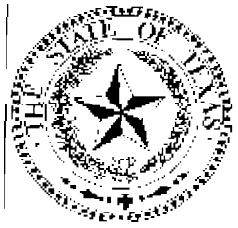
Affirmed and Opinion filed April 27, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00212-CR

NELSON ARCENIO MAURICIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 178th District Court
Harris County, Texas
Trial Court Cause No. 780,910

O P I N I O N

Nelson Arcenio Mauricio appeals a conviction for murder on the grounds that: (1) his conviction is void because the trial judge reviewed his presentence investigation report ("PSI") before finding him guilty, violating his federal and state constitutional rights to due process and due course of law, respectively; and (2) the fifty year sentence imposed is not proportional to the offense, constituting cruel and unusual punishment under both the federal and state constitutions. We affirm.

Background

Appellant was charged with murder and pleaded guilty without an agreed sentencing recommendation from the State.[1] The trial judge found appellant guilty and sentenced him to fifty years confinement.

Review of PSI Prior to Finding of Guilt

Appellant's first and second points of error argue that his conviction is fundamentally defective because the trial judge reviewed and considered his PSI before entering a finding of guilt.

A trial judge may not read a PSI unless the defendant pleads guilty or nolo contendre, is convicted of the offense, or authorizes it in writing. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 9(c) (Vernon Supp. 2000). Review of a PSI by a court before a determination of the defendant's guilt violates due process.[2] However, where a defendant signs a judicial confession and enters a plea of no contest or guilty before the trial judge reviews the PSI, then the defendant's guilt has been determined for this purpose.[3]

In this case, before the judge's review of the PSI, appellant had signed a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," and filed a motion for community supervision. Appellant also pleaded guilty to the court and was admonished regarding the consequences of his plea, including the full range of applicable punishment. The trial judge then found that there was evidence to substantiate appellant's guilt, but deferred a formal finding of guilt until the sentencing hearing.[4] Because appellant signed a judicial confession and entered his guilty plea before the trial court reviewed the PSI,

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1 Appellant was a juvenile at the time of the offense; however, jurisdiction was waived by the juvenile court.

2 *See State ex rel. Turner v. McDonald*, 676 S.W.2d 375, 379 (Tex. Crim. App. 1984); *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 7 (Tex. Crim. App. 1983).

3 *See Vela v. State*, 915 S.W.2d 73, 74-75 (Tex. App.–Corpus Christi 1996, no pet.); *Blalock v. State*, 728 S.W.2d 135, 138 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd); *Wissinger v. State*, 702 S.W.2d 261, 263 (Tex. App.–Houston [1st Dist.] 1985, pet ref'd).

4 Appellant concedes in his brief that the trial court's action in deferring a formal finding of guilt was beneficial for him because it was the only procedure whereby he could avoid going to prison after entering a plea of guilty. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (Vernon Supp. 2000). Were we to sustain appellant's position, it would in effect deny a trial judge the opportunity to review a PSI to determine whether deferred adjudication probation is appropriate.

article 42.12, section 9(c) was complied with, and appellant's first and second points of error are overruled.

Cruel and Unusual Punishment

Appellant's third and fourth points of error argue that his sentence amounted to cruel and unusual punishment under both the Eighth Amendment to the United States Constitution and Article I, section 13, of the Texas Constitution. Although appellant acknowledges that a trial court's assessment of punishment will generally not be disturbed on appeal if it falls within the statutory range,[5] he contends that he should have received a probated sentence under the facts and circumstances of this case.[6]

Regarding his state constitutional claim, we find no evidence in the record that appellant ever raised any objection to his sentence in the trial court. Therefore he has waived this argument on appeal. *See* TEX. R. APP. P. 33.1; *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996).

Regarding his federal constitutional claim, appellant's PSI indicates that he had been a member of a gang. He and several other individuals, all armed with semi-automatic weapons, were involved in a drive-by shooting. Appellant admitted he was the shooter. He pleaded guilty to the offense of murder, a first degree felony punishable by not less than 5 years and not more than 99 years or life in prison,[7] and was sentenced to fifty years confinement.

Apart from the general requirement that a sentence fall within the statutory range, there is some doubt whether the Eighth Amendment contains any guarantee of proportionality for non-death penalty offenses. *See Harmelin v. Michigan*, 501 U.S. 957, 964-96 (1991). Even if it does, however, in light

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5 *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Nunez v. State*, 565 S.W.2d 536, 538 (Tex. Crim. App. 1978); *see also Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983)(acknowledging that Texas courts have repeatedly rejected the cruel and unusual argument if the punishment is within the statutory limits); *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972)(noting that if punishment assessed is within the limits prescribed by the statute, the punishment is not cruel and unusual).

6 Appellant does not indicate specifically what "facts and circumstances"warrant probation, other than reference to a voluntary plea and seven letters in the PSI regarding appellant's character. Moreover, the contention that he should have received a probated sentence is at odds with his first and second points of error. *See supra*, note 4.

7 *See* TEX. PEN. CODE ANN. §§ 12.32, 19.02 (Vernon 1994).

of the serious and violent nature of his crime, appellant has failed to demonstrate that his sentence is disproportionate to the crime. Accordingly, we overrule appellant's third and fourth points of error and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Justices Hudson, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).