Affirmed and Memorandum Opinion filed October 19, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00499-CR

RODERICK DEON CARPENTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1171502

MEMORANDUM OPINION

A jury convicted appellant Roderick Deon Carpenter of capital murder. Because the State did not seek the death penalty, the trial court imposed an automatic sentence of imprisonment for life without parole. Appellant challenges his sentence on two grounds, claiming that an automatic sentence of life without parole violates the Eighth Amendment to the United States Constitution and the separation of powers doctrine of the Texas Constitution. U.S. CONST. amend. VIII; TEX. CONST. art. II, § 1. We affirm.

BACKGROUND

Appellant was indicted for capital murder for the deaths of Eduardo Arriaga and Van Lee Guzman in the same criminal transaction. A jury found him guilty, and the State did not seek the death penalty. Pursuant to section 12.31 of the Texas Penal Code, the trial court was required to impose an automatic sentence of life imprisonment without the possibility of parole. *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (West Supp. 2009). The statutory scheme does not allow a defendant to offer mitigation evidence for a reduced sentence, and appellant did not attempt to do so. He did not object at sentencing or file a post-judgment motion to challenge the statute, but he now presents facial challenges to the statute for the first time on direct appeal.

ANALYSIS

Appellant argues that an automatic sentence of life without parole for capital offenders, required by section 12.31(a)(2) when the State does not seek the death penalty, (1) violates the Eighth Amendment to the United States Constitution because there is no vehicle for a jury's consideration of mitigating evidence, thus making the sentence cruel and unusual, and (2) violates the separation of powers doctrine of the Texas Constitution because a judicial department officer—the prosecutor—is given the power to preclude parole officials in the executive department from exercising their executive power to grant parole. By not raising either of these issues in the trial court, appellant has failed to preserve any error for our review.

Both the Court of Criminal Appeals and this court have held that Eighth Amendment challenges to sentences may not be raised for the first time on direct appeal. *See Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *see also Karanev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) ("[A] defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute."). But even if we were to reach the merits of appellant's Eighth Amendment argument, we note that the

United States Supreme Court has held that a mandatory sentence of life without parole—with no opportunity to present mitigating evidence—was not cruel and unusual for a drug possession crime. *Harmelin v. Michigan*, 501 U.S. 957, 994–95 (1991). Accordingly, the failure to allow for mitigating evidence before imposing such a sentence could not be cruel and unusual for a defendant convicted of murder, a much more serious crime. *Cf. Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (holding that the sentencing of a juvenile to life without parole in a non-homicide case violated the Eighth Amendment partly because "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers").

Appellant has also failed to preserve his facial challenge to the statute on the ground that it violates the separation of powers doctrine of the Texas Constitution. The Court of Criminal Appeals recently held that to preserve error for appeal, a facial challenge to the constitutionality of a statute must first be presented in the trial court. *Karanev*, 281 S.W.3d at 434. In *Karanev*, the court explicitly overruled its prior decision in *Rose v. State*, 752 S.W.2d 529, 553 (Tex. Crim. App. 1987), in which the court had held that a challenge to a penal statute based on the separation of powers doctrine could be raised for the first time on appeal.[1] *Karanev*, 281 S.W.3d at 434 & n.51. Because the *Karanev* decision is controlling in this case, appellant was required to challenge the constitutionality of section 12.31(a)(2) in the trial court to preserve any error for our review.[2]

[1] The *Karanev* decision also implicitly overruled the dictum in *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002), in which the court noted that a challenge to a statute based on the separation of powers doctrine could be raised for the first time on appeal.

[2] The *Karanev* decision was rendered in April 2009, and appellant was sentenced in June 2009. Because the operative facts in this case—appellant's sentencing—occurred after the *Karanev* decision was rendered, we need not decide whether the new rule of error preservation should apply retroactively or only prospectively. *See Taylor v. State*, 10 S.W.3d 673, 678 & n.3 (Tex. Crim. App. 2000).

Appellant's issues are overruled, and we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.

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