00224-CR

SELSO ORTIZ MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 35th District Court
Brown County, Texas
Trial Court Cause Nos. CR23403 & CR23533

M E M O R A N D U M O P I N I O N

Selso Ortiz Martinez pleaded "no contest" to two offenses: evading arrest (with a prior conviction for evading arrest) and failure to comply with sex offender requirements. The trial court found him guilty of each offense. The trial court sentenced Appellant to confinement for two years in the State Jail Division of the Texas Department of Criminal Justice on the conviction for evading arrest. Additionally, the trial court sentenced Appellant to confinement for four years in the

Institutional Division of the Texas Department of Criminal Justice on the conviction for failure to comply with sex offender requirements. The judgments provided that the sentences are to be served concurrently. Appellant challenges his punishment in two issues on appeal. He contends that the trial court abused its discretion by assessing (1) the two-year sentence for evading arrest and (2) the four-year sentence for failing to comply with sex offender requirements. We affirm.

Background Facts

On March 25, 2013, Appellant was released from prison on parole after serving time for burglary of a habitation with intent to commit a sexual offense. As a result of this prior conviction, Appellant was required to register as a sex offender and report any change in his employment status. Appellant was informed of this requirement when he was released from prison.

Shortly after his release, Appellant began working at Humphrey Pete's restaurant. In May 2013, Appellant left his job. On July 25, Appellant reported this change in his employment status to the sex offender registrar in Brownwood. In October 2013, Appellant again began working at Humphrey Pete's. On or about March 28, 2014, Appellant again left his job. Consequently, Appellant was required to report this change in his employment status to the sex offender registrar by April 5, 2014. However, Appellant never reported this change.

A parole revocation warrant was issued for Appellant. Officer Carlyle Noe Gover drove to Appellant's residence, accompanied by several other police officers. Officer Gover anticipated that Appellant would attempt to escape, so he positioned Investigator Land at the back of Appellant's house. Appellant was standing in his front yard as Officer Gover approached him. Upon seeing the police officers, Appellant attempted to run. He ran approximately 150 yards before running into the arms of Investigator Land. After he was apprehended by police, Appellant falsely claimed that his name was David Martinez.

At the conclusion of the punishment proceedings, the State requested that the trial court sentence Appellant to two years on the evading-arrest conviction and eight years on the conviction for failure to comply with sex offender requirements. Appellant suggested to the trial court that he either be placed on probation or be given "a short sentence of two to three years." As noted previously, the trial court sentenced Appellant to confinement for two years for evading arrest and four years for failing to comply with sex offender registration requirements.

Analysis

In both of his issues, Appellant contends that the punishments assessed by the trial court are inconsistent with the objectives of the Penal Code. We note at the outset that Appellant is expressly not raising an Eighth Amendment challenge regarding his punishments to the extent that they are grossly disproportionate to the offenses and, therefore, constitute cruel and unusual punishment. *See Harmelin v. Michigan*, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 290–92 (1983); *State v. Simpson*, 488 S.W.3d 318, 322–23 (Tex. Crim. App. 2016). Instead, Appellant is asserting that his sentences are inconsistent with the goals of rehabilitation and prevention of recidivism as set out in Section 1.02 of the Penal Code and that they are "undeserved or inconsistent with the national consensus." *See* TEX. PENAL CODE ANN. § 1.02 (West 2011).

Appellant did not object to his sentences in the trial court, either at the time of sentencing or in any posttrial motion. To preserve a complaint for appellate review, a party must present a timely objection and obtain a ruling. TEX. R. APP. P. 33.1(a). Therefore, Appellant has failed to preserve error and has waived his complaint on appeal. *See id.*; *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (holding that failure to object on grounds of cruel and unusual punishment waives claim that sentence violated prohibition in Texas Constitution); *Curry v. State*, 910

S.W.2d 490, 497 (Tex. Crim. App. 1995); *Solis v. State*, 945 S.W.2d 300, 301–02 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

Moreover, we find that the trial court did not abuse its discretion in assessing Appellant's sentences. In reviewing a trial court's sentencing determination, "a great deal of discretion is allowed the sentencing judge." *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). We will not disturb a trial court's decision as to punishment absent a showing of abuse of discretion and harm. *Id.*

The statutory range of punishment for evading arrest (with a prior conviction for evading arrest) is "confinement in a state jail for any term of not more than two years or less than 180 days." PENAL § 12.35(a) (West Supp. 2016), § 38.04(b)(1)(A) (West 2016). The statutory range of punishment for failure to comply with sex offender requirements (as charged in this case) is confinement "for any term of not more than 10 years or less than 2 years." *Id.* § 12.34(a); TEX. CODE CRIM. PROC. ANN. art. 62.102(b)(2) (West Supp. 2016). Appellant concedes that his sentences are within the range of punishment that the legislature has provided.

A trial court's decision regarding what sentence to impose is a "normative process, not intrinsically factbound." *Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex. Crim. App. 2006). "Subject only to a very limited, 'exceedingly rare,' and somewhat amorphous Eighth Amendment gross-disproportionality review, a punishment that falls within the legislatively prescribed range, and that is based upon the sentencer's informed normative judgment, is unassailable on appeal."[1] *Id.* at 323–24 (footnote omitted); *see Simpson*, 488 S.W.3d at 323 ("[T]his Court has traditionally held that punishment assessed within the statutory limits, including punishment enhanced pursuant to a habitual-offender statute, is not excessive, cruel, or unusual.").

[1]Since Appellant is not making an Eighth Amendment claim that his sentences were grossly disproportionate, it would appear that there is a question as to whether his claims are cognizable in light of *Chavez*'s use of the term "unassailable."

The trial court heard evidence concerning the circumstances surrounding Appellant's failure to report his change in employment status and his attempt to run from police officers. Additionally, the trial court heard evidence of Appellant's criminal history,[2] testimony from the victim of his prior burglary offense, and testimony from Appellant's father and girlfriend regarding Appellant's good character and his newborn daughter.

In pronouncing Appellant's sentences and rejecting Appellant's request for probation, the trial court explained to Appellant, "[Y]our history speaks for itself." The trial court also explained to Appellant that it was assessing sentences that would permit him to obtain release on parole within a relatively short time. The trial court encouraged Appellant to follow his father's example of turning his life around after prison, and the trial court warned Appellant of the consequences of being a habitual offender if he committed future crimes. Accordingly, we cannot conclude that the trial court abused its discretion in assessing Appellant's sentences. We overrule Appellant's first and second issues.

This Court's Ruling

We affirm the judgments of the trial court.

JOHN M. BAILEY
JUSTICE

September 8, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.

[2]Appellant's trial counsel acknowledged to the trial court that Appellant "has got a long criminal history." The Texas Court of Criminal Appeals recognized in *Simpson* that an offender's prior adjudicated and unadjudicated offenses are relevant in assessing the appropriateness of a defendant's sentence. 488 S.W.3d at 323.