AFFIRM; and Opinion Filed November 1, 2016.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00015-CR

CHRISTIAN GALLEGOS-PEREZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 439th Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-13-476

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and O'Neill[1]
Opinion by Justice Brown

Appellant Christian Gallegos-Perez appeals an order adjudicating his guilt for sexual assault. In four issues, appellant generally contends (1) the trial court violated his common law right to allocution, (2) the trial court erred in failing to sua sponte declare a mistrial when polygraph evidence was admitted, and (3) he received ineffective assistance of counsel. For the following reasons, we affirm the trial court's judgment.

Appellant pleaded guilty to sexually assaulting "Jane Smith"[2] by causing his sexual organ to contact or penetrate Smith's sexual organ with the use of physical force or violence. Pursuant to a plea bargain agreement, the trial court deferred a finding of guilt and placed appellant on

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[1] The Hon. Michael J. O'Neill, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

[2] Jane Smith is a pseudonym for the victim.

community supervision for a period of five years and assessed a $2000 fine.[3] At the time of his guilty plea, appellant's trial counsel warned him about the dangers of deferred adjudication. Counsel also told appellant that he had serious doubts about appellant's ability to comply with the conditions of probation. Finally, appellant's attorney cautioned appellant that, because of the nature of the offense, even a minor violation of the conditions of his probation would likely result in an adjudication of guilt and a substantial sentence. Appellant nevertheless insisted on accepting the State's plea agreement.

The State subsequently filed a motion to proceed with an adjudication of guilt alleging appellant committed nine violations of the conditions of his probation, including failure to report, failure to pay his fine, fees, and other costs, failure to perform community service, and failure to successfully complete sex offender treatment. At the hearing on the motion to adjudicate, appellant pleaded true to all of the allegations in the motion. The State also presented evidence to support those allegations.

Appellant's probation officer testified appellant failed to report and failed to pay his fine and other required fees and costs. Al Merchant, a psychologist and social worker, testified appellant failed to successfully complete sex offender treatment. Merchant testified appellant's treatment goals included (1) taking full responsibility for his offense, including taking instant offense polygraphs, (2) reducing cognitive distortion, a "thinking error" sex offenders rely on to justify their offenses, and (3) maintaining sobriety. Merchant testified that in the first few months of his treatment, appellant was given one instant offense polygraph, which "showed deception." Merchant also testified that throughout his treatment, appellant was habitually late to and/or failed to attend group sessions. Instead of accepting responsibility for his conduct, appellant made excuses and blamed others. According to Merchant, appellant was engaging in

[3] The victim agreed to the terms of the plea bargain agreement and chose not to attend the hearing or to provide victim impact testimony.

cognitive distortion. When appellant continued to be late to and miss group sessions after being warned and failed to make any other changes or show a willingness to change, Merchant discharged him from the program.

Appellant testified and admitted violating the conditions of his probation. He blamed the violations on his limited financial resources and transportation issues. Appellant asked the trial court to continue him on probation with "minimal time." The trial court found the allegations in the State's motion true, adjudicated appellant guilty, and sentenced him to twenty years in prison. This appeal followed.

In his first issue, appellant asserts the trial court violated his "common law right to allocution." Appellant acknowledges that the trial court satisfied the statutory "allocution" requirements of Article 42.07 of the Texas Code of Criminal Procedure. *See* TEX. CRIM. PROC. CODE ANN. art. 42.07 (West 2014) ("Before pronouncing sentence, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him."). However, he asserts he was also entitled, under the common law, to make a personal plea in mitigation of punishment prior to sentencing. Appellant cites no authority that such a right exists under Texas law.[4] Regardless, it is well-settled that to complain on appeal of the denial of a right to allocution, whether statutory or one claimed under the common law, a defendant must timely object. *See Tenon v. State*, 563 S.W.2d 622, 623 (Tex. Crim. App. [Panel Op.] 1978); *McClintick v. State*, 508 S.W.2d 616, 618 (Tex. Crim. App. 1974) (op. on reh'g). Appellant did not do so. Therefore, we resolve the first issue against appellant.

[4] In *Green v. United States*, 365 U.S. 301, 303 n.1 (1961), the United States Supreme Court granted a petition for writ of certiorari to interpret Rule 32(a) of the Federal Rules of Criminal Procedure, which provided "[b]efore imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." The issue before the Supreme Court was whether Rule 32(a) required the trial court to allow the defendant to *personally* speak in mitigation of punishment or whether the Rule was satisfied if the defendant's attorney was given that opportunity. *Id*. at 304. Relying on the common-law origins of the rule, the Supreme Court held "the drafters of Rule 32(a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence." *Id*. Contrary to appellant's contention, the Supreme Court did not hold the right existed, even under federal law, independent of Rule 32(a).

