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Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00389-CR

TYRIL NORRIS OLIVER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 09-05882

MEMORANDUM OPINION

Tyril Norris Oliver pleaded guilty to deadly conduct and received four years of community supervision. *See* Tex. Penal Code Ann. § 22.05(b), (e) (West 2003). The State later filed a motion to revoke Oliver's community supervision. The trial court found that Oliver violated a condition of his community supervision, found Oliver guilty of deadly conduct, and sentenced Oliver to ten years in prison. On appeal, Oliver contends that: (1) the evidence is insufficient to support revocation, and (2) his sentence is constitutionally disproportionate and unreasonable. We affirm the trial court's judgment.

Revocation

In issues one and two, Oliver contends that the trial court abused its discretion by revoking his community supervision because the evidence is insufficient to show that he violated a condition of his community supervision.[1]

"'Appellate review of an order revoking probation is limited to abuse of the trial court's discretion.'" *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006) (quoting *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984)). "The State must prove by a preponderance of the evidence that a defendant violated the terms of his probation." *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). This standard is satisfied when the "'greater weight of the credible evidence . . . create[s] a reasonable belief that the defendant has violated a condition of his probation.'" *Rickels*, 202 S.W.3d at 763-64 (quoting *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974)). "It is the trial court's duty to judge the credibility of the witnesses and to determine whether the allegations in the motion to revoke are true or not." *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981). We review the evidence in the light most favorable to the trial court's ruling. *Id.*

In this case, the deferred adjudication order prohibits Oliver from contacting Alexander Garza, the victim of the deadly conduct offense. The trial court amended

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[1] Oliver raises legal and factual sufficiency challenges. Our review is conducted under the traditional abuse of discretion standard. *Brooks v. State*, 153 S.W.3d 124, 126 (Tex. App.—Beaumont 2004, no pet.).

Oliver's community supervision to include a condition prohibiting him from having contact with Juliana Konning.

In its motion to revoke, the State alleged that Oliver violated a term of his community supervision by having "contact with the victim(s) of the offense either in person, by telephone, via mail or through a third party[.]" At the beginning of the revocation hearing, Juliana stated that Oliver did not contact her and that she did not file any charges. The trial court proceeded with the hearing, and Oliver pleaded "[n]ot true" to the State's allegation.

Juliana testified that Oliver picks their baby up at her mother Connie's house. She was at work when Connie called to tell her that Oliver had come to the house. Oliver told Connie that he knew where Juliana worked, he knew her driver's license number, and he suggested that she stay home. Juliana felt upset, but not threatened. Oliver's community supervision officer, who is related to Oliver's girlfriend, told Juliana to contact the police.

Officer Tony Patterson perceived Oliver's comments to be threats made to Juliana either directly or through Connie. Patterson testified that Juliana wanted to sign a non-consent statement. Juliana admitted signing a non-consent form, but testified that she did what Oliver's community supervision officer told her to do, and she felt that she had been used to get Oliver into trouble. Oliver testified that he had permission to visit the baby at Connie's house. He denied threatening Juliana and denied attempting to contact Juliana either directly or through Connie.

On appeal, Oliver complains that the State's motion to revoke is insufficient because it does not name Juliana as the alleged victim, does not say who he contacted, and does not say how he made contact. At the revocation hearing, Oliver waived the formal reading of the motion to revoke and did not challenge the State's motion as insufficient. His complaint is not preserved for appellate review. *See* Tex. R. App. P. 33.1(a)(1); *see also Hunt v. State*, 5 S.W.3d 833, 835 (Tex. App.—Amarillo 1999, pet. ref'd).

Oliver next contends that he did not sign the amendment prohibiting him from contacting Juliana and the evidence does not show that he was aware of the amendment. The trial court "may, at any time during the period of community supervision, alter or modify the conditions [of community supervision]." Tex. Code Crim. Proc. Ann. art. 42.12 § 11(a) (West Supp. 2010).[2] Oliver cites no authority to support the position that his signature was required on the trial court's order amending the terms of his community supervision. *See* Tex. R. App. P. 38.1(i). Nor did he complain to the trial court that he was unaware of the amendment. His complaint is not preserved for appeal.[3] *See* Tex. R. App. P. 33.1(a)(1); *see also Eddie v. State*, 100 S.W.3d 437, 440 (Tex. App.—Texarkana 2003, pet. ref'd).

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[2] Because amended article 42.12 § 11(a) contains no material changes applicable to this case, we cite to the current version of the statute.

[3] Even had the issue been preserved, Oliver's conduct during the revocation hearing suggests that he was aware of this condition. *See Eddie v. State*, 100 S.W.3d 437, 440 (Tex. App.—Texarkana 2003, pet. ref'd).

Finally, Oliver contends that the evidence presented at the revocation hearing fails to show that he contacted Juliana. According to Oliver, Connie contacted Juliana of her own volition and not at his prompting. The alleged threats, however, were directed at Juliana and the trial court could reasonably conclude that Oliver either intended or expected Connie to communicate these statements to Juliana. The greater weight of the evidence created a reasonable belief that Oliver violated a condition of his probation by contacting Juliana through her mother Connie. *Rickels*, 202 S.W.3d at 763-64. Because the trial court could conclude by a preponderance of the evidence that Oliver violated a condition of his community supervision, it did not abuse its discretion by revoking Oliver's community supervision. *Cobb*, 851 S.W.2d at 873. We overrule issues one and two.

Sentence

In issues three and four, Oliver contends that his sentence is unconstitutionally disproportionate and unreasonable under the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure. *See* U.S. Const. amends. V, VIII, XIV; *see also* Tex. Const. art. I, § 13; Tex. Code Crim. Proc. Ann. art. 37.07 (West Supp. 2010).

The record does not show that Oliver presented his complaint to the trial court. *See* Tex. R. App. P. 33.1(a)(1). Even had Oliver preserved his complaint for appellate review, his ten-year sentence is within the statutorily-authorized range of punishment.

See Tex. Penal Code Ann. § 22.05(b), (e) (the offense of deadly conduct under subsection (b) is a third-degree felony); *see also* Tex. Penal Code Ann. § 12.34 (West Supp. 2010) (third-degree felony punishment range is two to ten years of confinement and a fine of up to $10,000).[4] Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). A punishment that is within the statutory range for the offense is generally not excessive or unconstitutionally cruel or unusual. *See Kirk v. State*, 949 S.W.2d 769, 772 (Tex. App.—Dallas 1997, pet. ref'd); *see also Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.). We overrule issues three and four.

Having overruled Oliver's four issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on January 3, 2011
Opinion Delivered January 12, 2011
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Before McKeithen, C.J., Gaultney and Horton, JJ.

[4] Because amended section 12.34 contains no material changes applicable to this case, we cite to the current version of the statute.