

Opinion issued December 1, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-01141-CR

DEMETRIUS LATRAE EARLY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1217084

MEMORANDUM OPINION

Demetrius Latrae Early pleaded guilty without an agreed punishment recommendation to theft of property with an aggregate value of two hundred thousand dollars or more, a first-degree felony. *See* TEX. PENAL CODE ANN.

§§ 31.03(a), (e)(7), 31.09 (West 2011). After a pre-sentence investigation and hearing, the trial court assessed a sentence of seventeen years' confinement. In this appeal, Early contends that the sentence assessed by the trial court was excessive and grossly disproportionate to the crime committed, in violation of his rights under the Eighth Amendment of the United States Constitution. We hold that Early waived this issue. We therefore affirm.

Background

Early admitted that, from August 2004 until July 2006, he operated an investment scheme in which he recruited investors to buy homes. The investors would provide accurate financial information to qualify for the mortgages, but the lenders did not receive that information. Instead, they received enhanced income and credit information. In addition, Early would have the homes appraised for an amount greater than their fair market value. This information would induce the lenders to approve loans more readily and for a larger amount than they otherwise would have.

Once a loan was in place, Early would collect a portion of the funds under the guise of marketing fees, consulting fees, or improvements. Early would tell the investors that he would manage the mortgage payments while leasing the homes to individuals with poor credit. After a year of regular lease payments, the renters would improve their credit enough to qualify for their own loans on the homes, and

then, Early told the investors, he would split profits with them from the sales. The scheme fell apart when Early did not keep up with the payments. The banks foreclosed on the homes, saddling the investors with debt and ruining their financial reputations.

Discussion

According to Early, the sentence assessed by the trial court violates the constitutional prohibition against cruel and unusual punishment because he qualified for deferred adjudication probation, was employed and thus was capable of making restitution payments, and accepted responsibility for his crime. *See* U.S. CONST. amend. VIII. We agree with the State's contention that Early failed to preserve this constitutional complaint for appellate review.

To preserve error for appellate review, the record must show that the defendant raised his complaint by a timely and specific objection. TEX. R. APP. P. 33.1(a)(1)(A); *Steadman v. State*, 31 S.W.3d 738, 741 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). This requirement serves two main purposes: (1) to inform the trial court of the objection and give the opportunity to rule on it, and (2) to give opposing counsel the opportunity to take appropriate action in response. *See* TEX. R. APP. P. 33.1(a)(1); *Wright v. State*, 178 S.W.3d 905, 931 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding that appellant failed to preserve error when appellant's counsel quoted objectionable phrase but did not state basis for

objection). A failure to object at trial constitutes waiver. *See Hookie v. State*, 136 S.W.3d 671, 679–80 (Tex. App.—Texarkana 2004, no pet.) (holding appellant waived disproportionality claim for failure to state constitutional objection of cruel and unusual punishment at time sentence was imposed); *see also Trahan v. State*, 991 S.W.2d 936, 939 (Tex. App.—Houston [1st Dist.] 1999, pet. dismissed) (holding that defendant may waive even claim of constitutional error by failing to make timely and adequate objection); *Jackson v. State*, 989 S.W.2d 842, 845 (Tex. App.—Texarkana 1999, no pet.) (holding that disproportionality does not fall within “right not recognized” exception to the contemporaneous objection rule and must be alleged by timely objection to preserve for appellate review).

The Eighth Amendment of the United States Constitution requires that a criminal sentence be proportionate to the crime for which a defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009 (1983). To preserve for appellate review a complaint that a sentence violates this constitutional requirement and amounts to cruel and unusual punishment, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. TEX. R. APP. P. 33.1(a); *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (concluding that defendant waived error because he presented argument for first time on appeal); *Wynn v. State*, 219 S.W.3d 54, 61 (Tex. App.—Houston [1st Dist.] 2006, no pet.)

(holding that defendant's failure to object to life sentence as cruel and unusual punishment waived error); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (holding that defendant could not assert cruel and unusual punishment for first time on appeal).

After the trial court announced its sentence at the end of the punishment hearing, Early did not object to the assessed punishment either orally or in his motion for new trial. *See Solis*, 945 S.W.2d at 301. We hold that Early waived this issue for review.

Conclusion

Early failed to preserve his Eighth Amendment challenge for appellate review. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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