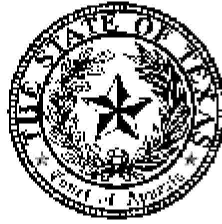
Affirmed and Opinion filed December 7, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-00-00111-CR

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SHUREE PATRICE MORRISON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 817250

O P I N I O N

Appellant, Shuree Patrice Morrison challenges her conviction for the felony offense of forgery on the grounds that the trial court erred in: (1) accepting her guilty plea under article 1.15 of the Texas Code of Criminal Procedure because she was not permitted to introduce any evidence, thereby violating her state and federal constitutional rights to compulsory process; (2) finding her guilty where the record is silent as to waiver of her right to compulsory process; and (3) assessing punishment at twenty months' confinement because the sentence is not proportional to the crime and constitutes cruel and unusual punishment under the United

States and Texas Constitutions. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by indictment with the state jail felony offense of forgery of a commercial instrument. *See* TEX. PEN. CODE ANN. § 32.21(d) (Vernon 1994 & Supp. 1999). She waived her right to a jury trial and entered a non-negotiated guilty plea to the offense charged. After a bench trial, the court made a formal finding of guilt and, following a sentencing hearing, assessed punishment at twenty months' confinement in the State Jail Division of the Texas Department of Criminal Justice. No court reporter was present to record appellant's plea proceedings or the assessment of punishment.

II. ISSUES PRESENTED ON APPEAL

In her first four points of error, appellant challenges her plea proceedings as violating her state and federal constitutional rights to compulsory process. In her fifth and sixth points of error, appellant challenges the constitutionality of the punishment assessed as "cruel and unusual."

A. Compulsory Process and Criminal Procedure Article 1.15

In her first two points of error, appellant claims the trial court committed fundamental error in following Texas Code of Criminal Procedure article 1.15, by proceeding to judgment and sentence after accepting appellant's guilty plea. Appellant asserts that this procedure violates both her federal and state constitutional rights to compulsory process because it requires the state to produce evidence of a defendant's guilt but does not entitle a defendant to introduce evidence of innocence.

Article I, Section 10 of the Texas Constitution provides that criminal defendants have a right to "compulsory process for obtaining witnesses . . . ." Moreover, the Texas Court of Criminal Appeals has recognized that "the right of the accused to have compulsory process for obtaining witnesses in his behalf as guaranteed by the Sixth Amendment is so fundamental and

essential to a fair trial that it is incorporated in the due process clause of the Fourteenth Amendment and is applicable to state trials." *Brito v. State*, 459 S.W.2d 834, 837–38 (Tex. Crim. App. 1970) (citing *Washington v. Texas*, 388 U.S. 14 (1967)).

Compulsory process is "'the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.'" *Coleman v. State*, 966 S.W.2d 525, 527 (Tex. Crim. App. 1998) (quoting *Washington*, 388 U.S. at 19); *Rodriguez v. State*, 21 S.W.3d 562, 568 (Tex. App.—Houston [14th Dist.] 2000, pet. filed). Compulsory process is an integral component, a core interest, of due process law. *Washington*, 388 U.S. at 19. Though important, the right to compulsory process is not absolute. *Weaver v. State*, 657 S.W.2d 148, 150 (Tex. Crim. App. 1983).

Article 1.15 provides a statutory procedure for entering a plea of guilty and proceeding to trial before the bench in felony cases less than capital. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1977 & Supp. 2000). Article 1.15, with emphasis on the contested provision, provides:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless in felony cases less than capital, the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; *provided, however, that it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same.* The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the papers of the cause.

Appellant argues that a plea of guilty under article 1.15 is a "trial" requiring evidence to support any judgment of guilt, but that, under the terms of article 1.15, "the court *must* base

its determination of guilt or innocence on the evidence stipulated or offered by the State alone . . . . [and that] the trial court is barred from considering evidence offered by the defendant." Based on these premises, appellant concludes that the article 1.15 procedure "is a violation of both the federal and state constitutional rights to compulsory process" and renders article 1.15 proceedings "inherently unreliable." *See* U.S. CONST. amends. VI, XIV; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.15. This argument is without merit.

