

Affirmed and Opinion filed October 11, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-00660-CR

RICHARD M. SORGMANN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from 182nd District Court
Harris County, Texas
Trial Court Cause No. 710,866**

OPINION

Richard M. Sorgmann appeals a conviction for attempted murder on the grounds that: (1) the trial court's delay in appointing counsel for appellant deprived him of assistance of counsel for seeking a new trial; (2) the trial court violated appellant's due process rights when it rejected reinstatement of his deferred adjudication and sentenced him to ten years confinement; (3) the trial court's imposition of a ten-year sentence constitutes cruel and unusual punishment; and (4) the trial court erred in adjudicating appellant's guilt because he did not violate the terms of his community supervision. We affirm.

Background

Appellant pleaded *nolo contendere* to the offense of attempted murder without an agreed punishment recommendation from the State. The trial court accepted the plea and placed him on deferred adjudication community supervision for six years. Appellant did not appeal that judgment. Nearly four years later, the State filed a motion to adjudicate guilt, and the trial court found appellant guilty of attempted murder and assessed punishment of ten years confinement and a fine of \$750. Appellant filed a *pro se* notice of appeal and motion for new trial. Five weeks later, appellant requested the court to appoint counsel for his appeal, and the court immediately did so. Appellant also filed a motion to reinstate probation, which the trial court denied.

Right to Counsel

Appellant's first point of error contends that the trial court's delay in appointing counsel for him deprived him of assistance of counsel for seeking a new trial based on ineffective assistance of counsel with regard to his original plea. Appellant asserts that his previous showing of indigency and his *pro se* notice of appeal should have alerted the trial court that his appointed trial counsel did not intend to pursue an appeal. He thus contends that the trial court should have made a timely inquiry as to whether appellant desired to prosecute an appeal and, if so, it should have appointed appellate counsel in time to file, and conduct an evidentiary hearing on, a motion for new trial.

A defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding only in appeals taken when deferred adjudication community supervision is first imposed. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). Therefore, appellant cannot challenge the effectiveness of the counsel who represented him at the original plea proceeding by appeal now that the resulting deferred adjudication has been revoked. Rather, any appeal to complain about his counsel from the original plea proceeding would have had to be undertaken when the deferred adjudication

probation was first imposed. *See id.* Therefore, appellant's complaint is not timely, and point of error one is dismissed for lack of jurisdiction.

Excessive Punishment

Appellant's second point of error argues that the trial court violated his due process rights under the Texas Constitution when it rejected reinstatement of his deferred adjudication and sentenced him to ten years confinement because other trial courts have imposed lesser sentences in similar, or more serious offense, cases. Appellant's third point of error similarly contends that the trial court's imposition of a ten-year sentence constitutes a violation of his right to be free from cruel and unusual punishment under the United States Constitution because he is 62 years old and the sentence thus amounts to a death sentence.

Appellant failed to preserve a complaint regarding the punishment assessed by the trial court by failing to challenge it when the punishment was assessed or in a motion for new trial.¹ In addition, because the sentence imposed by the trial court falls within the statutory range of punishment for the offense to which he pleaded guilty (attempted murder), it is not cruel or unusual punishment.² Accordingly, appellant's second and third points of error are overruled.

Entrapment

Appellant's fourth point of error contends that the trial court erred in adjudicating him guilty of the offense of attempted murder because the evidence showed that the undercover

¹ *See Stevens v. State*, 667 S.W.2d 534, 538 (Tex. Crim. App. 1984) (en banc) (holding that defendant's cruel and unusual punishment challenge was not preserved by proper objection in the trial court); *Steadman v. State*, 31 S.W.3d 738, 740 (Tex. App.—Houston [1st Dist.] 2000, pet. filed); *Rodriguez v. State*, 917 S.W.2d 90, 92 (Tex. App.—Amarillo 1996, pet. ref'd).

² *See McNew v. State*, 608 S.W.2d 166, 174 (Tex. Crim. App. 1978); *Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Benjamin v. State*, 874 S.W.2d 132, 134-35 (Tex. App.—Houston [14th Dist.] 1994, no pet.); TEX. PEN. CODE ANN. § 12.33 (Vernon 1994) (providing, for a confinement of not more than 20 years or less than 2 years, and a fine not to exceed \$10,000 for second degree felony of attempted murder); *see generally Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984) (en banc) (holding that as a general rule, as long as a sentence is within the proper range of punishment, it will not be disturbed on appeal).

vice officer entrapped him into the commission of the offense of solicitation of prostitution.³ However, appellant may not challenge the legal or factual sufficiency of the evidence to prove the offense for which deferred adjudication is revoked.⁴ Because we therefore have no authority to review an adjudication of guilt, appellant's fourth point of error is dismissed for lack of jurisdiction, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 11, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.⁵

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³ The trial court found that appellant violated his six-year deferred adjudication when he agreed to accept money from an undercover officer to locate a prostitute for the officer. *See* TEX. PEN. CODE ANN. § 43.03(a) (Vernon 1994) (“A person commits an offense [of promotion of prostitution] if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she knowingly . . . solicits another to engage in sexual conduct with another person for compensation.”)

⁴ *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 2001) (“The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination.”); *see also* *Olowosuko v. State*, 826 S.W.2d 940, 942 (Tex. Crim. App. 1992).

⁵ Senior Justice Don Wittig sitting by assignment.