Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00897-CR

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HOWARD JAMES LOREE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 94-18413

O P I N I O N

Appellant, Howard James Loree, appeals from the trial court's revocation of his probation. On November 30, 1994, after Loree plead guilty to driving while intoxicated, the trial court sentenced him to five years imprisonment, probated for five years, and a $1,000 fine. On March 16, 1998, the State filed a Motion to Revoke Probation, based on Loree's arrest for DWI during the probationary period. After a hearing on Loree's "not true" plea, the trial court revoked appellant's community supervision and assessed punishment at five years

confinement and a $1,000 fine. We affirm.

In his sole point of error, Appellant contends that his five-year sentence violates the constitutional prohibition against cruel and unusual punishment. *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. Specifically, Appellant argues that the sentence imposed is grossly disproportionate to the offense committed, citing *Hutto v. Finney*, 437 U.S. 678 (1978).

There is no indication in the record, however, that this issue was ever raised before the trial court either in the probation revocation hearing, the original proceeding, or any motion for new trial or other document filed with the court. It is well settled in Texas that an argument based on cruel and unusual punishment must be raised in the trial court or it is waived. *See Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd); *Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd); *Quintana v. State*, 777 S.W.2d 474, 479 (Tex. App.—Corpus Christi 1989, pet. ref'd). Appellant failed to preserve his claim of error in the present case.

Furthermore, even if appellant had preserved error, an assessment of punishment that falls within the statutory range is not cruel and unusual under the Federal or Texas constitutions. *See McNew v. State*, 608 S.W.2d 166, 174 (Tex. Crim. App. [Panel Op.] 1978); *Cooks v. State*, 5 S.W.3d 292, 298 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Here, the trial court sentenced Loree to five years imprisonment from a statutory range for felony DWI of no less than two nor more than ten years. TEX. PENAL CODE ANN. § 12.34 (Vernon 1994)(third degree felony).

Appellant acknowledges the general rule but contends that, besides his arrest for DWI during the probationary period, he "had been quite successful in following the conditions of his probation." On that basis, appellant argues that he should have received probation again or, at the most, the minimum allowable jail time. Eligibility for probation, however, does not effect the established rule that a punishment within the statutory range is not cruel and unusual punishment. *See Combs v. State*, 652 S.W.2d 804, 806 (Tex. App.—Houston [1st Dist.] 1983,

no pet.).

We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*

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

*Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.