Affirmed as Modified and Memorandum Opinion filed June 21, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00496-CR
NO. 14-15-00497-CR

TREY FOSTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 1374929 & 1374930

M E M O R A N D U M O P I N I O N

Appellant entered pleas of guilty to two counts of aggravated assault and was sentenced to sixteen years' confinement in each case with the sentences to run concurrently. In two issues he contends that the trial court's judgment incorrectly reflects he waived his right to appeal and that the trial court erred in sentencing him in the absence of a psychological evaluation in his presentence investigation report (PSI). Finding that the trial court's judgment contains an incorrect recitation,

we modify the judgment to delete the phrase, "Appeal waived. No permission to appeal granted." We affirm the judgment as modified.

BACKGROUND

Appellant entered guilty pleas to two counts of aggravated assault as a result of a shooting at Lone Star College. According to the PSI, three of the shooting victims were transported to the hospital. One of the victims identified Carlton Berry as being the suspect who shot him. Berry, who was wounded during the shooting, identified appellant as his accomplice. Berry told authorities that appellant began shooting during a verbal dispute with a student after the student bumped into appellant in the hall at school. In a written statement to the court, appellant pleaded for leniency, telling the trial court that at the time of the shooting he was in fear for his life. Appellant explained that he had received threatening messages from a woman and thought that the student who bumped him in the hall had been sent by that woman to kill him.

With regard to appellant's mental health, the PSI stated:

> The defendant reported suffering visual hallucinations as a result of seeing a friend (C.H.) die. The defendant also reported having suicidal thoughts but having never acted on them. The defendant stated he attended counseling following this offense but was unable to provide this author with any of the details regarding this counseling.

At the beginning of the punishment hearing the trial court asked appellant if there were any objections to the PSI. Appellant objected to the fact that he was classified as a gang member. Appellant made no other objection to the report.

Appellant made an oral statement directly to the trial court in which he expressed remorse and accepted responsibility for the pain he inflicted. Appellant told the court he had never been incarcerated before this event, and expressed his opinion that "the situation is being blown way out of proportion." Appellant asked

the court to be lenient in its sentencing. Other than the PSI, no evidence was introduced at the punishment hearing. In closing argument appellant's counsel pleaded for leniency, arguing that appellant was afraid for his life at the time of the shooting. Counsel referred to items found in appellant's jail cell, including marijuana, pill bottles, and a "shank." Counsel explained that those items did not belong to appellant, but belonged to other inmates.

The trial court sentenced appellant to sixteen years' confinement in each case, with the sentences to run concurrently.

ANALYSIS

Recitation of Waiver in Judgment

In his second issue appellant argues the trial court's judgment is incorrect in that it erroneously recites that appellant waived his right to appeal. Appellant entered a guilty plea without an agreed recommendation on punishment. Non-negotiated waivers of the right to appeal are valid only if the defendant waived the right of appeal knowing with certainty the punishment that would be assessed. *See Washington v. State*, 363 S.W.3d 589, 589–90 (Tex. Crim. App. 2012). Appellant entered a guilty plea prior to the preparation of the PSI and the hearing on punishment. The record does not reflect that appellant waived his right to appeal knowing with certainty the punishment that would be assessed. *See Ex parte Delaney*, 207 S.W.3d 794, 799 (Tex. Crim. App. 2006). Appellant's second issue is sustained.

Accordingly, we modify the judgment to delete the sentence, "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." *See French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (stating appellate court has authority to modify a judgment to "speak the truth").

Psychological Evaluation in PSI

In his first issue appellant contends the trial court erred in sentencing him in the absence of statutorily required information in the PSI. Specifically, appellant challenges the absence of a psychological evaluation. Article 42.12 section 9 of the Texas Code of Criminal Procedure provides in part:

> (i) A presentence investigation conducted on any defendant convicted of a felony offense who appears to the judge through its own observation or on suggestion of a party to have a mental impairment shall include a psychological evaluation which determines, at a minimum, the defendant's IQ and adaptive behavior score. The results of the evaluation shall be included in the report to the judge as required by Subsection (a) of this section.

Tex. Code Crim. Proc. Ann. art. 42.12.

