Opinion issued October 13, 2011

In The

Court of Appeals

For The

First District of Texas

NOS. 01-10-00389-CR & 01-10-00390-CR

CRISTIAN ORELLANA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Case Nos. 1195734 & 1195735

MEMORANDUM OPINION

Appellant, Cristian Orellana, pleaded guilty to the offenses of aggravated robbery[1] and injury to a child,[2] and the trial court assessed his punishment at

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1 *See* TEX. PENAL CODE ANN. §§ 29.02, 29.03 (Vernon 2011). Trial court cause number 1195734; appellate cause number 01-10-00389-CR.

confinement for life for both offenses. In his sole point of error, appellant contends that article 42.12, section 9 of the Texas Code of Criminal Procedure[3] is facially unconstitutional.

We affirm.

Background

Appellant pleaded guilty to the offenses of aggravated robbery and injury to a child, and the trial court reset the case for a presentence investigation ("PSI") hearing to assess punishment. The trial court subsequently found appellant guilty, and commenced the PSI hearing. During the PSI hearing, the State introduced the PSI report into evidence. Appellant stated that he had no objections to the introduction of this report. After the PSI hearing, the trial court sentenced appellant to life in prison for both offenses.

Waiver

In his sole point of error, appellant argues that article 42.12, section 9 of the Texas Code of Criminal Procedure is facially unconstitutional because it permits

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[2] *See id*. § 22.04(a) (Vernon 2011). Trial court cause number 1195735; appellate cause number 01-10-00390-CR.

[3] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9 (Vernon Supp. 2011).

the use of testimonial statements in a presentence investigation report ("PSI") against an accused in violation of the Sixth Amendment's Confrontation Clause.[4]

The Texas Court of Criminal Appeals has held that an appellant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009). In so holding, the court explained that statutes are presumed to be constitutional until it is determined otherwise and "[t]he State and the trial court should not be required to anticipate that a statute may later be held to be unconstitutional." *Id*. Here, appellant concedes that he did not assert in the trial court his facial constitutional challenge to article 42.12, section 9. All of the cases that appellant cites in support of his attempt to raise his challenge for the first time on appeal precede *Karenev*. Accordingly, we hold that appellant has waived his challenge. *Id*.; *see also Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005) (holding that defendant did not preserve Confrontation Clause objection by failing to clearly articulate objection in trial court).

We overrule appellant's sole point of error.[5]

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[4] U.S. CONST. amend. VI.

[5] Moreover, we note that even if we were to consider the merits of appellant's point, the Texas Court of Criminal Appeals has held that when a PSI is used in a non-capital case in which the defendant has elected to have the trial court determine sentencing, there is no violation of a defendant's Sixth Amendment rights to

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).

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confrontation. *Stringer v. State*, 309 S.W.3d 42, 48 (Tex. Crim. App. 2010) (citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004)).