Affirmed as Modified; Opinion Filed October 31, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01231-CR

JOHNNY CARLOS FLORES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F14-70989-N

MEMORANDUM OPINION

Before Justices Lang, Myers, and Evans
Opinion by Justice Myers

Appellant Johnny Carlos Flores pleaded no contest to aggravated sexual assault of a child and was sentenced to eight years in prison. Appellant argues the trial court erred by considering the application of the law of parole in assessing punishment and that the judgment should be reformed to reflect that appellant pleaded no contest. As modified, we affirm.

DISCUSSION

In his first issue, appellant contends the trial court committed harmful error by considering the law of parole in assessing sentence.

Appellant was indicted for the offense of aggravated sexual assault of a child under the age of fourteen. The record shows that, on August 31, 2015, the trial court explained the charge and the range of punishment to appellant. The court also explained that the State had offered appellant a fifteen-year sentence and that, under Texas law, he would have to serve one-half of

that sentence—seven and-a-half years—before being eligible for parole. The court asked how long appellant had been in jail, and appellant replied one year. The court stated that, if appellant accepted the plea bargain, he would be eligible for parole in six and one-half years. The court also told appellant that whether he received parole was up to the prison system, not the court. After the trial court explained all the options available to appellant, he chose not to accept the plea bargain. Appellant waived his right to a jury trial and elected to proceed to a trial before the court on a plea of no contest.

The case was subsequently tried to the court. By stipulation, appellant admitted to five prior convictions: burglary of a habitation with intent to commit the felony offense of sexual assault, possession of a controlled substance, selling alcohol to a minor, driving while intoxicated, and driving while license suspended. When both parties rested, the trial court asked how long appellant had been in jail, and he replied he had been in jail for a year and five days. The court then listened to arguments from both sides, after which it stated, in part:

> I'm not going to give you probation. You've had chance after chance and you just have not demonstrated, at least to me, that you're a good candidate for probation. I do find you guilty as charged. I'm finding you guilty of aggravated sexual assault of a child.
>
> Now, I think most of your problem in the past has been drug and alcohol. You appear to be a capable person. You have a family that loves you. I would like to see you get some help and become a productive member of society, so I'm not going to give you a long sentence, but I'm not going to give you the minimum either. You just don't deserve a minimum sentence.
>
> I'm going to set punishment at 8 years in the Texas Department of Criminal Justice. I know that's an awful long time to you, but I want you to remember that you were looking at up to life in prison. That's much longer than 8 years. You've got a year behind you. In three more years, you'll be eligible for probation—Excuse me—parole.
>
> I don't know whether you'll make parole or not. It's up to you what—it's up to you and how you act in prison and what you do. In three more years, you'll be able to apply for parole and, frankly, I hope they grant it. I don't have anything to do with that process. I can't make them do it, can't stop them from doing it, but I hope you get it. So in three years, I hope that you are released and that you

> become a productive member of society, but I just can't place you on probation for what you've done to [the complainant] and for the life you've been living.

There was no objection from defense counsel to the trial court's comments.

To preserve error for appellate review, the complaining party must make a timely, specific objection. TEX. R. APP. P. 33.1(a). Appellant did not object in the trial court on the ground that the court was committing error by considering the application of parole law. The first time appellant raised this complaint was on appeal to this Court. Other appellate courts that have reviewed this type of issue have applied rule 33.1(a) and found that the complaint was not preserved for appellate review if not raised in the trial court. *See Moreno v. State*, 961 S.W.2d 512, 515 (Tex. App.—San Antonio 1997, pet. ref'd) (citing rule 33.1 and concluding appellant failed to preserve for appeal complaint that jury improperly considered parole law during deliberations); *Lightsey v. State*, No. 02–10–00356–CR, 2011 WL 4916362, at *2 (Tex. App.—Fort Worth Oct. 13, 2011, no pet.) (mem. op., not designated for publication) (citing rule 33.1(a) and concluding appellant did not object and, thus, forfeited complaint that trial court considered parole law in sentencing appellant); *Nguyen v. State*, No. 01–98–00256–CR, 1999 WL 450026, at *2 (Tex. App.—Houston [1st Dist.] June 17, 1999, pet ref'd) (not designated for publication) (citing rule 33.1 and concluding that, by failing to object, appellant forfeited complaint that trial court considered effect of good conduct time and parole release in assessing punishment). Therefore, the error, if any, was not preserved for appellate review. We overrule appellant's issue.[1]

In his second issue, appellant argues the judgment should be modified to reflect that he entered a plea of no contest rather than a plea of guilty. The judgment states that appellant entered a plea of guilty, but the trial record shows appellant entered a plea of no contest. Based

[1] Additionally, even if we overlooked the issue of preservation, the trial court's statements merely showed it was informing appellant of the time required to be served before reaching parole eligibility. There is no indication in the record that the court actually considered the application of parole law in assessing punishment. *See Nguyen*, 1999 WL 450026, at *2.

on the record and the relevant law, we modify the judgment to reflect that appellant pleaded no contest to the charged offense. *See* TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd); *see also Tyler v. State*, 137 S.W.3d 261, 267–68 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

As modified, we affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHNNY CARLOS FLORES, Appellant

No. 05-15-01231-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F14-70989-N.
Opinion delivered by Justice Myers. Justices Lang and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

"Plea to Offense: GUILTY" should be changed to "Plea to Offense: NO CONTEST"

As **REFORMED**, the judgment is **AFFIRMED**. We direct the trial court to prepare a new judgment that reflects this modification.

Judgment entered this 31st day of October, 2016.