In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00354-CR

BRENT DOUGLAS ANDERSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 443rd District Court
Ellis County, Texas
Trial Court No. 39212CR, Honorable Cynthia Ermatinger, Presiding

August 29, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Presenting four appellate issues, appellant Brent Douglas Anderson challenges his conviction for the felony offense of driving while intoxicated. We will affirm the court's judgment.

Background

Appellant was indicted for the offense of driving while intoxicated, 3rd or more.[1] The indictment also included an enhancement provision alleging appellant had been

[1] TEX. PENAL CODE ANN. § 49.09(b) (West 2016).

previously convicted of a second-degree felony assault. His case was tried before a jury.

The State presented evidence that appellant drove his car past barriers alongside Interstate Highway 45. Through police officers' efforts, the car eventually stopped on the shoulder of the highway. Appellant exited the car while it was still moving. When Officer Mooney came into contact with appellant, he noticed a strong odor of alcohol, appellant's slurred speech and an open container in appellant's car. Mooney conducted field sobriety tasks, observing a number of indicators of intoxication. Mooney concluded appellant was intoxicated. A blood test showed appellant's blood alcohol level exceeded the legal limit.

Following appellant's conviction, the trial court held a punishment hearing. The court assessed punishment against appellant at ten years of imprisonment. This appeal followed.

Analysis

None of appellant's issues attack his conviction. By his first two issues, appellant points out asserted errors in the judgment, and by the latter two issues, he contends a sentence of ten years' imprisonment was cruel and unusual under the United States and Texas constitutions. His prayer for relief asks that we modify the judgment to correct the asserted errors and remand the cause for a new sentencing hearing.

By his first issue, appellant contends the judgment incorrectly identified the statute under which he was convicted.[2] The State disagrees, arguing the judgment properly reflects appellant was convicted pursuant to section 49.09 of the Penal Code[3] and his punishment was enhanced pursuant to section 12.42(a) of the Penal Code.[4] We agree with the State.

Texas judgments must reflect the "offense or offenses for which the defendant was convicted." TEX. CODE CRIM. PROC. ANN. art. 42.01, § 1(13) (West 2013). In this case, the record and judgment show appellant was convicted of the felony offense of driving while intoxicated, 3rd or more, pursuant to section 49.09 of the Penal Code. *See Gibson v. State*, 995 S.W.2d 693, 694-97 (Tex. Crim. App. 1999) (elements of felony DWI). The judgment also shows appellant's punishment range was enhanced by his felony assault conviction. He pleaded "true" to that enhancement, also noted in the judgment. The law requires nothing more.[5] We overrule appellant's first issue.

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[2] The judgment is not in the standardized felony judgment form promulgated by the Office of Court Administration. *See* TEX. CODE CRIM. PROC. ANN. art. 42.01, § 4 (West 2013).

[3] TEX. PENAL CODE ANN. § 49.09 (West 2016) (raises a driving while intoxicated offense to felony grade if it is shown that the defendant has been twice previously convicted of driving while intoxicated).

[4] TEX. PENAL CODE ANN. § 12.42(a) (West 2016) (providing enhanced penalties for repeat and habitual offenders).

[5] Appellant's argument may also be read to contend the judgment should have listed the enhancement statute, Penal Code section 12.42(a), in its designation of the degree of the offense. TEX. CODE CRIM. PROC. ANN. art. 42.01, § 1(14) (West 2013) (requiring judgment reflect the "degree of offense for which the defendant was convicted"). We can agree that listing the statutory provision may be a helpful practice, but appellant does not cite a statutory provision requiring it, and we are aware of none.

In his second issue, appellant contends he pleaded "no contest" at trial but the judgment reflects he pleaded "not guilty." Appellant argues on appeal that the judgment should be reformed to reflect he pleaded "no contest."

A plea of *nolo contendere* or *no contest* has the same legal effect as a plea of guilty except that such plea may not be used as an admission in any civil suit. TEX. CODE CRIM. PROC. ANN. art. 27.02(5) (West 2006). If a defendant refuses to plead, the court must enter a plea of not guilty for the defendant. TEX. CODE CRIM. PROC. ANN. art. 27.16(a) (West 2006).

On the day of trial, appellant told the trial court he was unhappy with his attorney and did not want to go to trial. After further discussion among the court, appellant and his attorney, the parties proceeded with jury selection for the guilt-innocence phase of trial. The next day, the guilt-innocence phase of trial commenced. When the trial court asked appellant how he pled, he responded "no contest." Appellant again responded "no contest" when the court asked him to enter either a plea of "guilty" or "not guilty." The trial judge said "thank you" in response to appellant's plea but did not admonish him regarding his entry of a "no contest" plea. Instead, the case proceeded to trial as though a "not guilty" plea had been entered on appellant's behalf. As noted, the judgment reflects a "not guilty" plea.

An appellate court has authority to reform a judgment to make the record speak the truth when the matter has been called to its attention. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State,* 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). We find the judgment here accurately reflects what occurred at trial. The record does not support appellant's

contention that the trial court received his plea of "no contest." Consequently, we will not reform the judgment. We resolve appellant's second issue against him.

In appellant's remaining two issues, he contends the ten-year sentence imposed constitutes cruel and unusual punishment in violation of his constitutional rights. *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. Finding appellant has failed to preserve his error for appellate review, we overrule his third and fourth issues.

Preservation of error is a systemic requirement on appeal. *Ford v. State,* 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). An appellate court should not address the merits of an issue that has not been preserved for appeal. *Wilson v. State,* 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). Both the United States and Texas constitutions require a criminal sentence to be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm,* 463 U.S. 277, 290, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). In order to preserve a disproportionate sentencing complaint for appellate review, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. *Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd); *see also Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (the defendant waived any error regarding the state constitutional right against cruel and unusual punishment by presenting the argument for the first time on appeal); *Noland v. State,* 264 S.W.3d 144, 151-52 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (the appellant's assertion that sentence was grossly disproportionate waived when no objection made or motion for new trial filed raising complaint in trial court); *Wynn v. State,* 219 S.W.3d 54, 61 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (the defendant's failure to object to his life sentence of imprisonment as cruel and unusual punishment waived error); *Solis v. State*, 945

S.W.2d 300, 301-02 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (the defendant could not assert cruel and unusual punishment for first time on appeal).

In this case, appellant did not object to his sentence in the trial court at the time it was imposed. Nor did appellant raise the issue in a motion for new trial. Appellant's third and fourth issues are not preserved for our review, and are overruled.

Conclusion

Having overruled each of appellant's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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