Affirmed and Opinion filed January 31, 2002.

In The

Fourteenth Court of Appeals

NOS. 14-01-00486-CR
14-01-00487-CR

GARY DEAN BAILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause Nos. 854,435 and 854,434

O P I N I O N

Appellant, Gary Dean Bailey, appeals from his two convictions for aggravated sexual assault of a child. Without benefit of an agreed recommendation, appellant pled guilty and consented to the preparation of a presentence investigation report. The trial judge subsequently found him guilty and assessed punishment at 25 years' incarceration for each offense, to be served concurrently. In two issues, appellant contends (1) that the sentence imposed constitutes cruel and unusual punishment, and (2) that his plea was involuntary because he expected deferred adjudication. We affirm.

Proportionality of Punishment

Appellant first contends that his sentence is excessive and disproportionate to the crime and, therefore, it violates the constitutional prohibition against cruel and unusual punishment, citing U.S. CONST. amend. VIII and TEX. CONST. art. I, § 13. Appellant's trial counsel, however, failed to raise this argument in the court below by making a timely request or objection on these grounds. The argument is therefore waived. *See* TEX. R. APP. P. 33.1; *Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995).

Furthermore, even if appellant had preserved the issue, the sentence did not constitute cruel and unusual punishment. Appellant was convicted of two first degree felonies and given concurrent sentences of twenty-five years. *See* TEX. PEN. CODE ANN. § 22.021(e) (Vernon Supp. 2002) (aggravated sexual assault is a first degree felony). The statutory range of punishment for a first degree felony is five to ninety-nine years. TEX. PEN. CODE ANN. § 12.32(a) (Vernon 1994). Generally, punishment assessed within the statutory limits is not considered cruel and unusual punishment. *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Cooks v. State*, 5 S.W.3d 292, 298-99 (Tex. App.—Houston [14th Dist.] 1999, no pet). However, in *Solem v. Helm*, 463 U.S. 277, 290 (1983), the United States Supreme Court recognized a narrow exception to this general rule. Under *Solem*, a reviewing court must first make a comparison of the gravity of the offense with the severity of the sentence. *See Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991). If, after making the comparison, a court determines the sentence is grossly disproportionate, it considers the sentences received for similar crimes in the jurisdiction and in other jurisdictions to determine the constitutionality of the sentence. *See id*.

Appellant admitted to sexually abusing his daughter beginning when she was three and continuing until she was seven. Appellant himself acknowledged over a dozen incidents within this time period. The last incident occurred about a month before his arrest and confession. The daughter's therapist foresees long-term therapy and possible future difficulties because of the attack. Appellant could have received a punishment ranging from

five to 99 years for each charged offense. *See* TEX. PEN. CODE ANN. §§ 12.32(a), 22.021(e). Twenty-five years is on the low end of the possible range.

By making the aggravated sexual assault of a child a first degree felony, the legislature has identified the crime as among the most heinous acts addressed in the penal code. And rightfully so; the impact on the victim emotionally, physically, and psychologically is often quite severe and lifelong. With that in mind, the concurrent twenty-five year sentences imposed by the court in these cases do not seem grossly disproportionate to the crimes committed. Appellant's cooperation in the proceedings below, expressions of remorse, and apparent willingness to learn about and receive treatment for his problem may well have been considered by the trial court in its assessment of punishment; however, such considerations play little or no role in our analysis of the severity of the offense. Likewise, the testimony by appellant's expert that appellant would be unlikely to re-offend if placed on probation may have entered into the trial court's reasoning, but it has little weight in our review of proportionality. Because we find appellant's sentences are not grossly disproportionate to his crimes, we need not examine the other *Solem* factors. *See Harmelin*, 501 U.S. at 1006. We overrule appellant's first issue.

Voluntariness of Plea

Appellant next contends that his guilty plea was not voluntarily given because he expected to receive deferred adjudication. Proper admonishment by a trial court constitutes a prima facie showing that a guilty plea is both knowing and voluntary. *George v. State*, 20 S.W.3d 130, 135 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). A defendant may still raise a claim of involuntariness, but the burden shifts to him to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). The voluntariness of a plea is to be determined by the totality of the circumstances. *George*, 20 S.W.3d at 135.

It is undisputed that the trial court admonished appellant on the range of punishment both in open court and in two written documents signed by appellant.[1] The written forms also included statements, separately initialed by appellant, that: (1) he understood the admonishments and the nature of the charges against him; (2) he understood the consequences of his plea; (3) he committed each and every element alleged in the indictments; and (4) he freely, knowingly, and voluntarily executed the statements. The record therefore reflects that appellant was properly admonished. The burden then shifts to appellant to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *See Martinez*, 981 S.W.2d at 197.

Although appellant's brief states that "[t]he record is replete with indications that appellant fully expected to get probation," the brief fails to cite to a single such indication. Even assuming the appellant did expect to get probation, a plea is not involuntary just because the sentence exceeded what appellant expected, even if the expectation was raised by his attorney. *See West v. State*, 702 S.W.2d 629, 633 (Tex. Crim. App. 1986); *Reissig v. State*, 929 S.W.2d 109, 112 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Appellant argues, however, that analysis under *West* and its progeny is not satisfactory in this case because he was "forthright, apologetic, remorseful, honest, and cooperative" during the trial court proceedings, and he pled guilty with the expectation of being treated fairly. Although the trial court may very well have considered these issues in assessing punishment, they are not particularly relevant for considering the voluntariness of the plea on appeal. Appellant further contends that he was forced to either plead guilty and trust that the judge would assess just punishment or plead not guilty and rob himself of the possibility of getting a probated sentence. Appellant's brief, however, does not develop this

[1] Appellant argues that the admonitions were not particularly helpful, specifically because the possible range of punishment was so vast. However, it is the very purpose of the admonitions to let the defendant know the range of punishment. When the legislature determines to invest the jury or trial judge with great latitude for assessing punishment in a particular case, the range may indeed appear vast. Once the defendant is admonished that he could serve up to 99 years, however, the alleged expectation of deferred adjudication appears unreasonable.

argument beyond that statement, nor does it cite to any relevant case law or record references on the issue. That argument is therefore waived. *See* TEX. R. APP. P. 38.1(h). Appellant's second issue is overruled.

The judgment of the trial court is affirmed.

/s/ Eva M. Guzman
Justice

Judgment rendered and Opinion filed January 31, 2002.
Panel consists of Justices Yates, Edelman, and Guzman.
Do Not Publish — TEX. R. APP. P. 47.3(b).