In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00559-CR

TOSHA RENEE ARTMORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 07-01593

MEMORANDUM OPINION

In carrying out a plea bargain agreement, Tosha Renee Artmore pled guilty to possession of a controlled substance–cocaine, in an amount less than four grams but at least one gram. The trial court found the evidence sufficient to find Artmore guilty, but deferred further proceedings and placed Artmore on community supervision for three years. Following several administrative proceedings, Artmore was found to have violated the conditions of her community supervision, including testing positive for PCP. As a result, the terms of Artmore's placement on community supervision were amended,

requiring that Artmore complete the Jefferson County Drug Intervention Program, and requiring that Artmore be confined and treated at an Intermediate Sanction Facility–Substance Abuse Track.

Artmore again tested positive following a PCP screening in August 2010. Subsequently, the State filed a motion to revoke Artmore's unadjudicated community supervision. During the revocation hearing, Artmore pled "true" to two violations–testing positive for the presence of Phencyclidine on August 25, 2010, and failing to complete the Jefferson County Drug Rehabilitation and Orientation Program. Artmore pled "not true" to having failed to work faithfully at suitable employment. At the conclusion of the hearing, the trial court found that Artmore had violated the conditions of her community supervision. Following a sentencing hearing, the trial court found Artmore guilty of possession of a controlled substance, and the trial court sentenced Artmore to ten years in prison.

In two issues, Artmore contends the trial court erred "in refusing to consider the entire range of punishment for [Artmore's] offense" and "in giving [Artmore] the maximum sentence punishing her for her drug addiction." Artmore asserts that her due process rights were violated because the trial judge asked her several questions and made comments referencing two of her pregnancies during which she had taken drugs while pregnant. Additionally, Artmore complains about her maximum sentence, that she is being punished for being a drug addict, and that her punishment constitutes a cruel and

unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The punishment range for the crime for which Artmore was charged–possession of a controlled substance–is a third-degree felony which carries a punishment range of confinement for two to ten years. Tex. Penal Code Ann. § 12.34 (West 2011); 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) (West 2010).

Artmore did not complain about her sentence either at the time it was imposed or in a motion for new trial. *See* Tex. R. App. P. 33.1(a)(1); *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 Eight Amendment argument that he received disproportionate sentence); *Trevino v. State*, 174 S.W.3d 925, 927-28 (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);

see also Teixeira v. State, 89 S.W.3d 190, 192 (Tex. App.—Texarkana 2002, pet. ref'd) (defendant failed to preserve error that trial court arbitrarily refused to consider entire range of punishment because he failed to make a timely objection); *Washington v. State*, 71 S.W.3d 498, 499-500 (Tex. App.—Tyler 2002, no pet.) (defendant, by failing to timely object to the trial judge's statement that was allegedly indicative of the trial judge's predetermination of punishment, waived the right to raise the issue on review); *but see Brumit v. State*, 206 S.W.3d 639, 644-45 (Tex. Crim. App. 2006) ("We need not decide today whether an objection below is required to preserve an error of this nature on appeal because the record here does not reflect partiality of the trial court or that a predetermined sentenced was imposed.").

Nevertheless, even had Artmore preserved her issues for appellate review, her complaints are without merit. In the absence of a clear showing to the contrary, we presume that the trial court was neutral and detached in assessing a defendant's punishment, and that the trial court considered the full range of punishment. *See Brumit*, 206 S.W.3d at 645; *Jaenicke v. State*, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Bias is not shown when the trial court makes no comments indicating consideration of less than the full range of punishment. *See Brumit*, 206 S.W.3d at 645.

In this case, the record does not support Artmore's contention that the trial court failed to consider the full range of punishment. In addition to the offense for which

Artmore was being sentenced–possession of a controlled substance–the trial court also had before it a record that included reports of multiple positive drug tests, several amendments to Artmore's community supervision extending rehabilitative assistance to Artmore, and an updated presentence investigation report. While the trial judge's comments about Artmore's inability to control her drug-use while pregnant reflects the trial court's concern over the extent of Artmore's difficulty in controlling her behavior, these comments do not reflect that the trial court failed to consider the law and the relevant facts neutrally. We overrule Artmore's issue concerning the trial court's alleged failure to consider the entire range of punishment.

Artmore also complains that her sentence is excessive. Artmore's sentence is within the statutory range that was authorized by the legislature for the crime to which Artmore pled guilty. *See* Tex. Penal Code Ann. § 12.34; Tex. Health & Safety Code Ann. §§ 481.102; 481.115(c). Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). A punishment that is within the statutory range for the offense is generally not excessive or unconstitutionally cruel or unusual punishment under the Texas Constitution or the United States Constitution. *See Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd); *see also Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.). This includes sentences imposed at the statutory maximum. *See Gavin v. State*, No. 01-08-00881-CR,

2010 Tex. App. LEXIS 3862, at **20-21 (Tex. App.—Houston [1st Dist.] May 20, 2010, no pet.) (not yet released for publication); *see also Holley v. State*, 167 S.W.3d 546, 549-50 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd). Finally, the record contains no evidence "reflecting sentences imposed for similar offenses on criminals in Texas or other jurisdictions by which to make a comparison" between the sentence given to Artmore and the sentences assessed in similar circumstances against others.[1] *Jackson*, 989 S.W.2d at 846.

On the record before us, we are unable to conclude that Artmore's sentence constitutes a cruel and unusual punishment. We overrule Artmore's constitutional challenges to the length of the sentence assessed by the trial court. Having overruled Artmore's two issues, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on July 14, 2011
Opinion Delivered July 27, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.

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[1]Artmore asks that the "record . . . be amended to allow a supplemental reporter's record as to all cases which were sentenced at the same date and time as [Artmore's]." Artmore cites no authority to support her request that would, if granted, allow the record to be changed from the state it was in when her case was before the trial court. *See* Tex. R. App. P. 38.1(i).