Dismissed in Part and Affirmed in Part and Opinion filed November 18, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00584-CR

CHRISTOPHER ALEXANDER LEVI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 729,006

O P I N I O N

Appellant Christopher Alexander Levi pleaded guilty to credit card abuse in 1996 and was placed on probation for five years. Before he completed his probation, the trial court revoked it and sentenced him to eight months' confinement in the state jail. Levi appeals in six points of error, complaining that his rights to compulsory process have been denied and that his state jail sentence is cruel and unusual punishment. We do not have jurisdiction to hear his appeal regarding compulsory process, and we hold that his eight months' confinement is not cruel and unusual punishment.

I. TIMELINESS OF NOTICE OF APPEAL

First, the State contends that Levi untimely filed his notice of appeal from the probation revocation hearing. However, Levi timely mailed his notice of appeal under the mailbox rule. Levi had thirty days after the trial court revoked his probation and sentenced him to perfect his appeal. TEX. R. APP. P. 26.2(a)(1). He mailed his notice of appeal to the Harris County district clerk on April 30, 1998, the thirtieth day after his sentencing, and the district clerk received it four days after mailing. A document is timely filed if it is mailed on or before the filing deadline and it is received by the clerk within ten days after the filing deadline. TEX. R. APP. P. 9.2(b)(1). The postmark on the envelope is conclusive proof of the date of mailing. TEX. R. APP. P. 9.2(b)(2). Levi has conclusively shown that he timely filed his notice of appeal for the probation revocation hearing, and we thus have jurisdiction to address appeals about that hearing.

II. POINTS OF ERROR ONE THROUGH FOUR

In points of error one through four, Levi complains that: 1) article 1.15 of the Texas Code of Criminal Procedure violates his federal and state constitutional rights to compulsory process because it denies him the opportunity to present evidence on his behalf; and 2) the trial court erred in accepting Levi's guilty plea without requiring an express waiver of his rights to compulsory process. These appellate points are an attack on the original conviction and sentence, not an appeal on the revocation of Levi's probation. Generally, an appeal from an order revoking probation is limited to the propriety of the revocation order and does not include review of the original conviction. *Clark v. State*, 997 S.W.2d 365, 369 (Tex. App.–Dallas, no pet. h.); *Rojas v. State*, 943 S.W.2d 507, 509 (Tex. App.--Dallas 1997, no pet.). To timely appeal the original conviction and sentence, Levi should have raised these points within 30 days after he was placed on probation. *See Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999); *Anthony v. State*, 962

S.W.2d 242, 246 (Tex. App.–Fort Worth 1998, no pet.); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 23(b) (Vernon Supp. 1999); TEX. R. APP. P. 26.2(a)(1). Instead, Levi waited for almost two years before attempting to appeal these issues. Having no jurisdiction to hear them in this appeal, we dismiss points one, two, three, and four.

Further, nothing in the record before this court shows that the trial court prevented Levy from presenting evidence before accepting his guilty plea. Nor is there any indication that Levy objected to his alleged inability to present evidence. Such failure to preserve error would constitute waiver on appeal, were we able to assert jurisdiction. TEX. R. APP. P. 33.1. Finally, even if Levi's first four points of error are issues that could be raised on appeal for the first time after probation revocation, both Houston courts of appeals have specifically overruled these points of error in *Vanderburg v. State*, 681 S.W.2d 713 (Tex. App.–Houston [14th Dist.] 1984, pet. ref'd), and *Lyles v. State*, 745 S.W.2d 567 (Tex. App.–Houston [1st Dist.] 1988, pet. ref'd).

III. POINTS OF ERROR FIVE AND SIX

In his fifth and sixth points of error, Levi claims that his eight month sentence violates the Texas and U.S. constitutions' ban on cruel and unusual punishment. We disagree. The Texas Legislature determines the proper punishment range for credit card abuse: "The power to define criminal offenses and prescribe their punishments resides with the legislature." *Francis v. State*, 877 S.W.2d 441, 443-44 (Tex. App.–Austin 1994, pet ref'd). Credit card abuse is a state jail felony punishable by confinement of not more than two years, but not less than 180 days. TEX. PEN. CODE ANN. §§ 32.31(d) & 12.35(a) (Vernon 1994). Where the punishment assessed does not exceed the statute's limits, the Texas Court of Criminal Appeals has held that the punishment is not cruel and unusual within the constitutional prohibition. *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Benjamin v. State*, 874 S.W.2d 132, 134-35 (Tex. App.–Houston [14th Dist.] 1994, no pet.).

Levi's eight months' confinement falls at the lower limits of the range of punishment for credit card abuse and is thus not cruel and unusual punishment. Accordingly, we overrule points of error five and six.

Having dismissed points one through four for want of jurisdiction and overruled points five and six, we affirm the judgment.

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Joe L. Draughn
Justice

Judgment rendered and Opinion filed November 18, 1999.

Panel consists of Justices Sears, Cannon, and Draughn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.