Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01514-CR

GILBERT JULIAN VELEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 846,313

O P I N I O N

Appellant, Gilbert Julian Velez, was convicted by a jury of aggravated sexual assault of a child and was sentenced to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In two points of error, appellant contends the trial court erred (1) in instructing the jury that he may earn time off the period of incarceration through the award of good time, and (2) in making a finding that he was required to register as a sex offender. We affirm.

I. JURY INSTRUCTION ON GOOD CONDUCT TIME

Appellant argues that instructing the jury that he may earn time off the period of incarceration through the award of good conduct time was misleading as applied to him because he is not eligible for mandatory supervision, thereby denying him due process of law. The trial court instructed the jury in accordance with Article 37.07, Section 4(a) of the Texas Code of Criminal Procedure:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or thirty years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Appellant did not object to this instruction at trial. Even in the absence of an objection, an appellate court is required to review a complaint that charge error violates a constitutional provision by the following standard: "'the judgment shall not be reversed unless it appears from the record that the defendant has not had a fair and impartial trial.'" *Jimenez v. State*, 32 S.W.3d 233, 238-39 (Tex. Crim. App. 2000) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.19). However, before we apply the standard of review for charge error, we must first determine whether the trial court erred in giving the jury the good conduct time instruction.

The instruction informing the jury of the existence and mechanics of parole law and good conduct time is mandatory. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 2002); *Thomas v. State*, 48 S.W.3d 373, 375 (Tex. App.—Fort Worth 2001, no pet.) (op. on reh'g). This charge is universally applicable to all non-capital felonies listed in Article 42.12, Section 3g(a) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a) (Vernon Supp. 2002); *Espinosa v. State*, 29 S.W.3d 257, 260 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Because appellant was convicted of aggravated sexual assault of a child, he is ineligible for mandatory supervision. TEX. GOV'T CODE ANN. § 508.149(a)(8) (Vernon Supp. 2002); *Cagle v. State*, 23 S.W.3d 590, 593 (Tex. App.—Fort Worth 2000, pet. filed) (op. on reh'g).

Appellant's argument that instructing the jury that he may earn time off the period of incarceration through the award of good conduct time was misleading as applied to him because he is not eligible for mandatory supervision has been addressed and expressly rejected by this court and other courts of appeals.[1] The charge does not mention mandatory

---

[1] *See, e.g., Washington v. State*, 59 S.W.3d 260, 266 (Tex. App.—Texarkana 2001, pet. filed); *Alawad v. State*, 57 S.W.3d 24, 26 (Tex. App.—Houston [14th Dist.] 2001, pet. filed); *Thomas*, 48 S.W.3d at 375; *Felan v. State*, 44 S.W.3d 249, 258 (Tex. App.—Fort Worth 2001, pet. filed); *Donoho v. State*, 39 S.W.3d 324, 332 (Tex. App.—Fort Worth 2001, pet. filed) (op. on reh'g); *Espinosa*, 29 S.W.3d at 260; *Cagle*, 23 S.W.3d at 594; *Edwards v. State*, 10 S.W.3d 699, 705 (Tex. App.—Houston [14th Dist.] 1999), *pet. dism'd, improvidently granted*, No. 0373-00, 2002 WL 123578 (Tex. Crim. App. Jan. 30, 2002) (per curiam); *Luquis v. State*, 997 S.W.2d 442, 443-44 (Tex. App.—Beaumont 1999, pet. granted); *Martinez v.*

supervision, but refers to good conduct time as only a possibility rather than a certainty. The charge further instructs the jury that it cannot accurately predict how the parole law and good conduct time might be applied to appellant and that it is not to consider the extent to which good conduct time may be awarded to him. An appellate court may assume the jury will follow an instruction as given. *Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996).

We find the charge is not misleading and, therefore, appellant was not denied due process of law. Consequently, the trial court did not err in instructing the jury on good conduct time.[2] Appellant's first issue is overruled.

