Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01308-CR

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KELVIN C. JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 792,076

O P I N I O N

Appellant entered a plea of not guilty to the offense of theft. He was convicted and the jury assessed punishment at twenty years and assessed a fine in the amount of $10,000. In a single point of error, appellant claims his punishment constituted cruel or unusual punishment under the federal and state constitutions. We affirm.

Between September 1996 and July 1998, appellant retained the services of nine lawyers and law firms to pursue a personal injury lawsuit based on appellant's false claim that he had been injured while working on an offshore oil rig. The lawyers, in turn, advanced money to appellant. Because appellant's claim was false, the lawyers were unable to recover the money

advanced to appellant. Appellant took over $17,000 over a two year period, some of which while he was in custody in jail. Based on the advances made, but not recovered, appellant was prosecuted for theft. He now claims his twenty year sentence constitutes cruel and/or unusual punishment.

Appellant cites no authority suggesting any distinction between the Eighth Amendment's prohibition of cruel and unusual punishment and the Texas Constitution's ban on cruel or unusual punishment. U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. We are aware of none. *See Moore v. State,* 935 S.W.2d 124, 128 (Tex. Crim. App. 1996). Thus, we address his federal and state constitutional claims together. *See Simmons v. State,* 944 S.W.2d 11, 14 (Tex. App.—Tyler 1996, pet. ref'd); *Davis v. State,* 905 S.W.2d 655, 664 (Tex. App.—Texarkana 1995, pet. ref'd).

In *Solem v. Helm,* the Supreme Court held that the Eighth Amendment prohibits disproportionate prison sentences. 463 U.S. 277, 288-90, 103 S.Ct. 3001, 3008-10, 77 L.Ed.2d 637 (1983). The Court identified three criteria that should be used to evaluate the proportionality of a particular sentence: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem,* 463 U.S. at 292, 103 S.Ct. at 3011.

The Court revisited the issue in *Harmelin v. Michigan,* but the majority could not come to a consensus on the issue of proportionality. 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). Justice Scalia, joined by Chief Justice Rehnquist, delivered the Court's opinion that a mandatory life sentence without the possibility of parole does not constitute cruel and unusual punishment under the Eighth Amendment. 501 U.S. at 994-96, 111 S.Ct. at 2701-02. Justices Kennedy, O'Connor and Souter concurred with Justice Scalia and Chief Justice Rehnquist in that respect. 501 U.S. at 965, 111 S.Ct. at 2686. Justices Kennedy, O'Connor, and Souter believe *Solem* is correct to the extent that the Eighth Amendment prohibits grossly disproportionate sentences. 501 U.S. at 1001, 111 S.Ct. at 2705 (Kennedy, J., concurring).

The Fifth Circuit applied a "head-count analysis" to *Harmelin* and concluded: "disproportionality survives; *Solem* does not." *McGruder v. Puckett,* 954 F.2d 313, 316 (5th Cir.), *cert. denied,* 506 U.S. 849 (1992). The Fifth Circuit looked to Justice Kennedy's concurring opinion and derived the following test to be employed when considering whether a particular sentence is disproportionate under the Eighth Amendment:

> We will initially make a threshold comparison of the gravity of [the appellant's] offense against the severity of his sentence. Only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the *Solem* test and compare the sentence received to (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions.

Id.

At least three intermediate appellate courts in Texas have applied the *McGruder* test in addressing disproportionate sentence claims. *See Mathews v. State,* 918 S.W.2d 666, 669 (Tex. App.—Beaumont 1996, pet. ref'd); *Puga v. State,* 916 S.W.2d 547, 549-50 (Tex. App.—San Antonio 1996, no pet.); *Lackey v. State,* 881 S.W.2d 418, 421 (Tex. App.—Dallas 1994, pet. ref'd). Three other courts have acknowledged *McGruder* and *Harmelin,* but have applied the *Solem* factors in assessing the proportionality of the sentences in question even after finding the sentences were not grossly disproportionate. *See Sullivan v. State,* 975 S.W.2d 755, 757-58 (Tex. App.—Corpus Christi 1998, no pet.); *Simmons,* 944 S.W.2d at 15; *Davis,* 905 S.W.2d at 665-65.

We find the *McGruder* rationale persuasive and will follow it as did the Dallas, San Antonio, and Beaumont courts. We will first compare the gravity of appellant's offense to the severity of the sentence imposed. *See McGruder,* 954 F.2d at 316. Only if this comparison raises an inference that the sentences are grossly disproportionate will we move to a consideration of the *Solem* factors. *Id.*

Absent any other criminal record, the offense appellant committed would have been a state jail felony, TEX. PENAL CODE ANN. § 31.03(3)(4)(A), punishable by confinement in a state jail for any term of not more than two years or less than 180 days and a fine not to exceed

$10,000. TEX. PENAL CODE ANN. § 12.35. The indictment, however, also alleged that appellant had been previously convicted of two theft offenses. When the value of the stolen property is more than $1500 and the indictment alleges the defendant has been previously convicted of two or more thefts, the defendant shall be punished for a second degree felony. TEX. PENAL CODE ANN. § 12.42(a)(2). A second degree felony is punishable by a fine not to exceed $10,000 and imprisonment in the institutional division for any term of not more than twenty years or less than two years. TEX. PENAL CODE ANN. § 12.33.

Appellant's sentence, in addition to being based on him having committed a second degree felony, was based on the habitual criminal provisions of section 12.42 of the Texas Penal Code. Under a recidivist statute, a sentence is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummell v. Estelle,* 445 U.S. 263, 284, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

We hold that appellant's sentence is not grossly disproportionate to the crime. Therefore, we need not address the remaining *Solem* factors. Appellant's sentence is within the statutory range for a second degree felony and does not constitute cruel or unusual punishment. Appellant's point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
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