Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NOS. 14-00-01450-CR
14-00-01451-CR

MICHAEL HOLDER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause Nos. 694,699 & 694,698

O P I N I O N

As a benefit of his felony plea bargain, Appellant Michael Holder received eight years' deferred adjudication for two charges of aggravated sexual assault of a child. One year later, the trial court adjudicated his guilt and sentenced appellant to twenty years' confinement. In four points of error, appellant challenges the trial court's adjudication of guilt, the validity of his original guilty plea, and the constitutionality of his twenty-year sentence. We dismiss appellant's first two points of error because we have no jurisdiction over those issues and affirm the judgment.

In 1996, appellant pleaded no contest to two charges of aggravated sexual assault of a child. In exchange, the State recommended appellant be placed on eight years' deferred adjudication. The trial court followed the terms of the plea bargain and deferred adjudication of appellant's guilt. A year later, the State filed a motion to adjudicate guilt alleging multiple "technical" violations of appellant's community supervision. Following a contested hearing in August 1997, the trial court adjudicated appellant's guilt and sentenced him to twenty years' incarceration. This Court dismissed appellant's first appeal from the order adjudicating guilt because appellant's pro se notice of appeal was not timely filed.[1] The Court of Criminal Appeals granted an out-of-time appeal, after which appointed counsel filed a notice of appeal alleging in the alternative that (1) the trial court granted permission to appeal, (2) the appeal was for a jurisdictional defect, or (3) the substance of the appeal was raised by written motion and ruled on before trial.

Appellate Jurisdiction

Although not argued by the State in its brief, we must consider whether this notice was sufficient to invoke the jurisdiction of this Court under Texas Rule of Appellate Procedure 25.2(b)(3). Ordinarily, the requirement of Rule 25.2(b)(3) that the notice of appeal specify a defendant has the trial court's permission or is appealing a pretrial motion or the jurisdiction of the trial court applies to an appeal from an order adjudicating guilt. *Vidaurri v. State,* 49 S.W.3d 880, 882 (Tex. Crim. App. 2001). Not only must the notice of appeal recite the applicable extra-notice requirements, the record and the issues raised in the brief must substantiate the recitations in the notice of appeal. *Betz v. State,* 36 S.W.3d 227, 228-29 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Sherman v. State,* 12 S.W.3d 489, 492 (Tex. App.—Dallas 1999, no pet.). Here, appellant does not appeal a pretrial motion, nor does he assert that the trial court lacked jurisdiction or gave permission for this appeal. Appellant's notice of appeal fails to comply in substance with the requirements of Rule

[1] Appellant filed his original notice of appeal in July 1998.

25.2(b)(3) and never properly invoked this Court's jurisdiction over the issues to which Rule 25.2(b)(3) applies. *See Betz*, 36 S.W.3d at 228–29.

The Rule 25.2(b)(3) limitations on appeal, however, do not apply when the appellant challenges an issue "unrelated to [his] conviction." *Vidaurri*, 49 S.W.3d at 885. Issues that challenge the process by which a defendant was sentenced rather than the propriety of the conviction will not be barred by failure to comply with Rule 25.2(b)(3). *See, e.g.*, *Kirtley v. State*, 56 S.W.3d 48, 51–52 (Tex. Crim. App. 2001) (allowing claim of ineffective assistance at the punishment hearing); *Vidaurri*, 49 S.W.3d at 885 (allowing appeal from denial of a separate punishment hearing following adjudication of guilt); *Feagin v. State*, 967 S.W.2d 417, 419 (Tex. Crim. App. 1998) (allowing appeal from denial of motion to dismiss revocation motion when appellant had been placed on "regular" probation).

Because appellant's first two points of error (admission of evidence at the adjudication hearing and involuntariness of his original plea) are related to his conviction, we do not have jurisdiction under Rule 25.2(b)(3) to address these issues. We also do not have jurisdiction to consider appellant's first point of error because Texas Code of Criminal Procedure 42.12, section 5(b), prohibits appeals that contend error in the adjudication of guilt process.[2] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2002)*; Connolly v. State*, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999). Appellant's second issue (that his original plea was involuntary because he did not initial the admonishments on the plea form) is additionally barred because he did not appeal the issue when he was placed on community supervision. *See Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999) (requiring defendant raising issues relating to his original plea proceeding to appeal when

[2] In his first point of error, appellant argues the trial court erred in allowing the admission of testimony regarding the results of a polygraph test during the hearing to adjudicate guilt. Appellant's group therapy counselor testified that at the beginning of the court-ordered program, appellant claimed he was innocent of the sexual assault. Because of a belief that denial interfered with effective treatment, patients like appellant were required to take a "clinical polygraph." The counselor stated appellant failed the polygraph, but later signed a statement that he had committed the offense. The counselor testified that after the polygraph, appellant partially admitted his guilt.

court first imposed deferred adjudication community supervision).[3] Thus, we dismiss appellant's points of error one and two for lack of jurisdiction.

Because appellant's third and fourth issues address the punishment assessed by the court following an adjudication of guilt and do not attack his conviction, we find we have jurisdiction to reach these issues despite the failure of the notice of appeal to comply *in substance* with Rule of Appellate Procedure 25.2(b)(3). *See Vidaurri*, 49 S.W.3d at 885; *Betz*, 36 S.W.3d at 228.

Constitutionality of Twenty-Year Sentence

In these final points of error, appellant claims his twenty-year sentence violates his right to due process under the Texas Constitution and right to be free from cruel and unusual punishment under the United States Constitution. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating specific grounds for the ruling desired. TEX. R. APP. P. 33.1. Because appellant did not object to the sentence when it was imposed and made no complaint regarding the punishment in his motion for new trial, he has waived the right to complain on appeal. *See id.*; *Cole v. State*, 931 S.W.2d 578, 580 (Tex. App.—Dallas 1995, pet. ref'd) (finding waiver of due process complaint when defendant does not object to punishment); *Solis v. State*, 945 S.W.2d 300, 302 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (finding waiver of complaint that sentence is cruel or unusual when not raised at trial).

Furthermore, appellant's twenty-year sentence does not violate due process, nor is it cruel and unusual considering (1) his thirteen-year-old half-sister's allegations of multiple incidents of aggravated sexual assault, (2) his lack of cooperation in sex-offender counseling, (3) his continued failure to tell others the truth about the sexual assault, and (4) the applicable

[3] While this rule does not apply to attacks on a void judgment, an involuntary plea will not void a judgment. *Jordan v. State*, 54 S.W.3d 783, 785 (Tex. Crim. App. 2001).

penalty range of five to ninety-nine years or life.[4] *See Solem v. Helm*, 463 U.S. 277, 291-92, 103 S. Ct. 3001, 3010 (1983) (considering the gravity of offense and harshness of the penalty as the first factor in Eighth Amendment analysis); *see also Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S. Ct. 2680, 2707 (1991) (Kennedy, J., concurring) (requiring an initial inference of gross disproportionality before conducting further analysis).

Accordingly, appellant's first two issues are dismissed for lack of jurisdiction, and we overrule points of error three and four and affirm the judgment of the trial court.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed March 7, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] *See* TEX. PEN. CODE ANN. § 12.32(a) (Vernon 1994), § 22.021(e) (Vernon Supp. 2002). Since amendments to the Penal Code have not changed the penalty range in effect at the time appellant committed the offense, we cite the current Code for convenience.