

Affirmed and Opinion filed September 9, 1999.



In The

Fourteenth Court of Appeals

NO. 14-96-01448-CR

RICHARD ANTHONY JAMES, Appellant

v.

THE STATE OF TEXAS, Appellee

**On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 94-16901**

O P I N I O N

The appellant pled guilty to aggravated robbery and the trial court deferred adjudicating appellant's guilt, assessed him a \$500 fine, and placed him on community supervision for a five-year period. Thereafter, the appellant violated his community supervision's terms and conditions. The trial court then adjudicated appellant's guilt and assessed his punishment at confinement for life.

In three points of error, appellant contends his life sentence constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution as well as Article 1, Section 13 of the Texas Constitution, and Article 1.09 of the Texas Code of Criminal Procedure. Specifically, he contends that his life sentence, although clearly within the punishment range for aggravated robbery, is so grossly disproportionate to his crime that it constitutes cruel and unusual punishment.

We affirm.

According to the pre-sentence investigation report, on July 18, 1994, appellant, after smoking marijuana all day with his two roommates, entered a Sam's Seven Day Food Store. Appellant approached Hamayun Khan, the store's only employee, and pulled a large black gun. Appellant commanded Khan to open the register and remove the money or he would shoot him. After taking approximately \$300 in cash and food stamps, appellant ordered Khan to crawl on his hands and knees into the store's cooler; appellant then fled.

Thereafter, appellant was charged by indictment with aggravated robbery to which he pled guilty without a punishment recommendation from the State. The trial court deferred adjudicating the appellant's guilt, and placed him on probation for five years.

The State later filed a motion to adjudicate appellant's guilt which alleged that appellant had violated the terms and conditions of his probation in several different respects. Appellant pled not true to the allegations. After a hearing on the motion, the court found several of the allegations to be true, and found appellant guilty of aggravated robbery as alleged in the indictment. The trial court then assessed appellant's punishment at confinement for life.

The record reflects that appellant filed no motion for new trial, nor did anything else to make the trial court aware that he thought confinement for life was a cruel and unusual punishment, or grossly disproportionate to the offense.

The right to appellate review extends only to complaints made in accordance with the rules of appellate procedure. *Burks v. State*, 876 S.W.2d 877 (Tex. Crim. App. 1994); *See Mayfield v. State*, 757 S.W.2d 871, 875 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd) (holding that the defendant was obligated to make his objection, if he had one, to the restitution order's entry during the sentencing hearing). To preserve purported sentencing error for appellate review, a defendant must raise the complaint by objecting to his sentence during the trial's punishment phase or by later filing a motion for new trial. *See* TEX R. APP. P. 33.1; *see also Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986); *Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984); *Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex. App.—Amarillo 1996, pet. ref'd); *Quintana v. State*, 777 S.W.2d 474, 479 (Tex. App.—Corpus Christi 1989, pet. ref'd). Appellant failed to object to his life sentence in the trial court, and made no objection to the trial court's assessed punishment, nor did he file a motion for new trial. Accordingly, appellant presents nothing for review under either the former or the current rules of appellate procedure.¹

Waiver notwithstanding, appellant has not shown his life sentence for aggravated robbery was cruel and unusual punishment under constitutional or statutory standards. Sentences falling within the limits prescribed by statute are not "cruel and unusual." *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Johnson v. State*, 864 S.W.2d 708, 725 (Tex. App.—Dallas 1993), *aff'd*, 912 S.W.2d 227 (Tex. Crim. App. 1995).

¹ Under the former rules of appellate procedure, to preserve a complaint for appellate review, a defendant must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. TEX R. APP. P. 52(a) (Vernon 1998). The current rules require, as a prerequisite to presenting a complaint for appellate review, a record showing that (1) the complaint was made to the trial court by a timely request, objection or motion that: (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. TEX. R. APP. P. 33.1 (West Pamph. 1998).

Aggravated robbery is a first degree felony. TEX. PENAL CODE ANN. § 29.03(b) (Vernon Supp. 1998). Appellant pled guilty and was convicted of aggravated robbery. The punishment range for a first degree felony is five to ninety-nine years or life confinement and an optional fine not to exceed \$10,000. TEX. PENAL CODE ANN. § 12.42(b) (Vernon Supp. 1998). Appellant's punishment of confinement for life, with no accompanying fine, is well within the range authorized by statute, and therefore does not constitute cruel or unusual punishment.

Additionally, the record contains no evidence to support appellant's complaint that his punishment is disproportionate to the offense. *See Solem v. Helm*, 463 U.S. 277, 290 (1983). Absent such record, an assessed punishment within the range authorized by statute is neither arbitrary nor capricious and not subject to an extended proportionality analysis. *See Solem v. Helm*, 463 U.S. at 290 n.16.

Appellant further contends that his life sentence is not proportionate to the aggravated robbery for which he has been convicted. He relies upon *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991), for the contention that this court should conduct a proportionality analysis. However, he has not shown his life sentence in his aggravated robbery case is grossly disproportionate under any constitutional or statutory standards.

The Eighth Amendment prohibits sentences that are grossly disproportionate to the crime. *United States of America v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997); *see Solem v. Helm*, 463 U.S. at 288. The constitutional principal of the Eighth Amendment is tempered, however, by the corollary proposition that the determination of prison sentences is a legislative prerogative that is primarily within the province of the legislatures, not the courts. *Gonzales*, 121 F.3d at 942; *see also Rummel v. Estelle*, 445 U.S. 263, 274-76 (1980). The courts must grant "substantial deference to the broad authority that legislatures

necessarily possess in determining the types and limits of punishments for crimes.” *Solem*, 463 U.S. at 290; accord *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991).

When adjudicating an Eighth Amendment proportionality challenge, we must first make a threshold comparison between the gravity of the charged offense and the severity of the sentence. *Gonzales*, 121 F.3d at 942. It is only when the court concludes that a sentence is “grossly disproportionate” to the offense that we may proceed to consider whether the sentence offends the Eighth Amendment under the test announced in *Solem*. *Gonzales*, 121 F.3d at 942. As discussed above, appellant has failed to show that his life sentence, which was clearly within the punishment range for aggravated robbery, is grossly disproportionate under any constitutional or statutory standard. We conclude that the sentence is not “grossly disproportionate,” and thus, must defer to the will of the legislature. *See Gonzales*, 121 F.3d at 942.

Given the nature of appellant’s crime, coupled with the totality of the circumstances in which his sentence was imposed, the trial court did not abuse its discretion in assessing appellant the maximum period of confinement available under the statute. In light of the facts surrounding the offense, the punishment assessed by the trial court was not excessive, and thus, was *not* grossly disproportionate. The sentence does not violate the United States or Texas Constitutions, or the Texas Code of Criminal Procedure. Appellant's points of error are overruled. Judgment is affirmed.

/s/ Cynthia Hollingsworth
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Justices Fowler, Lee and Hollingsworth.²

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

² The Honorable Cynthia Hollingsworth, former Justice, Court of Appeals, Fifth District of Texas at Dallas, and Senior Justice Norman Lee, participating by assignment.