Affirmed and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00894-CR

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MYRNA DURON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 793,118

O P I N I O N

Appellant, Myrna Duron, entered a plea of guilty to the charge of indecency with a child, a second degree felony. She now appeals, claiming in three points of error that her plea was involuntary and that the sentence imposed—six years in the Texas Department of Criminal Justice, Institutional Division—violates the prohibitions against cruel and unusual punishment found in both the Texas and United States constitutions. We affirm.

Background

On August 11, 1998, appellant offered to take her neighbor's five-year-old daughter, M, home for the afternoon because the neighbor was complaining of a headache. After appellant returned M to her mother, M said appellant sexually molested her. Approximately three weeks later, the police interviewed appellant. Although she initially denied any wrongdoing, appellant later recanted, telling the police that while she and M watched afternoon soap operas, M asked her what the actors on television were doing. M then repeatedly asked appellant to kiss her on the mouth. Appellant finally did so, and over the course of the next hour, she removed M's clothes and touched M's buttocks and breasts.

In March of 1999, appellant, without a sentencing recommendation from the State, entered a plea of guilty to the charge of indecency with a child. The trial court found appellant guilty, ordered a pre-sentence investigation ("PSI") report, and scheduled a sentencing hearing for May. At the May hearing, the court sentenced appellant to a term of sixteen years in the Texas Department of Corrections, Institutional Division. Appellant filed a motion for new trial, which was granted on June 3,1999. Appellant then entered a second plea of guilty, and this time was sentenced to six, rather than sixteen, years.[1] On June 16, 1999, appellant filed an amended motion for new trial which was overruled by operation of law. This appeal followed.

Voluntariness of Plea

In her first point of error, appellant argues that her plea was not given knowingly and voluntarily because she did not understand the consequences of her plea. Specifically, appellant maintains that although she pled guilty to the offense of indecency with a child, the

[1] No record from either the hearing on the motion for new trial or the subsequent plea of guilty is before this Court.

only act she admitted to was kissing M on the cheek. Appellant further claims she pled guilty solely because she believed she would receive probation, not because she was, in fact, guilty.[2]

A plea of guilty or nolo contendere may be accepted by a court only if it is entered into freely and voluntarily. TEX. CODE CRIM. PROC. ANN. Art. 26.13(b) (Vernon 1989). When reviewing the voluntariness of a plea, we consider the entire record. *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). The voluntariness of a guilty plea is determined by the totality of the circumstances. *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986) (en banc)). On appeal, we presume the regularity of the judgment and proceedings in the trial court, and the defendant bears the burden of overcoming this presumption. *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). When the defendant waives a court reporter at the plea hearing, the burden is nonetheless his to present a sufficient record on appeal to show reversible error. *Montoya v. State*, 872 S.W.2d 24, 25 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Here, the judgment recites:

> The Defendant waived [her] right of trial by jury, and pleaded [guilty]. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the

[2] In support of her argument, appellant requests this Court, in the interest of justice, to consider the affidavit she attached to the First Amended Motion for New Trial. This evidence is not properly before us. *See, e.g., Lamb v. State*, 680 S.W.2d 11 (Tex. Crim. App. 1984) (en banc) (finding an affidavit attached to a motion for new trial was not evidence that an appellate court could consider, where the motion was overruled by operation of law and the affidavit was not otherwise offered into evidence). Even assuming we could consider the affidavit, it would be insufficient to support her claim of involuntariness. *See, e.g., Heiligmann v. State*, 980 S.W.2d 713, 715 n.4 (Tex. App.—San Antonio 1998, no pet.) (noting that a plea is not rendered involuntary simply because the defendant did not receive probation, even where that expectation resulted from advice of counsel).

> consequences of [her] plea; the plea is hereby received by the Court and entered of record.

In the absence of an affirmative showing to the contrary, the recitation above is entitled to a presumption of regularity. *Dusenberry*, 915 S.W.2d at 949.

Additionally, the record reflects that appellant and her attorney, as well as the prosecutor and judge, signed a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," and "Admonishments, Statements and Waivers of Defendant." Appellant initialed the latter document 19 times. Written admonishments signed by a defendant create a presumption that the plea was voluntary. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (en banc). The burden shifts to the defendant to show that she did not fully understand the consequences of her plea and that she suffered harm. *Id.*

Appellant has overcome neither the presumption of regularity reflected by the recitation contained in the judgment, nor the presumption created by the written admonishments that the plea was voluntary.[3] Appellant's first point of error is overruled.

