AFFIRMED as MODIFIED and Opinion Filed June 2, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00738-CR

BARRY LAKEITH GRIGSBY, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1575554-M

MEMORANDUM OPINION

Before Justices Bridges, Pedersen, III, and Evans
Opinion by Justice Bridges

The State indicted appellant Barry Lakeith Grigsby for aggravated robbery. The original indictment included two enhancement paragraphs later dropped by the State. Appellant pleaded guilty and pursuant to a plea agreement, the trial court placed him on five years deferred adjudication and probated a $3,000 fine.

The State later moved to adjudicate guilt in 2015 and 2017. In 2018, the State filed another motion to adjudicate guilt alleging appellant failed to report, pay various fees, complete community service, and participate in several required classes. Appellant pleaded not true to the allegations, but the trial court found the

allegations true. The trial court then assessed punishment at twenty-five years' confinement.

In two issues, appellant argues his sentence violates both the United States and Texas Constitutions because it is grossly disproportionate to the crime. In a third issue, he asserts the judgment should be reformed to indicate he pleaded not true to the State's motion adjudicating guilt. As modified, we affirm the trial court's judgment.

Because the law is well-settled, we issue this memorandum opinion. TEX. R. APP. P. 47. Further, because the parties are familiar with the underlying facts and appellant has not challenged the sufficiency of the evidence, we include only those facts necessary for disposition of the appeal. TEX. R. APP. P. 47.1.

In his first two issue, appellant argues his sentence violates his Eighth Amendment right against cruel and unusual punishment under the United States Constitution and the rights afforded him under article I, section 13 of the Texas Constitution. The State responds appellant failed to preserve his issues for review, or alternatively, his sentence does not violate the United States and Texas constitutions.

For error to be preserved for appeal, the record must show appellant made a timely request, objection, or motion. *See* TEX. R. APP. P. 33.1(a)(1). Constitutional rights, including the right to be free from cruel and unusual punishment, may be

waived. *Castaneda v. State*, 135 S.W.3d 719, 723 (Tex. App.—Dallas 2003, no pet.) (citing *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996)).

At the end of the hearing, the trial court asked defense counsel if there was "any reason at law why your client should not be sentenced at this time?" and counsel said no. When the trial court announced appellant's sentence, counsel did not object to the sentence as violating appellant's constitutional rights, and he did not raise the argument in any post-trial motion. Accordingly, appellant has not preserved these issue for appellate review.

Notwithstanding appellant's failure to preserve error, however, his argument fails. Punishment assessed within the statutory range is not unconstitutionally cruel and unusual. *Id*.

Using nearly identical language, both the United States and Texas Constitutions prohibit cruel and/or unusual punishment and the Texas Court of Criminal Appeals has held that there is no significant difference between the protections afforded in the two provisions. *See Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997); *Hornsby v. State*, No. 05-18-00479-CV, 2019 WL 3315448, at *2 (Tex. App.—Dallas pet. ref'd) (mem. op., not designated for publication). Accordingly, these two claims will be analyzed together.

Texas courts have traditionally held that as long as the punishment is within the range established by the legislature, the punishment assessed does not violate either the federal or Texas prohibitions against cruel and/or unusual punishment. *See*

Samuel v. State, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972) ("[T]his court has frequently stated that where the punishment assessed by the judge or jury was within the limits prescribed by the statute the punishment is not cruel and unusual within the constitutional prohibition.").

Here, appellant pleaded guilty to the offense of aggravated robbery with a deadly weapon, a first-degree felony. The applicable punishment range for the offense is five to ninety-nine years or life imprisonment. *See* TEX. PENAL CODE ANN. § 12.32(a). Appellant's twenty-five-year sentence falls within this range, and therefore, cannot be considered cruel or unusual. *Hornby*, 2019 WL 3315448, at *2.

However, a very narrow exception exists that an individual's sentence may constitute cruel and unusual punishment, despite falling in the statutory range, if it is grossly disproportionate to the offense. *See Kim v. State*, 283 S.W.3d 473, 475 (Tex. App.—Fort Worth 2009, pet. ref'd) ("Subject only to a very limited, 'exceedingly rare,' and somewhat amorphous Eighth Amendment gross-disproportionality review, a punishment that falls within the legislatively prescribed range, and that is based upon the sentencer's informed normative judgment, is unassailable on appeal."). To evaluate the proportionality of a sentence, the first step is for the court to make a threshold comparison of the gravity of the offense against the severity of the sentence. *Hornsby*, 2019 WL 3315448, at *3. When we analyze the gravity of the offense, we examine the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and

unadjudicated offenses. *See State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). Only if gross disproportionality is found do we then compare the sentence to sentences received for similar crimes in this and other jurisdictions. *Id*.

Appellant argues a twenty-five year sentence for failing to report and pay fines and court costs is severe and disproportionate to the crime. Further, he claims his behavior during his adjudication hearing indicates he continues to struggle with mental issues and the trial court should have honored his request to be placed on the mental health probation case load. However, in determining appellant's sentence, the trial court considered the severity of the crime, one in which appellant pleaded guilty to cutting the victim in the hand with a large kitchen knife during the commission of committing a theft. Appellant's community supervision provisions were twice modified to require participation in drug treatment programs. Appellant's probation officer testified appellant failed to report after October 26, 2017 and failed to pay certain fees, complete community service hours, or participate in certain required classes. Appellant was originally charged as a violent habitual offender because of prior convictions for aggravated robbery and burglary of a habitation. Thus, the trial court considered appellant's past violent history and his inability to complete probation.

On this record, we cannot conclude appellant's twenty-five-year sentence qualified as grossly disproportionate to his offense, a first degree felony.

Accordingly, appellant's sentence does not constitute cruel and unusual punishment. We overrule appellant's first and second issues.

In his third issue, appellant requests the Court to reform the judgment to reflect a not true plea to the motion to adjudicate guilt. The State agrees the judgment should be reformed.

We may reform a judgment to "speak the truth" when we have the necessary information in the record to do so. *See* TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). Here, appellant did not enter a plea to the alleged violations of his community supervision, but instead, the trial court entered a plea of not true on his behalf. The judgment states, "Plea to motion to adjudicate: TRUE." Accordingly, we reform the judgment to delete "TRUE" and replace with "NOT TRUE." We sustain appellant's third issue.

As modified, we affirm the trial court's judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BARRY LAKEITH GRIGSBY, Appellant	On Appeal from the 194th Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1575554-M.
No. 05-19-00738-CR V.	Opinion delivered by Justice Bridges. Justices Pedersen, III and Evans participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> We **DELETE** "True" and **REPLACE** with "Not true" for the Plea to the Motion to Adjudicate.

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered June 2, 2020