Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01355-CR
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DEMOND BOYD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause Nos. 814,158, 807,146 & 807,146

O P I N I O N

Appellant, Demond Boyd, entered a plea of guilty to three counts of aggravated robbery and was sentenced to three concurrent terms of 25 years in the Texas Department of Criminal Justice, Institutional Division. In seven points of error, appellant complains that (1) the trial court abused its discretion in refusing appellant's motion to withdraw two of the three guilty pleas; (2) the stipulations of evidence are invalid because they were not sworn to by the district clerk; (3) the State failed to provide timely notice of its intent to use extraneous offense

evidence; (4) the evidence is insufficient to support the trial court's finding that appellant used or exhibited a deadly weapon during the commission of the offenses; and (6) appellant's sentences violate state and federal constitutional prohibitions against cruel and unusual punishment. We affirm.

I. Background

On February 17, 1999, appellant and an accomplice entered the Ton Sun convenience store. While appellant distracted its owner, fifty-eight year old Xuan Tran, appellant's accomplice, identified later as Charles Wayne Russell, pointed a gun at Tran and demanded money and access to the store's safe. When Tran stated that the store did not have a safe, appellant and Russell beat Tran with their fists and the butt of the gun. They forced him to open the cash register and then forced him into a restroom while they continued to beat him. After they took Tran's ATM card, they demanded to know his security number. When Tran stated he could not remember the number, appellant fired the gun into the restroom wall. Appellant and Russell left with $300.00, a VCR and a cellular phone, and some lottery tickets.

On February 25, 1999, appellant and Christopher Warren entered Merlos Video. Appellant stated he wanted to apply for a membership, then jumped over the counter and pulled a pistol from his pants. He noticed a gun behind the counter and gave it to Warren. Appellant then demanded that the owner, Lidia Merlos, open the cash register and give him the money. She handed him $150.00. Appellant and Warren then forced her into a back room and told her to wait there.

On March 6, 1999, appellant and Wayne Collins drove to the Quick Food convenience store. Collins entered the store while appellant remained in a vehicle parked outside. After waiting until all the customers left the store, Collins demanded that Mary Wilkinson, the store's clerk, give him all of her money. She told him she only had $40.00, which Collins took, stating as he left that "if you call anybody, I'll come back and shoot you."

Appellant was indicted for the offenses described above. Appellant also robbed the Tri

Star Video store at gunpoint on January 24,1999. He took $220.00, a purse, a pager, earrings, and the complainant's checkbook and credit cards. On February 18, 1999, appellant robbed World of Liquor of $150.00, a purse, a pager, and an I.D. card. On February 21, 1999, he robbed Video For Less of $1,600.00, a purse, and a wallet. Further, on February 24,1999, he attempted to rob Coreas Cleaners. During each of these offenses, the complaining witnesses told police that appellant displayed a gun. Although appellant was not charged with any of these offenses, they form the basis of his complaint that the State used these extraneous offenses without giving appellant proper notice.

After appellant was arrested and indicted, and the cases consolidated, he pled guilty on August 9, 1999, without a recommendation from the State as to punishment. Appellant filed a motion for community supervision, and the trial court deferred formal adjudication pending the preparation of a pre-sentence investigation report ("PSI").

II. Refusal to Allow Withdrawal of Guilty Pleas

In his first point of error, appellant argues that the trial court abused its discretion in refusing appellant's motion to withdraw two of the three pleas of guilty because he denied guilt at the punishment hearing. Essentially, appellant complains that he pled guilty—even though he is innocent—because detectives promised he would receive probation.