Appellant derives the "inability" to present evidence from the portion of article 1.15 which states: "it shall be necessary for the state to introduce evidence into the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgment. . . ." TEX. CODE CRIM. PROC. ANN. art. 1.15; *see Lyles v. State*, 745 S.W.2d 567, 567 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd). However, appellant misconstrues both the purpose and the effect of article 1.15. *See Lyles*, 745 S.W.2d at 567.

The purpose of article 1.15 is to ensure that no one will be convicted of a felony on a guilty plea without the introduction of sufficient evidence of guilt. *Id.* (citing *Crawford v. State*, 278 S.W.2d 845 (1955)). Article 1.15 effectively maintains the burden of proof on the State even where a defendant has entered a plea of guilt. *Id.* at 567–68 (citing *Thornton v. State*, 601 S.W.2d 340, 344 (Tex. Crim. App. 1980), *rev'd on other grounds*, *Bender v. State*, 758 S.W.2d 278 (Tex. Crim. App. 1988)). Article 1.15 does not preclude either the defendant's offering of evidence or the trial court's consideration of such evidence. *Lyles*, 745 S.W.2d at 568; *Vanderburg v. State*, 681 S.W.2d 713, 718 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) ("[n]othing in Article 1.15 prohibits the court from considering testimony produced through cross-examination of the state's witnesses or by the defense putting on its own evidence through rebuttal witnesses.").

Moreover, although article 1.15 does not preclude the court's consideration of rebuttal evidence offered by a defendant, "if it did, this would entail no violation of the appellant's constitutional rights." *Vanderburg*, 681 S.W.2d at 718; *see Thornton v. State*, 601 S.W.2d

at 348 (finding that the provision of article 1.15 now complained of "passes constitutional muster."). The fact is, Texas requires an *additional* procedural safeguard after the defendant has waived his right to compulsory process by pleading guilty. *Vanderburg*, 681 S.W.2d at 718 (stating that under article 1.15, "evidence is received to support the judgment, not to accept a plea . . . . Even though federal common law allows a conviction upon a guilty plea alone, Texas does not. Texas requires the judgment be supported by sufficient evidence from the state.") (citation omitted).

Finally, we note that "[a] defendant cannot normally complain that he was deprived of a constitutional right, such as compulsory process of witnesses, which he did not attempt to exercise . . . ." *Drew v. State*, 743 S.W.2d 207, 225 (Tex. Crim. App. 1987). Nothing in the record indicates that appellant objected to article 1.15 or to any alleged inability to exercise her federal and state rights to compulsory process. "It is well settled that almost every right, constitutional and statutory, may be waived by the failure to object." *Borgen v. State*, 672 S.W.2d 456, 460 (Tex. Crim. App. 1984).

Appellant's first and second points of error are overruled.

B. Waiver of Right to Compulsory Process

In appellant's third and fourth points of error, she complains of fundamental error based on the trial court's entry of a judgment of guilt after appellant's bench trial, allegedly without the record reflecting any waiver of her federal and state constitutional rights to compulsory process. Appellant asserts that although she executed a written waiver of her rights to confrontation and cross-examination of witnesses,[1] "this waiver did not expressly or implicitly waive appellant's right to produce witnesses on her behalf, and to have the trial court consider

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[1] The Sixth Amendment contains both the confrontation clause and the compulsory process clause. U.S. CONST. amend. VI; *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985). The confrontation clause provides the following rights to criminal defendants: the right physically to face those who testify against him, and the right to conduct cross-examination. U.S. CONST. amend. VI; *Delaware*, 474 U.S. at 18–19.

their testimony." Appellant further asserts that a defendant should be required to expressly waive the right to compulsory process. In support, appellant cites to cases from other jurisdictions which hold that a court commits reversible error in proceeding to judgment based on stipulated evidence, where the record does not contain an affirmative waiver of a defendant's rights to either present evidence on her behalf or have compulsory process.