The PSI detailed appellant's family and criminal history including references to his mental health status and history. Appellant alleges that the PSI was inadequate because it lacked a more complete mental health evaluation. But, in the trial court he did not challenge either the general adequacy of the PSI or its specific failure to include a more complete psychological evaluation. The right to a psychological evaluation as a part of a PSI may be forfeited by a failure to object. *Nguyen v. State*, 222 S.W.3d 537, 541–42 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (holding that the right to a psychological evaluation may be forfeited, just as the right to a presentence investigation generally). Because appellant did not object to the absence of a psychological evaluation, any error is waived. *See Brand v. State*, 414 S.W.3d 854, 855 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

Appellant relies on *Garrett v. State*, 818 S.W.2d 227, 229 (Tex. App.—San Antonio 1991, no pet.), for the proposition that a PSI is mandatory in a felony case in which it appears to the trial court that the defendant may have a mental impairment. In *Garrett*, the trial court ordered the defendant to be examined by a

psychiatrist to determine his competency to stand trial. *Id.* at 228. In the first of two reports, the county psychiatrist found Garrett was not competent to stand trial because he was mentally ill. *Id.* The report also found Garrett had "mixed organic brain syndrome, schizophrenia," and that his intellectual functioning was estimated to be below average. *Id.* The San Antonio Court of Appeals held that the trial court erred in not ordering a PSI despite Garrett's failure to object to the absence of one. *Id.* at 229.

We distinguish the narrow holding in *Garrett* from the facts of this case in that appellant, unlike the defendant in *Garrett*, requested and received a PSI. Moreover, *Garrett* involved a case under the prior version of article 42.12, section 9(i), and the court of appeals focused on the fact that no PSI had been conducted on Garrett despite a previous finding by the county psychiatrist that Garrett was not competent to stand trial due to mental illness. *Garrett*, 818 S.W.2d at 228. Section 9(i)[1], as it existed at the time *Garrett* was decided, required that a PSI be conducted and that the PSI include a psychological evaluation when the defendant may have a mental impairment. *See Holloman v. State*, 942 S.W.2d 773, 776 (Tex. App.—Beaumont 1997, no writ). The current version of section 9(i) requires that, if a trial court is otherwise required to order a PSI or does so in its own discretion, then the PSI must contain a psychological evaluation of the defendant if the defendant appears to have a mental impairment. *Id*. *Garrett* is distinguishable in that, in this case, appellant requested and received a PSI and there was no evidence of a prior diagnosis of mental illness.

Appellant further argues that he did not waive his complaint to a psychological evaluation because the reference in the PSI to visual hallucinations

[1] Act of June 15, 1989, 71st Leg., R.S., ch. 785, § 4.17, 1989 Tex. Gen. Laws 3498, 3503, amended by Act of August 29, 1991, 72nd Leg., 2d C.S., ch. 10, § 16.01, 1991 Tex. Gen. Laws 213.

alerted the trial court to appellant's potential mental health issues. Appellant relies on article 42.12, section 9(i), which provides in part, that if a felony defendant "appears to the judge through its own observation or on suggestion of a party to have a mental impairment," the PSI is required to include a psychological evaluation, the reports of which shall be included in the report. Tex. Code Crim. Proc. Ann. art. 42.12 § 9(i). Though the record may contain evidence that appellant at one time had visual hallucinations after seeing the death of his friend, appellant supplied no information about when those hallucinations occurred relative to the offense. Moreover, neither appellant, nor the PSI investigator attributed the cause of the offense to appellant's mental health. Because appellant only challenged inaccuracies in the report about his gang status, rather than objecting to the trial court's failure to order a psychological evaluation, any error was waived on appeal. *See Welch v. State*, 335 S.W.3d 376, 382 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). Moreover, under the doctrine of regularity, "we must presume that the trial court would have ordered a psychological evaluation had it observed that appellant was suffering from a mental impairment." *Id.*

Appellant further argues the trial court violated the prohibition against cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 13 of the Texas Constitution. A defendant must object when his sentence is assessed or file a motion for new trial to preserve a complaint of cruel and unusual punishment. *See* Tex. R. App. P. 33.1(a); *Arriaga v. State*, 335 S.W.3d 331, 334 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Appellant did not object when his punishment was announced or file a motion for new trial. Accordingly, nothing is presented for our review.

Under these circumstances, appellant waived any complaint on appeal as the record reveals he was afforded the opportunity to request a psychological

evaluation, and he did not object to the lack of one. *See id*. We overrule appellant's first issue.

CONCLUSION

We modify the trial court's judgment to delete the sentence, "APPEAL WAIVED. NO PERMISSION TO APPEAL GRANTED." and we affirm the trial court's judgment as modified. *See* Tex. R. App. P. 43.2(b).

/s/ Sharon McCally
Justice

Panel consists of Chief Justice Frost and Justices McCally and Brown.
Do Not Publish — Tex. R. App. P. 47.2(b).