Affirmed as Modified; Opinion Filed August 30, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00293-CR
No. 05-16-00295-CR

DAMON ERIC COPELAND, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F09-54401-M & F09-59137-M

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Boatright
Opinion by Justice Evans

Damon Eric Copeland appeals from his convictions and sentences for aggravated robbery (our No. 05-16-00295-CR; trial court No. F09-59137-M) and felony theft (our No. 05-16-00293-CR; trial court No. F09-54401-M). He appeals asserting in three issues he is entitled to a new punishment hearing because (1) the trial court erred by denying him his right to common law allocution, (2) his punishments were cruel and unusual in violation of the Eighth Amendment because the sentences were grossly disproportionate to the offenses, and (3) his counsel was ineffective. We affirm the trial court's judgment in the felony theft case (our No. 05-16-00293-CR; trial court No. F09-54401-M) and on our own motion we modify the trial court's judgment in the aggravated robbery case (our No. 05-16-00295-CR; trial court No. F09-59137-M) to reflect the correct statute for offense and affirm it as modified.

Factual Background

Appellant was indicted in the aggravated robbery case for robbing a woman using a knife and in the theft case for stealing a motorcycle valued between $1,500 and $20,000. Without a plea bargain, appellant pleaded guilty to each indictment. He testified to robbing the woman using a knife and stealing the motorcycle and in each case was originally placed on ten years deferred adjudication and fines. Twice the State moved to adjudicate and each time the trial court continued appellant on community supervision with modified terms. The trial court reminded appellant he faced up to life in prison for the aggravated robbery case and he needed to complete the community supervision. Ultimately, appellant pleaded guilty to a new indictment for evading arrest. Then in each of the cases in this appeal he pleaded true to grounds asserted for revoking his community supervision which included the new offense and other violations of the terms of his community supervision. He testified about his prior convictions, drug possession, use, and addiction, and mental health issues. The trial court assessed punishment at forty-five years confinement for aggravated robbery and eight years confinement for felony theft. The trial court heard and denied appellant's motions for new trial.

Common Law Allocution

In his first issue, appellant complains the trial court violated appellant's right to common law allocution. The State responds the issue was not preserved because appellant did not object in the trial court.

The record reflects that immediately after pronouncing his sentences, the trial court inquired, "Counsel, any reason at law why your client should not be sentenced at this time?" to which appellant's counsel replied, "None, Judge." No objection appears in the record. Appellant contends "at law" limited him to statutory allocution, *see* TEX. CODE CRIM. PROC.

ANN. art. 42.07 (West 2014), and that by limiting its question to statutory allocution the trial court deprived him of his common law right of allocution.

An appellant must timely object in the trial court to complain on appeal he was denied his right to allocution. *See* TEX. R. APP. P. 33.1; *Tenon v. State*, 563 S.W.2d 622, 623 (Tex. Crim. App. [Panel Op.] 1978); *see also Gallegos–Perez v. State*, 05-16-00015-CR, 2016 WL 6519113, at *2 (Tex. App.—Dallas Nov. 1, 2016, no pet.) (mem. op., not designated for publication). Because appellant did not do so, he has not preserved the issue for our review.

Disproportionate Sentences

In his second issue, appellant argues his eight-year and forty-five year sentences violate the Eighth Amendment prohibition against cruel and unusual punishment because the sentences are grossly disproportionate to the offenses. Although these sentences are within the prescribed punishment ranges, the State concedes, "the Eighth Amendment's prohibition against grossly disproportionate sentences survives whether or not a punishment is within the prescribed range," citing among other authorities *Winchester v. State*, 246 S.W.3d 386, 388 (Tex. App.—Amarillo 2008, pet. ref'd) (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983)) and *Davis v. State*, 119 S.W.3d 359, 363 (Tex. App.—Waco 2003, pet. ref'd). The court of criminal appeals has so held. *See State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016).

Both appellant and the State rely on this Court's opinion in *Lackey v. State*, 881 S.W.2d 418, 420-21 (Tex. App.—Dallas 1994, pet. ref'd). The *Lackey* opinion relied on this Court's en banc opinion in *Johnson v. State*, 864 S.W.2d 708, 725 (Tex. App.—Dallas 1993) (en banc), *aff'd on other grounds*, 912 S.W.2d 227 (Tex. Crim. App. 1995). Both opinions analyzed whether sentences within applicable statutory punishment ranges were grossly disproportionate to an offense and concluded that because the sentences did not fail the first analytical factor established by the Supreme Court—"the gravity of the offense and the harshness of the