Cruel and Unusual Punishment

In her second and third points of error, appellant contends that the sentence she received violates the cruel and unusual punishment clauses of the United States and Texas constitutions. Because appellant did not raise these issues with the court below, she has waived the right to complain of them on appeal. TEX. R. APP. P. 33.1(a); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (holding that a defendant waives the right to

[3] In an attempt to show that her *second* plea was involuntary, appellant points to testimony from the *first* sentencing hearing. Even assuming we could properly consider testimony from the first hearing, there appellant admitted, under oath, that she kissed M on the mouth, touched M's breasts and buttocks, and that M touched appellant. This is substantially consistent with her statement in the PSI report and is consistent with the allegations in the indictment. In fact, appellant admitted at the sentencing hearing that her "continued denials" were actually a series of lies to the police, her parents, and the judge in this case. We do not read this testimony as any indication that appellant did not understand the consequences of her plea.

complain that his sentence is cruel or unusual where he did not raise that at trial). Additionally, appellant waived any argument that the sentence imposed by the court violates the Texas Constitution because she has not briefed this issue. TEX. R. APP. P. 38.1(h); *King v. State*, 17 S.W.3d 7, 23 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Nevertheless, in the interest of justice, we address the merits of each claim briefly.

The prescribed sentence for indecency with a child is confinement in the Texas Department of Criminal Justice, Institutional Division, for a term of not less than two nor more than twenty years. TEX. PEN. CODE ANN. §§ 21.11(a)(1), (c) and 12.33 (Vernon 1994). Appellant was initially sentenced to sixteen years in the institutional division, but after the trial court granted a new trial, she was sentenced to six years. Texas has long held that punishments falling within the prescribed statutory limitations are neither cruel nor unusual within the meaning of the Texas Constitution. *Jordan v. State*, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Rodriguez v. State* 917 S.W.2d 90, 92 (Tex. App.—Amarillo 1996, pet. ref'd); *Robinson v. State*, 906 S.W.2d 534, 536–37 (Tex. App.—Tyler 1995, no pet.); *Davis v. State*, 905 S.W.2d 655, 664 (Tex. App.—Texarkana 1995, pet. ref'd); *Benjamin v. State*, 874 S.W.2d 132, 134 (Tex. App.—Houston [14th Dist.] 1994, no pet.). We, therefore, hold that appellant's sentence is not cruel and unusual within the meaning of the Texas Constitution.

The Supreme Court has suggested, however, that even where the sentence is authorized by statute, it may be cruel and unusual under the Eighth Amendment to the United States Constitution. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In order to fit within federal constitutional strictures, the punishment must be proportionate to the crime. *Id*. The Court further indicated that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Id*. at 289–90 (alterations and emphasis in original) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). In any event, the *Solem* Court announced three factors a reviewing court should consider in

determining whether a sentence is disproportionate. First, the reviewing court should compare the gravity of the offense to the harshness of the penalty. Second, the court should undertake a comparison of the sentences imposed on other defendants within the same jurisdiction. Finally, the court should look to the punishment for the same offense in other jurisdictions. *Id*. at 291–92.

Several years later, however, Justice Kennedy explained in a concurring opinion that the test developed in *Solem* is not part of a mandatory analysis because "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). Justice Kennedy's application of the *Solem* test has been recognized by the Fifth Circuit and many courts of appeals across Texas. *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992); *Dunn v. State*, 997 S.W.2d 885, 892 (Tex. App.—Waco 1999, pet. ref'd); *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.); *Sullivan v. State*, 975 S.W.2d 755, 757 (Tex. App.—Corpus Christi 1998, no pet.); *Mathews v. State*, 918 S.W.2d 666, 669 (Tex. App.—Beaumont 1996, pet. ref'd); *Thomas v. State*, 916 S.W.2d 578, 583 (Tex. App.—San Antonio 1996, no pet.); *Lackey v. State*, 881 S.W.2d 418, 420–21 (Tex. App.—Dallas 1994, pet. ref'd).

Here, appellant's six-year sentence is not disproportionate to the offense committed. Appellant was placed in a position of trust and abused that trust, a point recognized by the trial court at the original sentencing hearing. Additionally, the PSI report indicates that M and her mother had to move from their home as a result of this incident. M's mother reported her daughter has nightmares attributable to appellant's conduct, a fact confirmed by the investigator who verified that M sees a therapist on a weekly basis for counseling. We find that appellant has failed to make out a threshold showing that the sentence imposed is grossly disproportionate. Accordingly, we do not find that the sentence appellant received violates

constitutional prohibitions against cruel and unusual punishment. Appellant's second and third points of error are overruled.

Affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).