Review of Recent Juvenile Cases (2012)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Ninety-nine year sentence did not constitute cruel and unusual punishment for violation of deferred adjudication for juvenile who had been certified and transferred to adult court.[Diamond v. State](12-2-3B)

On April 25, 2012, the Beaumont Court of Appeals held that juvenile's ninety-nine year sentence for violating his aggravated robbery deferred adjudication did not constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

12-2-3B. **Diamond v. State**, Nos. 09–11–00478–CR, 09–11–00479–CR, --- S.W.3d ----, 2012 WL 1431232 (Tex.App.-Beaumont, 4/25/12).

Facts: Terrell Dewayne Diamond appeals from the trial court's revocation of his deferred adjudication community supervision and imposition of sentence in two cases. Because Diamond was under the age of seventeen years, the cases were initially referred to the juvenile court. That court waived its jurisdiction and transferred the matters to the district court for trial as an adult.

In accordance with a plea-bargain agreement, Diamond entered a plea of guilty to the offense of the unauthorized use of a motor vehicle. *See* Tex. Penal Code Ann. § 31.07 (West 2011). The trial court found the evidence sufficient to find Diamond guilty, deferred further proceedings, and placed Diamond on community supervision for five years. In the second case, Diamond entered a plea of guilty to the offense of aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). The trial court found evidence sufficient to find Diamond guilty, deferred further proceedings, placed Diamond on community supervision for ten years, and assessed a $1,000 fine. The State subsequently filed motions to revoke Diamond's unadjudicated community supervision in both cases. At the hearing on the motion to revoke, Diamond pled "true" to four violations of the conditions of his community supervision. The trial court found that Diamond violated the terms of his community supervision, found him guilty of aggravated robbery, and assessed his punishment at 99 years' confinement. The trial court further found Diamond guilty of the unauthorized use of a motor vehicle, and assessed his punishment at 2 years' confinement, to run consecutive to his sentence for the aggravated robbery charge.

Diamond filed a motion to reconsider the imposition of his state jail sentence. In both cases Diamond also filed a motion for new trial and motion in arrest of judgment wherein Diamond argued that the verdict is contrary to the law and the evidence, and that his sentence is inappropriate and unreasonable. As there is not a signed order in the record denying Diamond's motions for new trial, we deem they were denied by operation of law. *See* Tex.R.App. P. 21.8. Diamond appealed both cases.

In his appeal in cause numbers 7889 and 7890, Diamond argues that he has been denied a complete record. In his appeal in cause number 7890, Diamond raises three additional issues. He argues that the record fails to establish that the trial court had proper jurisdiction, that the trial court erred in failing to grant his motion for new trial, and that his sentence for aggravated robbery constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article 1.09 of the Texas Code of Criminal Procedure.

Held: Affirmed

Opinion: In Diamond's third and fourth issue in cause number 7890, he contends that the trial court should have granted his motion for a new trial because his sentence is disproportionate and constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and article 1.09 of the Texas Code of Criminal Procedure [FN2]. The State argues that Diamond did not object and therefore waived any claim of disproportionate sentence on appeal.

FN2. Diamond has briefed his article 1.09 claim with his issue regarding the Eighth Amendment. He has not by argument or authority established that the cruel and unusual provisions of the state statute are broader and offer greater protection than the Eighth Amendment. Therefore, nothing is presented for review. *See Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Crim.App.1992).

To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court, and obtain a ruling. Tex.R.App. P. 33.1(a). A party's failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for the purposes of appellate review. *Rhoades v. State,* 934 S.W.2d 113, 120 (Tex.Crim.App.1996); *Noland v. State,* 264 S.W.3d 144, 151 (Tex.App.-Houston [1st Dist.] 2007, pet. ref'd). While Diamond did not raise any objections when the trial court sentenced him, he did subsequently file post-sentence motions complaining about the alleged excessive sentence. We find that Diamond preserved this issue for review.

Generally, a sentence that is within the range of punishment established by the Legislature will not be disturbed on appeal. *See Jackson v. State,* 680 S.W.2d 809, 814 (Tex.Crim.App.1984). The appellate court rarely considers a punishment within the statutory range for the offense excessive, unconstitutionally cruel, or unusual under either Texas law or the United States Constitution. *See Kirk v. State,* 949 S.W.2d 769, 772 (Tex.App.-Dallas 1997, pet. ref'd); *see also Jackson v. State,* 989 S.W.2d 842, 846 (Tex.App.-Texarkana 1999, no pet.). Aggravated robbery is a first-degree felony, which carries a punishment range of confinement from five to ninety-nine years. Tex. Penal Code Ann. §§ 12.32, 29.03(b) (West 2011). Diamond's sentence of ninety-nine years is within the statutory range authorized by the Legislature for the crime of aggravated robbery. *See id.*