In his second and third issues, appellant complains of the admission of polygraph evidence. Specifically, he complains of Merchant's testimony that he showed deception during an "instant offense polygraph." Although appellant did not object to the polygraph evidence, he contends the trial court was required to sua sponte declare a mistrial when the evidence was admitted. We disagree.

It is well-settled that complaints about the admission of evidence, even evidence that violates constitutional rights, are waived by failure to object. *See Saldano v. State*, 70 S.W.3d 873, 889 (Tex. Crim. App. 2002); *see also* TEX. R. APP. P. 33.1(a); *Willis v. State*, 05-13-00530-CR, 2014 WL 5475490, at *2 (Tex. App.—Dallas Oct. 30, 2014, no pet.). It necessarily follows a trial court is under no obligation to declare a mistrial when evidence is admitted without objection.

Moreover, our review in this appeal is limited to determining whether the trial court abused its discretion. *See Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *see also Ditto v. State*, 988 S.W.2d 236, 239 (Tex. Crim. App. 1999); *Benge v. State*, 07-08-0278-CR, 2009 WL 1543801, at *3 (Tex. App.—Amarillo June 3, 2009, no pet.). In this issue, appellant does not contend the trial court abused its discretion in revoking his probation because the polygraph evidence was improperly admitted. *See, e.g., Leonard v. State*, 385 S.W.3d 570, 583 (Tex. Crim. App. 2012). To the contrary, appellant concedes any one of his nine pleas of true alone is sufficient to support the trial court order. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980). However, he asserts we may review his complaint because admission of the polygraph evidence could have caused the trial court to assess a more severe sentence.

It is well-settled that upon revocation of deferred adjudication community supervision, the trial court may assess punishment anywhere within the range provided by law. *See Ditto*,

988 S.W.2d at 237; *Von Schounmacher v. State*, 5 S.W.3d 221, 223 (Tex. Crim. App. 1999) (per curiam). As a general rule, a sentence within that range will not be disturbed on appeal. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Johnson v. State*, 05-01-00318-CR, 2001 WL 856944, at *1 (Tex. App.—Dallas July 31, 2001, no pet.). Here, the trial court assessed appellant's punishment at twenty years' confinement, which was within the range of punishment for the offense. *See* TEX. PENAL CODE ANN. §§ 12.33(a), 22.011(f) (West 2011). Appellant has failed to show it abused its discretion in doing so. We resolve the second and third issues against appellant.

In his fourth issue, appellant contends he received ineffective assistance of counsel at the hearing on the State's motion to adjudicate. To prevail on an ineffective assistance of counsel claim, an appellant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see also Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). Generally, a silent record that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). Without evidence of counsel's trial strategy, we will assume a strategic motive "if any can be imagined" and "will find counsel's performance deficient only if the conduct was so outrageous that no competent attorney would have engaged in it." *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005).

According to appellant, his trial counsel was ineffective for failing to object to the trial court's violation of his common law right to allocution and to the admission of the polygraph evidence. Appellant does not claim the alleged errors had any effect on either his plea or the

range of punishment available for the offense. Instead, he asserts that, but for counsel's alleged errors, he may have been assessed a lighter sentence.

Appellant has failed to meet his burden under either prong of Strickland. First, the record is devoid of any evidence to show counsel's reasons for the complained of conduct. We cannot conclude that the conduct was such that no reasonably competent attorney could have engaged in it. Appellant has also failed to show a reasonable probability exists that, but for counsel's alleged errors, the result of the proceeding would have been different. Appellant was assessed a twenty year sentence for his commission of a violent and forcible sexual assault, not his probation violations. *See Lawrence v. State*, 420 S.W.3d 329, 333 (Tex. App.—Fort Worth 2014, pet. ref'd). We resolve the fourth issue against appellant.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
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JUDGMENT

CHRISTIAN GALLEGOS-PEREZ, Appellant

No. 05-16-00015-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 439th Judicial District Court, Rockwall County, Texas
Trial Court Cause No. 2-13-476.
Opinion delivered by Justice Brown. Justices Fillmore and O'Neill participating.

Based on the Court’s opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 1st day of November, 2016.