In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00383-CR

GLENN ROGERS A/K/A GLENN RODGERS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court No. Two
Tarrant County, Texas
Trial Court No. 1392184D, Honorable Wayne Salvant, Presiding

June 13, 2018

MEMORANDUM OPINION[1]

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

Glenn Rogers appeals from two judgments revoking his probation and imprisoning him for possessing child pornography in violation of Texas Penal Code § 43.26(a).[2] The trial court initially found him guilty of twice possessing such pornography and sentenced

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. *See* TEX. R. APP. P. 41.3.

[2] A person commits an offense if he knowingly or intentionally possesses, or knowingly or intentionally accesses with intent to view, visual material that depicts a child younger than eighteen years of age at the time the image of the child was made who is engaging in sexual conduct and he knows that the material depicts a child. TEX. PENAL CODE ANN. § 43.26(a)(1), (2) (West 2016).

him to six years' imprisonment for each crime. The sentences were suspended, however. Thereafter, appellant was placed on community supervision and ordered to abide by various conditions to his continued supervision. Those conditions were amended. One amendment and its alleged violation formed the basis of the State's final motion to revoke appellant's community supervision. Appellant responded to that motion by filing his own motion to dismiss. The trial court ultimately revoked appellant's community supervision and sentenced him to serve two years' imprisonment. Appellant urges us, via two issues, to reverse the trial court's decision because the condition not only was unreasonable but also violated his constitutional rights under the First Amendment to the United States Constitution. We affirm.

As recently said in *Obella v. State*, 532 S.W.3d 405 (Tex. Crim. App. 2017), it is the duty of a court of appeals to ensure that alleged error was preserved before addressing the merits of that error. *Id.* at 407. Indeed, preservation appears to be a systemic requirement that "a first-level appellate court should ordinarily review . . . on its own motion." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007); *accord Clay v. State*, 361 S.W.3d 762, 765 (Tex. App.—Fort Worth 2012, no pet.) (stating the same).

Having questions about preservation, we broached the topic with the parties earlier. The record disclosed that appellant said nothing about the condition in question until after the State moved to revoke his probation. *See Wiley v. State*, 410 S.W.3d 313, 318–19 (Tex. Crim. App. 2013) (stating that an appellant may not raise on appeal from an order revoking probation any claim that he could have raised through an appeal from the original imposition of that probation). Each party responded to our inquiry by indicating that nothing in the record suggested appellant had the opportunity to object at

an earlier time and, therefore, the complaint was most likely preserved. Due to this response, we set the cause for oral submission and questioned the parties about preservation and the merits of the complaint during their argument. Since then, another aspect of preservation has arisen.

The appellate record before us consists of only the clerk's record. The court reporter did not file a transcript of the revocation hearing. The reason for this was disclosed in a letter written in November of 2017. Through the missive, the reporter informed us that "there was not a record of these [i.e., the revocation] proceedings, therefore, [she] will not be filing a record in this case." Neither party contradicted the representation. Thus, we do not know what arguments were urged to and considered by the trial court in deciding to revoke appellant's probation. Moreover, the clerk's record neither contains an order denying or overruling appellant's motion to dismiss nor indicates that the motion was presented to the trial court.

Normally, error must be preserved for review. How one does that is prescribed in Texas Rule of Appellate Procedure 33.1(a). According to that rule, the "record must show" (1) the complaint was made to the trial court by a timely request, objection or motion stating the grounds for the ruling sought and (2) the trial court ruled on it or refused to rule and the party objected to the refusal. TEX. R. APP. P. 33.1(a)(1), (2). Admittedly, a ruling may be expressed or implicit. Yet, it is only logical that, before it can be said the trial court implicitly ruled on the objection, the record must illustrate that the complaint was brought to its attention. *See State v. Kelley*, 20 S.W.3d 147, 153 (Tex. App.—Texarkana 2000, no pet.) (concluding that because "the record does not reflect that the motion was ever specifically brought to the trial court's attention, . . . we cannot say that the trial court's

failure to dismiss the case was an implicit overruling of the motion"); *accord James v. State,* 102 S.W.3d 162, 169 (Tex. App.—Fort Worth 2003, pet. ref'd) (stating that, "[w]hile an appellate court will generally find that a trial court made an implicit ruling on an objection when the objection was brought to the trial court's attention, it will only do so when 'the trial court's subsequent action clearly addressed the complaint'").

Here, we have no express ruling on the complaint raised by appellant regarding the enforceability of the condition. Nor does the record illustrate that the complaint was brought to the trial court's attention at any hearing or that the motion to dismiss was presented to the trial court. Thus, we lack basis to reasonably infer that the trial court explicitly or implicitly overruled appellant's objection when it revoked his probation. Simply put, the trial court cannot overrule a matter about which it may know not.

Consequently, the record does not show that appellant preserved his complaint for review as required by Rule 33.1. *See Kelley*, 20 S.W.3d at 153 (holding that the defendant's speedy trial complaints were not preserved due to the absence of an explicit ruling upon the motion to dismiss or proof that the motion was presented to the trial court). We overrule his issues concerning the alleged unreasonableness and unconstitutionality of the condition and affirm the trial court's final judgments.

Brian Quinn
Chief Justice