**Affirmed and Opinion filed March 30, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00461-CR**

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**JOSE LUIS ARELLANO, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 184th District Court**
**Harris County, Texas**
**Trial Court Cause No. 792,189**

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## O P I N I O N

Jose Luis Arellano appeals a conviction for aggravated sexual assault of a child on the grounds that: (1) his due process rights under the Texas Constitution were violated when the trial court rejected his application for probation and sentenced him to thirty-five years in prison; and (2) the imposition of a thirty-five year sentence for his first offense of aggravated sexual assault of a child constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. We affirm.

**Background**

Appellant was charged by indictment with aggravated sexual assault of a child and pleaded no contest without an agreed recommendation from the State. He requested a presentence investigation report ("PSI") and filed a motion for community supervision. After a punishment hearing, the court sentenced appellant to thirty-five years confinement and assessed a $5,000 fine.

**Preservation of Error**

In two points of error, the appellant argues that his sentence violates his constitutional rights of due process and to be free from cruel and unusual punishment.

To preserve a complaint for appellate review, a party must present a timely objection to the trial court, state the specific grounds for the objection, and obtain a ruling. *See* TEX. R. APP. P. 33.1(a). Thus, an appellant may not assert error pertaining to his punishment where he failed to object or otherwise raise error in the trial court. *See Mercado v. State*, 718 S.W.2d 291, 296 (Tex. Crim. App. 1986). Even constitutional errors of the types asserted by appellant are waived if not raised in the trial court. *See* TEX. R. APP. P. 33.1.[1]

In this case, after the trial judge assessed punishment, appellant neither objected to the sentence nor otherwise challenged it, such as in a post-verdict motion to the trial court. Therefore, appellant failed

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[1] *See e.g., Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (noting that the appellant had failed to properly preserve his cruel and unusual punishment argument by not raising it in the trial court); *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995) (noting that constitutional errors may be waived by failure to object at trial and holding that, because the appellant's objection at trial did not comport with his due process violation claim on appeal, he failed to properly preserve the error); *Solis v. State*, 945 S.W.2d 300, 301-02 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd) (finding that appellant's arguments, that his sentence was grossly disproportionate to the offense and was a cruel and unusual punishment under the Texas and United States Constitutions, had been waived because he had failed to assert them in the trial court).

to properly preserve his claims for our review.[2] However, even if appellant's complaints had been preserved, they are without merit.

**Due Process Rights**

Appellant's first point of error contends that his due process rights were violated by imposition of a thirty-five year sentence. Appellant asserts that this sentence was a "miscarriage of justice" and an abuse of discretion which amounted to a violation of his due process rights because this was his first offense, he was eligible for probation, and other more severe cases have received a sentence of less than thirty-five years.

Although appellant refers us to several cases in support of this argument, those decisions merely indicate that sentencing violates due process where the record reflects consideration of improper factors.[3]

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[2] *See, e.g., Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (finding that the appellant had failed to properly preserve his cruel and unusual punishment argument because he did not object at trial); *Jackson v. State*, 989 S.W.2d 842, 844 (Tex. App.–Texarkana 1999, no pet.) (determining that the appellant had not properly preserved his argument, that his sentence was cruel and unusual punishment, because he failed to raise a specific objection to the sentence pronounced); *Keith v. State*, 975 S.W.2d 433, 433 (Tex. App.–Beaumont 1998, no pet.) (finding that the appellant had failed to preserve his constitutional claims regarding his sentence because he did not raise an objection in the trial court or file any post-verdict motions); *Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.–Houston [14th Dist.] 1992, pet. ref'd) (finding that the appellant had failed to properly preserve his cruel and unusual punishment argument because he did not raise the issue in the trial court).

[3] *See United States v. Cavazos*, 530 F.2d 4, 4 (5th Cir. 1976) (finding that the trial court's inappropriate analogy to a bank robber and citing to statistics which indicated that several narcotics transactions occur before the individual is apprehended, injected hypothetical, extraneous considerations into the sentencing process and was error); *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (stating "the trial court's use, over objection, of a [PSI] in determining what punishment will be assessed, prior to the effective date of the 1981 amendment to Article 37.07, § 3(d) . . . was error"); *Hayes v. State*, 709 S.W.2d 780, 781-82 (Tex. App.–Houston [1st Dist.] 1986, no pet.) (stating that if the trial court assessed punishment by considering "circumstances beyond the permissible areas provided in [Texas Code of Criminal Procedure] article 37.07, [section] 3(d)," it would be error; however, it was not error that required reversal because the appellant had never objected to the court's consideration of the impermissible evidence, stated that the facts mentioned were false, or asked for more time to rebut matters outside the investigative report, thus waiving the error); *Townsend v. Burke*, 334 U.S. 736, 740-41(1948) (finding that because the trial judge had facetiously recited a long list of charges against the defendant, several of which had resulted in a not guilty verdict, the defendant had been sentenced on the basis of assumptions concerning his criminal record which were materially untrue). The *Townsend* Court also noted:

Because appellant does not assert that the trial court considered improper factors in this case or that the process followed in determining his sentence was otherwise improper, his claims of gross sentencing disparity and excessiveness for a first time offender do not constitute a due process violation.

**Cruel and Unusual Punishment**

Appellant's second point of error argues that the imposition of a thirty-five year sentence for his first offense is a violation of his right to be free from cruel and unusual punishment under the United States Constitution. Appellant acknowledges that a trial court's assessment of punishment will generally not be disturbed on appeal if it falls within the statutory range.[4] However, he contends that his sentence, though within the statutory range,[5] was grossly disproportionate to the seriousness of the offense he committed.

Apart from the general requirement that a sentence fall within the statutory range, there is some doubt whether the Eighth Amendment contains any guarantee of proportionality for non-death penalty offenses. *See Harmelin v. Michigan*, 501 U.S. 957, 964-96 (1991). Even if it does, however, the PSI in this case reflects that appellant repeatedly sexually assaulted the complainant, his stepdaughter, starting when she was only six years old. She reported that he pulled her pants down on numerous occasions, touched her genitals, and, on at least one occasion, inserted his finger into her vagina. He also touched her with her clothing on. She stated that he would come into her room at night and "mess" with her, getting on top of her and going behind her, taking his pants and her shorts off. He told her that he

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> [W]e are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction. . . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false . . . that renders the proceedings lacking in due process.

*Id*.

4 *See Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984); *Nunez v. State*, 565 S.W.2d 536, 538 (Tex. Crim. App. 1978).

5 Aggravated sexual assault of a child is a felony of the first degree. *See* TEX. PEN. CODE ANN. § 22.021(e) (Vernon Supp. 2000). The range of punishment applicable to a first degree felony is imprisonment for life or any term of not more than 99 years or less than 5 years. *See* TEX. PEN. CODE ANN. § 12.32 (Vernon 1994).

loved her and wanted to have a baby with her. On several occasions, appellant had the complainant perform oral sex on him and ejaculated into her mouth. He also had her put on her mother's night clothes and took photos of her with "her legs open,"and made her take a photo of his genitals. Appellant also requested that the complainant "be with" some of his friends. Finally, the PSI indicated that the complainant's older brother had observed appellant sexually assaulting her. In light of the severe and continuous nature of these assaults, appellant has not demonstrated that his sentence is disproportionate to the crime he committed.

Because appellant's points of error have not been preserved and are without merit, they are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Yates, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).