

Affirmed and Opinion Filed December 22, 2017



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00190-CR

**CORY DESHANE MURPHY, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F14-40100-L**

MEMORANDUM OPINION

**Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill**

Pursuant to a plea bargain, appellant Cory Deshane Murphy entered an open plea of guilty to aggravated sexual assault of a child. He waived his right to a jury trial, and the trial court sentenced him to 26 years in prison. He appeals, raising three issues. None of his issues were preserved in the trial court, so we affirm.

I. BACKGROUND

Appellant was indicted for continuous sexual abuse of a child. At some point he agreed to plead guilty (apparently to aggravated sexual assault of a child), and a hearing was held at which the complainant, appellant, and others testified. But the trial judge rejected the plea because appellant did not admit to having sexual intercourse with the complainant.

Later, at an admonishment hearing before a different trial judge, the State offered appellant a plea bargain of 25 years for the charged offense or 40 years on a lesser charge of aggravated sexual assault of a child. The offer further provided that the judge presiding over the admonishment hearing would read the transcript of the prior hearing and then the parties would reconvene for a sentencing hearing before the same judge. At that hearing, appellant would be allowed testify further if he wished. Appellant accepted those terms, and his judicial confession was admitted into evidence. The court then recessed.

Appellant's sentencing hearing occurred about a month later. Only appellant testified. He admitted that he had the complainant move her hand up and down on his exposed penis twice and that he touched her vagina on top of her underwear once, but he denied having sexual intercourse with her. Appellant also testified that his own uncle physically and sexually abused him when he was a child. Appellant's counsel asked for punishment at the lower end of the statutory range, which was 5 to 99 years or life in prison. The State asked for 35 years' imprisonment. The judge found appellant guilty of aggravated sexual assault of a child and sentenced him to 26 years' imprisonment.

Appellant timely appealed.

II. ANALYSIS

"Preservation of error is a systemic requirement on appeal." *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009) (footnote omitted). Here, appellant did not preserve any of his three issues.

A. **Issue One: Was appellant's common-law right to allocution violated?**

Appellant complains that the trial court denied him a common-law allocution right. "Allocution" is the practice of asking a criminal defendant to speak in mitigation of the sentence to be imposed. *McClintick v. State*, 508 S.W.2d 616, 618 (Tex. Crim. App. 1974). Appellant

concedes that the trial court implemented the statutory allocution right found in the Texas Code of Criminal Procedure, *see* TEX. CODE CRIM. PROC. art. 42.07, but he urges that he was denied an additional common-law right to make a final plea for mercy or in mitigation of punishment.

The State correctly responds that appellant did not object in the trial court that he was being denied his alleged common-law allocution right. This issue must be preserved in the trial court. *See McClintick*, 508 S.W.2d at 618. Because appellant did not do so, we overrule his first issue.

B. Issue Two: Did the trial court err by reviewing a transcript that was not admitted into evidence at appellant’s sentencing hearing?

Appellant next complains that the trial court erred by reviewing a hearing transcript containing witness testimony and considering it in his sentencing although the transcript was not offered or admitted into evidence at the sentencing hearing.

As previously noted, part of appellant’s plea agreement was that the trial court would review the transcript before the sentencing hearing. The State correctly urges that appellant never objected to this procedure. Accordingly, we overrule appellant’s second issue because he forfeited this complaint. *See* TEX. R. APP. P. 33.1(a); *Harvey v. State*, 173 S.W.3d 841, 850 (Tex. App.—Texarkana 2005, no pet.) (appellant forfeited complaint that trial judge considered matters outside the record in assessing punishment).

C. Issue Three: Is appellant’s sentence unconstitutionally excessive?

Appellant’s final issue argues that his sentence is grossly disproportionate to his crime and thus violates the Eighth Amendment and the Texas Constitution.

Again the State correctly urges appellant’s failure to raise this objection in the trial court. The constitutional rights appellant now invokes must be preserved in the trial court. *See Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). Accordingly, appellant forfeited his third issue, and we overrule it.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

/Bill Whitehill/

BILL WHITEHILL
JUSTICE

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TEX. R. APP. P. 47
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CORY DESHANE MURPHY, Appellant

No. 05-17-00190-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
No. 5, Dallas County, Texas

Trial Court Cause No. F14-40100-L.

Opinion delivered by Justice Whitehill.

Justices Lang and Brown participating.

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

Judgment entered December 22, 2017.