II. REGISTRATION AS A SEX OFFENDER

A. DUE PROCESS

In his second issue, appellant claims the trial court erred in requiring him to register as a sex offender without notice and a hearing as required to satisfy due process. Appellant was convicted of a reportable crime. TEX. CODE CRIM. PROC. ANN. art. 62.01(5)(A) & (6)(A) (Vernon Supp. 2002). Under the sex offender registration statute, appellant is required to register with the local law enforcement authority in the municipality in which he resides or intends to reside for more than seven days. *Id.* art. 62.02(a). The registration form requires the offender's full name, each alias, date of birth, sex, race, height, weight, eye

---

State, 969 S.W.2d 497, 501 (Tex. App.—Austin 1998, no pet.). *But see Jimenez v. State*, 992 S.W.2d 633, 638 (Tex. App.—Houston [1st Dist.] 1999), *aff'd on other grounds*, 32 S.W.2d 233 (Tex. Crim. App. 2000) (holding charge on good conduct time was unconstitutional as applied to defendant who was not eligible for early release under mandatory supervision); *Bradley v. State*, 45 S.W.3d 221, 224 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (same).

[2] Appellant also argues the instruction was harmful because it made jurors less likely to grant probation because of mistaken beliefs about good time resulting in accelerated release. Even if we were to find that the trial court erred in submitting the instruction on good conduct time to the jury, the record does not show that appellant did not have a fair and impartial trial. *See Jimenez*, 32 S.W.2d at 238-39. At punishment, the State argued vigorously against probation. Although the range of punishment for a first degree felony is imprisonment from five to 99 years or life and a fine up to $10,000, the jury assessed only a ten-year prison sentence and did not assess a fine. TEX. PEN. CODE ANN. § 12.32 (Vernon 1994).

color, hair color, social security number, driver's license number, shoe size, home address, photograph, complete set of fingerprints, as well as the type of offense, age of victim, punishment received, and an indication as to whether the offender is discharged, paroled, or released on juvenile probation, community supervision, or mandatory supervision. *Id.* art. 62.02(b). If the victim is younger than 17 years of age and the basis on which the offender is subject to registration is not an adjudication of delinquent conduct, the local law enforcement authority must immediately publish notice in English and Spanish in the most widely circulated newspaper in the county in which the offender intends to reside. *Id.* art.62.03(e). The notice shall include the offender's full name, age, gender, numeric street address or physical address, zip code, recent photograph, and a brief description of the offense. *Id.* art. 62.03(f).

If the victim is younger than 17 years of age, the authority shall immediately provide notice by mail to the superintendent of the public school district and to the administrator of any private primary or secondary school located in the district in which the offender intends to reside. *Id.* art. 62.03(e). Such notice shall include any information the authority determines is necessary to protect the public, except: the offender's social security number, driver's license number, and telephone number, and any information that would identify the victim. *Id.* art. 63.02(g). The superintendent must disclose the information contained in the notice to appropriate school district personnel, including peace officers and security personnel, principals, nurses, and counselors. *Id.* art. 62.03(e).

The statute requires the Department of Public Safety to maintain a computerized central database containing the same information required for registration. *Id.* art. 62.08(a). With the exception of the registrant's social security number, driver's license number, telephone number, and information that would identify the victim, the information contained in the database is public information available upon written request. *Id.* art. 62.08(b) & (c). Law enforcement is immune from liability for damages arising from the release of public information. *Id.* art. 62.09. Appellant, as an offender with a reportable conviction under this

chapter, must comply with all registration requirements for life. *Id.* art. 62.12(a). Appellant could be convicted of a third degree felony for failure to comply with any requirement. *Id.* art. 62.10(b)(2).

The requirements of procedural due process apply to only the deprivation of constitutionally protected property and liberty interests. *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Reese v. State*, 877 S.W.2d 328, 331 (Tex. Crim. App. 1994). Only if we conclude appellant had a protected interest, must we determine whether the level of due process afforded to appellant was sufficient, i.e., whether the right to due process was violated.

Appellant argues the public disclosure provisions of the sex offender registration statute impose a punitive stigma that constitutes punishment. We disagree. This court has previously has held the registration and notice requirements of the sex offender registration statute are remedial, not punitive. *Dean v. State*, 60 S.W.3d 217, 225 (Tex. App.—Houston [14th Dist.] 2001, pet. filed); *Ruffin v. State*, 3 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *see also Ducker v. State*, 45 S.W.3d 791, 796 (Tex. App.—Dallas 2001, no pet.); *Rodriguez v. State*, 45 S.W.3d 685, 689 (Tex. App.—Fort Worth 2001, pet. granted); *Saldana v. State*, 33 S.W.3d 70, 71-72 (Tex. App.—Corpus Christi 2000, pet. ref'd); *White v. State*, 988 S.W.2d 277, 278-79 (Tex. App.—Texarkana 1999, no pet.).[3]

[3] In *Dean*, this court analyzed whether the sex offender registration statute is regulatory or punitive in nature by determining (1) the intent of the legislature in passing the statute, and (2) whether the statute is "so punitive either in purpose or effect as to negate that intention." *Dean*, 60 S.W.3d at 221 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1979)). Considering the language of the statute, the court concluded the intent of the statute was to prevent criminal conduct and to protect the community and, therefore, was regulatory. *Id.* In considering whether the effect of the statute is so punitive that it negates its non-punitive intent, the court analyzed the statute under the following factors: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment–retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 222 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). After conducting a through analysis of those factors, the court held the sex offender registration statute is not excessive in relation to its non-punitive purposes. *Id.* at 225.

