

Opinion filed June 25, 2020



In The
Eleventh Court of Appeals

Nos. 11-19-00354-CR & 11-19-00355-CR

THOMAS ELIJAH ATKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 91st District Court
Eastland County, Texas
Trial Court Cause Nos. 25007 & 24281**

MEMORANDUM OPINION

Appellant, Thomas Elijah Atkins, pleaded guilty to the offense of bail jumping and failure to appear and the offense of possession of a controlled substance (less than one gram of methamphetamine). Pursuant to the terms of the plea agreements, the trial court deferred a finding of guilt and placed Appellant on community supervision for three years in each case. In one of the cases—cause no. 24281—the

trial court also assessed a fine of \$2,000 when it deferred the adjudication of Appellant's guilt. The State subsequently filed a motion to adjudicate Appellant's guilt in each case. The trial court held a contested hearing on the State's motions to adjudicate, found the State's allegations to be true, revoked Appellant's community supervision, and adjudicated Appellant guilty of the charged offenses. The trial court assessed Appellant's punishment in cause no. 25007 at imprisonment for two years and in cause no. 24281 at confinement in a state jail facility for eighteen months. We modify the trial court's judgments and affirm the judgments as modified.

Appellant's court-appointed counsel has filed a motion to withdraw in each appeal. Each motion is supported by a brief in which counsel professionally and conscientiously examines the record and applicable law and states that he has concluded that these appeals are frivolous and without merit. In each cause, counsel provided Appellant with a copy of the brief, a copy of the motion to withdraw, a copy of the clerk's record and the reporter's record, and an explanatory letter. Counsel advised Appellant of his right to review the record and file a response to counsel's brief. Counsel also advised Appellant of his right to file a pro se petition for discretionary review in order to seek review by the Texas Court of Criminal Appeals. See TEX. R. APP. P. 68. Court-appointed counsel has complied with the requirements of *Anders v. California*, 386 U.S. 738 (1967); *Kelly v. State*, 436 S.W.3d 313 (Tex. Crim. App. 2014); *In re Schulman*, 252 S.W.3d 403 (Tex. Crim. App. 2008); and *Stafford v. State*, 813 S.W.2d 503 (Tex. Crim. App. 1991).

Appellant has not filed a pro se response to counsel's *Anders* briefs. Following the procedures outlined in *Anders* and *Schulman*, we have independently reviewed the records, and we agree that the appeals are without merit. The State presented evidence in support of the allegations in the motions to adjudicate. In that regard, we note that proof of one violation of the terms and conditions of community

supervision is sufficient to support revocation. *Smith v. State*, 286 S.W.3d 333, 342 (Tex. Crim. App. 2009). Further, absent a void judgment, issues relating to an original plea proceeding may not be raised in a subsequent appeal from the revocation of community supervision and adjudication of guilt. *Jordan v. State*, 54 S.W.3d 783, 785–86 (Tex. Crim. App. 2001); *Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999). Based on our review of the records, we agree with counsel that no arguable grounds for appeal exist.¹

We conclude, however, that the judgments contain nonreversible errors. First, in cause no. 24281, there is a variation between the oral pronouncement of sentence and the written judgment of adjudication. The written judgment includes “Court Costs” of \$2,984.64; the clerk’s bill of cost indicates that \$2,000 of that amount constitutes a fine rather than court costs. When the trial court assessed Appellant’s punishment and orally pronounced the sentence in open court, the trial court did not mention a fine. The trial court was required to pronounce the sentence in Appellant’s presence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.03 (West 2018); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). When there is a variation between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Coffey v. State*, 979 S.W.2d 326, 328–29 (Tex. Crim. App. 1998); *see also Taylor*, 131 S.W.3d at 500–02 (explaining the distinction between regular community supervision, in which sentence is imposed but suspended when a defendant is placed on community supervision, and deferred-adjudication community supervision, in which the adjudication of guilt and the imposition of sentence are deferred). Because the trial court did not mention any fine when it orally pronounced Appellant’s sentence and because we have the necessary

¹We note that Appellant has a right to file a petition for discretionary review pursuant to TEX. R. APP. P. 68.

information for reformation, we modify the trial court’s judgment to delete the fine. *See Taylor*, 131 S.W.3d at 502; *Cerna v. State*, No. 11-14-00363-CR, 2015 WL 3918259, at *2 (Tex. App.—Eastland June 25, 2015, no pet.) (mem. op., not designated for publication).

Second, in both judgments, the trial court ordered Appellant to pay court costs that included a time payment fee of \$25 pursuant to former Section 133.103 of the Texas Local Government Code. *See* former TEX. LOC. GOV’T CODE ANN. § 133.103 (2004).² We held that subsections (b) and (d) of that section were facially unconstitutional because the collected fees were to be allocated to general revenue and were not sufficiently related to the criminal justice system. *See King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *1, *5–6 (Tex. App.—Eastland July 11, 2019, pet. filed) (mem. op., not designated for publication). Accordingly, the trial court erred when it assessed a time payment fee under former Section 133.103, subsections (b) and (d) of the Texas Local Government Code as a court cost. *See id.*

When the trial court erroneously includes fees as court costs, we should modify the trial court’s judgment to remove the improperly assessed fees. *See Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). We therefore modify the trial court’s judgments to delete \$22.50 of the time payment fee assessed as court costs, leaving a time payment fee of \$2.50. *See King*, 2019 WL 3023513, at *5–6.

We grant counsel’s motions to withdraw; modify the judgment of the trial court in cause no. 24281 to delete the \$2,000 fine and \$22.50 of the time payment

²We note that the legislature has recently repealed subsections (b) and (d) of Section 133.103; transferred Section 133.103 from the Local Government Code to Chapter 102 of the Texas Code of Criminal Procedure; redesignated Section 133.103 as Article 102.030; and amended the language of the statute to delete the provisions that were previously held to be unconstitutional. *See* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 2.54, 4.40(33), 5.01, 5.04, 2019 Tex. Gen. Laws ____ (codified at TEX. CODE CRIM. PROC. ANN. art. 102.030 (West Supp. 2019)) (effective January 1, 2020). The legislature provided that the above changes “apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of this Act.” *Id.* § 5.01. The records in these causes reflect that both offenses occurred prior to January 1, 2020. Therefore, the former statute, rather than the recent revisions, apply to these cases.

fee; modify the judgment of the trial court in cause no. 25007 to delete \$22.50 of the time payment fee; and, as modified, affirm the judgments of the trial court.

PER CURIAM

June 25, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Stretcher, J.,
Wright, S.C.J.,³ and Trotter, J.⁴

Bailey, C.J., and Willson, J., not participating.

³Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.

⁴The Honorable W. Stacy Trotter, 358th District Court, Ector County, Texas, sitting by assignment.