



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-18-00172-CR

PATRICK HENRY DUNCAN, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 18th District Court
Johnson County, Texas
Trial Court No. F47696, Honorable John Edward Neill, Presiding

August 31, 2018

MEMORANDUM OPINION

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

Appellant Patrick Henry Duncan appeals from the trial court's judgment revoking his community supervision and imposing a sentence of imprisonment for a period of nine years. Appellant challenges the imposed sentence through two issues. Finding appellant has failed to preserve his appellate complaints for our review, we affirm the judgment of the trial court.

Background

Appellant was charged by indictment in 2013 with assault on a public servant.¹ He pleaded guilty pursuant to a plea agreement with the State and was sentenced to ten years of imprisonment, probated for a period of ten years.² The terms of appellant's community supervision were amended twice in 2015, both amendments requiring his participation in substance abuse programs.

Two years later, the State filed a third motion to revoke appellant's community supervision, alleging appellant violated its terms by committing a new offense, failing to abstain from the use of illegal controlled substances and failing to pay various fees, fines and costs. At the hearing on the motion, appellant entered a plea of "true" to all but one allegation, that being the commission of a new offense.³ Appellant also waived his right to have a presentence investigation (PSI) conducted and provided to the court before the hearing.

During the hearing, the State introduced into evidence, without objection, the written plea admonishments on the motion to revoke community supervision, signed by appellant. The State also offered the testimony of appellant's community supervision officer. He told the court the terms of appellant's community supervision had been

¹ TEX. PENAL CODE ANN. § 22.01(b)(1) (West 2018).

² TEX. PENAL CODE ANN. § 12.34 (West 2018). This is a third-degree felony punishable by imprisonment for any term of not more than ten years or less than two years and a fine not to exceed \$10,000.

³ The State waived that allegation.

amended twice because of appellant's use of methamphetamine and that appellant had failed to pay fees in the amount of \$6450.

Appellant and his wife testified. Appellant admitted he was delinquent in paying his fees but explained that was caused by his limited income and his obligation to pay child support for five children. He also admitted he had used methamphetamine twice since being discharged from the second of the two substance abuse programs. He asked the court to reinstate his community supervision and agreed he would like to be placed in "some sort of rehab." Appellant's wife agreed that sending appellant to "some sort of rehab program" would be "better than prison."

The trial judge had not presided over appellant's 2013 guilty plea or either of the two prior revocation proceedings. After presentation of the evidence, the court asked if a PSI had been prepared. The prosecutor informed the court there was no PSI because appellant "waived PSI." The court inquired whether "there [was] one initially" and the prosecutor told the judge a report was prepared at the time of the original plea. The court asked the prosecutor whether the probation department had the PSI and when the prosecutor answered affirmatively, recessed the hearing to review that report. The community supervision officer took the document out of the file and provided it to the court. The document was not admitted into evidence and does not appear in the appellate record. After the recess, the trial judge stated, "the court has reviewed the file at some length, the clerk's file, and also looked at the former PSI." After some additional remarks, the court revoked appellant's community supervision and sentenced him to nine years of imprisonment.

Analysis

We review an order revoking community supervision for abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Akbar v. State*, 190 S.W.3d 119, 122 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A plea of “true” standing alone is sufficient to support a trial court’s revocation order. *Moses v. State*, 590 S.W.2d 469, 470 (Tex. Crim. App. 1979).

Here, appellant does not challenge the sufficiency of the evidence supporting the revocation of his community supervision. Rather, appellant’s two issues on appeal concern the trial court’s consideration of the PSI prepared at the time of his initial plea. First, he argues the trial court erred by considering that PSI without providing notice to appellant. Second, appellant contends the trial court erred by not allowing appellant or his attorney to comment on the PSI prior to the trial court’s decision to revoke his community supervision.

The parties do not dispute appellant waived, under article 42A of the Code of Criminal Procedure, preparation of a PSI at the time of his revocation. See TEX. CODE CRIM. PROC. ANN. art. 42A.252(b) (West 2017). And, the parties agree article 42A provides that a court shall permit the defendant or his attorney to read a PSI at least 48 hours prior to sentencing. TEX. CODE CRIM. PROC. ANN. art. 42A.255. Lastly, it is undisputed that the trial court told the parties it reviewed the document treated as a PSI⁴

⁴ The State makes the argument the document was not a formal PSI but only a report prepared by the probation department for its own use. As we have noted, the document is not present for our review, and its nature is not important to our disposition of appellant’s issues on appeal.

that was generated at the time of appellant's initial plea of guilt, and that appellant and his counsel did not review it at the hearing.

However, as the State notes, appellant raised no objection at the hearing when the trial court asked about the PSI and recessed the proceedings to review the document. Nor did appellant raise a complaint when the trial court informed those present that it had "reviewed the file at some length, the clerk's file, and also looked at the former PSI." And, appellant never requested an opportunity to review and comment on the document the court said it considered.

Generally, to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. TEX. R. APP. P. 33.1(a)(1); *Layton v. State*, 280 S.W.3d 235, 238-39 (Tex. Crim. App. 2009). Nearly every right, whether constitutional or statutory, may be waived by failing to object. *Renteria v. State*, No. 01-06-00677-CR, 2007 Tex. App. LEXIS 8306, at *2 (Tex. App.—Houston [1st Dist.] Oct. 18, 2007, no pet.) (mem. op., not designated for publication) (citations omitted) (collecting cases). Further, the objection must be made as soon as the basis for the objection becomes apparent. TEX. R. EVID. 103(a)(1); *Reyes v. State*, 361 S.W.3d 222, 228-29 (Tex. App.—Fort Worth 2012, pet. ref'd). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Id.* (citing *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009)).

Several courts have found error preservation rules precluded their consideration on appeal of complaints of a trial court's consideration of a PSI report. See *Reyes*, 361 S.W.3d at 229 (finding defendant failed to perfect objection to court's consideration of PSI report by objecting when the report was introduced at trial or when the defendant testified about its contents, precluding appellate court from considering assignment of error); *Henderson v. State*, Nos. 10-07-00030-CR, 10-07-00031-CR, 2008 Tex. App. LEXIS 1613, at *1 (Tex. App.—Waco Mar. 5, 2008, no pet.) (mem. op., not designated for publication) (defendant failed to preserve his complaint for review when he did not request opportunity to review the PSI and did not object to trial court's consideration of report or to lack of opportunity to comment on it); *Renteria*, 2007 Tex. App. LEXIS 8306, at *3 (finding defendant's failure to object to trial court's consideration of PSI report prior to formal finding of guilt waived appellate complaints); *Fisher v. State*, No. 2-04-434-CR, 2005 Tex. App. LEXIS 3282, at *3 (Tex. App.—Fort Worth April 28, 2005, no pet.) (mem. op., not designated for publication) (because appellant failed to object to trial court's consideration of PSI, he forfeited his complaint on appeal).

Among the cases appellant cites is *Watson v. State*, 919 S.W.2d 845, 846 (Tex. App.—Austin 1996, no pet.), in which the trial court failed to afford the defendant an opportunity to present evidence or argument concerning the presentence investigation or sentencing. The record in this case does not depict any action by the trial court like that reflected in *Watson*. Appellant was not hindered from raising in the trial court the complaints he makes on appeal.

Because appellant failed to make the trial court aware of an objection to its review or consideration of the PSI report, failed to raise a request to comment on the report,

indeed failed to raise before the trial court any complaint concerning the document, his complaints present nothing for our review on appeal. We overrule both of his appellate issues.

Conclusion

Having resolved appellant's issues against him, we affirm the judgment of the trial court.

James T. Campbell
Justice

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