Appellant contends he had a protected liberty interest in being free of the stigma imposed by the sex offender registration statute. The words "liberty" and "property" do not single out "reputation as a candidate for special protection over and above other interests that may be protected by state law." *Paul v. Davis*, 424 U.S. 693, 701 (1976). In other words, damage to an individual's reputation alone, apart from some more tangible interest, is not enough to establish a due process violation. *Id.*; *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000). Thus, injury to a sex offender's reputation, without more, is not sufficient to establish a protected liberty interest entitled to due process. *See In re M.A.H.*, 20 S.W.3d 860, 864-65 (Tex. App.—Fort Worth 2000, no pet.) (op. on reh'g) (holding juvenile sex offender had no protected liberty interest in reputation that would entitle him to due process); *see also Cutshall*, 193 F.3d at 479 (holding imposition of stigma under Tennessee sex offender registration statute does not implicate due process); *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997) (holding collection and dissemination of information under Washington sex offender registration statute does not violate protected privacy interest and does not constitute deprivation of liberty or property); *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1268-69 (3d Cir. 1996) (holding offender had no interest in reputational damage, if any, accompanying registration under New Jersey sex offender registration statute).

The Fort Worth Court of Appeals addressed whether the sex offender registration statute violated due process because it authorizes notification without any preliminary determination of whether the offender poses a continuing threat to society. *In re M.A.H.*, 20 S.W.3d at 863. As in this case, the defendant in *In re M.A.H.*, a juvenile, argued that his "reputation and good name [were] at stake." Rejecting that argument, the court explained:

> Although dissemination of the information contemplated by the program to the community may be potentially harmful to appellant's personal reputation, we conclude he has failed to articulate a liberty interest that entitles him to the protection of due process. Therefore, the due process required in juvenile proceedings was all that was necessary. Appellant was found

> to have engaged in delinquent conduct for indecency, conduct which he admittedly inflicted upon a 7-year-old girl, thus triggering the registration and notification requirements, only after a hearing where he had the opportunity to call witnesses and present evidence in his defense. Any additional requirement that an individualized hearing be conducted for purposes of determining whether appellant presents a continuing threat to society before dissemination of the information is not warranted on the basis of deprivation.

Id. at 865 (citations omitted).

Other than asserting the sex offender registration statute serves as additional punishment—which has been soundly rejected—appellant has not advanced any other theory on which he could claim a protected liberty interest. In the absence of a tangible interest, we find appellant has no protected liberty interest in his reputation and was not denied due process.

B. OUTLAWRY

Appellant also argues this type of punishment is also foreclosed by Article I, Section 20 of the Texas Constitution, which prohibits "outlawry." Outlawry is the withdrawal of all legal rights and protection from a citizen. TEX. CONST. art. I, § 20 interp. commentary (Vernon 1997). The outlawry provision was intended to prohibit the state from either denying a citizen all legal rights or transporting a citizen out of the state as punishment for an offense. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995).

We disagree with appellant's contention. The sex offender registration statute does not withdraw all legal rights and protection from its registrants or deny the right to redress in the courts, but, rather, it imposes duties as a result of a conviction for certain offenses. *Dean*, 60 S.W.3d at 226 (quoting *Gone v. State*, 54 S.W.3d 27, 37 (Tex. App.—Texarkana 2001, pet. ref'd)). Although the statute places restrictions on the exercise of appellant's ability to locate his place of residence and requires him to keep in contact with law enforcement, this does not equate to the withdrawing of his rights under our judicial system

or denying him access to the courts. *Id.* (quoting *Gone*, 54 S.W.3d at 37). Instead, "[t]his provision is designed for the protection of the citizens, not a punishment of the convicted party." *Id.* (quoting *Gone*, 54 S.W.3d at 37). Likewise, we find the sex offender registration requirements do not violate the constitutional prohibition against outlawry.

Appellant's second issue is overruled. Accordingly, the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed February 14, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).