Diamond failed to prove that his sentence was grossly disproportionate to the offense he committed. Further, there is no evidence in the record of sentences imposed for similar offenses by which we can make a reliable comparison. *See Jackson,* 989 S.W.2d at 846. Diamond cites to a number of cases wherein the appellate courts have found lengthy sentences constitutional. *See Thomas v. State,* 916 S.W.2d 578, 584 (Tex.App.-San Antonio 1996, no pet.) (40–year

conviction constitutional noting appellant had two prior felonies, including theft from a person and robbery); *Phillips v. State*, 887 S.W.2d 267, 268–69 (Tex.App.-Beaumont 1994, pet. ref'd) (99 years for aggravated sexual assault after adjudication based on failure to attend offenders program and failure to wear electronic monitoring device); *Lackey v. State*, 881 S.W.2d 418, 420–21 (Tex.App.-Dallas 1994, pet. ref'd) (35–year sentence for enhanced shoplifting constitutional when punishment enhanced by prior felony convictions for burglary and robbery); *Nevarez v. State*, 832 S.W.2d 82, 86–87 (Tex.App.-Waco 1992, pet. ref'd) (life sentence constitutional when punishment enhanced by two prior felony convictions); *Smallwood v. State*, 827 S.W.2d 34, 37–38 (Tex.App.-Houston [1st Dist.] 1992, pet. ref'd) (50–year sentence found constitutional when appellant's punishment was enhanced pursuant to the habitual offenders statute and when appellant had other theft offenses and felony convictions); *Simpson v. State*, 668 S.W.2d 915, 919–20 (Tex.App.-Houston [1st Dist.] 1984, no pet.) (life sentence constitutional when appellant convicted for possession of cocaine had two prior felony convictions). Diamond argues each of these cases had aggravating factors not present in his case. We disagree. During his sentencing hearing, the trial court questioned Diamond about the circumstances surrounding the aggravated robbery offense for which he had previously pleaded guilty. Diamond stated that while he was robbing a man, he hit him with a rock and knocked the man unconscious. He admitted that after knocking the man unconscious, he left the man to die while his “co-partner” continued beating the unconscious man. Diamond indicated to the court that his drug addiction was the source of his problems. Further, contrary to Diamond's argument, his community supervision violations were not purely administrative. His violations included his testing positive for marijuana use twice and breaking curfew by being at a residence other than his own at 2:17 a.m. The same drug problems Diamond had when he nearly killed a man, he continued to struggle with while on community supervision. The record indicates that the trial court also considered Diamond's juvenile offenses, which were substantial, including among others, second-degree robbery, theft, unauthorized use of a motor vehicle, and aggravated robbery. The trial court was lenient in granting Diamond community supervision in the first instance. The trial court apparently sought to instill in Diamond the seriousness of his situation by imposing a 180–day up-front time period in jail. Diamond was placed on community supervision to participate in programs to reform his behavior. However, his testimony established that he did not fulfill his community supervision requirements. Prior to sentencing, the trial court not only had the statements made by Diamond and his pleas of true as to the violations of his community supervision, but also had his original plea of guilty to the indictment of aggravated robbery. The trial court was very explicit regarding the reasons for the sentence imposed, wherein the court stated:

> And the only reason that somebody's not dead yet is because we just haven't given you enough time out on the street to make that happen. But I believe in my heart that if you're given an opportunity to get back out on the street you're going to kill the next one.

Based on the record before us, we are unable to conclude that Diamond's sentence constitutes a cruel and unusual punishment. We overrule Diamond's constitutional challenges to the length of the sentence assessed by the trial court in cause number 7890.

Conclusion: Having overruled Diamond's issues in cause numbers 7889 and 7890, we affirm the trial court's judgment in both cases.

Dissent: In the appeal of the judgment in cause number 09–7890, appellant's counsel argues that a ninety-nine year sentence for a seventeen-year-old, who committed the offense when he was fifteen, is cruel and unusual punishment. Counsel states that the United States Supreme Court recently held it unconstitutional "to sentence a juvenile in a non-homicide case to a sentence that could not be discharged in his lifetime." In *Graham v. Florida*, the Supreme Court reasoned:

Roper established that because juveniles have lessened culpability they are less deserving of the most severe punishments. [*Roper v. Simmons,* 543 U.S. 551, 569,] 125 S.Ct. 1183, 161 L.Ed.2d 1. As compared to adults, juveniles have a ' "lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." *Id.*, at 569–570, 125 S.Ct. 1183, 161 L.Ed.2d 1. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573, 125 S.Ct. 1183, 161 L.Ed.2d 1. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.*, at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra,* at 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (plurality opinion).

The State responds that "the probability of parole makes these circumstances different from *Graham.*" The Supreme Court also noted in *Graham* that "[t]hose who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Id.* at 2030. Although the State argues that the facts justify the sentence, the State acknowledges it "cannot disagree that holding a human being to what amounts to life in prison for horrendously bad decisions made at age fifteen is an ethically and morally monumental burden, not to be undertaken without serious consideration."

The law provides that, after an adjudication of guilt, "all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred." Tex.Code Crim. Proc. Ann. art. 42.12, § 5(b) (West Supp.2011); *see Pearson v. State*, 994 S.W.2d 176, 178 (Tex.Crim.App.1999); *Issa v. State*, 826 S.W.2d 159, 161 (Tex.Crim.App.1992). In this case, sentencing occurred immediately after revocation, as follows:

Cause No. 7890, I find the evidence to be sufficient to find Counts 2, 3, 4, and 6 to be true. They are true. I hereby revoke your unadjudicated probation. I now find you guilty of the offense of aggravated robbery. I assess your punishment at 99 years' confinement in the Institutional Division. You'll get credit for whatever time that you're entitled to by law.

Defense counsel filed a motion for new trial noting that the sentence was "unreasonable and without consideration of existing verifiable facts [.]" Defense counsel also filed a motion for reconsideration of the imposition of sentence, asked for a hearing and opportunity to present evidence, and requested that defendant be placed on community supervision. Appellant argues that "[b]ased upon the age of the defendant and matters set out in the motion for new trial and

motion for reconsideration of imposition of sentence, and the manifest injustice of the harsh sentence, the decision of the trial court was contrary to the law and evidence, and therefore the trial court should have granted the motion for new trial."