NOS. 12-17-00158-CR
12-17-00168-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MARCUS SHEDD, APPELLANT	***§***	***APPEALS FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HOUSTON COUNTY, TEXAS***

MEMORANDUM OPINION

Marcus Shedd appeals his convictions for forgery and obstruction or retaliation. In one issue in each case, he argues that his punishment is excessive and grossly disproportionate to the crimes for which he was convicted. We affirm.

BACKGROUND

In two separate cases, Appellant was charged by indictment with (1) one count of forgery, a third degree felony, punishable by not less than two years but not more than ten years imprisonment, and (2) one count of obstruction or retaliation, a third degree felony, punishable by not less than two years but not more than ten years imprisonment.[1] In each case, the State filed a notice of intent to seek habitual punishment pursuant to Section 12.42(a) of the Texas Penal Code, alleging that Appellant had previously been finally convicted of the felony offense of forgery. The enhancement in each case elevated the punishment range to not less than two years but not more than twenty years imprisonment.

[1] In the forgery case, Appellant was charged by indictment with another count of forgery ("count one"). Additionally, in the obstruction or retaliation case, Appellant was also charged by indictment with a count of theft ("count one"). The State abandoned both of these charges.

Appellant entered an "open" plea of guilty to count two of the forgery indictment, and entered an "open" plea of guilty to count two in the second case, the obstruction or retaliation indictment. In both cases, there was no recommendation for punishment and the State agreed to take count one of each indictment into consideration. After a punishment hearing, the trial court found the enhancement allegation paragraph to be "true" in both cases, found Appellant to be "guilty" in both cases, and assessed punishment at twenty years imprisonment on the forgery charge and ten years imprisonment on the obstruction or retaliation charge. This appeal followed.

CRUEL AND UNUSUAL PUNISHMENT

In his sole issue in each case, Appellant argues that the twenty year and ten year sentences imposed by the trial court are grossly disproportionate to the crimes committed and amount to cruel and unusual punishment. "To preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, 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) (waiver of complaint of cruel and unusual punishment under the Texas Constitution because defendant presented his argument for first time on appeal); ***Curry v. State***, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (defendant waived complaint that statute violated his rights under the United States Constitution when raised for first time on appeal); ***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."); TEX. R. APP. P. 33.1. A review of the record shows that Appellant lodged no objection to the constitutionality of his sentences at the trial court level, and has, therefore, failed to preserve error for appellate review. *See* ***Kim***, 283 S.W.3d at 475; *see also* ***Rhoades***, 934 S.W.2d at 120; ***Curry***, 910 S.W.2d at 497; ***Mays***, 285 S.W.3d at 889; TEX. R. APP. P. 33.1.

However, despite Appellant's failure to preserve error, we conclude his sentences do not constitute cruel and unusual punishment. The Eighth Amendment to the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed,

nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This provision was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. ***Meadoux v. State***, 325 S.W.3d 189, 193 (Tex. Crim. App. 2010) (*citing* ***Robinson v. California***, 370 U.S. 660, 666–667, 82 S. Ct. 1417, 1420–21, 8 L. Ed. 2d 758 (1962)).

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 this case, Appellant was convicted of forgery and obstruction or retaliation, the punishment ranges for which, considering enhancements, is two to twenty years imprisonment. *See* TEX. PENAL CODE ANN. §§ 12.33(a), 12.42(a), 32.21(b), (e), 36.06(a)(1)(A), (c) (West 2011, 2016 & West Supp. 2017). Thus, the sentences imposed by the trial court fall within the range set forth by the legislature. Therefore, the punishment is not prohibited as cruel, unusual, or excessive per se. *See* ***Harris***, 656 S.W.2d at 486; ***Jordan***, 495 S.W.2d at 952; ***Davis***, 905 S.W.2d at 664.

Nevertheless, 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. ***Id.***, 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 are guided by the holding in ***Rummel v. Estelle*** in making the threshold determination of whether Appellant's sentences are grossly disproportionate to his crimes. 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In ***Rummel***, the Supreme Court considered

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. In that case, the appellant received a life sentence because he had two prior felony convictions—one for fraudulent use of a credit card to obtain $80 worth of goods or services and the other for passing a forged check in the amount of $28.36. ***Id.***, 445 U.S. at 265–66, 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 284–85, 100 S. Ct. at 1144–45.

In this case, the offenses committed by Appellant—forgery and obstruction or retaliation—are certainly no less serious than the combination of offenses committed by the appellant in ***Rummel***, while Appellant's twenty year and ten year sentences are far less severe than the life sentence upheld by the Supreme Court in ***Rummell***. Thus, it is reasonable to conclude that if the sentence in ***Rummell*** is not constitutionally disproportionate, neither are the sentences assessed against Appellant in this case. In his briefs, Appellant makes a conclusory statement that his twenty year and ten year sentences are grossly disproportionate, stating that other sentences for the same enhanced convictions resulted in "significantly" less harsh sentences. However, he cites to no authority to support this contention. *See* TEX. R. APP. P. 38.1(i) ("[t]he brief must contain a clear and concise argument for the contentions made, with appropriate citations to the authorities..."). Because we do not conclude that Appellant's sentences are disproportionate to his crimes, we need not apply the remaining elements of the ***Solem*** test. Appellant's sole issue in both cases is overruled.

DISPOSITION

Having overruled Appellant's sole issue in each case, we ***affirm*** the judgments of the trial court.

BRIAN HOYLE
Justice

Opinion delivered April 25, 2018.
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

APRIL 25, 2018

NO. 12-17-00158-CR

MARCUS SHEDD,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 16CR-109)

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.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 25, 2018

NO. 12-17-00168-CR

MARCUS SHEDD,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 349th District Court
of Houston County, Texas (Tr.Ct.No. 16CR-114)

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.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.