Affirmed and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01365-CR

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KENNY LEE ALLEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 818,219

O P I N I O N

Appellant, Kenny Lee Allen, entered a plea of guilty to the offense of aggravated robbery and was sentenced to serve ten years in the Texas Department of Criminal Justice, Institutional Division. In four points of error, he complains that (1) his conviction is void because the trial court's review of his pre-sentence investigation report prior to making an express finding of guilt violated his rights under both the United States and Texas constitutions, and (2) the ten-year sentence he received violates both the United States and Texas constitutional prohibitions against cruel and unusual punishment. We affirm.

I. Introduction

Appellant entered a plea of guilty to the charge of aggravated robbery. At that time, the trial court postponed entering a finding of guilt, ordered a pre-sentence investigation ("PSI") report, and scheduled a sentencing hearing for a future date. At this later hearing, the trial court formally found appellant guilty and assessed punishment.

II. Trial Court's Review of Appellant's PSI Report

In his first two points of error, appellant argues that the trial court's order is void, under the Due Process Clause of the United States and Texas constitutions, because the court reviewed his PSI report prior to making an express finding of guilt. In support of this argument, appellant relies on *State Ex Rel. Bryan v. McDonald*, 662 S.W.2d 5 (Tex. Crim. App. 1983) (en banc) and *State Ex Rel. Turner v. McDonald*, 676 S.W.2d 375 (Tex. Crim. App. 1984) (en banc).

Unlike the procedure followed in this case, the *McDonald* decisions concerned the "routine practice of a trial judge in ordering and considering pre-sentence investigation reports *before determining guilt*." *Wissinger v. State*, 702 S.W.2d 261, 263 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd) (emphasis added). Here, appellant entered a plea of guilty on August 24, 1999. At that same time, he requested a PSI report. Thus, as in *Wissinger*, "there is no evidence that the judge considered the [PSI] report or ordered it until [appellant] had pleaded [guilty], signed a judicial confession, and stipulated to the evidence of [his] guilt. Therefore, the report could not have influenced the judge except in deciding the appropriate punishment." *Id.*; *see also Blacklock v. State*, 728 S.W.2d 135 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd) (holding that, because the PSI report was made at defendant's request, and because a formal finding of guilt was deferred until after the PSI report was completed so that the court could consider deferred adjudication as a sentencing option, the court's review of the PSI report before a final pronouncement of guilt did not violate the defendant's constitutional rights). Accordingly, we find that the procedure followed by the trial court did

not risk any of the due process violations condemned in the *McDonald* cases.

Appellant's first two points of error are overruled.

III. Cruel and Unusual Punishment

In his third and fourth points of error, appellant complains that the trial court's imposition of a ten-year sentence violates both the United States and Texas constitutions' prohibition of cruel and unusual punishment. Specifically, he urges that his sentence is disproportionate to the crime to which he pled guilty.

Aggravated robbery is classified as a first degree felony in Texas. TEX. PEN. CODE ANN. § 29.03(b) (Vernon 1994). A first degree felony is punishable "by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years," plus the possibility of a monetary fine. *Id*. at § 12.32(a) (Vernon 1994). Here, appellant was sentenced to serve a term of ten years.

Texas has long held that punishments falling within the prescribed statutory limitations are not cruel and unusual within the meaning of the Texas Constitution. *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Simmons v. State*, (Tex. App.—Tyler 1996, pet. ref'd); *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 or unusual under the Texas Constitution.

The United States Supreme Court has suggested that, although a 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 *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 292. Justice Kennedy, however, later explained that the *Solem* test requires "intrajurisdictional and interjurisdictional analyses . . . 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. 597, 1004 (1991) (Kennedy, J., concurring). This interpretation has been recognized by the Fifth Circuit and 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.); *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 and an accomplice robbed a man at knife point of a ring valued at approximately $4,000.00. In the PSI report, appellant denied virtually any responsibility for the crime, asserting that his accomplice "did all of the talking . . . and all I did was pull the knife out . . . I did [not] say or do anything to harm or threaten [the victim] in any form or fashion." Although the complaining witness agreed that appellant was silent initially, his version of the robbery, as reflected in the PSI report, was that, as soon as appellant and the accomplice learned of the ring's value, appellant, who was always within arm's length of the complainant, stepped out from behind the accomplice, pulled out a knife with a ten-inch blade, and said, "Sir, we are taking the rings [sic]." When the complainant resisted, appellant moved the knife to within a foot of the complainant's stomach. Upon seizing the ring, appellant and his accomplice fled in a getaway car, chased by Good Samaritan witnesses, and were involved in a car accident a few blocks away. Additionally, the complainant testified at the sentencing hearing that appellant pointed the knife at him during the robbery and that he was in fear for his life. He further testified that he was closing his business because he was afraid of another

robbery. Based upon these facts, we find that appellant's ten-year sentence is in no way disproportionate to the offense committed. Having failed to establish the threshold showing required of *McGruder*, appellant's final points are overruled.

The judgement of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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