In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00273-CR

MARK STEPHEN PRADO, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 26,238-B, Honorable David L. Gleason, Presiding

December 8, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, Mark Stephen Prado, entered a plea of guilty, without benefit of a plea bargain, to the offense of fraudulent use or possession of identifying information in an amount of ten or more but less than fifty items.[1] The indictment contained an enhancement paragraph alleging appellant had a prior felony conviction.[2] Additionally,

[1] *See* TEX. PENAL CODE ANN. § 32.51(b),(c) (West Supp. 2016).

[2] *See id.* § 12.42(b) (West Supp. 2016). This raised the punishment range to that of a first-degree felony, life or any term of not more than 99 years or less than five years in the Institutional Division of the Texas Department of Criminal Justice (ID-TDCJ), with an optional fine not to exceed $10,000. *See id.* § 12.32 (West 2011).

the State filed a "Notice of Intention to Offer Prior Conviction for Enhancement of Punishment Range" which alleged another final felony conviction. In addition to pleading guilty to the indicted offense, appellant entered pleas of true to each enhancement alleged. Following a hearing on punishment, the trial court sentenced appellant to serve forty years' in the ID-TDCJ and assessed a fine of $10,000.

Appellant now appeals through three issues. First, appellant contends that the evidence was insufficient to sustain the forty year sentence and $10,000 fine. Second, appellant contends that the sentence of forty years' confinement violated the doctrine of proportionality and was, therefore, cruel and unusual punishment under both the United States Constitution and Texas Constitution. *See* U.S. CONST. amend. VIII; TEX. CONST. art. 1, § 13. Finally, appellant contends that assessing a $10,000 fine against an indigent is cruel and unusual punishment under both the United States Constitution and Texas Constitution. *See id.* For the reasons hereinafter stated, we will affirm.

Factual and Procedural Background

Appellant entered an open plea of guilty. The record recites appellant's arrest following a traffic stop of a vehicle in which he was a passenger. The owner of the vehicle granted the police officers consent to search her vehicle. While searching the vehicle, the officers discovered a backpack and a laundry basket in the back seat of the car, next to where appellant was seated. Appellant claimed ownership of both items and consented to a search of each. It was during these searches that the various items of identifying information were located. Appellant was subsequently indicted on the underlying offense.

The original indictment contained an enhancement paragraph alleging a conviction out of Randall County, Texas, for the offense of "Fraudulent Possession of Identifying Information, Enhanced." According to the record, the State became concerned that the enhancement paragraph might be faulty because the underlying offense was a state jail felony. In order to avoid this issue, the State filed a notice of intent to offer a prior felony conviction for purpose of enhancement of punishment. This particular notice is for a prior felony conviction from Randall County for the offense of burglary of a motor vehicle.

At the time of the plea, appellant pleaded guilty to the primary offense and true to both the original enhancement paragraph in the indictment and to the prior felony noticed in the subsequent notice document.

When the trial court found appellant guilty and assessed punishment at confinement in the ID-TDCJ for forty years with a fine of $10,000, appellant lodged no objection to any part of the sentence. Further, no motion for new trial was filed that attacked any part of the trial court's sentence. With these facts in mind, we turn to the contentions now raised by appellant.

Preservation of Error

Preservation of error is a systemic requirement that first-level appellate courts should ordinarily review on its own motion. *Wilson v. State,* 311 S.W.3d 452, 473 (Tex. Crim. App. 2010) (op. on reh'g) (per curiam). In order to preserve an error for appeal, the record must contain a complaint that was made to the trial court by a timely and specific request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1); *Griggs v. State,*

213 S.W.3d 923, 927 (Tex. Crim. App. 2007). The requirement to preserve a complaint of error through a timely and specific request, objection, or motion applies to almost all error, even constitutional error. *See Fuller v. State,* 253 S.W.3d 220, 232 (Tex. Crim. App. 2008).

