



NUMBERS 13-17-00656-CR and 13-17-00657-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JOSHUA D. LEMONS,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 36th District Court
of San Patricio County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Justice Benavides**

By two issues, appellant Joshua D. Lemons appeals his sentence for possession of a controlled substance, penalty group one, and bail jumping, both third-degree felonies. See TEX. HEALTH & SAFETY CODE ANN. § 481.115 (West, Westlaw through 2017 1st C.S.); TEX. PENAL CODE ANN. § 38.10 (West, Westlaw through 2017 1st C.S.). Lemons argues that the judgment adjudicating his probation was void because probation was illegally

extended and that his sentence was excessive. We affirm.

I. BACKGROUND

Lemons was charged with possession of a controlled substance for possessing methamphetamine on March 14, 2008. See TEX. HEALTH & SAFETY CODE ANN. § 481.115. Lemons was subsequently charged with bail jumping on June 27, 2008. See TEX. PENAL CODE ANN. § 38.10. On January 26 2009, Lemons pleaded guilty in both cases¹ and was placed on five years' deferred adjudication probation.

In May 2009, the trial court amended Lemons's probation on both cases regarding court costs, to which Lemons signed and agreed. On January 6, 2014, the trial court again amended Lemons's probation on both cases and extended the term for one year. Lemons signed an agreement to the extension on January 10, 2014,² and the agreement was filed with the district clerk on January 15, 2014.

In June 2014, the State filed its first motion to revoke. The State alleged that Lemons, in cause 13-17-00656-CR (656), failed to report to probation for five months and failed to pay restitution, supervisory fees, fines, and court costs. In cause 13-17-00657-CR (657), the State alleged Lemons failed to report for five months. Lemons pleaded true to the allegations, and the trial court continued him on probation adding the following conditions: (1) extended the term of probation until January 26, 2017; (2) confinement in an intermediate sanctions facility (ISF) for treatment; (3) sixty-days home confinement

¹ Lemons's possession case was trial court cause number S-08-3177CR and cause number 13-17-00656-CR (656) in this Court. Lemons's bail jumping case was trial court cause number S-08-3313CR and cause number 13-17-00657-CR (657) in this Court. These cause have been consolidated into one memorandum opinion for the purpose of the appeals, as Lemons raises the same issues in both causes.

² There was a handwritten note on both documents that Lemons received a copy from the Bexar County community service officer.

with GPS monitoring; (4) participation in the intensive community supervision program and caseload; (5) participate in the moral reconnection therapy program; (6) report to probation and submit to urinalysis twice a month; and (7) not possess or consume synthetic marijuana.

Lemons's probation was amended again in February 2015, deleting part of the court costs and fine, adding an additional fee for interstate transfer of probation, and waiving supervision fees due to successful completion of ISF. Then in May 2015, the State filed a second motion to adjudicate guilt. In it, the State alleged in cause 656 that Lemons: (1) failed to report for six months; (2) failed to pay restitution; (3) failed to pay supervision fees; (4) failed to pay his fine and court costs; (5) failed to pay a crime stoppers fee; (6) failed to pay an application fee; and (7) violated his curfew on January 23 and 24, 2016. In cause 657, the State alleged that Lemons: (1) failed to report for six months; (2) failed to pay his crime stoppers fee; and (3) violated his curfew on January 23 and 24, 2016. In June 2016, Lemons pleaded true to the violations, and the trial court continued Lemons on probation and extended his probation term until January 26, 2019.

In November 2016, the State filed its third motion to adjudicate. In cause 656, the State alleged Lemons: (1) failed to report for three months; (2) failed to submit to UAs for three months; (3) failed to pay restitution; (4) failed to pay the supervision fee; (5) failed to pay the fine and court costs; (6) failed to pay the crime stoppers fee; and (7) failed to pay an application fee.³ In cause 657, the State alleged Lemons: (1) failed to report for

³ The State alleged Lemons failed to pay the same application fee from April 17, 2015, on both the second and third motion to revoke his probation. Since Lemons pleaded true to the allegations in the second motion to revoke, the State cannot allege the same violation on the third motion to revoke. Therefore, we will not consider the application fee violation on the third motion to revoke.

three months; (2) failed to submit to UAs for three months; and (3) failed to pay the crime stoppers fee.

