Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01012-CR

VAN BENJAMIN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1105761

MEMORANDUM OPINION

Appellant Van Benjamin challenges the trial court's judgment adjudicating his guilt on the grounds that the trial court abused its discretion in finding that he had violated the terms of his community supervision by committing burglary of a habitation and that the sentence imposed by the trial court violates his state and federal constitutional rights. We affirm.

Background

Pursuant to a plea agreement, appellant pleaded guilty to the third-degree felony offense of possession of a controlled substance. In February 2007, the trial court entered

an order of deferred adjudication and placed appellant on community supervision for two years in accordance with the plea agreement. As is relevant here, as part of the terms of appellant's community supervision, he was ordered to:

- Commit no offense against the laws of this or any other state;
- Avoid injurious or vicious habits, including the use, possession, or consumption of marijuana;
- Pay a supervision fee of $25.00 per month for the duration of his community supervision; and
- Pay laboratory fees of $5.00 per month for the duration of his community supervision.

On September 8, 2008, the State filed a motion to adjudicate appellant's guilt based on several alleged violations of the terms of his community supervision. Specifically, the State alleged that appellant had (1) committed the offense of burglary of a habitation on July 16, 2008, (2) used marijuana, as evidenced by the presence of delta 9-tetrahydrocannabinol, a marijuana metabolite, in urine samples taken on March 22, 2007, April 19, 2007, and May 15, 2007, and (3) failed to pay community supervision fees of $150 and laboratory fees of $2.00. Appellant was arrested for these violations on that same day.

The trial court conducted a hearing on the State's motion to adjudicate appellant's guilt on October 29, 2008. Appellant pleaded "not true" to the State's allegations that he committed burglary of a habitation and used marijuana on April 19 and May 15, 2007. He pleaded "true" to the allegations that he (1) "use[d] a controlled substance, namely marijuana, which was evidenced . . . by the presence of delta 9-tetrahydroccanabinol in a urine sample taken from [appellant] on March the 22nd of 2007 at the Harris County Community Supervision and Corrections Department" and (2) failed to pay his community supervision and laboratory fees.

At the hearing, the State presented evidence regarding the terms and conditions of appellant's community supervision, appellant's arrearages in supervisory and laboratory fees, and appellant's other violations of the terms of community supervision. A Harris County Community Supervision employee testified that he monitored appellant's March 22, April 19, and May 15, 2007 urine tests. This employee stated that he observed positive indicators for the presence of marijuana metabolites in appellant's urine samples on each of these dates.

In addition, the State presented evidence of a burglary that occurred on July 16, 2008. The complainant testified that he returned to his apartment for lunch that day and discovered the door had been kicked in; two flat-screen television sets were missing, among other items. The complainant reported the burglary to police, and then began calling local pawn shops to search for his possessions. An employee at one of the pawn shops informed the complainant that an individual had brought two flat-screen television sets into the shop that morning. The complainant reported the information to the police and went to the pawn shop, where he was able to identify both of his television sets. Pawn shop employees identified appellant as the individual who had pawned the televisions, although he was accompanied by another person when he came into the shop. Appellant explained that he had pawned the television sets for a friend and was unaware that they had been stolen. He stated that he gave the money he received for pawning the televisions to his friend.

After hearing the evidence, the trial court found "true" the allegations that appellant had (a) committed burglary of a habitation, (b) violated the terms and conditions of his community supervision by using marijuana as evidenced by the urine sample taken on March 22, 2007, and (c) failed to pay his supervisory and laboratory fees. The court then adjudicated appellant guilty of the third degree felony offense of possession of a controlled substance and assessed his punishment at ten years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant filed a motion for new trial, asserting that his sentence was excessive and

violated his constitutional and statutory rights. The motion was overruled by operation of law, and this appeal timely ensued.

Analysis

In his first issue, appellant asserts that the trial court abused its discretion in finding that he had violated the terms and conditions of his community supervision by committing burglary of a habitation. In his second and third issues, appellant contends that his punishment of incarceration for ten years is cruel and excessive, in violation of the federal and state constitutional prohibitions against cruel and unusual punishment.[1]

A. Adjudication of Guilt

We review a trial court's decision to adjudicate guilt in the same manner as we review a trial court's revocation of community supervision. TEX. CODE CRIM. PROC. art. 42.12, § 5(b) (Vernon Supp. 2008). We review a trial court's order revoking community supervision under an abuse of discretion standard. *See Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Moore v. State*, 11 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The State's burden of proof in a revocation proceeding is by a preponderance of the evidence. *Cobb v. State*, 851 S.W.2d 871, 874 (Tex. Crim. App. 1993). Proof of any one of the alleged violations is sufficient to support a revocation of probation. *Moore*, 11 S.W.3d at 498.

