In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-09-00154-CR

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JASON CHILDRESS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 08-03781

MEMORANDUM OPINION

Pursuant to a plea bargain, Jason Childress pled no contest to aggravated assault. The trial court deferred adjudication of guilt and placed Childress on community supervision for three years. The State filed a motion to revoke. After finding two of the alleged violations to be true, the trial court revoked the unadjudicated community supervision, found Childress guilty, and sentenced him to twenty years in prison. Childress raises four issues on appeal.

In issue one, Childress argues the evidence is insufficient to revoke his unadjudicated

community supervision. The trial court found the following alleged violations to be true: failing to report to the probation department and failing "to successfully complete the program of Specialized Mental Health Caseload[.]" We review an order revoking community supervision under an abuse of discretion standard. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). In a revocation hearing, the State's burden of proof is by a preponderance of the evidence. *Id*. at 763-64. The State meets that burden when the greater weight of the credible evidence creates a reasonable belief that the defendant violated a condition of his community supervision. *Id*. at 764. Proof of a single violation is sufficient to support a revocation order. *Marcum v. State*, 983 S.W.2d 762, 766-67 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd).

Childress argues that he was never actually identified in court as the Jason Childress on community supervision in cause number 3781. During the revocation hearing, the following exchange occurred:

> The Court: This is Cause No. 3781 on Jason Childress. Are you Mr. Childress?
>
> [Childress]: Yes.
>
> . . . .
>
> [J. Rabbit]: I'm the mental health case load community supervision officer.
>
> [Prosecutor]: As part of your work, is Jason Childress on your caseload?
>
> [J. Rabbit]: Yes, he is.

[Prosecutor]: Is this Jason Childress here right in front of me?

[J. Rabbit]: Yes.

[Prosecutor]: Your Honor, please let the record reflect she has identified the defendant, Jason Childress.

The Court: The record will so reflect.

The record establishes that appellant was identified.

Childress also argues the evidence is insufficient to show he understood he was required to report to his supervising officer. Nothing in the record below indicates Childress was unable to understand the reporting requirements set out in the deferred adjudication order. A letter from Dr. Edward Gripon, who completed a psychiatric evaluation of Childress prior to the revocation hearing, stated that Childress has a "[s]chizo-[a]ffective [d]isorder," but is competent to stand trial. "He has a rational as well as factual understanding of his current legal difficulty and he possesses sufficient ability to communicate with his attorney with a reasonable degree of rational understanding."

Jenny Rabbit testified that Childress did not report to the probation department, as required by the deferred adjudication order, and he did not successfully complete the specialized mental health program. She acknowledged that Childress was in a mental hospital most of the time, and Childress had been on several medications. The record also reveals, however, that Childress was released from the hospital, but he did not report to the department or give his location. There is sufficient evidence that Childress violated his

community supervision. The trial court did not abuse its discretion in revoking the community supervision. We overrule issue one.

Issues two and three concern punishment. In issue two, Childress contends that "in light of the complainant's desires and appellant's mental deficiency[,]" the trial court abused its discretion by sentencing appellant to the maximum sentence (twenty years) for aggravated assault. As Childress points out, the prosecutor informed the trial court at the plea hearing that the complainant did not want Childress to go to jail. In issue three, Childress argues that the sentence is excessive, cruel, unusual, and disproportionate to the crime. The nature of the crime is revealed in the indictment, which states that Childress "intentionally and knowingly threaten[ed] imminent bodily injury to [the complainant] with the use of a deadly weapon, namely, a knife . . . ."

Childress relies on the following: the Eighth Amendment to the United States Constitution; article I, subsection 13 of the Texas Constitution; and article 1.09 of the Code of Criminal Procedure.[1] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.

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[1]Childress does not argue that the cruel and unusual provisions of the state constitution or the statute are broader and offer greater protection than the Eighth Amendment. *Baldridge v. State*, 77 S.W.3d 890, 894 (Tex. App.--Houston [14th Dist.] 2002, pet. ref'd) ("Neither by argument nor authority has appellant established that the provisions of the Texas Constitution offer broader or greater protection than the Eighth Amendment of the United States Constitution[;] [a]ccordingly, nothing is presented for review."); *Puga v. State*, 916 S.W.2d 547, 550 (Tex. App.--San Antonio 1996, no pet.).

CONST. amend. VIII. "Subject only to a very limited, 'exceedingly rare,' and somewhat amorphous Eighth Amendment gross-disproportionality review, a punishment that falls within the legislatively prescribed range, and that is based upon the sentencer's informed normative judgment, is unassailable on appeal." *Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006) (footnote omitted). Although Childress's punishment was the maximum allowed for a second degree felony, the sentence was within the statutory range for aggravated assault. *See* TEX. PEN. CODE ANN. § 12.33 (Vernon Supp. 2009); TEX. PEN. CODE ANN. § 22.02(a)(2),(b) (Vernon Supp. 2009). Further, a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, must be preserved for appellate review by a timely request, objection, or motion stating the specific grounds for the ruling desired. *Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.--Fort Worth 2009, pet. ref'd) (citing *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996)); *see* TEX. R. APP. P. 33.1(a). Childress did not raise this complaint below.

Even if we assume Childress preserved his complaint, the sentence is not cruel, unusual, or excessive. Childress cites various cases in which the trial court sentenced a defendant to a lesser punishment for aggravated assault. Those include sentences of twelve years, ten years, seven years (probated), five years, and two years. Childress argues, as illustrated by these sentences, that his sentence is disproportionate to the crime, and there are mitigating factors the trial court should have considered. Article 37.07, section 3(a)(1) of the

Code of Criminal Procedure provides:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. . . .

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2009); *see generally Ellison v. State*, 201 S.W.3d 714, 718 (Tex. Crim. App. 2006) (Holding that a probation officer could testify at punishment as to the defendant's suitability for probation, the Court stated, "[W]e acknowledge that, by amending Article 37.07, Section 3(a) to include evidence of 'any matter the court deems relevant to sentencing,' the Legislature thereby allowed a jury to consider a wide range of evidence in determining whether to recommend probation."). "Relevancy in the punishment phase is 'a question of what is helpful to the [factfinder] in determining the appropriate sentence for a particular defendant in a particular case.'" *Ellison*, 201 S.W.3d at 719 (quoting *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999)). The trial court's broad discretion is not unfettered. *Id*. at 722. The trial court must operate within the bounds of Texas Rules of Evidence 401, 402, and 403. *Id*.

The record reveals that the trial court considered the matters appellant raises,

specifically Childress's mental condition, his apparent suicide attempts, the facts in the aggravated assault offense, and the complainant's wishes of no incarceration for Childress. The sentence is within the range permitted by statute. The trial court did not abuse its discretion in assessing the twenty-year sentence. We overrule issues two and three.

In issue four, Childress argues trial counsel was ineffective in failing to object to the sentence assessed and in failing to file a motion for new trial or for reconsideration of the sentence. The trial court did not abuse its discretion in sentencing Childress to twenty years; trial counsel was not ineffective in failing to object or raise the issue in a motion for new trial. We overrule issue four.

We affirm the judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on February 9, 2010
Opinion Delivered February 17, 2010
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.