Opinion filed June 18, 2020

In The

Eleventh Court of Appeals

No. 11-18-00155-CR

DEBRA DIANE AGUERO
A/K/A DEBRA DIANE CHANEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 42nd District Court
Taylor County, Texas
Trial Court Cause No. 27114A

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

Debra Diane Aguero a/k/a Debra Diane Chaney waived a jury and entered an open plea of guilty before the trial court to the state jail felony offense of possession of methamphetamine. Appellant also pleaded true to two alleged punishment enhancements. The trial court accepted Appellant's plea and ordered a presentence investigation (PSI) before it determined Appellant's punishment.

After the disposition hearing, the trial court found Appellant guilty, found the enhancement allegations to be true, and assessed Appellant's punishment at imprisonment for eight years. It sentenced Appellant accordingly. In a single issue on appeal, Appellant contends that the trial court violated her Eighth Amendment right to be free from cruel and unusual punishment. We affirm.

At the disposition hearing, the State relied on the PSI and presented no other evidence. Appellant then testified about her lengthy criminal history, her addiction to methamphetamine, and her mental health issues.

Appellant had used methamphetamine for over thirty years and attributed her criminal history to her methamphetamine addiction. Appellant was "not sure" about the number of times that she had "been to the penitentiary" but admitted that she had been "in and out quite a few [times]."

In connection with her incarcerations, Appellant was sent two times to a treatment program at "SAFPF." She had also received treatment for her addiction at Serenity House but, due to drug use, failed to successfully complete the treatment. Appellant sought treatment again after her arrest on the charged offense. She was required to provide her social security number and to obtain identification in order to receive treatment. Because she did not have the money to obtain identification and was "just on drugs," she did not pursue the treatment. Appellant admitted that she had not made the right decision and had not been responsible.

Appellant also admitted that she was "not being responsible" when she failed to appear for her interview with the probation department in connection with the PSI. Although Appellant denied that she was notified about the interview, she admitted that did not stay in contact with her attorney after the initial plea hearing.

Appellant testified that she had been sexually, physically, and mentally abused as a child by her stepfather, her father, and her grandfather. She had

struggled with mental health issues and had been prescribed medication several times. Appellant had not had a full-time job in six or seven years and "got by" on odd jobs and assistance from churches.

According to Appellant, she did not enjoy her lifestyle and did not "want to live this life no more." Although the time that she spent in prison kept her away from drugs "involuntarily," Appellant wanted an opportunity to address her addiction "head-on." She requested that the trial court place her on probation and that she receive treatment for substance abuse.

After testimony and argument concluded, the trial court assessed Appellant's punishment at imprisonment for eight years. Appellant did not object to the sentence imposed.

In her sole issue, Appellant argues that the sentence was excessive and violated her right under the Eighth Amendment to be free from cruel and unusual punishment. *See* U.S. CONST. amend. VIII. Appellant specifically asserts that there was no evidence that the offense caused physical injury to a person, that the trial court essentially punished her for her addiction to methamphetamine, and that evolving standards of decency mandate that her sentence was excessive and disproportionate to the crime.

To preserve a complaint that a sentence constitutes cruel and unusual punishment, a defendant must first raise the issue in the trial court. TEX. R. APP. P. 33.1(a); *Burt v. State*, 396 S.W.3d 574, 577 (Tex. Crim. App. 2013) ("In some instances, an appellant may preserve a sentencing issue by raising it in a motion for new trial."). Appellant did not object to her sentence in the trial court, either at the time of disposition or in a posttrial motion. Specifically, Appellant did not object, under constitutional or other grounds, that the sentence was cruel, unusual, excessive, or disproportionate to sentences that other individuals received for the

same offense. Therefore, Appellant failed to preserve her complaint for our review. *See Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (failing to object at trial waives a claim of cruel and unusual punishment under the United States Constitution).

But, even if Appellant had preserved the issue, her sentence does not constitute cruel and unusual punishment. When we review 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.* (citing *Hogan v. State*, 529 S.W.2d 515 (Tex. Crim. App. 1975)).

Appellant pleaded guilty to possession of less than one gram of methamphetamine, a state jail felony. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), .115(a)–(b) (West 2017 & Supp. 2019). Appellant also pleaded true to two alleged punishment enhancements, which increased the applicable punishment range to that for a second-degree felony. *See* TEX. PENAL CODE ANN. § 12.425(b) (West 2019). Therefore, the punishment range for the offense was two to twenty years' imprisonment and an optional fine not to exceed $10,000. *See id.* § 12.33. Appellant's eight-year sentence falls within the statutory punishment range. Generally, "punishment assessed within the statutory limits, including punishment enhanced pursuant to a habitual-offender statute, is not excessive, cruel, or unusual." *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016).

However, a sentence that is within the applicable range of punishment might be cruel or unusual in the "exceedingly rare" or "extreme" case in which the sentence is grossly disproportionate to the offense. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)); *Solem v. Helm*, 463 U.S. 277, 287 (1983). "The gross

disproportionality principle reserves a constitutional violation for only the extraordinary case." *Lockyer*, 538 U.S. at 77.

"To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses." *Simpson*, 488 S.W.3d at 323 (citing *Graham v. Florida*, 560 U.S. 48, 60 (2010)). "In the rare case in which the threshold comparison leads to an inference of gross disproportionality, the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* (citing *Graham*, 560 U.S. at 60). "If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* (citing *Graham*, 560 U.S. at 60).

The evidence showed that Appellant had used methamphetamine for over thirty years and had an extensive criminal history that she attributed to her drug use. Although Appellant had undergone treatment at least three times for substance abuse, she continued to use methamphetamine and continued to commit criminal offenses. Rather than pursue additional treatment after she was arrested on the charged offense, she chose to continue to use drugs. On this record, the eight-year sentence assessed by the trial court is not grossly disproportionate to the offense. Consequently, we need not compare Appellant's sentence with the sentences received for similar crimes in this or other jurisdictions. *See id.* We overrule Appellant's sole issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
SENIOR CHIEF JUSTICE

June 18, 2020

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

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[1]

Willson, J., not participating.

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