In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-08-00188-CR

KIMBERLY RENEE PARKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th Judicial District Court
Gregg County, Texas
Trial Court No. 32659-B

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Kimberly Renee Parker's erratic, suspicious driving at around 3:45 a.m. led Officer John Rowe to discover that her vehicle registration was expired. When Rowe stopped Parker's vehicle, he learned that Parker was jittery, appeared to be under the influence of methamphetamine, and had outstanding warrants for her arrest. Parker and her lone passenger were both arrested and placed in the back of a patrol car. The subsequent search of Parker's vehicle yielded 7.88 grams of methamphetamine and many drug-related items. Parker was convicted of possession of methamphetamine in an amount between four and 200 grams and was sentenced to sixteen years' imprisonment and assessed a $10,000.00 fine. We affirm the judgment of the trial court because (1) Parker failed to preserve any error in the admission of the evidence found in the search of her vehicle, and (2) Parker's sentence is not disproportionate to the offense.

Rowe was on patrol very early one morning when he spotted Parker driving a vehicle well below the speed limit while weaving within the lane. Thinking she might be intoxicated, he decided to follow her. The turn signal was sporadically blinking on and off in a manner that led Rowe to believe the "bulb was shorting out." He ran the vehicle's license plate and registration while following. Dispatch advised that the registration was expired, and Rowe decided to pull Parker over. She turned without signaling before coming to a stop.

When Rowe first approached Parker, she appeared nervous and jittery. His "very first impression was I'm dealing with somebody that's on some kind of drug," "tweaking, that's where someone is sped up on speed, methamphetamines." Rowe called for backup due to Parker's

mannerisms, and because a male passenger was present. Officer Jerry Wayne McDaniel arrived at the scene and observed that Parker could not "keep her hands still." Based on his experience and training, it was also apparent to McDaniel that Parker was under the influence of methamphetamine.

Parker had no identification. Rowe asked her to step out of the car. As she stepped out, both officers thought they saw a gun underneath the driver's seat. They quickly handcuffed Parker, but discovered they mistook a hairbrush handle for the handle of a handgun. Nevertheless, a name and birth date check revealed that Parker had outstanding warrants for her arrest, and she was placed in the back of a patrol car. A weapons frisk of the passenger produced brass knuckles, and the passenger was also arrested and placed in a patrol car for possession of a prohibited weapon. Subsequently, the officers searched the vehicle.

Among various other items, officers found in the vehicle 7.88 grams of methamphetamine, a metal tube pipe and glass pipe commonly used to smoke methamphetamine, a broken glass pipe, tin foil with residue, and another piece of aluminum foil charred by heat.

McDaniel testified that the search also revealed "a flask-type balloon which was—the flask contained a dark colored substance, had the balloon that was attached, had black electrical tape wrapped around the balloon, it was pulled down over the neck of the flask, and it was emitting a smoke that was coming off of it." Parker's counsel affirmatively stated there was no objection to the introduction of photographs depicting this contraption. The officers found "several other precursors . . . used to manufacture methamphetamine," all admitted with counsel's affirmative statement of no objection, and displayed for the jury. They included: a backpack containing a Scooby Doo note pad

with a list of ingredients and instructions for manufacturing methamphetamine, Lorazepam and Alprazolam pills, a hot plate used to create a chemical reaction to break down pills, a bag containing razor blades, a pill box, a metal box, balloons, a silver spoon, acetone solvent used during the manufacture of methamphetamine, a dish designed to "powder out the finished product from the liquid to go to crystalline," and a heat gun used to flash the solvent off the finished product.

(1) Parker Failed to Preserve Any Error in the Admission of the Evidence Found in the Search of Her Vehicle

Parker asserts that the evidence of her guilt was improperly admitted, as it was the fruit of an illegal search of her vehicle.[1] We note three glaring problems with her assertion on appeal.

First, while Parker filed a motion to suppress the evidence obtained from the search of her vehicle, she failed to request a ruling from the trial court. Second, her counsel affirmatively stated on the record that he had no objection to the introduction of the methamphetamine and other items recovered in the vehicle. Third, no objection was made to Rowe's and McDaniel's testimony recounting the fruits of their search.

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[1]The exception allowing a warrantless search of a motor vehicle incident to an arrest does not justify a search of a vehicle after the occupants of the vehicle have been handcuffed or otherwise secured. *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct.1710, 1714, 173 L.Ed.2d 45 (2009). The exception authorizes a search within an arrestee's immediate control to prevent the arrestee from gaining possession of a weapon or destroying evidence. *Id.* Thus, when an arrestee is secured so he or she cannot access a weapon or evidence in his or her vehicle, a search (otherwise unauthorized) of the arrestee's vehicle violates the Fourth Amendment to the United States Constitution. *Id.* at 1719.

Parker contends that *Gant* applies to her situation because she was allegedly arrested for the outstanding warrants and placed in the back of the patrol car before the search of her vehicle. Although the facts of this are distinguishable from *Gant*, we need not address this unpreserved issue.