The law regarding whether a trial court must allow a defendant to withdraw his plea of guilty is well settled. After a case has been taken under advisement[1] or the court has adjudged the defendant guilty, a motion to withdraw a plea is considered untimely, and the trial court has discretion whether to allow a defendant to withdraw his plea. *DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981); *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979); *Milligan v. State*, 168 Tex. Crim. 202, 324 S.W.2d 864, 865 (1959). Under this standard, appellant must establish that the trial court's ruling lies outside the "zone of

[1] Ordering a PSI report constitutes taking the case under advisement. *Stone v. State*, 951 S.W.2d 205, 207 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

reasonable disagreement." *DuBose v. State*, 915 S.W.2d 493, 496–97 (Tex. Crim. App. 1996) (*citing Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990)). The Court of Criminal Appeals held, in *Sullivan v. State*, 573 S.W.2d 1 (Tex. Crim. App. 1978) (op. on reh'g), that:

> [W]hen a plea of guilty is before the court it need not be withdrawn and a plea of not guilty entered when evidence is introduced that might reasonably and fairly raise the issue of fact as to the guilt of the defendant. The trial judge as the trier of facts may without withdrawing the plea decide the issue either finding the defendant not guilty or guilty as he believes the facts require.

Sullivan, 573 S.W.2d at 4; *see also Moon v. State*, 572 S.W.2d 681 (Tex. Crim. App. 1978) (en banc); *Straps v. State*, 632 S.W.2d 781 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

While acknowledging the law stated above, appellant maintains that the trial court's decision constituted an abuse of discretion. In support of this argument, appellant relies on three cases.[2] Each case is inapposite. In *Saenz* and *Odom*, the defendants pleaded guilty to a jury.[3] In *Payne*, the defendant made a timely motion to withdraw a plea during the guilt rather than the punishment phase of trial. 790 S.W.2d at 652. Here, appellant's motion was untimely because appellant had previously pled guilty and the trial court had taken the case under advisement. The only remaining issue to be decided was appellant's punishment. On these facts, we cannot say that the trial court abused its discretion in overruling appellant's motion to withdraw his plea. Accordingly, appellant's first point of error is overruled.

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[2] *Payne v. State*, 790 S.W.2d 649 (Tex. Crim. App. 1990); *Odom v. State*, 852 S.W.2d 685 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *Saenz v. State*, 807 S.W.2d 10 (Tex. App.—Corpus Christi 1996, no pet.).

[3] If a defendant pleads guilty to a felony before a jury, and evidence is introduced which reasonably and fairly raises a question of fact regarding his innocence, and such evidence is not withdrawn, the trial court must *sua sponte* withdraw the guilty plea. *Griffin v. State*, 703 S.W.2d 193, 195 (Tex. Crim. App. 1986).

III. Stipulation of Evidence

In his second point of error, appellant complains that the stipulations of evidence are invalid, and the evidence is insufficient to support his pleas of guilty, because the district clerk failed to complete the jurat on his plea papers. The record in these consolidated cases indicates that appellant signed a form entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" in each of the three cases. These forms were also signed by appellant's trial attorney, the prosecutor, and the court; however, they were not sworn to before the district court clerk.

Article 1.15 of the Texas Code of Criminal Procedure provides that a defendant in a felony case may waive his right to a jury trial and plead guilty, provided that the State introduces sufficient evidence of the defendant's guilt. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 1998). If the defendant further waives his right to confront and cross-examine witnesses, the evidence of guilt may be stipulated. *Id*. Article 1.15, sets forth, in relevant part:

> 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 must be approved by the *court* in writing, and be filed in the file of the papers in the cause.

TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon 1998) (emphasis added). Accordingly, the statute only requires that the court—not the clerk—approve the defendant's waiver in writing. Furthermore, there is no requirement that the stipulation be sworn. But even if there were, a stipulation of evidence is not an essential prerequisite to accepting a plea of guilty. *Terry v. State*, 681 S.W.2d 136, 138 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). A judicial confession, that is, a defendant's admission that the allegations in the indictment are true, is an equally acceptable method of providing sufficient evidence to sustain a conviction upon a

plea of guilty. *Id*. at 139. Furthermore, it is well-settled that a judicial confession standing alone is sufficient evidence to sustain a plea of guilty. *Dinnery v. State*, 592 S.W.2d 343, 352–53 (Tex. Crim. App. 1979) (op. on reh'g). Because the documents in this case were judicial confessions as well as agreements to stipulate and waivers of constitutional rights, the trial court did not violate Article 1.15 by finding appellant guilty based on the admission of the appellant's judicial confessions, even though the documents were not sworn to by the clerk. *See Terry*, 681 S.W.2d at 138. Appellant's second point of error is overruled.

