



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00199-CR

THOMAS CRAIG SELL

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1376549D

OPINION

I. INTRODUCTION

Appellant Thomas Craig Sell entered an open plea of guilty to the offense of aggravated assault with a deadly weapon, and the trial court ultimately assessed his punishment at fifteen years' confinement. In his sole point, Sell contends that his right to confront his accusers was violated when the trial court

considered a presentence investigation report (PSI) in assessing punishment. We will affirm.

II. BACKGROUND

After entering his guilty plea, the trial court delayed assessing punishment and ordered a PSI. Later, the trial court held a punishment hearing. During the hearing, the State introduced the PSI report into evidence. Sell stated that he had no objections to the introduction of this report. After considering the PSI and the testimony of several witnesses, the trial court assessed punishment and entered judgment accordingly. This appeal followed.

III. DISCUSSION

In his sole point of error, Sell argues that his right to confront the witnesses against him was violated when the trial court considered the PSI at punishment. See U.S. Const. amend. VI. The State argues that Sell has failed to preserve this issue for our review. See *Reyna v. State*, 168 S.W.3d 173, 179–80 (Tex. Crim. App. 2005) (holding that defendant did not preserve Confrontation Clause objection by failing to clearly articulate objection in trial court).

Sell acknowledges that the court of criminal appeals has held that when a PSI is used in a non-capital case in which the defendant has elected to have the trial court determine sentencing, there is no violation of a defendant's Sixth Amendment right to confrontation. See *Stringer v. State*, 309 S.W.3d 42, 48 (Tex. Crim. App. 2010) (citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004)).

Sell argues, however, that because of this “well-settled” proposition of law, it was not incumbent upon him to object to the State’s introduction of the PSI. *See Ex parte Hathorn*, 296 S.W.3d 570, 572 (Tex. Crim. App. 2009) (“Given the settled state of the case law at the time of appellant’s trial, we refuse to fault him or his attorney for failing to object. . . . Under the established precedent, the trial judge would have been correct in overruling the objection. . . .”) (quoting *Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991); *see also Ex parte Turner*, 542 S.W.2d 187, 189 (Tex. Crim. App. 1976) (holding that “[i]t would be unreasonable to expect the petitioner to anticipate the future decision of the United States Supreme Court” and that there was no intentional waiver for failing “to object upon a ground not yet established as a defect of constitutional magnitude.”) (quoting *Ex parte Casarez*, 508 S.W.2d 620, 622 (Tex. Crim. App. 1974))).

Sell’s reliance on these cases is dubious, and the preservation issues involved in the cases cited are distinct from what is at issue in this case. First, Sell cites no authority indicating that the United States Supreme Court has altered the landscape regarding the Sixth Amendment right to confrontation when the trial court’s review of a PSI is at issue. *See Stringer*, 309 S.W.3d at 48 (acknowledging that federal circuit courts do not apply *Crawford* to a sentencing hearing). Second, the court of criminal appeals stated that the preservation of the issue involved in *Hathorn* was a “particular circumstance[]” in which it had previously held that no objection was necessary—Sell does not point to any

authority indicating that such an exception to the preservation rules applies in this case. See *Hathorn*, 296 S.W.3d at 572. And finally, Sell affirmatively stated that he had no objection when the State sought to admit the PSI. See *Swain v. State*, 181 S.W.3d 359, 368 (Tex. Crim. App. 2005) (discussing the “affirmative acceptance” rule of error preservation). We conclude that Sell has failed to preserve this issue for our review.

But even assuming that Sell had not forfeited his confrontation clause complaint, Sell acknowledges that the court of criminal appeals has held that when a PSI is used in a non-capital case in which the defendant has elected to have the trial court determine sentencing, there is no violation of a defendant’s Sixth Amendment right to confrontation. See *Stringer*, 309 S.W.3d at 48. That is precisely what occurred in this case, and we are bound by the court of criminal appeals’s holdings. See *Wiley v. State*, 112 S.W.3d 173, 175 (Tex. App.—Fort Worth 2003, pet. ref’d) (“[W]e are bound to follow the pronouncements of the court of criminal appeals.”). We overrule Sell’s sole point.

IV. CONCLUSION

Having overruled Sell’s sole point on appeal, we affirm the trial court’s judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and MEIER, JJ.

DAUPHINOT, J., filed a concurring and dissenting opinion.

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