Affirmed and Memorandum Opinion filed July 7, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-01088-CR

SAMUEL DAMICO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 1264406

MEMORANDUM OPINION

Appellant Samuel Damico appeals his conviction for murder on his plea of no contest and sentence of twenty-five years' incarceration. In two issues, appellant claims that his sentence is cruel and unusual punishment. We affirm.

BACKGROUND

Appellant pleaded "no contest" to the charge of murder without an agreed recommendation from the State on punishment. Appellant also pleaded "true" to an enhancement paragraph alleging a conviction for felony burglary of a habitation. The trial court found the evidence sufficient to find appellant guilty of murder but deferred a

finding of guilt pending a presentence investigation (PSI) report and set the case for a PSI hearing.

According to the PSI report, on December 20, 2007, complainant, Timothy McMichael, was at a storage facility visiting with the manager, Country Patterson, in her office. Appellant arrived at the storage facility at 4:50 p.m. and asked to see McMichael. Appellant was on a cell phone talking to the police about missing prescription medication. Patterson heard appellant and McMichael discussing the prescription medication. Patterson saw appellant pull a knife out of his pocket and heard him tell McMichael that "I'm going to cut your fucking throat." Patterson told appellant to get out of the office. Appellant and McMichael left the office. Patterson saw appellant stab McMichael with the knife. A seven-year-old girl, whom Patterson was babysitting, also witnessed the stabbing. Appellant got in his vehicle and left the storage facility. McMichael died at the hospital, and the autopsy report showed that McMichael sustained a stab wound to the chest.

The trial court admitted into evidence appellant's medical records describing his health history, including diabetes, cirrhosis, hepatitis C, hypertension, hepatic encephalopathy, lung disease, and liver disease. In a statement attached to the PSI report, appellant stated that he did "not remember the day's events as they are reported," and he did not go to the storage facility to kill McMichael.

Also, at the PSI hearing, the trial court confirmed that it had agreed to accept recorded comments by the police that appellant is frail and sick, did not intend to kill McMichael, and would survive only two years or not even that long. The trial court also confirmed an agreement that a 911 tape reflects that appellant attempted to report the theft of a medical prescription.

In two issues on appeal, appellant claims that his twenty-five year sentence is cruel and unusual punishment in violation of the United States Constitution and the Texas Constitution. *See* U.S CONST. amend VIII; TEX. CONST. art. I, § 13.

ANALYSIS

Almost every right, constitutional or statutory, may be waived by failing to object. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995); *Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986). Specifically, an objection based on cruel and unusual punishment must be made in the trial court or it is waived on appeal. *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Conceding that the failure to object in the trial court to punishment as cruel and unusual waives such complaint on appeal, appellant contends that the "dialogue" he had with the trial court after it assessed his sentence preserved his complaint for appellate review. Appellant claims that, although he did not specifically state that the sentence was grossly disproportionate to the crime, "such grounds were readily apparent from the context of his objection to the pronouncement of sentence in his lack of memory of the event and discussion of severe medical issues facing him."

After announcing the twenty-five year sentence, the trial court allowed appellant to make a statement. Appellant stated that he did not remember stabbing McMichael in the chest—"All I can say is I don't remember the things happening the way they said they did." The record does not reflect that appellant objected at the PSI hearing to his sentence as cruel and unusual punishment. Moreover, appellant did not file a motion for new trial objecting to his sentence. Appellant failed to preserve his complaints for appellate review.

Even if appellant had preserved error, we cannot conclude that his sentence is disproportionate to the offense for which he was charged. Punishment assessed within the statutory limits is generally not cruel and unusual punishment. *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972). Appellant was convicted of murder, a first-degree felony, and he pleaded "true" to a felony enhancement paragraph, elevating the range of punishment to fifteen to ninety-nine years or life and a fine not to exceed

$10,000. *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West 2011); TEX. PENAL CODE ANN. § 19.02(b) (West 2011). Therefore, appellant's sentence falls well within the statutory limits.

Appellant concedes that the twenty-five year sentence is within the statutory range of punishment. However, he contends that his sentence is grossly disproportionate to the crime when compared to the gravity of the offense. In *Solem v. Helm*, the United States Supreme Court 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. *See* 463 U.S. 277, 290 (1983). The Court set forth the following three objective criteria by which reviewing courts should analyze proportionality claims: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. In conducting an Eighth Amendment proportionality analysis, we first make a threshold comparison of the gravity of the offense against the severity of the sentence. *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992); *Harris v. State*, 204 S.W.3d 19, 29 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Only upon determining that the sentence is grossly disproportionate do we then consider the two remaining *Solem* factors—sentences imposed in the same and other jurisdictions. *McGruder*, 954 F.2d at 316; *Harris*, 204 S.W.3d at 29.

Appellant contends that his "life threatening medical issues" and the police detectives' opinion that he did not intend to kill McMichael outweigh his criminal history. However, appellant pleaded "guilty" to murder—a first degree felony second in gravity only to capital murder. *See* TEX. PENAL CODE ANN. § 19.03 (West 2011). Further, the "offense" at issue is not only murder, but murder with an enhancement. Appellant's status as a habitual offender is a factor in evaluating the gravity of the offense. *See McGruder*, 954 F.2d at 316. Moreover, as described in the PSI report, appellant committed the offense in the presence of a seven-year-old girl. Although

appellant presented evidence that he had suffered from myriad medical conditions, there was no evidence that any such conditions impaired him on day of the offense.

The record reflects that the trial court orally admonished appellant, and appellant understood that by pleading "true" to the enhancement paragraph, the punishment range was raised to between fifteen and ninety-nine years or life and a fine of up to $10,000. Appellant's attorney informed the court that appellant had some psychiatric issues but was competent to stand trial. Appellant's twenty-five year sentence falls in the lower end of the range of punishment under the habitual felony offenders statute.

We conclude that appellant's sentence of twenty-five years' incarceration is not grossly disproportionate to the offense of murder, enhanced by a prior felony. Because we have found the sentence is not grossly disproportionate, we need not evaluate appellant's sentence under the two remaining *Solem* factors. *See Harris*, 204 S.W.3d at 29.[1] We overrule appellant's first and second issues.

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

/s/ Sharon McCally
Justice

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

[1] Even if appellant's twenty-five year sentence were grossly disproportionate to the offense, appellant has not addressed the remaining two *Solem* factors, thereby waiving any challenge as to them on appeal. *See* TEX. R. APP. P. 38.1.