IV. Extraneous Offenses

In his next point of error, appellant complains that the trial court erred in allowing the State to introduce evidence of extraneous offenses because it did not provide appellant with timely notice of its intent to do so. Appellant asserts that his lawyer did not receive notice of the State's intent to use extraneous offense evidence until the sentencing hearing.

Texas Rule of Evidence 404(b) provides that "[e]vidence of other crimes . . . may be admissible . . . provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence. . . ." TEX. R. EVID. 404(b). The Code of Criminal Procedure further provides that "[o]n timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b). . . ." TEX. CODE CRIM. PROC. ANN. art. 37.07(3)(g) (Vernon 1998).

The clerk's record reflects that appellant's lawyer filed his article 37 request with the State on August 4, 1999. The record also reflects that *on that same day*, the State sent its response by facsimile. At the October sentencing hearing, appellant's lawyer told the court:

> I have reviewed my file and I do not have a copy of [the State's notice] in my file and I have also reviewed the court's file in all three cause numbers and I have been unable to find anywhere in any of the court's files where that document has been filed and made a part of the court's papers.

> And the absence of that document in my file is why I'm raising this is because I don't have that. *I don't dispute that that was, in fact, sent or attempted to be sent but I don't have a copy of this in my file.* (Emphasis our own.)

In response, the State introduced a facsimile transmittal cover sheet with its attached notice. Appellant's attorney did not deny that the number on the fax confirmation was his fax number. Moreover, each file in this case has a copy of the State's notice filed on August 4, 1999, the same day indicated on the facsimile confirmation. Here, the sentencing hearing was held October 25, 1999—76 days after the State notified appellant of its intent to use the extraneous offenses. We hold that this is sufficient notice within the meaning of article 37. The fact that appellant's lawyer may have lost or misplaced that document does not affect the timely nature of the State's notice. Appellant's point of error is overruled.

V. Deadly Weapon Finding

In his fourth and fifth points of error, appellant complains of the trial court's affirmative finding that a deadly weapon was used. First, he argues that the court erred because the evidence was insufficient to support a finding either that (1) appellant, as opposed to his accomplice, actually used a firearm or (2) appellant was a party to the offense and knew a firearm would be used.

A plea agreement silent on deadly weapon finding will not prevent the trial court from making such a finding. *Ex parte Williams*, 758 S.W.2d 785, 786 (Tex. Crim. App. 1988). "If a defendant pleads guilty to an indictment that includes an allegation that he used a deadly weapon, the trial court may make a deadly weapon finding." *Alexander v. State*, 868 S.W.2d 356, 361 (Tex. App.—Dallas 1993, no pet.) (citing *Ex parte Franklin*, 757 S.W.2d 778, 784 (Tex. Crim. App. 1988)). Moreover, a judicial confession that states the defendant is pleading guilty and confessing to aggravated robbery as alleged in the indictment is sufficient evidence to support the trial court's affirmative deadly weapon finding where the indictment contains a deadly weapon allegation. *Id.* at 360. Here, the indictment to which appellant entered a guilty

plea provides, in relevant part, that appellant "intentionally and knowingly threaten[ed] and place[d] Mary Wilkinson in fear of imminent bodily injury and death, and the ***Defendant did then and there use and exhibit a deadly weapon, to-wit: A FIREARM.***"[4] (Emphasis our own.) Appellant's fourth point of error is overruled.