penalty"—the sentences were not unconstitutional. *Johnson*, 864 S.W.2d at 725 (quoting *Solem v. Helm*, 463 U.S. 277, 289–90 & n.16, 292 (1983)); *Lackey*, 881 S.W.2d at 420. Both appellant and the State cite *Lackey* for the proposition that although there is uncertainty about the factors used in the analysis, if a punishment does not fail the first factor, it is not grossly disproportionate and the analysis ends. *See Lackey*, 881 S.W.2d at 420-21. This is consistent with the court of criminal appeals analytical approach. *See Simpson*, 488 S.W.3d at 323. "Because of the substantial deference reviewing courts accord the legislatures and trial courts, appellate review rarely requires extended analysis to determine the constitutionality of the sentence." *Johnson*, 864 S.W.2d at 725 (citing *Solem*, 463 U.S. at 289-90 & n. 16).

"We review a trial judge's denial of a motion for new trial under an abuse of discretion standard." *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). "We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable." *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). When no reasonable view of the evidence—viewed in the light most favorable to the trial court's ruling, presuming all reasonable factual findings against the losing party—supports the trial court's ruling, the trial court abused its discretion. *Colyer*, 428 S.W.3d at 122.

To analyze the gravity of the offense and the harshness of the penalty—*Johnson*, 864 S.W.2d at 725—we first consider the gravity of Appellant's offenses. Appellant testified at his plea hearing in the aggravated robbery case that he entered a store, pulled out a knife on a woman in a manner that was threatening to her and demanded she give him "the money." He admitted several times when he testified at several hearings on the motions to revoke that he committed a violent offense and agreed with the trial court at one hearing that it was one of the most serious crimes but less serious than murder. In his judicial confession in the felony theft case, appellant swore he took the motorcycle having a value of at least $1,500 but less than

$20,000 without the effective consent of the owner intending to deprive the owner of the property.

The theft indictment to which appellant pleaded guilty was a third degree felony level because appellant committed two prior state jail felony convictions: a different felony theft and a felony unauthorized use of a motor vehicle. In his judicial confession in the theft case, appellant testified to his two prior state jail felony convictions. Without distinguishing which were felonies, appellant testified he had previous convictions for possessing marijuana evading arrest on multiple occasions, unauthorized use of a motor vehicle on multiple occasions, possession of other controlled substance cases, attempted burglary of a coin operated machine, burglary of a habitation, more evading arrest cases, and a criminal trespass. He testified every time he was given probation he "messed it up." Appellant explained his conduct as the result of his drug addiction and bipolar disorder. As for his sentences, appellant's forty-five year sentence is below the mid-range of the applicable sentencing range: aggravated robbery is a first degree felony punishable by imprisonment for "life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. §§ 12.32(a), 29.03(b) (West 2011). Additionally, appellant's eight-year sentence for felony theft is below the maximum of two to ten years for felony theft. *See id*. at §§ 12.35(a), § 12.42(a)(1)[1] (*see* Act of June 7, 1995 , 74th Leg., ch. 318, § 1, 1994 Tex. Gen. Laws 2734 (current version at Tex. Penal Code Ann. § 12.425(a) (West Supp. 2016)), 31.03(e)(4)(A)[2] (*see* Act of June 19, 1993, 73rd Leg., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3638 (current version at TEX. PENAL CODE ANN. § 31.03(e)(4)(A) (West Supp. 2016).

[1] Section 12.42(a)(1) was amended on June 17, 2011, effective September 1, 2011, to remove the provisions relating to penalties for repeat and habitual felony offenders on trial for a state jail felony and add current § 12.425(a). (See Act of June 17, 2011, 82nd Leg., ch. 834, §§ 1 to 2, 2011 Tex. Session Law Serv. 2104).

[2] Section 31.03(e)(4)(A) was amended on June 20, 2015, effective September 1, 2015 to make theft a state jail felony if the amount of pecuniary loss is $2,500 or more but less than $30,000. *See* TEX. PENAL CODE ANN. § 31.03(e)(4)(A) (West Supp. 2016).

Appellant does not contest he will become eligible for parole. Appellant does not cite and we have not found an opinion concluding that a sentence below life without parole—here significantly below the maximum of the ranges of punishment—was grossly disproportionate. *See Johnson*, 864 S.W.2d at 725 (sentence in mid-range took into account appellant's argument); *see also Lackey*, 881 S.W.2d at 421 (noting sentence within range to be considered in deciding grossly disproportionate issue).

The focus of appellant's argument is that his punishments are grossly disproportionate considering his drug addiction and mental health issues which he presented to the trial court. In addition, appellant's argument compares the sentences imposed against the plea bargain offered, a methodology unsupported by any authority and which we reject. Instead, having analyzed the record according to the first factor pertinent to appellant's argument claiming he received a grossly disproportionate sentence and viewing the evidence and reasonable inferences in the light most favorable to the trial court's decision when it denied appellant's motion for new trial on this issue, the trial court did not abuse its discretion. Accordingly, we find no merit in appellant's second issue.