Specifically, complaints regarding cruel and unusual punishment, pursuant to the Eighth Amendment, must be preserved by a timely request, objection, or motion. *See Curry v. State,* 910 S.W.2d 490, 497 (Tex. Crim. App. 1995). Although a reviewing court may take notice of a complaint alleging an error so fundamental as to affect the basic rights of an appellant, Eighth Amendment rights concerning cruel and unusual punishment are not among those rights that are so fundamental. *See Trevino v. State,* 174 S.W.3d 925, 927-28 (Tex. App.—Corpus Christi 2005, pet. ref'd).

Having reviewed the record and having found no request, objection, or motion that complains or contends that the trial court's sentence was grossly disproportionate and, therefore, a violation of the prohibition against cruel and unusual punishment, we hold that appellant has failed to preserve any such contention for appellate review. *See Wilson,* 311 S.W.3d at 473-74. Thus, we overrule appellant's second and third issues to the contrary.

Even were we to determine that appellant had preserved the issue for appeal or that the issue could be addressed without proper preservation, the record before the Court reveals that appellant was a career criminal. In the record, we find judgments showing appellant had been convicted of seven felony offenses and four misdemeanor offenses. The punishment range in the case before the Court was for a term of life or not more than 99 years or less than five years. *See* TEX. PENAL CODE ANN. §§ 12.32,

12.42(b). In this case the trial court assessed punishment that was less than half of the applicable range of punishment. *See id.* A punishment of less than one-half of the applicable range of punishment is not so severe as to raise an inference of a grossly disproportionate punishment. *See McGruder v. Puckett,* 954 F.2d 313, 316 (5th Cir. 1992). As such, we would overrule appellant's contention, even if it was properly before the Court.

Insufficient Evidence

By his first issue, appellant argues that the evidence was insufficient to sustain a forty year sentence and a fine of $10,000. Appellant cites the Court to two cases for the proposition that a reviewing court is to apply the same standard of review to the sufficiency of the evidence during the punishment phase that is used for the guilt/innocence phase. *See Amos v. State,* 819 S.W.2d 156, 161 (Tex. Crim. App. 1991); *Valdez v. State,* 776 S.W.2d 162, 166 (Tex. Crim. App. 1989). Appellant cites another case for the proposition that, when the reviewing court concludes that a rational trier of fact would necessarily have entertained a reasonable doubt concerning the appropriateness of the defendant's sentence, the reviewing court will find such evidence legally insufficient. *See Coble v. State,* 330 S.W.3d 253, 265 (Tex. Crim. App. 2010). While, in the proper context, such statements are correct statements of the law, a review of these cases leads to only one conclusion. The circumstance in question in this case is review by an appellate court of a jury's verdict regarding future dangerousness in the punishment portion of a capital murder case. In such a situation, the jury is answering a fact-specific question regarding the future dangerousness of one who has been convicted of capital murder. See TEX. CODE CRIM. PROC. ANN. art.

37.071, § 2(b)(1) (West Supp. 2016). Specifically, the jury must decide whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *See id.* Thus, the jury is making a factual determination in a capital death case.

We are not dealing with this type of situation in the case before the Court. In the punishment phase of a non-capital offense, the factfinder is not dealing with discrete factual issues. Rather, deciding what punishment to impose is a normative process that is not intrinsically factbound. *See Hayden v. State,* 296 S.W.3d 549, 552 (Tex. Crim. App. 2009). Thus, we do not review a punishment decision for evidentiary sufficiency. Appellant's complaint is simply part of his overarching complaint that the sentence was disproportionate and, therefore, constitutionally infirm. As such, it suffers from the same preservation problems outlined above and provides nothing for the Court to review. *See Wilson,* 311 S.W.3d at 473-74.

Conclusion

Having determined that appellant's issues were not properly preserved for appeal and, even if they were preserved, would not have constituted error, we affirm the trial court's sentence.

Mackey K. Hancock
Justice

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