TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00731-CR

Jose Manuel Marin, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF HAYS COUNTY, 428TH JUDICIAL DISTRICT
NO. CR-15-0259, THE HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Jose Manuel Marin of felony driving while intoxicated, *see* Tex. Penal Code §§ 49.04(a), 49.09(b), and assessed his punishment, enhanced pursuant to the habitual offender provision of the Penal Code, at confinement for 99 years in the Texas Department of Criminal Justice, *see id.* § 12.42(d). On appeal, appellant complains about cruel and unusual punishment and clerical error in the written judgment of conviction. We will modify the judgment to correct the clerical error and, as modified, affirm the judgment of conviction.

DISCUSSION[1]

Cruel and Unusual Punishment

Appellant was convicted of felony DWI. *See id.* §§ 49.04(a) (defining offense of driving while intoxicated), 49.09(b) (elevating offense to third degree felony if defendant has been convicted twice before of DWI offense). His punishment range was enhanced by two prior sequential felony convictions pursuant to the habitual offender provision of the Penal Code, subjecting him to a punishment range of "imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years."[2] *See id.* § 12.42(d). The jury assessed appellant's punishment at 99 years' imprisonment, and the trial court imposed sentence in accordance with the jury's verdict. In his first point of error, appellant claims that his sentence—imposed, he maintains, because of his alcohol addiction —is grossly disproportionate to the offense underlying the conviction and constitutes cruel and unusual punishment in violation of the United States Constitution.

The Eighth Amendment to the United States Constitution, prohibiting cruel and unusual punishment, forbids extreme sentences that are "grossly disproportionate" to the crime. *See Graham v. Florida*, 560 U.S. 48, 58 (2010); *State v. Simpson*, 488 S.W.3d 318, 322–23 (Tex. Crim. App. 2016); *see also* U.S. Const. amend. VIII. However, to preserve a complaint that a sentence is

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[1] The parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial. Accordingly, we do not recite them in our opinion except as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

[2] The record reflects that appellant had seven prior convictions for DWI, three misdemeanors, two of which were used to elevate the instant DWI offense to a felony, and four felonies, one of which was used for the habitual offender enhancement.

grossly disproportionate, constituting cruel and unusual punishment, a defendant must make a timely, specific objection to the trial court or raise the issue in a motion for new trial. *Rucker v. State*, No. 01-17-00330-CR, 2017 WL 4782628, at *1 (Tex. App.—Houston [1st Dist.] Oct. 24, 2017, no pet. h.) (mem. op., not designated for publication); *Johnson v. State*, No. 03-12-00006-CR, 2012 WL 1582236, at *10 (Tex. App.—Austin May 4, 2012, no pet.) (mem. op., not designated for publication); *see Williams v. State*, 191 S.W.3d 242, 262 (Tex. App.—Austin 2006, no pet.) ("Claims of cruel and unusual punishment must be presented in a timely manner."); *see also* Tex. R. App. P. 33.1(a) (to preserve complaint for appellate review, party must have presented specific and timely request, motion, or objection to trial court).

Appellant did not object to his 99-year sentence as cruel and unusual or grossly disproportionate when the trial court imposed sentence, nor did he raise this complaint in any post-trial motion. Therefore, appellant has failed to preserve this complaint for our review. *See, e.g.*, *Battle v. State*, 348 S.W.3d 29, 30–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (appellant waived complaint that imprisonment for life without parole for capital murder was "grossly disproportionate" punishment under Eighth Amendment because he failed to raise complaint to trial court); *Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd) (appellant waived argument that seven-year sentence for burglary of habitation was cruel and unusual punishment because appellant failed to raise issue to trial court); *Noland v. State*, 264 S.W.3d 144, 151–52 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (failure to raise issue of gross disproportionality in punishment of 55 years' confinement and $10,000 fine for murder in objection at trial or motion for new trial waived right to raise issue on appeal).