As a prerequisite to presenting a complaint for our review, a party must have made the complaint to the trial court by a timely request, objection, or motion, which was ruled on by the trial court expressly or implicitly, or which it refused to rule on despite complaint. TEX. R. APP. P. 33.1. "Even constitutional rights, such as protection from an unlawful search and seizure, can be waived by failing to object in a timely manner." *Stults v. State*, 23 S.W.3d 198, 206 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Little v. State*, 758 S.W.2d 551, 564 (Tex. Crim. App. 1988)). "An objection should be made as soon as the ground for objection becomes apparent, which is generally when the item is offered into evidence." *Id.* at 205 (citing *Dinkins v. State*, 894 S.W.2d 330, 355 (Tex. Crim. App. 1995)).

To preserve error on a claim of illegal seizure, Parker was required to obtain a ruling on a motion to suppress or object during trial. *Bollinger v. State*, 224 S.W.3d 768, 778 (Tex. App.—Eastland 2007, pet. ref'd) (citing *Dunavin v. State*, 611 S.W.2d 91, 97 (Tex. Crim. App. 1981)); *Sands v. State*, 64 S.W.3d 488, 491 (Tex. App.—Texarkana 2001, no pet.); *Ortiz v. State*, 930 S.W.2d 849, 855 (Tex. App.—Tyler 1996, no pet.) (absent a ruling, counsel's motion to suppress the evidence was insufficient to preserve error on unlawful search complaint) (citing *Calloway v. State*, 743 S.W.2d 645, 650 (Tex. Crim. App. 1988)).

Because Parker failed to preserve this point of error for our review, we overrule it.

(2) Parker's Sentence Is Not Disproportionate to the Offense

Parker also claims her sentence was disproportionate given the mitigating testimony presented during the punishment phase about her character, hardships she suffered in life, and the possibility that some of the items found in the car could have belonged to the passenger.[2] We disagree.

Texas courts have traditionally held that, as long as the punishment assessed is within the range prescribed by the Legislature in a valid statute, the punishment is not excessive, cruel, or unusual. *See*, *e.g.*, *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973). Possession of methamphetamine in an amount between four and 200 grams is a second-degree felony offense. TEX. HEALTH & SAFETY CODE ANN. § 481.115(d) (Vernon 2003). "An individual adjudged guilty of a felony of the second degree shall be punished by imprisonment in the institutional division for any term of not more than 20 years or less than 2 years." TEX. PENAL CODE ANN. § 12.33 (Vernon 2003). Additionally, a fine of up to $10,000.00 may be imposed. *Id.* Parker's sentence falls within the applicable statutory range.

That does not end our inquiry. A prohibition against grossly disproportionate punishment survives under the Eighth Amendment to the United States Constitution apart from any consideration of whether the punishment assessed is within the range established by the Legislature. U.S. CONST.

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[2]This claim was appropriately preserved through a motion for new trial. *See Williamson v. State*, 175 S.W.3d 522, 523–24 (Tex. App.—Texarkana 2005, no pet.); *Delacruz v. State*, 167 S.W.3d 904 (Tex. App.—Texarkana 2005, no pet.).

amend. VIII; *see Harmelin v. Michigan*, 501 U.S. 957 (1991) (Scalia, J., plurality op.); *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.); *Lackey v. State*, 881 S.W.2d 418, 420–21 (Tex. App.—Dallas 1994, pet. ref'd); *see also Ex parte Chavez*, 213 S.W.3d 320, 323 (Tex. Crim. App. 2006) (describing this principle as involving a "very limited, 'exceedingly rare,' and somewhat amorphous" review).

First, we engage in an initial threshold comparison of the gravity of the offense with the severity of the sentence to determine whether it leads to an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005; *see McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992); *Lackey*, 881 S.W.2d at 420–21. Only then do we compare the sentence at issue to the sentences imposed for similar crimes in the same jurisdiction and sentences imposed for commission of the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1005; *Solem*, 463 U.S. at 292; *McGruder*, 954 F.2d at 316; *Mullins v. State*, 208 S.W.3d 469, 470 (Tex. App.—Texarkana 2006, no pet.); *Lackey*, 881 S.W.2d at 420–21.

In this case, Parker's sentence was not grossly disproportionate to the gravity of the offense, especially in light of the evidence presented during the trial and punishment phases. Even if it was, no evidence in the record allows us to compare Parker's sentence to the sentences imposed on other persons in Texas or on persons in other jurisdictions who committed a similar offense. *See Latham v. State*, 20 S.W.3d 63, 69 (Tex. App.—Texarkana 2000, pet. ref'd); *Davis v. State*, 905 S.W.2d 655, 664–65 (Tex. App.—Texarkana 1995, pet. ref'd). Without such evidence, the record before us does not support Parker's claim of demonstrable error. *Cf. Jackson*, 989 S.W.2d at 846 ("there is no

evidence in the record reflecting sentences imposed for similar offenses on criminals in Texas or other jurisdictions by which to make a comparison").

We affirm the judgment of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 21, 2009
Date Decided: July 24, 2009

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