Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-01326-CR

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DEAN EDWARD COX, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 714,787

O P I N I O N

Dean Edward Cox plead guilty to aggravated sexual assault, specifically sexual intercourse with a person younger than fourteen years of age. The trial court assessed punishment at ten years imprisonment. On appeal, Cox contends: (1) that his conviction is void because the trial judge viewed a presentence report before finding him guilty, and (2) that the sentence imposed constitutes cruel and unusual punishment. We affirm.

Presentence Report

In his first two points of error, Cox contends that his conviction is void because the trial judge viewed a presentence report before finding him guilty in violation of the Texas and federal constitutions. After Cox entered a plea of guilty, the judge ordered a presentence investigation. The judge then viewed the resulting report prior to entering a formal finding of guilt and assessing punishment. Cox now claims that the trial court's procedure violated his due process rights. *See* U.S. CONST. amend. V, XIV; TEX. CONST. art. I, § 19.

Cox acknowledges that this court has already addressed this issue on very similar facts in *Blalock v. State*, 728 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd). In *Blalock*, we held that under certain circumstances the viewing of a presentence report prior to a finding as to guilt is permissible. *See id*. at 139 (following *Wissinger v. State*, 702 S.W.2d 261, 263 (Tex.App.--Houston [1st Dist.] 1985, no pet.)). *See also Vela v. State*, 915 S.W.2d 73, 75 (Tex. App.—Corpus Christi 1996, no pet.)(following *Blalock* and *Wissinger*).

Cox contends, however, that the courts in *Blalock* and *Wissinger* misinterpreted the breadth of the Court of Criminal Appeals opinions in *State ex. rel. Turner v. McDonald*, 676 S.W.2d 375 (Tex.Crim.App. 1984) and *State ex. rel. Bryan v. McDonald*, 662 S.W.2d 5 (Tex.Crim.App. 1983). In those cases, the court held that the inspection of presentence reports prior to *determinations* of guilt is violative of due process rights under both the Texas and federal constitutions. *See Bryan v. McDonald*, 662 S.W.2d at 7. Cox contends that these opinions strictly preclude a trial judge from viewing a presentence report before entering a finding on guilt or innocence, even when the defendant pleads guilty.

Contrary to Cox's assertions, however, the Court of Criminal Appeals limits it's holding in the *McDonald* cases to when the procedures implemented by the trial court make it possible that the court would consider the presentence reports *in making a determination of guilt or innocence*. *See id*. In fact, in *Bryan v. McDonald*, the court specifically found that the presentence report was "obviously considered by the trial court ... before a plea [was] even

entered." *Id*.[1]

The facts in the present case, like the fact situations in *Blalock* and *Wissinger*, differ in decisive ways from those at issue in the *McDonald* cases. Here, the judge clearly did not consider or even order the presentence investigation report until after Cox plead guilty in writing and in open court. Therefore, the report could not have influenced the judge except in deciding the appropriate punishment. *See Blalock*, 728 S.W.2d at 139; *Wissinger*, 702 S.W.2d at 263.

Furthermore, the record reflects that Cox sought a probated sentence and actually requested that the court order the report, apparently hoping that such a report would persuade the judge to deal with him leniently. Since a judge may not order probation in an aggravated sexual assault case on a finding of guilt, the only way for Cox to have received probation would have been on a deferred adjudication basis. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 §§ 3g(a)(1), 5(a) (Vernon Supp. 2000). A court must consider a presentence investigation report before it can defer adjudication. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5; *Blalock*, 728 S.W.2d at 139. Thus, it was inevitable that the judge would consider the report before formally finding the appellant guilty; otherwise, deferred adjudication would not have been an option. *See Blalock*, 728 S.W.2d at 139.

Cox further argues that the holdings in *Blalock* and *Wissinger* are premised on the defendant's waiver of his rights in requesting that the court order and view the report. He suggests that the *McDonald* cases identified an independent obligation on the part of the trial court to not view the report before making a finding on guilt, and thus the defendant could not waive the right. *See generally Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993)(absolute requirements cannot be avoided even with consent of the defendant). The

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[1] The *Bryan* court also found that the trial court's procedures were not authorized by the version of Article 42.12 of the Texas Code of Criminal Procedure then in effect. The provision has been subsequently changed to specifically allow the trial court to inspect presentence reports after a plea of guilty or *nolo contendere* is entered. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 9(c)(1) (Vernon Supp. 2000). In this appeal, Cox does not challenge the court's actions under the statute or, directly, the constitutionality of the statute.

McDonald cases, however, do not even address waiver,[2] and, as described above, are self-limiting to when court procedures make it possible for the judge to consider the report in making a determination as to guilt. *See Bryan v. McDonald*, 662 S.W.2d at 7. The *McDonald* cases, therefore, have no application where, as happened here, the court's procedures allow the judge to consider the presentence report in determining whether to defer adjudication or in deciding punishment.

The record before us demonstrates that, in response to Cox's request, a formal finding as to guilt was deferred until the presentence investigation report was complete so that the trial court could consider probation under deferred adjudication as an option. The trial court's viewing of the report before a final pronouncement of guilt and sentencing, therefore, did not risk any of the due process violations condemned in the *McDonald* cases. *See Blalock*, 728 S.W.2d at 139; *Wissinger*, 702 S.W.2d at 263. Accordingly, we overrule Cox's first two points of error.

