

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00496-CV

IN RE COMMITMENT OF KIRK BRANDON MULLER

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 15-05-05172-CV

MEMORANDUM OPINION

Kirk Brandon Muller appeals from a jury verdict that resulted in his civil commitment as a sexually-violent predator. *See* Tex. Health & Safety Code Ann. § 841.001–.151 (West 2010 & Supp. 2016) (the SVP statute). In his sole issue, Muller challenges the facial constitutionality of the SVP statute in his appeal from the trial court’s judgment and order of commitment. Because Muller failed to preserve his facial challenge to the SVP statute by presenting his challenge to the constitutionality of the statute to the trial court, we conclude that his issue was not preserved for review on appeal. We affirm.

In the brief he filed to support the argument he presents in his appeal, Muller contends that the 2015 amendments to Chapter 841 of the Texas Health and Safety Code, the SVP statute, rendered the statute, as amended, facially unconstitutional. Senate Bill 746, which contains the amendments to the SVP statute that are at issue in this appeal, were effective as of June 17, 2015. *See* Act of May 21, 2015, 84th Leg., R.S., ch. 845, 2015 Tex. Sess. Law Serv. 2700, 2700-12. Muller’s trial began on October 19, 2015, after the effective date of the amendments. According to Muller, the 2015 amendments to the SVP statute changed the SVP statute in ways that made it a facially unconstitutional statute. Muller argues the amendments caused the SVP statute to fail the “intent-effects test,” which is the test the Texas Supreme Court utilized in evaluating several challenges to the constitutionality of the SVP statute prior to the amendments that are at issue here. *See In re Commitment of Fisher*, 164 S.W.3d 637, 645-53 (Tex. 2005).

Generally, to preserve a complaint for appellate review, the complaining party must present the complaint to the trial court in a timely request, objection, or motion. Tex. R. App. P. 33.1(a)(1). The rule of error preservation applies to facial challenges to the constitutionality of the SVP statute, as we have previously held that such challenges are required to be raised in the trial court to preserve them for the purposes of appellate review. *In re Commitment of Welsh*, No. 09-15-00498-CV,

2016 WL 4483165, at *2 (Tex. App.—Beaumont Aug. 25, 2016, pet. denied) (mem. op.); *see also In re Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) (“[T]he constitutionality of a statute should be considered only when the question is properly raised and such determination is necessary and appropriate to a decision in the case.”).

The record before us indicates that Muller did not raise the issue of the facial constitutionality of the amended SVP statute before or during trial, or in any post-trial motions. We conclude that Muller presented his facial challenge to the amended SVP statute for the first time in the brief that he filed to support the only issue that he has raised in his appeal.

Muller argues that he should be excused from the rules of error preservation that apply to appeals. *See* Tex. R. App. P. 33.1 (preserving error for appellate review requires the complaining party to show that he presented his complaint to the trial court in a timely request, objection, or motion and that the trial court ruled on the request). Muller contends that he should be excused because a lower court declared the amended SVP statute to be unconstitutional after he was tried. *See generally In re Commitment of May*, 500 S.W.3d 515, 520–24 (Tex. App.—Beaumont 2016, pet. denied). However, we reversed the trial court’s ruling in *May*, and we held that the amended statute is neither punitive nor facially unconstitutional. *Id.*

We conclude that Muller failed to follow the rules regarding the preservation of error on the issue he seeks to raise for the first time in his appeal. *See In re Commitment of Clemons*, No. 09-15-00488-CV, 2016 WL 7323298, at *8 (Tex. App.—Beaumont Dec. 15, 2016, pet. denied) (mem. op.); *see also* Tex. R. App. P. 33.1. We overrule Muller’s sole issue, and we affirm the trial court’s judgment and order of commitment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on August 15, 2016
Opinion Delivered March 9, 2017

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