Preservation of error is a systemic requirement on appeal. *Darcy v. State*, 488 S.W.3d 325, 327 (Tex. Crim. App. 2016); *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014); *Riordan v. State*, No. 03-16-00297-CR, 2017 WL 3378889, at *8 (Tex. App.—Austin Aug. 4, 2017, no pet.) (mem. op., not designated for publication). A reviewing court should not address the merits of an issue that has not been preserved for appeal. *Blackshear v. State*, 385 S.W.3d 589, 590 (Tex. Crim. App. 2012); *Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010); *Riordan*, 2017 WL 3378889, at *8. Accordingly, we overrule appellant's first point of error.[3]

[3] Even if appellant had preserved error, his Eighth Amendment challenge would fail. As appellant concedes, his sentence is within the statutory range for a habitual offender. *See* Tex. Penal Code § 12.42(d). Generally, as courts have repeatedly held, punishment that falls within the range set by the Legislature in a valid statute is not excessive, cruel, or unusual under the constitutions of either Texas or the United States. *See Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Hill v. State*, 493 S.W.2d 847, 849 (Tex. Crim. App. 1973); *Young v. State*, 425 S.W.3d 469, 474 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd); *Diamond v. State*, 419 S.W.3d 435, 440 (Tex. App.—Beaumont 2012, no pet.); *Winchester v. State*, 246 S.W.3d 386, 388 (Tex. App.—Amarillo 2008, pet. ref'd); *Dale v. State*, 170 S.W.3d 797, 799 (Tex. App.—Fort Worth 2005, no pet.); *Delacruz v. State*, 167 S.W.3d 904, 906 (Tex. App.—Texarkana 2005, no pet.); *Sierra v. State*, 157 S.W.3d 52, 65 (Tex. App.—Fort Worth 2004), *aff'd*, 218 S.W.3d 85 (Tex. Crim. App. 2007); *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.). Moreover, the Court of Criminal Appeals recently reiterated that it "has traditionally held that punishment assessed within the statutory limits, *including punishment enhanced pursuant to a habitual-offender statute*, is not excessive, cruel, or unusual." *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016) (emphasis added); *see Ex parte Chavez*, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006) ("Subject only to a very limited, 'exceedingly rare,' and somewhat amorphous Eighth Amendment gross-disproportionality review, a punishment that falls within the legislatively prescribed range, and that is based upon the sentencer's informed normative judgment, is unassailable on appeal.") (internal citation omitted).

Clerical Error in Judgment

In his second point of error, appellant argues that the trial court's written judgment of conviction must be modified because it incorrectly indicates that the jury found the first enhancement paragraph to be "not true" and that appellant pled true to the second habitual enhancement paragraph.

The record reflects that appellant pled "not true" to both enhancement paragraphs of the indictment. The record further reflects that the jury found both of the enhancement paragraphs to be "true." The written judgment of conviction, however, states that the "Findings on the 1st Enhancement Paragraph" was "NOT TRUE" and that the "Plea to 2nd Enhancement/Habitual Paragraph" was "TRUE." Because the record in this case demonstrates that appellant pled "not true" to both enhancement allegations and that the jury found both allegations to be "true," these recitations in the judgment are erroneous. We sustain appellant's second point of error.[4]

This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 43.2(b) (authorizing court of appeals to modify trial court's judgment and affirm it as modified); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993) (concluding that Texas Rules of Appellate Procedure empower courts of appeals to reform judgments). According, we modify the judgment of conviction to reflect that the jury found the first enhancement paragraph to be "TRUE" and that appellant pled "NOT TRUE" to the second habitual enhancement paragraph.

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[4] The State concedes that the written judgment contains error relating to the jury's finding on the first enhancement paragraph and appellant's plea to the second enhancement paragraph and joins appellant's request for modification of the judgment.

CONCLUSION

Having concluded that appellant did not preserve any alleged error regarding his claim that his sentence is cruel and unusual but that the written judgment of conviction in this case contains non-reversible clerical error, we modify the trial court's judgment of conviction as described above and affirm the judgment as modified.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Modified and, as Modified, Affirmed

Filed: December 1, 2017

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