

MODIFY and AFFIRM; and Opinion Filed November 8, 2017.



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

No. 05-17-00248-CR

No. 05-17-00249-CR

No. 05-17-00250-CR

MICHAEL AGUINAGA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause Nos. F15-60012-K, F16-57271-K, F16-57272-K**

MEMORANDUM OPINION

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

Michael Aguinaga waived a jury and pleaded guilty to unlawful possession of a firearm by a felon (UPFF), possession with intent to deliver methamphetamine in an amount of one gram or more but less than four grams, and possession with intent to deliver cocaine in an amount of one gram or more but less than four grams. Appellant also pleaded true to one enhancement paragraph contained in the UPFF indictment. After finding appellant guilty, the trial court sentenced him to twelve years' imprisonment in each case to be served concurrently. In two points of error, appellant contends the sentences constitute cruel and unusual punishment and the trial court abused its discretion in sentencing him to prison for each offense. The State asserts a cross-point urging modification of the judgment. We modify the trial court's judgments and affirm as modified.

SENTENCES

In his first issue, appellant argues the sentences are proportionally unfair and in violation of the United States and Texas Constitutions. *See* U.S. CONST. amend. VIII, XIV; TEX. CONST. art. I, § 13. Appellant acknowledges the sentences are within the punishment range, but asserts the punishment is severe in light of his longstanding drug addiction. In his second issue, appellant argues the trial court abused its discretion in sentencing him to twelve years' imprisonment because that punishment violates the objectives of the penal code. Appellant asserts the trial court failed to give some facts the proper weight, such as appellant's seeking drug treatment on his own, and that the trial court incorrectly focused on punishment rather than rehabilitation.

The State responds that appellant failed to preserve this challenge for appellate review and alternatively, the sentence is not unconstitutionally disproportionate given appellant's extensive criminal background. The State further responds that the trial court properly exercised its discretion in sentencing appellant.

To preserve error for appellate review, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). Constitutional rights, including the right to be free from cruel and unusual punishment, may be waived. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996). Appellant did not object when he was sentenced, nor did he file motions for new trial addressing this complaint. Accordingly, he has not preserved the issue for appellate review. *See Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.).

Moreover, appellant's claim of disproportionate punishment would fail even if it had been preserved below. To be sure, the basic concept of proportionality is embodied within the Eighth Amendment's proscription on cruel and unusual punishment. U.S. CONST. amend. VIII; *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016). This is a "narrow principle," however, that does not compel any arithmetic proportionality between the crime and the sentence imposed.

Simpson, 488 S.W.3d at 322 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). Rather, it forbids only those extreme sentences that are so “grossly disproportionate” to the crime as to amount to cruel and unusual punishment. *Id.* A sentence is grossly disproportionate to the crime “only in the exceedingly rare or extreme case.” *Id.* at 322–23.

Generally, a punishment within the statutory limits will not be excessive, cruel, or unusual in any given case. *Id.* at 323. To determine whether a particular sentence is “grossly disproportionate,” we first consider the severity of the sentence in light of the harm caused or threatened to the victim or victims, the culpability of the offender, and the offender’s prior misconduct. *Id.* In the rare case in which this threshold comparison leads to an inference of gross disproportionality, we would then compare the defendant’s sentence with the sentences of other, similarly situated offenders in Texas and with the sentences imposed for the same or analogous crime in other jurisdictions. *Id.* If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is indeed cruel and unusual. *Id.*

After careful scrutiny of the records here, we do not find appellant’s sentence to support an inference of gross disproportionality. Unlawful possession of a firearm by a felon is a third-degree felony offense punishable by imprisonment for two to ten years and an optional fine not to exceed \$10,000. *See* TEX. PENAL CODE ANN. §§ 12.34, 46.04(a), (e) (West 2011). Due to the enhancement paragraph, however, the punishment range in this case was increased to that for a second-degree felony punishable by imprisonment for two to twenty years and an optional fine not to exceed \$10,000. *See id.* § 12.33, 12.42 (a) (West 2011 & Supp. 2016). Possession with intent to deliver methamphetamine and cocaine are both second-degree felony offenses punishable by imprisonment for two to twenty years and an optional fine not to exceed \$10,000. *See id.* § 12.33; TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (c) (West 2017). Appellant’s concurrent twelve-year sentences are within the statutory punishment range for these offenses and commensurate with the risks posed by

an armed felon engaged in the unlawful distribution of narcotics. We overrule appellant's first and second issue.

CROSS-POINT

In a cross-point, the State asks us to modify the trial court's judgment in cause no. 05-17-00248-CR to reflect appellant's plea and the trial court's finding on the enhancement paragraph. The record shows appellant pleaded true to one enhancement paragraph contained in the indictment in cause no. 05-17-00248-CR and the trial court found the enhancement paragraph true. The judgment states "N/A" for "plea to 1st paragraph" and "N/A" for "findings on 1st enhancement paragraph." We sustain the State's cross-point. Additionally, we note that appellant's name is incorrectly spelled on the judgments in cause nos. 05-17-00248-CR and 05-17-00249-CR.

Accordingly, we modify the trial court's judgments as follows: in cause no. 05-17-00248-CR, we modify appellant's name to state "Michael Aguinaga," the section entitled "plea to 1st paragraph" is "True," and the section entitled "findings on 1st paragraph" is "True." TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (courts of appeals have authority to modify a judgment); *Estrada v. State*, 334 S.W.3d 57, 63–64 (Tex. App.—Dallas 2009, no pet.) (same). In cause no. 05-17-00249-CR, we modify appellant's name to state "Michael Aguinaga." *Id.*

CONCLUSION

As modified, we affirm the trial court's judgments in cause nos. 05-17-00248-CR and 05-17-00249-CR. In cause no. 05-17-00250-CR, we affirm the trial court's judgment.

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TEX. R. APP. P. 47

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/David J. Schenck/

DAVID J. SCHENCK
JUSTICE



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

JUDGMENT

MICHAEL AGUINAGA, Appellant

No. 05-17-00248-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
No. 4, Dallas County, Texas

Trial Court Cause No. F15-60012-K.

Opinion delivered by Justice Schenck.

Justices Lang and Evans participating.

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

The case name is modified to show "Michael Aguinaga."

The section entitled "Plea to 1st Enhancement" is modified to show "True."

The section entitled "Findings on 1st Enhancement Paragraph" is modified to show "True."

As modified, we **AFFIRM** the trial court's judgment.

Judgment entered this 8th day of November, 2017.



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

JUDGMENT

MICHAEL AGUINAGA, Appellant

No. 05-17-00249-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
No. 4, Dallas County, Texas

Trial Court Cause No. F16-57271-K.

Opinion delivered by Justice Schenck.

Justices Lang and Evans participating.

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

The case name is modified to show "Michael Aguinaga."

As modified, we **AFFIRM** the trial court's judgment.

Judgment entered this 8th day of November, 2017.



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

JUDGMENT

MICHAEL AGUINAGA, Appellant

No. 05-17-00250-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court

No. 4, Dallas County, Texas

Trial Court Cause No. F16-57272-K.

Opinion delivered by Justice Schenck.

Justices Lang and Evans participating.

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

Judgment entered this 8th day of November, 2017.