Next appellant argues the trial court erred in entering judgment with a finding that a deadly weapon was used because the judgment "totally failed to recite that the appellant 'was a party to the offense and knew that a deadly weapon would be used or exhibited' as required by statute." At the PSI hearing, the trial court orally pronounced judgment, including a finding that a deadly weapon was used in each of the cases. Appellant waived this argument by failing to timely object at sentencing. TEX. R. APP. P. 33.1(a). Even if not waived, appellant stipulated to the evidence, which included the fact that a deadly weapon was used. We overrule appellant's fifth point of error.

VI. Cruel and Unusual Punishment

In his final points of error, appellant argues that, because this was his "very first felony offense," the sentence imposed by the trial court—25 years imprisonment at the Texas Department of Criminal Justice, Institutional Division—violates the United States and Texas constitutions prohibiting the imposition of cruel and unusual punishment.

Aggravated robbery is a first degree felony. TEX. PEN. CODE ANN. § 29.03(b) (Vernon 1994). A first degree felony is punishable "by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years." *Id.* at § 12.32(a) (Vernon 1994). It also carries the possibility of a monetary fine. *Id.* Texas has long held that punishments falling within the proscribed statutory limitations are not cruel and unusual within the meaning of the Texas Constitution. *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App.

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[4] A firearm is *per se* a deadly weapon. TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1994); *see also Arthur v. State*, 11 S.W.3d 386, 389 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (citing *Boyett v. State*, 692 S.W.2d 512, 517 (Tex. Crim. App. 1985)).

1983); *Simmons v. State*, (Tex. App.—Tyler 1996, pet. ref'd); *Davis v. State*, 905 S.W.2d655, 664 (Tex. App.—Texarkana 1995, pet. ref'd); *Benjamin v. State*, 874 S.W.2d 132, 134 (Tex. App.—Houston [14th Dist.] 1994, no pet.). We, therefore, hold that appellant's sentence is neither cruel nor unusual under the Texas Constitution.

The United States Supreme Court has suggested that, although a sentence may be authorized by statute, it does not necessarily follow that it is not also cruel and unusual under the Eighth Amendment to the United States Constitution. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In order to fit within federal constitutional strictures, the punishment must be proportionate to the crime. *Id*. The *Solem* Court announced three factors a reviewing court should consider in determining whether a sentence was disproportionate. First, the reviewing court should compare the gravity of the offense to the harshness of the penalty. Second, the court should undertake a comparison of the sentences imposed on other defendants within the same jurisdiction. Finally, the court should look to the punishment for the same offense in other jurisdictions. *Id*. at 292. Justice Kennedy, however, later explained that the *Solem* test requires "intrajurisdictional and interjurisdictional analyses . . . only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin v. Michigan*, 501 U.S. 597, 1004 (concurring). This interpretation has been recognized by the Fifth Circuit and courts of appeals across Texas. *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992); *Dunn v. State*, 997 S.W.2d 885, 892 (Tex. App.—Waco 1999, pet. ref'd); *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.); *Sullivan v. State*, 975 S.W.2d 755, 757 (Tex. App.—Corpus Christi 1998, no pet.).

There is no inference here that appellant's 25-year sentence is disproportionate to the first degree felony of aggravated robbery. First, we note that appellant pled guilty to three separate robberies, and in each appellant displayed a gun. Further, in the PSI, appellant refused to accept responsibility for these crimes. Acceptance of responsibility and truthfulness after the fact is a proper factor for a court to weigh in setting an appropriate sentence. *Grayson v.*

United States, 438 U.S. 41, 45–47 (1978). Additionally, on at least one occasion, according to the PSI, appellant pistol-whipped one of the complainants about the head and, in one of the extraneous offenses with which appellant was not charged, he robbed a mentally-retarded young woman. Appellant's final points are overruled.

Affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Yates, Fowler, and Lee.[5]

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

[5] Senior Justice Norman Lee sitting by assignment.