Affirmed and Memorandum Opinion filed March 25, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00388-CR

JOHNNIE THOMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 53987

MEMORANDUM OPINION

Appellant entered a guilty plea, without a recommendation on punishment, to possession of cocaine with intent to deliver. On March 25, 2008, after reviewing a presentence investigation report, the trial court sentenced appellant to confinement for ten years in the Institutional Division of the Texas Department of Criminal Justice. Appellant filed a timely notice of appeal, and the trial court certified that appellant has the right to appeal. We affirm.

Appellant raises a single issue challenging his sentence as grossly disproportionate to the crime committed. Specifically, he argues that the sentence assessed by the trial court

violated his freedom from cruel and unusual punishment under the Federal and Texas Constitutions. U.S. Const. amend. VIII; Tex. Const. art. I, § 13.

Complaints regarding violation of these constitutional rights may be waived if not raised in the trial court. *See Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986) (en banc); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). To present a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely objection or motion. Tex. R. App. P. 33.1(a). A complaint that a sentence is cruel and unusual must be preserved either by objection during the punishment hearing or by motion for new trial. *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). The record contains no objection to the sentence during the punishment hearing or in a motion for new trial. Therefore, the complaint is not preserved for our review. Even if appellant had preserved this complaint, however, he would not prevail.

Appellant pled guilty to possession with intent to deliver a controlled substance, specifically cocaine, with an aggregate weight of at least one gram but less than four grams. *See* Tex. Health & Safety Code Ann. § 481.112(a) (Vernon 2003). This second degree felony is punishable by a term of confinement for two to twenty years and a fine of up to $10,000. *See id.* § 481.112(c); Tex. Penal Code Ann. § 12.33(a) (Vernon 2003). Appellant's sentence is within the statutory range.

Appellant acknowledges that, as a general rule, punishment assessed within the statutory limits is not excessive, cruel, or unusual punishment. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Buerger v. State*, 60 S.W.3d 358, 365 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Appellant argues, however, that although a sentence may be within the statutory range, "it may nevertheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment." *Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

Under the Eighth Amendment prohibition against cruel and usual punishment, a state criminal sentence must be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S.277, 284, 103 S.Ct. 3001, 3006 (1983).[1] The Supreme Court has set forth objective factors to be considered in reviewing the proportionality of a sentence under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *See id.*, 463 U.S. at 290-91, 103 S.Ct. at 3011. Texas courts require as a threshold determination that the sentence be grossly disproportionate to the crime before addressing the other elements of the *Solem* test and comparing the sentence to similar crimes in the same and different jurisdictions. *Culton v. State*, 95 S.W.3d 401, 403 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *Baldridge v. State*, 77 S.W.3d 890, 893 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A sentence is grossly disproportionate to the crime only when an objective comparison of the gravity of the offense against the severity of the sentence reveals the sentence to be extreme. *Harris v. State*, 204 S.W.3d 19, 29 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd).

Appellant contends that his sentence is grossly disproportionate to the severity of the offense for five reasons: (1) appellant did not commit a violent felony; (2) appellant pled guilty and never denied his guilt in asking for probation; (3) appellant has a steady job and pays child support regularly; (4) appellant is a product of an absent mother and father;

[1] It is unclear whether the Eighth Amendment contains a proportionality guarantee after the decision in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680 (1991). Justice Scalia, joined by Chief Justice Rehnquist, concluded that "the Eighth Amendment contains no proportionality guarantee." 501 U.S. at 965, 111 S.Ct. at 2686. Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment "encompasses a narrow proportionality principle." 501 U.S. at 997, 111 S.Ct. at 2702 (Kennedy, J., joined by O'Connor & Souter, JJ., concurring in part and concurring in judgment). Justice White, joined by Justices Blackmun and Stevens, found that the Eighth Amendment does include a "proportionality principle." 501 U.S. at 1012, 111 S.Ct. at 2710 (White, J., joined by Blackmun and Stevens, JJ., dissenting).

and (5) appellant has a substance abuse problem best addressed through strict supervision by the probation department. We disagree.

In determining whether a sentence is grossly disproportionate, we consider not only the present offense but also appellant's prior criminal history. *Buster v. State*, 144 S.W.3d 71, 81 (Tex. App.—Tyler 2004, no pet.); *Culton*, 95 S.W.3d at 403-04. The trial court considered the presentence investigation report which revealed that appellant's criminal history included the possession, manufacture and delivery of controlled substances, aggravated assault and weapons offenses. Appellant received probation for two prior drug offenses, but his probation was revoked and he served time in county jail. At the time of his arrest in this case, appellant had just been released from an eight-year sentence in prison for another drug-related conviction.

There is no fundamental right to receive probation; it is within the discretion of the trial court to determine whether an individual defendant is entitled to probation. *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999). The trial court acted within its discretion in rejecting probation based on appellant's prior criminal history. We conclude appellant's sentence is not grossly disproportionate.

We overrule appellant's sole issue. The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.
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