In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-09-00214-CR
NO. 09-09-00229-CR

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DESMOND MONROE LIMBRICK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 97515 and 94686

MEMORANDUM OPINION

Pursuant to plea bargain agreements, Desmond Monroe Limbrick pled guilty to possession of a controlled substance (cocaine) and injury to a child. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.115 (Vernon Supp. 2009)[1]; TEX. PEN. CODE ANN. § 22.04(a)(3), (f) (Vernon Supp. 2009). Limbrick appeals from the judgments in both cases,

[1]We cite to the current version of the Texas Health and Safety Code, Texas Penal Code, and Texas Code of Criminal Procedure throughout this opinion because the amendments to the cited provisions have no bearing on the law at issue in this appeal.

Trial Cause Number 97515 and Trial Cause Number 94686.[2] In his first two issues, Limbrick contends that his sentences are excessive and that his sentences constitute cruel and unusual punishments. *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13; TEX. CODE CRIM. PROC. ANN art. 1.09 (Vernon 2005). Limbrick also asserts that he received ineffective assistance of counsel at his sentencing hearing. Because the issues all relate to the sentences he received and Limbrick filed one brief to address both sentences, we consider his appeals together.

Background

Limbrick pled guilty to the allegations in the two indictments. In each case, the trial court found the evidence sufficient to find Limbrick guilty, but then deferred further proceedings. In Cause Number 97515, the trial court placed Limbrick on community supervision for five years for possessing cocaine. In Cause Number 94686, the trial court placed Limbrick on community supervision for four years for injuring a child.

Approximately three years later, in each case, the State requested that the trial court revoke Limbrick's unadjudicated community supervision. At the revocation and punishment hearing, in each of the cases, Limbrick pled "true" to having violated two conditions of his community supervision. Following comments from Limbrick's counsel, Limbrick addressed the court, and the court asked Limbrick several questions. The State responded and requested revocation. At that point, in Cause Number 97515, the trial court found that

[2]The respective appellate cause numbers for the cases are No. 09-09-00214-CR and No. 09-09-00229-CR.

Limbrick had violated the conditions established for his community supervision, found Limbrick guilty of possession of a controlled substance, and assessed his punishment at ten years' confinement in the Texas Department of Criminal Justice-Institutional Division. In Cause Number 94686, the trial court found that Limbrick had violated the conditions established for his community supervision, found him guilty of injury to a child, and assessed his punishment at two years' confinement in State Jail. The trial court then stacked Limbrick's sentences, and ordered Limbrick to serve his two-year sentence in Cause Number 94686 upon completing his ten-year sentence in Cause Number 97515.

Analysis

In his first two issues, Limbrick contends his sentences are excessive even though they each are within the statutory punishment range established by the Legislature for each offense.[3] The State contends that by failing to timely object, Limbrick waived any issue related to whether his sentences are excessive.

To preserve error for appellate review, a party must present a timely objection to the trial court, state the specific grounds for the objection, and obtain a ruling. TEX. R. APP. P.

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[3]The punishment range for a third-degree felony possession of a controlled substance, cocaine, is confinement of two to ten years. TEX. PEN. CODE ANN. § 12.34 (Vernon Supp. 2009); TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D) (including cocaine as a penalty group one substance); 481.115(c) (explaining that possession of controlled substances included in penalty group one is a third-degree felony if the substance weighs more than one gram but less than four grams) (Vernon Supp. 2009). The punishment range for recklessly injuring a child, a state jail felony, is confinement for one-hundred-eighty days to two years. *See* TEX. PEN. CODE ANN. §§ 12.35, 22.04(a)(3), (f) (explaining that reckless injury to a child is a state jail felony) (Vernon Supp. 2009).

33.1(a). Generally, the failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for purposes of appellate review. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (defendant forfeited complaint about his constitutional right to be free from cruel and unusual punishment by failing to raise objection in the trial court on that basis); *Noland v. State*, 264 S.W.3d 144, 151-52 (Tex. App.–Houston [1st Dist.] 2007, pet. ref'd) (defendant failed to preserve Eighth Amendment argument that he received disproportionate sentence); *Trevino v. State*, 174 S.W.3d 925, 928 (Tex. App.–Corpus Christi 2005, pet. ref'd) (defendant, by failing to preserve error, forfeited complaint that the trial court's sentence was cruel and unusual); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd) (defendant waived complaint about the disproportionality of sentence by failing to object in the trial court). Because Limbrick did not raise any objections when the trial court sentenced him, and because he subsequently did not file any post-sentence motions complaining about the length of his sentences, we hold that he waived his complaints regarding the length of his respective sentences. We overrule issues one and two.

In his third issue, Limbrick complains that his trial counsel rendered ineffective assistance by failing to object to his sentences and by failing to file post-judgment motions. Appellate courts review claims of ineffective assistance of counsel under the standards set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show his counsel's performance was deficient and that the deficient

performance prejudiced his defense. *Id.*; *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Recently, the Texas Court of Criminal Appeals reiterated the *Strickland* standard for ineffective-assistance claims as follows:

> To succeed on an ineffective-assistance claim, the defendant must show that: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. To show deficient performance, the defendant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Garza v. State, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007) (footnotes omitted) (citing *Strickland,* 466 U.S. at 687-88, 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). But, as *Garza* explained, our review of ineffective-assistance claims is "highly deferential" to trial counsel as we presume "that counsel's actions fell within the wide range of reasonable and professional assistance." *Garza*, 213 S.W.3d at 348 (citing *Bone,* 77 S.W.3d at 833; *Chambers v. State,* 903 S.W.2d 21, 33 (Tex. Crim. App. 1995)).