Lemons pleaded true to the allegations, the trial court adjudicated his guilt, and sentenced him to eight years' imprisonment in the Texas Department of Criminal Justice—Institutional Division in each case with the sentences to run concurrently. Lemons's motions for new trial were denied and this appeal followed.

II. PROBATION WAS NOT ILLEGALLY EXTENDED

By his first issue, Lemons argues that the judgment revoking his probation was void because the trial court illegally extended his probation back in January 2014.

A. Standard of Review

We review a trial court's decision revoking probation for abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In a revocation proceeding, it is the State's burden to prove by a preponderance of the evidence that a probationer violated the terms of his probation. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The trial judge is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The trial court abuses its discretion when it revokes probation after the State has failed to meet its burden of proof. *Cardona*, 665 S.W.2d at 493–94. Proof by a preponderance of the evidence of any one of the alleged violations of the conditions of probation will support revocation on appeal. *Moore v. State*, 605 S.W.2d 924, 926

(Tex. Crim. App. [Panel Op.] 1980); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

B. Applicable Law

Under former article 42.12, section 5(a), a trial judge was given the discretion (except in certain offenses) to grant deferred-adjudication community supervision for felonies and misdemeanors. *Garrett v. State*, 377 S.W.3d 697, 704 (Tex. Crim. App. 2012) (citing former TEX. CRIM. PROC. CODE ANN. art. 42.12, § 5(a) (current version at TEX. CRIM. PROC. CODE ANN. arts. 42A.103 (West, Westlaw through 2017 1st C.S.)). The maximum period of community supervision for felonies and misdemeanors is prescribed. *Id.* Moreover, “[a] judge may increase the maximum period of community supervision in the manner provided by section 22(c) or 22A of this article.” *Id.* (quoting former TEX. CRIM. PROC. CODE ANN. art. 42.12, § 5(a)).

Article 42A.103 (formerly section 22(c) of article 42.12) provides that:

The judge may extend a period of community supervision on a showing of good cause under this section as often as the judge determines is necessary, but the period of community supervision in a first, second, or third-degree felony case may not exceed 10 years, and except as otherwise provided by this subsection, the period of community supervision in a misdemeanor case may not exceed three years.

.....

A court may extend the period of community supervision under this section at any time during the period of supervision or, if a motion for revocation of community supervision is filed before the period of supervision ends, before the first anniversary of the date on which the period of supervision expires.

TEX. CRIM. PROC. CODE ANN. art. 42A.103 (formerly TEX. CRIM. PROC. CODE ANN. art. 42.12, § 22(c)). Additionally, article 42A.052 states:

- (a) A judge who places a defendant on community supervision may authorize the supervision officer supervising the defendant or a magistrate appointed by the district courts in the county that give preference to criminal cases to modify the conditions of community supervision for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions.
- (b) A supervision officer or magistrate who modifies the conditions of community supervision shall:
 - (1) deliver a copy of the modified conditions to the defendant;
 - (2) file a copy of the modified conditions with the sentencing court; and
 - (3) note the date of delivery of the copy in the defendant's file.
- (c) If the defendant agrees to the modification in writing, the officer or magistrate shall file a copy of the modified conditions with the district clerk and the conditions shall be enforced as modified. If the defendant does not agree to the modification in writing, the supervision officer or magistrate shall refer the case to the judge for modification in the manner provided by Article 42A.752.

Id. 42A.052 (West, Westlaw through 2017 1st C.S.) (formerly TEX. CRIM. PROC. CODE ANN. art. 42.12, § 10(d), (e)) (referencing Article 42A.752 (continuation or modification of community supervision after violation)).