There is no requirement under United States or Texas law that a defendant expressly waive her right to compulsory process. *See Lyles v. State*, 745 S.W.2d 567, 568 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). The United States Supreme Court has held that, to enter a guilty plea, a defendant must specifically waive three federal rights: (1) the privilege against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront one's accusers. *Id.* (citing *Boykin*, 395 U.S. at 243). Under Texas law, the following three rights must be overtly waived: (1) the right to a jury trial, (2) the right to confront one's accusers, and (3) the right to refuse to testify at trial. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 1984); *Vanderburg v. State*, 681 S.W.2d 713, 717 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd) (citing *Casares v. State*, 478 S.W.2d 462 (Tex. Crim. App. 1972)).

Appellant, however, urges that we adopt a rule followed in other jurisdictions which include the right to compulsory process among those a defendant must expressly waive. *Vanderburg*, 681 S.W.2d at 717. However, all the cases from other jurisdictions appellant cited urging this court to adopt such a rule were decided in 1980 and before. Since then, however, Texas courts have considered the argument now advanced by appellant and have explicitly rejected the notion that this state's policy should be extended to require an express waiver of the right to compulsory process. *Id.* (stating that "[a]lthough certain other jurisdictions include . . . [compulsory process] among the constitutional rights a defendant must expressly waive, Texas does not. We refuse to extend this state's policy to require such a waiver."). Moreover, as noted in *Vanderburg,* and oft-repeated, there is no requirement that the court present a criminal defendant with a "laundry list" of constitutional rights waived by

a plea of guilty and no requirement that she separately waive each right for the record. *Id.*

Nonetheless, even if Texas did have a rule requiring the right to compulsory process to be expressly waived, our examination of the record in this case reveals that appellant did just that. Appellant signed a statement waiving, *inter alia*, her right to compulsory process before trial:

> Under Art. 1.14 V.A.C.C.P. I give up all rights given to me by law, whether of form, substance or procedure. Joined by my counsel, *I waive and give up* my right to a jury in this case and *my right to require the appearance*, confrontation and cross examination *of the witnesses*. I consent to oral and written stipulations or evidence in this case.

By giving up her right to require the appearance of witnesses, appellant waived her right to compulsory process under both the United States and Texas Constitutions. Accordingly, appellant's third and fourth points of error are overruled.

C. Cruel and Unusual Punishment

In her fifth and sixth points of error, appellant asserts the trial court committed reversible error in sentencing her to twenty months' confinement. Appellant complains that this sentence was disproportionate to the offense committed and that this disparity violates the federal and state prohibitions against cruel and unusual punishment. Specifically, she alleges violations of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 13 of the Texas Constitution.[2] *See* U.S. CONST. amends. VIII, XIV; TEX.

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[2] The Eighth Amendment's ban on cruel and unusual punishment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Through the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment was made applicable to the states. *Robinson v. California*, 370 U.S. 660 (1962); *Ladd v. State*, 3 S.W.3d 547, 575 (Tex. Crim. App. 1999). Article I, section 13 of the Texas Constitution provides, in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." The Texas Code of Criminal Procedure article 1.09 provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." TEX. CODE CRIM. PROC. ANN. art. 1.09 (Vernon 1977). Texas courts make no distinction between the Texas and federal constitutional prohibitions of "cruel and unusual" punishment. *Dunn v. State*, 997 S.W.2d 885, 891 (Tex. App.—Waco 1999, pet. ref'd).

CONST. art. I, § 13; TEX. CODE CRIM. PROC. ANN. art. 1.09 (Vernon 1977).

Because appellant failed object to her punishment, she has not preserved this issue for our review. *See* TEX. R. APP. P. 33.1(a)(1)(A); *Chapman v. State*, 859 S.W.2d 509, 515 (Tex. App.—Houston [1st Dist.] 1993), *rev'd on other grounds*, 921 S.W.2d 694 (Tex. Crim. App.1996) (finding that failure to object to sentence as cruel and unusual waives error). Appellant's fifth and sixth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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