Cruel and Unusual Punishment

In his third and fourth points of error, Cox contends that the trial court erred in assessing punishment in violation of the right against cruel and unusual punishment as guaranteed by the United States and Texas Constitutions. *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13; TEX. CODE CRIM. PROC. ANN. art. 1.09 (Vernon 1977). He specifically argues that his sentence was not proportionate to the offense committed.

As the State correctly points out, Cox made no objection in the court below to the imposition of his sentence. He therefore waived his claim that the sentence constituted cruel and unusual punishment. *See Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996);

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[2] Cox contends that because the Court of Criminal Appeals took the appeals in the *McDonald* cases on writs of mandamus this means that the trial court had no discretion in the matter and thus the defendant could not have waived his procedural rights, citing *Millsap v. Lozano*, 692 S.W.2d 470 (Tex. Crim. App. 1985)(writs of mandamus for mandatory ministerial acts). Even assuming the validity of this argument, the *McDonald* cases are distinguishable on the facts and on the basis of the limitations placed on the holdings therein. *See, e.g., Bryan v. McDonald*, 662 S.W.2d at 7.

Smith v. State, 10 S.W.3d 48, 49 (Tex. App.—Texarkana 1999, no pet.). Moreover, even if Cox had properly preserved error, we find that his sentence did not constitute cruel or unusual punishment under either the federal or state constitutions.

Cox provides no argument or authority suggesting a distinction between the Eighth Amendment's prohibition against "cruel and unusual" punishment and the Texas Constitution's ban on "cruel or unusual" punishment. *See Moore v. State*, 935 S.W.2d 124, 128 (Tex. Crim. App. 1996). Thus, we will address his federal and state constitutional claims together. *See Dunn v. State*, 997 S.W.2d 885, 891 (Tex. App.—Waco 1999, pet. ref'd).

"Although a sentence may be within the range permitted by statute, it may nonetheless run afoul of the Eighth Amendment prohibition against cruel and unusual punishment." *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Diaz-Galvan v. State*, 942 S.W.2d 185, 186 (Tex. App.-Houston [1st Dist.] 1997, pet. ref'd). In reexamining its *Solem* analysis in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court produced a plurality opinion that has created a fair amount of confusion among the lower federal courts. *See, e.g., Henry v. Page*, 223 F.3d 477, 482 (7th Cir. 2000)(holding that there is no guarantee of proportionality in non-capital cases). Texas courts, however, have generally followed the rules of analysis as laid out by the Fifth Circuit in *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, 506 U.S. 849 (1992). *See, e.g., Hicks v. State*, 15 S.W.3d 626, 632 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.); *Dunn*, 997 S.W.2d at 892; *Jackson v. State*, 989 S.W.2d 842, 845 (Tex. App.—Texarkana 1999, no pet.); *Puga v. State*, 916 S.W.2d 547, 549 (Tex. App.—San Antonio 1996, no pet.)(opinion by Onion, J.).

In *McGruder*, the court conducted a head-count among the various opinions in *Harmelin* and found support for a continued Eighth Amendment guarantee against disproportional sentences, although no longer based on the full analysis in *Solem*. *See McGruder*, 954 F.2d at 316. The Fifth Circuit explained that courts should make a threshold comparison of the gravity of the offense against the severity of the sentence. *Id*. Only if the court determines that the sentence was "grossly disproportionate" to the offense should the

court consider the remaining factors of the *Solem* test and compare the sentence imposed to sentences for the same crime imposed in the same jurisdiction and in other jurisdictions as well. *Id*.

Punishment is grossly disproportionate to a crime only when an objective comparison of the gravity of the offense against the severity of the sentence reveals the sentence to be extreme. *Harmelin*, 501 U.S. at 1006 (Kennedy, J., plurality op.). Cox was convicted of aggravated sexual assault and sentenced to ten years imprisonment. Aggravated sexual assault is a first degree felony, which is punishable by imprisonment of not less than five years nor more than 99 years. TEX. PEN. CODE ANN. §§ 12.32, 22.021(e)(Vernon 1994 and Supp. 2000). Cox's sentence was, therefore, clearly toward the lower end of the range deemed appropriate by the legislature. Furthermore, the nature of the crime, sexual relations with a child, is morally reprehensible, in no small part because of the potentially devastating impact the crime is likely to have on the mental well-being of the victim. Texas has a profound responsibility to protect its children against such crimes.

Cox asserts, however, that he told the judge that he thought the female victim was seventeen at the time of the crime and not her actual age of thirteen. He further maintains that he had never been in trouble with the law before and that he abided by the terms of his bond between the time of his initial arrest and eventual incarceration. He argues that under these facts the sentence imposed was cruel and unusual.

Although the trial court could certainly have considered these issues in deciding punishment, and may well have done so, we find that they fail to make a sentence grossly disproportionate that is in the lower end of the statutory range and on a crime of such infamy. *See, generally, Moore*, 935 S.W.2d at 128 (weight given to evidence of mitigating factors is within prerogative of fact finder); *Poe v. State*, 513 S.W.2d 548 (Tex. Crim. App. 1974)(existence of mitigating factors did not cause punishment to become unconstitutional).

We do not find Cox's punishment to be grossly disproportionate to the offense he committed. We therefore need not address the remaining *Solem* factors. *See McGruder*, 954

F.2d at 316. Cox's third and fourth points of error are overruled.

We affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Sears, Lee, and Amidei.[***]

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

[***] Senior Justices Ross A. Sears and Norman Lee and Former Justice Maurice Amidei sitting by assignment.