In general, if the assessed punishment is within the range proscribed by the Legislature in a valid statute, the punishment is not excessive, cruel, or unusual. *See Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); *Harris v. State*, 204 S.W.3d 19, 29 (Tex. App.–Houston [14th Dist.] 2006, pet. ref'd). Further, the trial court's cumulation of multiple sentences does not generally constitute a cruel and unusual punishment. *See Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984). Nevertheless, a sentence that falls

within the range permitted by statute may still run afoul of the Eight Amendment prohibition against cruel and unusual punishment if the punishment is grossly disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 288-290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *Hicks v. State,* 15 S.W.3d 626, 632 (Tex. App.–Houston [14th Dist.] 2000, pet ref'd).

Punishment is grossly disproportionate to a crime only when an objective comparison of the gravity of the offense against the severity of the sentence reveals that the trial court's sentence was extreme. *Harmelin v. Michigan*, 501 U.S. 957, 1004-006, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Hicks*, 15 S.W.3d at 632. In reviewing the proportionality of a sentence, an appellate court considers the gravity of the offense and the harshness of the penalty; if the sentence is grossly disproportionate to the crime, appellate courts next consider the sentences imposed upon other criminals in the same jurisdiction and the sentences imposed for the commission of the same crime in other jurisdictions. *McGruder v. Puckett,* 954 F.2d 313, 316 (5th Cir.), *cert. denied,* 506 U.S. 849, 113 S.Ct. 146, 121 L.Ed.2d 98 (1992); *see also Harmelin*, 501 U.S. at 1005; *Solem*, 463 U.S. at 290.

In this case, Limbrick did not file any post-trial motions. As a result, Limbrick's trial counsel had no opportunity to explain his strategy at the punishment hearing. In the absence of evidence, we generally are unable to conclude that trial counsel's decisions were not grounded on a reasonable appreciation of the circumstances given the facts of the particular case.

Because the trial court's record concerning Limbrick's claim that he received excessive sentences is undeveloped, Limbrick refers us to several cases that address excessive sentences in an effort to demonstrate that he received excessive sentences. In support of his argument that the trial court should have considered his claims of mental impairment, Limbrick cites to death penalty cases, including *Atkins v. Virginia*, 536 U.S. 304, 321,122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that executing mentally retarded criminals is prohibited by the Eighth Amendment's prohibition against cruel and unusual punishments. But, Limbrick's evidence did not show that he is mentally retarded. Moreover, it appears the trial court considered Limbrick's explanation for his crimes, as the record of the punishment hearing reflects that Limbrick told the trial court that he was "bipolar," had been diagnosed with "ADHD," and that he suffered from "temper tantrums." In summary, the record does not reflect that the trial court excluded any evidence that Limbrick attempted to offer that related to his medical condition. Moreover, Limbrick presented no evidence that his symptoms impaired his ability to understand the legal proceedings or the charges against him, or that any alleged mental deficiency prevented him from communicating with an attorney with a reasonable degree of rational understanding.

Limbrick's brief cites seven cases to support his claim that his sentences were excessive. After reviewing the cases, we find that they all involve defendants convicted of aggravated assault instead of convictions involving possession of a controlled substance, which is at issue in this case. We conclude that he has failed to compare either of his

sentences to other defendants who committed the same offenses, either within Texas or in other jurisdictions.

In conclusion, though Limbrick's sentences are the maximum terms of confinement authorized by the applicable statutes, they are within the range the Legislature determined to be appropriate punishments for these crimes. *See* TEX. PEN. CODE ANN. §§ 12.34,12.35, 22.04(a)(3), (f); TEX. HEALTH & SAFETY CODE ANN. §§ 481.102; 481.115(c). Because Limbrick's offenses were not part of the same criminal episode, the trial court also had discretion to cumulate Limbrick's sentences. *See* TEX. PEN. CODE ANN. § 3.01 (Vernon 2003), § 3.03 (Vernon Supp. 2009); TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon Supp. 2009). Based on the evidence before us, we are not able to conclude that Limbrick received ineffective assistance of trial counsel.[4] *See Bone*, 77 S.W.3d at 833 (noting that in the majority of cases on a direct appeal, the trial court record is not sufficiently developed to adequately reflect the failings of trial counsel). Further, having reviewed the record, we are unable to conclude that no competent attorney would have employed the possible strategy reflected by the record.

Accordingly, we overrule Limbrick's third issue and affirm the trial court's judgments in Trial Cause Numbers 97515 and 94686.

AFFIRMED.

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[4]Relief in appropriate cases for claims of ineffective assistance of counsel is generally available through an application for writ of habeas corpus. *See Thompson v. State*, 9 S.W.3d 808, 814-15 (Tex. Crim. App. 1999).

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HOLLIS HORTON
Justice

Submitted on December 31, 2009
Opinion Delivered January 20, 2010
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Before McKeithen, C.J., Gaultney and Horton, JJ.