Ineffective Assistance of Counsel

Appellant's last argument is that the trial court erred when it denied his motion for new trial on the ground that his trial counsel was ineffective. In his brief, appellant alleges his trial counsel was ineffective for failing to (1) object or argue common law allocution, (2) develop or argue mental health evidence, and (3) to call appellant's wife to testify on his behalf at the last revocation and adjudication hearing.

To prevail on an ineffective assistance of counsel claim, appellant must establish both that his trial counsel performed deficiently and that the deficiency prejudiced him. *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (citing *Strickland v. Washington*, 466

U.S. 668, 687 (1984)). With respect to the first prong, the record on appeal must be sufficiently developed to overcome the strong presumption of reasonable assistance. *See Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). Absent an opportunity for trial counsel to explain his actions, we will not conclude his representation was deficient "unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Texas procedure makes it "'virtually impossible'" for appellate counsel to present an adequate ineffective assistance claim on direct review. *See Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Robinson v. State*, 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). This is because the inherent nature of most ineffective assistance claims means that the trial court record "will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id*. (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)). As a result, the better procedural mechanism for pursuing a claim of ineffective assistance is almost always through writ of habeas corpus proceedings. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003).

Here, appellant did not call his previous trial counsel to testify at the motion for new trial on any of the three matters he complains about on appeal. As to each, the record is inadequate to conclude that there was no possible reasonable trial strategy for trial counsel's conduct. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). For example, as to failing to object regarding common law allocution, the law in Texas is not clear that a common law right of allocution survives in Texas for which reason appellant's trial counsel may not have objected. *See Brown v. State*, No. 06-16-00007-CR, 2016 WL 5956064, at *3 n.3 (Tex. App.—Texarkana Oct. 14, 2016, pet. denied) (mem. op., not designated for publication) (law unclear whether common law allocution still exists in Texas); *Ex parte Smith*, 296 S.W.3d 78, 81 (Tex. Crim. App. 2009) (where law unclear counsel's conduct not ineffective assistance). As to appellant's

mental health argument, appellant did testify about his mental health and drug addiction at previous hearings on motions to revoke. However, appellant did not testify, and his counsel did not argue, about the abuse he experienced as a child until the hearing on the motion for new trial. There could be many strategic reasons for which trial counsel did not bring out that one fact. Finally, as to appellant's wife not being called to testify at the hearing on the motion to revoke and adjudicate, she testified at the hearing on the motion for new trial that she is the one who called the probation department to report appellant was using drugs in violation of the terms of his probation. After he received the forty-five year sentence she testified that she would call again if the trial court put him back on probation. Without a record establishing what defense counsel knew of appellant's wife's testimony and her willingness to testify on behalf of appellant before he received the forty-five year sentence, and why defense counsel did not call her to testify, we cannot speculate on this record. On this record, we decline to find defense counsel's performance was "so outrageous that no competent attorney would have engaged in it." *Garcia*, 57 S.W.3d at 440. The trial court did not abuse its discretion when it denied appellant's motion for new trial on the ground of ineffective assistance of counsel.

Modification of Judgment

The trial court's judgment mistakenly recites "Penal Code 31.03" as the statute for offense in the aggravated robbery case (our No. 05-16-00295-CR; trial court No. F09-59137-M). Because the necessary information is available in the record, on our own motion we modify the trial court's judgment in the aggravated robbery case to recite "Penal Code 29.03" as the statute for 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).

Conclusion

On the record of this case, we do not find merit in appellant's issues. We affirm the judgment in the felony theft case (our No. 05-16-00293-CR; trial court No. F09-54401-M) and affirm the judgment in the aggravated robbery case (our No. 05-16-00295-CR; trial court No. F09-59137-M) as modified to recite "Penal Code 29.03" as the statute for offense.

/David W. Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAMON ERIC COPELAND, Appellant

No. 05-16-00293-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court, Dallas County, Texas
Trial Court Cause Nos. F09-54401-M
Opinion delivered by Justice Evans.
Justices Lang-Miers and Boatright participating.

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

Judgment entered this 30th day of August, 2017.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAMON ERIC COPELAND, Appellant

No. 05-16-00295-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-59137-M.
Opinion delivered by Justice Evans.
Justices Lang-Miers and Boatright participating.

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

> The reference to "Penal Code 31.03" as the statute for offense is replaced with a reference to "Penal Code 29.03" as the statute for offense.

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 30th day of August, 2017.