**Affirmed and Memorandum Opinion filed December 2, 2010.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-09-01034-CR**

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**MANUEL GUTIERREZ JR., Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 228th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1137161**

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## MEMORANDUM OPINION

Appellant Manuel Gutierrez pled guilty to the felony of burglary of a habitation without any agreed plea bargain with the State. Appellant, however, received deferred adjudication of his guilty plea and was put on community supervision. Approximately one year later, the State made a motion to adjudicate guilt based upon appellant's alleged failure to follow the terms of his community supervision. The trial court held a hearing on the motion to adjudicate guilt, found the allegations true, and sentenced appellant to fifteen years' imprisonment for the underlying burglary charge. Appellant asserts two issues on appeal. The first is the trial court abused its discretion in finding there was violation of the

terms of community supervision. The second is the fifteen year sentence constitutes cruel and unusual punishment. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 18, 2008, appellant pled guilty to the charge of burglary of a habitation. The Order of Deferred Adjudication did not include an agreed punishment recommendation. The trial court issued an Order of Deferred Adjudication, placed appellant on community supervision for three years, and ordered appellant to submit to random drug and alcohol testing. He was also required to pay $1,000 in restitution to the victim, $50 to Crime Stoppers, fines, and the fees associated with his community supervision (collectively referred to below as "the fees").

On June 11, 2009, the State filed a motion to adjudicate guilt, alleging appellant had violated the terms of his community supervision by: (1) violating a law; (2) failing to submit to random drug and alcohol testing; (3) failing to pay the fees as ordered.

At the hearing on the motion to adjudicate guilt, the State informed the trial court that it would be dropping the claim of violation of the law and going forward on the failure to submit to drug and alcohol testing and failure to pay the fees. The State acknowledges in its appellate brief that appellant did not violate his community supervision because the fees were not yet due.[1]

Andrea Curtiss testified that she was a court liason officer assigned to appellant's case and that she had reviewed appellant's community supervision file. She testified that appellant's probation officer had twice ordered him to submit to random drug and alcohol tests on the day the probation officer called. Appellant did not appear for testing until the

[1] From the record, we learn that appellant was originally required to begin paying fees in May 2009, but a later amendment to his community supervision altered the due date to July 2009. Appellant was arrested on June 3, 2009 on a separate charge and therefore did not have access to his funds after that time. The State has conceded the issue in its appellate brief, so we will not consider the fees in our review of this case. *See In re SWEPI L.P.*, 103 S.W.3d 578, 582 n. 2 (Tex. App.—San Antonio 2003, no pet.) (appellate court need not address a conceded issue).

following day in both cases. When the late tests were administered, appellant tested negative for restricted substances.

Appellant testified each time he went for drug and alcohol testing late, his probation officer had approved the delay after receiving a call from appellant explaining that he could not appear that day. Appellant stated that he received a "paper" from his parole officer approving the delay, but he gave the paper to "the guy where I went to go take the [urinalysis]." No notations were made by the probation officer in appellant's probation record about the alleged conversations. Appellant stated he did not know why the probation officer had failed to make any notes in his file about the alleged conversations.

The trial court found there were violations of the terms of community supervision and sentenced appellant to fifteen years' imprisonment by the Texas Department of Criminal Justice for the burglary charge.

## DISCUSSION

### I. Did the Trial Court Abuse its Discretion by Finding Appellant Violated the Terms of His Community Supervision?

Appellant argues the trial court did not have sufficient evidence to support a finding that appellant violated his community supervision.

#### A. Standard of Review

An order revoking probation must be supported by a preponderance of the evidence. *Rickels v. State,* 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). The State meets its burden if the evidence creates a reasonable belief that it is more likely than not that the defendant violated the terms of his community supervision. *Id.* at 763-64. An appellate court reviews a trial court's order revoking probation under an abuse of discretion standard. *Id.* at 763; *Cardona v. State,* 665 S.W.2d 492 (Tex. Crim. App. 1984). Thus, we will view the evidence in the light most favorable to the trial court's decision. *Moore v. State,* 11 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2000, no pet.)

### B. Analysis

The State submitted evidence appellant did not submit in a timely fashion for a random drug and alcohol test. Appellant admitted he knew he reported late for the test, but testified that his probation officer gave him permission to be late. Appellant produced no evidence in the form of telephone records, testimony of the probation officer, or any written agreement to the delay. "[T]he trial judge is the sole trier of fact and determines the credibility of the witnesses and the weight to be given to their testimony." *Id.* at 498. The question of whom to believe is a credibility issue; we must conclude the trial court's implied finding that appellant's story was not believable. *Id.*

The question is whether two missed random drug tests, even when later completed and passed, is sufficient to revoke community supervision. Appellant does not cite any cases supporting the proposition that a tardy completion of a community supervision condition means that a court cannot revoke community supervision. A single violation of the terms of community supervision is sufficient to revoke community supervision. *See Moore v. State,* 605 S.W.2d 924, 926 (Tex. Crim. App. 1980) ("[O]ne sufficient ground for revocation will support the court's order to revoke probation.") In this case, viewing the evidence in the light most favorable to the trial court's decision, the State met its burden of preponderance of the evidence. The trial court did not abuse its discretion.

Appellant's first issue is overruled.

## II. Did the Trial Court Commit Error by Imposing Cruel and Unusual Punishment on Appellant?

Appellant argues the fifteen years' incarceration for the burglary offense is cruel and unusual punishment although the sentence is within the statutory range for the offense. He argues on appeal the sentence is a violation of the Eighth Amendment of the United States Constitution, Article I, section 13 of the Texas Constitution, and the Texas Code of

Criminal Procedure. However, there is no objection on any of these grounds in the trial court record.

An appellant must make an objection in the trial court for an appellate court to review the issue for error on appeal. Tex. R. App. P. 33.1(a). Claims of cruel and unusual punishment can be waived if not brought before the trial court. *See Rhodes v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (failure to raise a challenge to sentence under the Eighth Amendment to the U.S. Constitution or Article I, section 13 of the Texas Constitution in the trial court leads to waiver on appeal); *Noland v. State*, 264 S.W.3d 144, 151-42 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (waiver of cruel and unusual punishment claim occurred because no objection was made at trial).

Appellant did not raise any of his objections to the punishment at the trial court. As a result, he has waived them. *See* Tex. R. App. 33.1(a); *Rhodes*, 934 S.W.2d at 120. We overrule appellant's second issue.

**CONCLUSION**

Having overruled all of appellant's points of error, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).