In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00248-CR

RANDY NELSON CARR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 07-01861

MEMORANDUM OPINION

Randy Nelson Carr appeals from the trial court's revocation of his community supervision and adjudication of guilt. Carr contends that (1) his sentence is excessive and constitutes cruel and unusual punishment and (2) he received ineffective assistance of counsel. We overrule both issues and affirm the trial court's judgment.

BACKGROUND

Pursuant to a plea bargain agreement, Carr pled guilty to burglary of a building.

See Tex. Penal Code Ann. § 30.02 (West 2003). The trial court deferred adjudication of guilt and placed him on community supervision for a period of four years. The State subsequently filed a motion to revoke, alleging Carr violated terms of his community supervision. After Carr pled "true" to three violations of the conditions of his community supervision, the trial court found Carr guilty of burglary of a building, and sentenced Carr to two years in the state jail. Carr neither objected when the trial court pronounced sentence, nor did Carr file a motion for new trial.

EIGHTH AMENDMENT

In issue one, Carr complains that his punishment was constitutionally disproportionate, and cruel and unusual under the Eighth Amendment of the United States Constitution and Article I, section 13 of the Texas Constitution. *See* U.S. Const. amend. VIII; Tex. Const. art. I, § 13; Tex. Code Crim. Proc. Ann. § 1.09 (West 2005). The State contends that Carr waived this issue by failing to timely object.

To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court, and obtain a ruling. Tex. R. App. P. 33.1(a). A party's failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for the purposes of appellate review. *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Because Carr did not object when the trial court sentenced him, and because he subsequently did not

file any post-sentence motions complaining about the alleged excessive sentence, we hold that he has waived his complaints regarding the length of his sentence.

INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

In issue two, Carr complains that his trial counsel rendered ineffective assistance of counsel during the punishment phase of the proceeding by failing to preserve the error raised in his first issue. Carr argues that his sentence is disproportionate to his background and the circumstances of the crime. *See* U.S. Const. amend. VIII; *see also Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, 506 U.S. 849, 113 S.Ct. 146, 121 L.Ed.2d 98 (1992).

To show ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

> To show deficient performance, the defendant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Garza v. State, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007) (footnotes omitted) (citing *Strickland*, 466 U.S. at 688, 694). We "'indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance[.]'" *Williams*, 301 S.W.3d at 687 (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

The record on direct appeal is generally insufficient to show that counsel's representation was deficient. *Id.* When the record is insufficient "we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Garza*, 213 S.W.3d at 348.

Prior to sentencing Carr, the trial court received evidence of Carr's multiple violations of community supervision, including the commission of new offenses while on community supervision, his substantial criminal history, and specific concerns of the probation department. The trial court then sentenced Carr to the maximum sentence. Carr's counsel did not object to the sentence, nor did counsel file post-trial motions concerning the length of Carr's sentence.

Carr's sentence is within the range of punishment the Legislature has deemed appropriate for his crime. *See* Tex. Penal Code Ann. § 12.35(a) (West Supp. 2010). Counsel's rationale for her actions and intentions do not appear in the record. Absent such record, counsel is presumed to have provided adequate assistance and made all decisions in the exercise of reasonable professional judgment. *Ex Parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001). Affording proper deference to trial counsel's representation, we conclude there is insufficient evidence in the record to find that counsel's decisions fell below the standard of professional norms, nor do we find the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State,*

187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia,* 57 S.W.3d at 440).[1]

Overruling appellant's two issues, we find the record does not show the trial court abused its discretion in revoking Carr's community supervision and adjudicating his guilt. We affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on January 24, 2011
Opinion Delivered March 16, 2011
Do not publish

Before McKeithen, C.J., Kreger and Horton, JJ.

[1] Relief in appropriate cases for claims of ineffective assistance of counsel is generally available through an application for writ of habeas corpus. *See Thompson v. State*, 9 S.W.3d 808, 814-15 (Tex. Crim. App. 1999).