

**NO. 12-15-00109-CR**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

***LEOPOLDO TOVAR,  
APPELLANT***

§ ***APPEAL FROM THE 3RD***

***V.***

§ ***JUDICIAL DISTRICT COURT***

***THE STATE OF TEXAS,  
APPELLEE***

§ ***ANDERSON COUNTY, TEXAS***

---

---

***MEMORANDUM OPINION***

Leopoldo Tovar appeals his sentence following the revocation of his community supervision. In one issue, Appellant argues that his sentence amounted to cruel and unusual punishment. We affirm.

**BACKGROUND**

Appellant was charged by indictment with third degree felony driving while intoxicated<sup>1</sup> and pleaded “guilty.” The trial court found Appellant “guilty” as charged and sentenced him to imprisonment for ten years, but suspended the sentence and placed Appellant on community supervision for ten years.

On February 27, 2015, the State filed a motion to revoke Appellant’s community supervision alleging that Appellant had violated certain conditions thereof. On April 13, 2015, the trial court conducted a hearing on the State’s motion. Appellant pleaded “true” to several of the allegations in the State’s motion. At the conclusion of the hearing, the trial court found the allegations in the State’s motion to be “true,” revoked Appellant’s community supervision, and sentenced him to imprisonment for ten years. This appeal followed.

---

<sup>1</sup> See TEX. PENAL CODE ANN. §§ 49.04, 49.09(b)(2) (West Supp. 2015).

## CRUEL AND UNUSUAL PUNISHMENT

In his sole issue, Appellant argues that the ten year sentence imposed by the trial court amounts to cruel and unusual punishment. However, Appellant made no timely objection to the trial court raising the issue of cruel and unusual punishment and has, therefore, failed to preserve any such error. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (waiver with regard to rights under the Texas Constitution); *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (waiver with regard to rights under the United States Constitution); *see also* TEX R. APP. P. 33.1; *Mays v. State*, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009) (“Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion[;] . . . it [is] incumbent upon the [c]ourt itself to take up error preservation as a threshold issue.”). But even despite Appellant’s failure to preserve error, we conclude that the sentence about which he complains does not constitute cruel and unusual punishment.

The legislature is vested with the power to define crimes and prescribe penalties. *See Davis v. State*, 905 S.W.2d 655, 664 (Tex. App.—Texarkana 1995, pet. ref’d); *see also Simmons v. State*, 944 S.W.2d 11, 15 (Tex. App.—Tyler 1996, pet. ref’d). Courts have repeatedly held that punishment which falls within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); *Davis*, 905 S.W.2d at 664. In the case at hand, Appellant was convicted of third degree felony driving while intoxicated, the punishment range for which is two to ten years. *See* TEX. PENAL CODE ANN. §§ 12.34(a), 49.04, 49.09(b)(2) (West 2011 & Supp. 2015). Here, the sentence imposed by the trial court falls within the range set forth by the legislature. Therefore, the punishment is not prohibited as cruel, unusual, or excessive per se.

Nonetheless, Appellant urges the court to perform the three part test originally set forth in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). Under this test, the proportionality of a sentence is evaluated by considering (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 292, 103 S. Ct. at 3011. The application of the *Solem* test has been modified by Texas courts and the Fifth Circuit Court of Appeals in light of the Supreme Court’s decision in *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) to require a

threshold determination that the sentence is grossly disproportionate to the crime before addressing the remaining elements. *See, e.g., McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992), *cert. denied*, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992); *see also Jackson v. State*, 989 S.W.2d 842, 845–46 (Tex. App.–Texarkana 1999, no pet.).

We first must determine whether Appellant’s sentence is grossly disproportionate. In so doing, we are guided by the holding in *Rummel v. Estell*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In *Rummel*, the Supreme Court addressed the proportionality claim of an appellant who had received a mandatory life sentence under a prior version of the Texas habitual offender statute for a conviction of obtaining \$120.75 by false pretenses. *See id.*, 445 U.S. at 266, 100 S. Ct. at 1135. A life sentence was imposed because the appellant also had two prior felony convictions—one for fraudulent use of a credit card to obtain \$80.00 worth of goods or services and the other for passing a forged check in the amount of \$28.36. *Id.*, 445 U.S. at 266, 100 S. Ct. at 1134–35. After recognizing the legislative prerogative to classify offenses as felonies and, further, considering the purpose of the habitual offender statute, the court determined that the appellant’s mandatory life sentence did not constitute cruel and unusual punishment. *Id.*, 445 U.S. at 285, 100 S. Ct. at 1145.

In the case at hand, the offense committed by Appellant—third degree felony driving while intoxicated—is more serious than the combination of offenses committed by the appellant in *Rummel*, while Appellant’s ten year sentence is less severe than the life sentence upheld by the Supreme Court in *Rummel*. Thus, it is reasonable to conclude that if the sentence in *Rummel* was not unconstitutionally disproportionate, then neither is the sentence assessed against Appellant in the case at hand. Therefore, since we do not find the threshold test to be satisfied, we need not apply the remaining elements of the *Solem* test. Appellant’s sole issue is overruled.

#### DISPOSITION

Having overruled Appellant’s sole issue, we *affirm* the trial court’s judgment.

JAMES T. WORTHEN  
Chief Justice

Opinion delivered February 29, 2016.

*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(DO NOT PUBLISH)



## COURT OF APPEALS

### TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

#### JUDGMENT

FEBRUARY 29, 2016

NO. 12-15-00109-CR

**LEOPOLDO TOVAR,**  
Appellant  
V.  
**THE STATE OF TEXAS,**  
Appellee

---

Appeal from the 3rd District Court  
of Anderson County, Texas (Tr.Ct.No. 30489)

---

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.  
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*