Affirmed and Opinion filed October 5, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00625-CR

ROMERO SIMPSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 666,200

O P I N I O N

Appellant, after waiving his right to a jury trial, was found guilty of indecency with a child. The trial court sentenced appellant to eight years, probated. On April 29, 1999, the trial court revoked appellant's probation and sentenced him to seven years in the Texas Department of Criminal Justice Institutional Division. Appellant raises two points of error on appeal.

In appellant's two points of error, he claims that his sentence constitutes cruel and unusual punishment in violation of the United States and Texas Constitutions. Specifically, appellant contends that his sentence is not proportional to the offense committed.

At the hearing on the Motion to Revoke Probation, appellant raised no objection to the imposition of the sentence. To preserve a complaint for appellate review, a party must have presented to the trial court a timely request, specifically stating the grounds for the ruling desired, and obtain a ruling. TEX. R. APP. P. 33.1(a). Almost all constitutional and statutory rights may be waived by failing to object. *See Smith v. State*, 721 S.W.2d 844, 855 (Tex. Crim. App. 1986); *Borgen v. State*, 672 S.W.2d 456, 460 (Tex. Crim. App. 1984); *Boulware v. State*, 542 S.W.2d 677, 682 (Tex. Crim. App. 1976). A number of courts have found waiver with regard to claims that the punishment assessed by the trial court was grossly disproportionate to the offenses committed and thus constituted cruel and unusual punishment. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Smith v. State*, 10 S.W.3d 48, 49 (Tex. App.–Texarkana 1999, no pet.); *Jackson v. State*, 989 S.W.2d 842, 845-46 (Tex. App.–Texarkana 1999, no pet.); *Keith v. State*, 975 S.W.2d 433, 433-34 (Tex. App.–Beaumont 1998, no pet.); *Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.–Houston[1st Dist] 1997, pet. ref'd); *Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex. App.–Amarillo 1996, pet. ref'd). Appellant has failed to preserve his alleged error for appeal. Moreover, even if appellant had properly preserved error, we find his sentence does not constitute cruel and unusual punishment under either the Texas or United States Constitutions.

Texas courts have repeatedly held that punishments falling within the statutory limits for an offense are not cruel and unusual within the constitutional prohibition. *See Harris v. State*, 656 S.W.2d 481, 486 (Tex.Crim.App. 1983); *McNew v. State*, 608 S.W.2d 166, 174 (Tex.Crim.App. [Panel Op.] 1978) (citing *Samuel v. State*, 477 S.W.2d 611, 614 (Tex.Crim.App.1972)); *Jordan v. State*, 495 S.W.2d 949, 952 (Tex.Crim.App. 1973); *Cooks v. State*, 5 S.W.3d 292, 298-99 (Tex. App.–Houston[14th Dist.] 1999, no pet.); *Simmons v. State*, 944 S.W.2d 11, 14 (Tex. App.–Tyler 1996, no pet.). Appellant was found guilty of the third degree felony offense of indecency with a child, punishable by not more than ten years and not less than two years imprisonment. TEX. PEN. CODE ANN. §§ 12.34, 21.11(Vernon 1994). Appellant's seven year sentence is well within the statutory limits prescribed by the Texas Legislature. Since the punishment did not violate the Texas Constitution, we overrule appellant's second point of error.

Punishment falling within the statutory limits, however, can still be cruel and unusual in violation of the United States Constitution. *See Solem v. Helm*, 463 U.S. 277, 282-90, 103 S.Ct. 3001, 3005-09, 77 L.Ed.2d 637 (1983). The punishment must be proportionate to the crime. *See id*. at 289-90, 103 S.Ct. at 3009. In *Solem*, the Supreme Court set out three factors the reviewing court should consider when determining whether the sentence is cruel and unusual: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the punishment for the same offense in other jurisdictions. *See id*. at 292, 103 S.Ct. at 3011. No one factor is dispositive, however, in determining unconstitutional disproportionality. *See Harmelin v. Michigan*, 501 U.S. 957, 1004, 111 S.Ct. 2680, 2707, 115 L.Ed.2d 836 (1991). Moreover, the Supreme Court in *Harmelin*, has modified the test announced in *Solem* to require a threshold comparison of the crime committed and the sentence imposed. *See id*. at 1005, 111 S.Ct. at 2707 (holding that there must exist an inference of gross disproportionality before intrajurisdictional and interjurisdictional analysis is appropriate); *see also McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992) (interpreting *Harmelin* as modifying the *Solem* test to require a threshold determination of gross disproportionality between the sentence and the crime); *Jackson*, 989 S.W.2d at 845-46 (holding that an initial threshold comparison between the crime committed and the sentence imposed must lead to a finding of gross disproportionality).

Appellant's seven year sentence is not grossly disproportionate to the third degree felony of indecency with a child. Appellant received a sentence within the range of punishment prescribed by the legislature for a third degree felony. Additionally, the record reflects that the trial court gave appellant credit for the one year period he reported to his probation officer, thus resulting in a sentence of seven years rather than eight years. Since we do not find the sentence grossly disproportionate to the crime committed, factors two and three of the *Solem* test need not be considered.[1] Appellant's first point of error is overruled.

---

[1] Even if we were to find that appellant's sentence was grossly disproportionate to the crime committed, there is no evidence in the record, as required by *Solem*, reflecting sentences imposed on similar offenses in Texas or other jurisdictions. *See Jackson*, 898 S.W.2d at 846; *Sullivan v. State*, 975 S.W.2d 755, 757-58 (Tex. App.–Corpus Christi 1998, no pet.); *Simmons v. State*, 944 S.W.2d at 15.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed October 5, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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