Here, as detailed above, appellant pleaded "true" to several violations of the terms and conditions of his community supervision. Appellant does not challenge the trial court's finding of "true" to the allegations that he failed to pay his supervisory and laboratory fees or that he used marijuana as evidenced by the results of the March 22, 2007 urinalysis. These unchallenged findings support the trial court's adjudication of

[1] Appellant's brief contains a fourth issue asserting that his punishment of incarceration for sixty years is cruel and excessive; however, appellant was not sentenced to incarceration for sixty years. His second and third issues correctly challenge his ten year sentence, so we do not address this fourth issue.

guilt despite any merit to his challenge to the trial court's finding regarding the burglary of a habitation allegation. *See id.* Thus, we overrule his first issue.

B. Punishment

Where deferred adjudication community supervision is revoked, the trial court may impose any punishment authorized by statute. *Von Schounmacher v. State*, 5 S.W.3d 221, 223 (Tex. Crim. App. 1999) (per curiam). Appellant was convicted of possession of methamphetamine, a third-degree felony, with a punishment range of two to ten years' incarceration. *See* TEX. HEALTH & SAFETY CODE § 481.103(a)(1) (Vernon 2008) (methamphetamine is a Penalty Group 2 substance); *id.* § 481.116(c) (possession of Penalty Group 2 substance weighing between one and four grams is third degree felony); TEX. PENAL CODE § 12.34 (Vernon 2008) (third degree felony punishment range is two to ten years). As noted above, appellant was sentenced to ten years' incarceration, which falls within the statutory range of punishment.

Punishment assessed within the statutory limits is generally not considered cruel and unusual.[2] *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Baldridge v. State*, 77 S.W.3d 890, 893–94 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). A narrow exception to this rule was announced by the United States Supreme Court in *Solem v. Helm*, which held that criminal sentences must be proportionate to the crime and that even a sentence within the statutorily prescribed range may violate the Eighth Amendment. 463 U.S. 277, 290 (1983). Punishment may be grossly disproportionate to a crime only when an objective comparison of the gravity of the offense against the severity of the sentence shows the sentence to be extreme. *Baldridge*, 77 S.W.3d at 893

[2] Although appellant argues that the Texas Constitution affords greater protection than the United States Constitution, he has not cited any cases in which the Texas Constitution's prohibition against "cruel *or* unusual" punishment has been interpreted to provide more protection than the United States Constitution's prohibition against "cruel *and* unusual" punishment. *Compare* TEX. CONST. art. I, § 13 (prohibiting cruel or unusual punishment) *with* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment). Further, our courts have consistently concluded that there is "no significance in the difference" between the two constitutional provisions. *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997).

(citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (plurality op.) (Kennedy, J., concurring)). If we determine that the sentence is grossly disproportionate to the offense, we must then consider the remaining factors of the *Solem* test and compare the sentence received to (1) sentences for similar crimes in this jurisdiction, and (2) sentences for the same crime in other jurisdictions. *Id.*

As detailed above, appellant was placed on community supervision for a drug offense on February 27, 2007. There was evidence that in March, April, and May 2007, the immediate three consecutive months after being placed on community supervision, appellant's urine tested positive for a marijuana metabolite. Additionally, the trial court found the allegation that appellant had committed burglary of a habitation "true." This finding is supported by the record: Appellant admitted selling television sets to a pawn shop; these television sets had been stolen shortly before appellant took them to a pawn shop near the location from which they had been stolen. Although appellant stated that he was selling the television sets for a friend, the trial court was entitled to disbelieve his explanation. *See James v. State*, 48 S.W.3d 482, 486–87 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (concluding that factfinder was justified in rejecting as unreasonable and false the appellant's explanation that he was on his way to pawn recently stolen property for "some other dude"). Finally, appellant, who testified that he had been employed for four years, admitted that he had failed to pay his court-ordered community supervision and laboratory fees. Indeed, appellant failed to pay his community supervision fees for six out of the seven months he was on community supervision before the State filed its motion to adjudicate his guilt.

In determining an appropriate sentence, the trial court may consider evidence of "any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3 (Vernon 2008). Appellant's behavior while he was on community supervision—continuing his drug use, committing burglary, and failing to pay his court-ordered fees—indicates a complete disregard for the terms of his community supervision. Considering all the evidence, we conclude that the trial court's imposition of ten years'

incarceration, which falls within the legislatively mandated range of punishment, is not grossly disproportionate to the offense. Moreover, appellant has provided no argument or authority concerning sentences imposed on other individuals either in Texas or in other jurisdictions who committed a similar offense so that we may consider the other two *Solem* factors. *See* TEX. R. APP. P. 38.1(h); *see also Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.) (noting that even if the court wanted to consider the other *Solem* factors, there was no evidence in the record reflecting sentences imposed for similar offenses in Texas or other jurisdictions to which to compare the appellant's sentence).

Under these circumstances, we conclude that the sentence imposed in this case does not run afoul of the state or federal prohibitions against cruel or unusual punishment, and we overrule appellant's second and third issues.

Conclusion

We affirm the trial court's judgment.

/s/ Margaret Garner Mirabal
Justice

Panel consists of Chief Justice Hedges, Justice Anderson, and Senior Justice Mirabal.[*]
Do Not Publish — TEX. R. APP. P. 47.2(b).

[*] Senior Justice Margaret Garner Mirabal sitting by assignment.