C. Discussion

Lemons argues that the trial court abused its discretion by imposing a condition without affording him due process, especially by not conducting a hearing. However, we find the rationale in *Little v State* consistent with Lemons's case and compelling. See

376 S.W.3d 217, 220 (Tex. App.—Fort Worth 2012, pet. ref'd). In *Little*, Little's probation was amended to include additional sex offender requirements without a hearing. However, Little did not raise any objection to the amendments until almost three years after they were imposed and he was facing a motion to revoke his probation. *Id.* The Fort Worth Court held that three years was too long to wait to raise an objection, and Little had forfeited preservation of his claim. *Id.*

We agree with the Fort Worth Court. In order to preserve error for appellate review, a party must make a *timely* and specific objection or motion at trial, and there must be an adverse ruling by the trial court. TEX. R. APP. P. 33.1(a) (emphasis added); *Aldrich v. State*, 104 S.W.3d 890, 894–95 (Tex. Crim. App. 2003). In *Speth v. State*, the court of criminal appeals held that to complain about a probation condition on appeal, an appellant must have first challenged the condition in the trial court when it was imposed and that conditions that are not objected to are deemed affirmatively accepted. 6 S.W.3d 530, 534–35 (Tex. Crim. App. 1999).

Lemons now complains regarding the amendment that first extended his probation back in 2014. Since the 2014 extension, Lemons's probation was extended two additional times, about which he does not complain. Although it does not appear from the record that a hearing was held, based on current article 42A.052, a hearing is not required to modify certain conditions of probation. See TEX. CRIM. PROC. CODE ANN. art. 42A.052. Lemons agreed to the modification of his probation on January 10, 2014 and signed the document with a Bexar County probation officer. If he had objections to the extension at that time, he could have refused, and the modification would have fallen

under the requirements of current article 42A.752. See *id.* However, he did not and waited over three and a half years to first allege his 2014 modification was a violation. We find error was not preserved and overrule Lemons's first issue.

III. SENTENCE WAS NOT DISPROPORTIONATE

By his second issue, Lemons complains his sentence was disproportionate to the seriousness of the alleged offenses.

A. Applicable Law

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. Even though within the range permitted by law, a sentence may nonetheless be disproportionate to the gravity of the offense. See *Ex parte Chavez*, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006).

To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court and obtain a ruling. TEX. R. APP. P. 33.1(a). A party's 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 the purposes of appellate review. See *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (“[I]n order to preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired.”).

B. Discussion

Generally, punishment assessed within the punishment statutory range is not subject to a challenge for excessiveness. *Lawrence v. State*, 420 S.W.3d 329, 333 (Tex. App.—Fort Worth 2014, pet. ref'd). When community supervision is revoked, the trial court may generally impose any punishment within the range authorized by statute. See *id.* When reviewing excessiveness in a case in which the trial court has revoked probation, we do not weigh the sentence against the gravity of the violations of the community supervision, but rather the gravity of the initial offense to which the appellant pleaded guilty. See *id.*; *Buerger v. State*, 60 S.W.3d 358, 365–66 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (setting out that an appellant's sentence rests upon the adjudication of guilt for the crime alleged, not an appellant's violation of community supervision requirements that led to the revocation).

Having reviewed the record, we note that appellant did not object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion. See TEX. R. APP. P. 33.1(a); *Arriaga v. State*, 335 S.W.3d 331, 334 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Accordingly, appellant has waived any error for purposes of appellate review. See *Rhoades*, 934 S.W.2d at 120; *Noland*, 264 S.W.3d at 151. However, even if Lemons had objected to the trial court's sentence, the eight years' imprisonment was within the statutory range for a second-degree offense. Lemons's second issue is overruled.

IV. CONCLUSION

We affirm the judgments of the trial court.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
9th day of August, 2018.