

**COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS
CHRISTI–EDINBURG**

Murray Johnson IV v. The State of Texas

No. 13-18-00691-CR (Tex. App.—Corpus Christi–Edinburg Apr. 23, 2020) · No. 13-18-00691-CR · Decided
April 23, 2020

SUMMARY

The Thirteenth Court of Appeals of Texas affirmed the revocation of Murray Johnson IV’s community supervision and his seven-year prison sentence for evading arrest with a motor vehicle. The court held that Johnson waived his cruel-and-unusual-punishment and disproportionality challenge by failing to object in the trial court or file a timely motion for new trial. The court also noted that the sentence was within the statutory range and near its lower end.

CASE DETAILS

COURT	Court of Appeals of Texas, Thirteenth District, Corpus Christi–Edinburg
WRITING FOR THE COURT	Gina M. Benavides; Justice Perkes; Justice Tijerina
JURISDICTION	Texas
DECIDED	April 23, 2020
DOCKET	13-18-00691-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the revocation of community supervision and the resulting seven-year prison sentence.
STANDARD OF REVIEW	An excessive-sentence or cruel-and-unusual-punishment complaint must be preserved by a timely and specific objection or motion in the trial court. When community supervision is revoked, the reviewing court evaluates proportionality against the gravity of the original offense, not merely the violations of supervision.
PRECEDENTIAL VALUE	Nonprecedential memorandum opinion; designated do not publish.
PARTIES	Murray Johnson IV v. The State of Texas

TOPICS

cruel and unusual punishment

sentencing

preservation of error

appellate procedure

criminal procedure

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

sentencing

QUESTIONS PRESENTED

1. Whether Johnson's seven-year sentence following revocation of community supervision constituted cruel and unusual or disproportionate punishment under the Eighth Amendment.
2. Whether Johnson preserved his disproportionate-sentence complaint for appellate review.

HOLDINGS

1. Johnson waived appellate review of his cruel-and-unusual-punishment claim because he did not make a timely, specific objection in the trial court or file a timely post-trial motion raising the complaint.
2. The seven-year sentence was at the lower end of the applicable two-to-twenty-year punishment range, and the court affirmed without reaching the merits of disproportionality because the claim was waived.

KEY QUOTATIONS

“Accordingly, Johnson waived any error for purposes of appellate review.” (at 5)

“We affirm the judgment of the trial court.” (at 6)

FACTUAL BACKGROUND

Johnson was convicted of evading arrest with a motor vehicle, enhanced to a second-degree felony because of two prior felony convictions, and was placed on community supervision. The State alleged numerous violations, including positive drug tests, failures to report and pay fees, failure to complete treatment, and new drug-related criminal conduct. After a revocation hearing, the trial court found several allegations true, revoked supervision, and sentenced Johnson to seven years' imprisonment, which was within the applicable two-to-twenty-year punishment range.

PROCEDURAL HISTORY

Johnson pleaded nolo contendere to evading arrest with a motor vehicle, an offense enhanced to a second-degree felony based on two prior felony convictions, and received a probated ten-year sentence. After multiple alleged violations of community supervision, the trial court revoked supervision on October 24, 2018, and imposed seven years' imprisonment. Johnson appealed, arguing that the sentence was cruel and unusual because it was disproportionate to the offense.

DISPOSITION

affirmed

CASES CITED

- Ex parte Chavez, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006)

- Lawrence v. State, 420 S.W.3d 329, 333 (Tex. App.—Fort Worth 2014, pet. ref'd)
- Buerger v. State, 60 S.W.3d 358, 365–66 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd)
- Layton v. State, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009)
- Rhoades v. State, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996)
- Noland v. State, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd)
- Arriaga v. State, 335 S.W.3d 331, 334 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd)

OPINION

PER CURIAM.

NUMBER 13-18-00691-CR COURT OF APPEALS THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI - EDINBURG MURRAY JOHNSON IV, Appellant, v. THE STATE OF
TEXAS, Appellee. On appeal from the 156th District Court of Bee County, Texas.
MEMORANDUM OPINION Before Justices Benavides, Perkes, and Tijerina Memorandum
Opinion by Justice Benavides Appellant Murray Johnson IV appeals the revocation of his
community supervision and his sentence of seven years' imprisonment in the Texas Department of
Criminal Justice-Institutional Division.

By a single issue, he argues that his sentence constitutes cruel and unusual punishment because it
is disproportionate to his offense of evading arrest with a motor vehicle, a third-degree felony. See
TEX. PENAL CODE ANN. § 38.04(b)(2)(a).

We affirm. I. BACKGROUND In June 2014, Johnson was indicted for evading arrest with a motor
vehicle, a third- degree felony that was later enhanced to a second-degree felony based upon
Johnson's two previous felony convictions. See *id.* §§12.42(a), 38.04(b)(2)(b).

In November 2015, Johnson pleaded *nolo contendere* and was sentenced to ten years'
imprisonment probated for seven years of community supervision. A *nunc pro tunc* judgment was
signed in April 2016 that suspended Johnson's sentence for five years rather than the seven
originally shown.

