In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00441-CR
NO. 09-11-00442-CR
NO. 09-11-00443-CR

EDDIE DAVON KELLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 09-07640, 09-07642, 09-07815

MEMORANDUM OPINION

Eddie Davon Keller appeals from the revocation of his unadjudicated community supervision in three aggravated robbery offenses. All three offenses involved Keller's use of a firearm. Keller was sentenced to life in prison for each offense. The trial court ordered the sentences to run consecutively. With identical briefs, Keller appeals the trial court's judgment in each case. He raises two issues on sentencing and one issue on confrontation of witnesses.

In issue one, Keller argues the trial court erred by ordering the life sentences to run consecutively. The Code of Criminal Procedure grants the trial court authority to order sentences to run concurrently or consecutively.[1] The trial court's discretion is limited by section 3.03(a) of the Penal Code.[2] Generally, sentences will run concurrently when the accused is prosecuted in a single criminal action and is found guilty of more than one offense arising out of the same criminal episode.[3]

Keller argues the trial court record shows that the offenses were prosecuted in a single action. The record reflects that the trial judge called each case separately, took the pleas of "true" or "not true" separately, revoked the community supervision separately, and sentenced Keller separately in each case.[4] We overrule issue one.

In issue two, Keller argues the punishment violates the Eighth Amendment to the United States Constitution and article 1, section 13 of the Texas Constitution. Keller does not argue that the cruel and unusual provisions of the state constitution are broader and offer greater protection than the Eighth Amendment.[5] He contends the sentence in each case is disproportionate to the gravity of the offense because of the length of punishment assessed and because of the stacking of one sentence upon another.

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[1] *See* Tex. Code Crim. Proc. Ann. art. 42.08 (West Supp. 2011).

[2] *See* Tex. Penal Code Ann. § 3.03 (West Supp. 2011).

[3] *See Reese v. State*, 305 S.W.3d 882, 884-85 (Tex. App.—Texarkana 2010, no pet.) (citing *Ex parte McJunkins*, 954 S.W.2d 39, 40-41 (Tex. Crim. App. 1997)).

[4] *See Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995).

[5] *See Baldridge v. State*, 77 S.W.3d 890, 893-94 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[6] Even though within the range permitted by law, a sentence may nonetheless be disproportionate to the gravity of the offense.[7] "The concept of proportionality is central to the Eighth Amendment."[8]

In *Graham v. Florida*, the United States Supreme Court referenced *Harmelin v. Michigan* and the test *Harmelin* cited for determining whether a sentence is grossly disproportionate to a defendant's crime.[9] The proportionality principle does not require strict proportionality between crime and sentence, but forbids extreme sentences that are grossly disproportionate to the crime.[10] The first step is to compare the gravity of the offense with the severity of the sentence.[11] If there is gross disproportionality, then the court should "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."[12]

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[6] U.S. Const. amend. VIII.

[7] *See Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006).

[8] *Graham v. Florida*, 130 S.Ct. 2011, 2021, 176 L.Ed.2d 825 (2010).

[9] *Id.* at 2021-22 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of Kennedy, J., concurring in part and concurring in judgment)); *see also Ewing v. California*, 538 U.S. 11, 23-30, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (employing Justice Kennedy's concurrence in *Harmelin* as guide for application of proportionality principles).

[10] *Graham*, 130 S.Ct. at 2021; *Harmelin*, 501 U.S. at 997, 1001 (Kennedy, J., concurring).

[11] *Graham*, 130 S.Ct. at 2022.

[12] *Id.*

Keller committed three aggravated robberies over the course of four days. He used a firearm in each robbery. While on community supervision for these three offenses, he committed four robberies and the offense of unauthorized use of a vehicle. The sentences in the cases before us on appeal are within the statutory range of punishment for the offense of aggravated robbery.[13] Cumulation of sentences is permitted by statute.[14] The sentences do not violate the Eighth Amendment or article I, section 13. We overrule issue two.

In issue three, Keller asserts a Confrontation Clause violation. During the hearing on revocation and punishment, the prosecutor described evidence that she had available for the trial court's consideration regarding other criminal offenses committed by the defendant. The prosecutor informed the trial court that the witnesses to those offenses were present at the hearing and ready to testify. Keller's attorney raised hearsay and Confrontation Clause objections to the prosecutor's "proffer" of the evidence. The trial court overruled the objection.

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." [15] A *Crawford* challenge under the Sixth Amendment "is not directly

[13] *See* Tex. Penal Code Ann. §§ 12.32, 29.03(a)(2), (b) (West 2011).

[14] *See Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984).

[15] *See* U.S. Const. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .

applicable in [a] revocation proceeding."[16] The Court of Criminal Appeals has held "that when a PSI is used in a non-capital case in which the defendant has elected to have the judge determine sentencing, *Crawford* does not apply."[17] In any event, the record does not reflect that the trial court, in assessing the sentences, considered the "proffer" as evidence in assessing the sentences.

Furthermore, the record does reflect that as part of the "written plea admonishments," Keller signed the following waiver: "Joined by my attorney, I give up my right to a jury in this case and my right to the appearance, confrontation and cross examination of the witnesses for all phases of this case, including punishment." The right to confront and cross-examine witnesses may be waived.[18] Keller's signed waiver specifically includes the punishment phase.[19] Issue three is overruled.

The judgments in trial cause numbers 09-07640, 09-07642, and 09-07815 are affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

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[16] *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2004, pet. ref'd).

[17] *See Stringer v. State*, 309 S.W.3d 42, 48 (Tex. Crim. App. 2010); *compare Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005); *see also United States v. Roche*, 415 F.3d 614, 618 (7th Cir.), *cert. denied*, 546 U.S. 1024, 126 S.Ct. 671, 163 L.Ed.2d 541 (2005) (applicability of Due Process Clause).

[18] *Stringer v. State*, 241 S.W.3d 52, 56 (Tex. Crim. App. 2007).

[19] *Id*. at 57-58.

Submitted on May 18, 2012
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Before Gaultney, Kreger, and Horton, JJ.