In between the two judgments, the trial court amended his conditions of supervision three times by
requiring Johnson to serve periods of days in the county jail and to attend a drug and alcohol
relapse program. The State moved to revoke Johnson's community supervision in January 2017
alleging Johnson's urinalysis tests were positive for marijuana in August, September, and October
2016.

In addition, the State alleged that Johnson failed to pay fees and fines from December 2016
through December 2017, failed to comply with medication requirements at the local drug and
rehabilitation facility in October 2016, failed to complete the drug and alcohol program in

November 2016, and in December 2016 while committing theft, he injured a person by punching and kicking him.

See *id.* § 29.02(a). The State then moved to dismiss the motion to revoke without prejudice. 2 In September 2017, the State refiled the motion to revoke and added additional violations. In May 2018, the trial court declined to revoke Johnson's community supervision, but sentenced him to thirty days' confinement in the county jail and extended his community supervision by an additional five years.

In July 2018, the State again moved to revoke Johnson's community supervision alleging that he committed new violations, possession with intent to deliver by actual transfer synthetic marijuana to a confidential informant on March 8, 2018, tested positive for cocaine, in addition to other violations of his supervision by failing to report or to pay fines and fees.

See TEX. HEALTH & SAFETY CODE ANN. § 481.112(a). During the hearing on the motion to revoke, the State called witnesses to establish that synthetic marijuana was seized from Johnson's residence area from an outdoor shed, witnesses testified that they were present the day of the seizure and observed Johnson sell synthetic marijuana to others and to them, that he was known to sell synthetic marijuana, and that he lived in the house on the premises with his wife and children.

One witness testified that the small house in the back of the property appeared to be vacant. At the time the Beeville police searched the property, Johnson claimed he reported to the probation office, but his probation officer was never there when he arrived. He further testified that the probation department should have known Dr. Capitaine was supervising his medication, not a physician from the local clinic.

He denied using cocaine and testified that some of his prescribed medication may have caused a false positive. The trial court found the following allegations true: 2, 4, 6, 7, 8, 9, 10, 14, 15, 17 and 18. The trial court did not make findings on the remaining allegations.

The State 3 withdrew allegations 11 and 12 at the hearing. After the hearing on October 24, 2018, the trial court revoked his supervision and imposed a sentence of seven years imprisonment. Johnson appeals. II. CRUEL AND UNUSUAL PUNISHMENT A. Applicable Law The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST.

AMEND. VIII. A sentence may be disproportionate to the gravity of the offense even when it is within the range permitted by law. See *Ex parte Chavez*, 213 S.W.3d 320, 323–24 (Tex. Crim. App. 2006). Although generally, punishment assessed within the punishment statutory range is not subject to a challenge for excessiveness. See *Lawrence v. State*, 420 S.W.3d 329, 333 (Tex.

App.—Fort Worth 2014, pet. ref'd). When community supervision is revoked, the trial court may generally impose any punishment within the range authorized by statute. See *id.* When reviewing excessiveness in a case in which the trial court has revoked community supervision, we do not weigh the sentence against the gravity of the violations of the community supervision, but rather the gravity of the initial offense to which the appellant pleaded guilty.

See *id.*; *Buerger v. State*, 60 S.W.3d 358, 365–66 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (noting that an appellant's sentence rests upon adjudication of guilt for crime alleged, not his violation of community supervision requirements that led to revocation).

The penalty range for Johnson's enhanced felony was two to twenty years' imprisonment. See TEX. PENAL CODE ANN. § 12.33(a). 4 To preserve error for appellate review, the complaining party must present a timely and specific objection to the trial court and obtain a ruling. TEX. R. APP. P. 33.1(a); *Layton v. State*, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009).

A party's failure to specifically object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a post-trial motion waives any error for the purposes of appellate review. See *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (“[I]n order to preserve for appellate review a complaint that a sentence is grossly disproportionate, constituting cruel and unusual punishment, a defendant must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired.”).

B. Discussion Johnson did not object to an alleged disproportionate or cruel and unusual sentence in the trial court or in a timely post-trial motion.¹ See TEX. R. APP. P. 33.1(a); *Arriaga v. State*, 335 S.W.3d 331, 334 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd).

Accordingly, Johnson waived any error for purposes of appellate review. See *Rhoades*, 934 S.W.2d at 120; *Noland*, 264 S.W.3d at 151. We also note that Johnson's sentence was at the lower end of the punishment range and he had two prior felony convictions. Johnson's sole issue is overruled. 1 Johnson's counsel filed an untimely motion for new trial. See TEX. R. APP.

P. 21.4(a) (“The defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court.”). Although Johnson filed a timely pro se notice of appeal, there was a delay in appointing appellate counsel for him. Counsel was not appointed until after the time to file a motion for new trial had expired.

5 III. CONCLUSION We affirm the judgment of the trial court. GINA M. BENAVIDES, Justice Do not publish. TEX. R. APP. P. 47.2 (b). Delivered and filed the 23rd day of April, 2020. 6