TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00675-CR

Michael Wells, Appellant

v.

The State of Texas, Appellee

FROM THE 33RD DISTRICT COURT OF LLANO COUNTY
NO. CR7497, THE HONORABLE J. ALLAN GARRETT, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

A jury convicted appellant Michael Wells of the state jail felony offense of possession of a penalty group one controlled substance in an amount less than one gram. *See* Tex. Health & Safety Code § 481.115(a), (b). The jury found the enhancement paragraphs true raising the punishment range to that of a third degree felony, *see* Tex. Penal Code § 12.425(a), and sentenced appellant to confinement for ten years in the Texas Department of Criminal Justice and imposed a fine of $2,500. For the following reasons, we modify the trial court's judgment of conviction and withdrawal order and, as modified, affirm the judgment of conviction.

Analysis

Appellant does not challenge the jury's verdicts. His six appellate issues seek to modify the judgment to delete certain assessed fees and court costs, to reflect the correct offense

level, and to correct clerical errors. He also seeks to modify the withdrawal order to comport with the requested modifications to the judgment.

Court-Appointed Attorney's Fees

In his first issue, appellant argues that the evidence is insufficient to support the trial court's decision to order him to pay court-appointed attorney's fees. In the trial court's judgment, signed September 25, 2018, the court included the following finding and order: "Defendant acknowledged his ability to pay and is court ordered to pay court appointed attorney's fees in the amount of $425.00 in periodic payments."

A trial court may order a defendant to pay court-appointed attorney's fees "[i]f the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole the costs of the legal services provided to the defendant." Tex. Code Crim. Proc. art. 26.05(g). A trial court's determination under article 26.05(g) "requires a present determination of financial resources and does not allow speculation about possible future resources." *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). Further, "[a] defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs." Tex. Code Crim. Proc. art. 26.04(p).

Appellant argues that the judgment should be modified to delete the order requiring him to pay court-appointed attorney's fees because the evidence is insufficient to show that he has the ability to pay the assessed attorney's fees, and the State agrees.[1] *See Mayer*

[1] Appellant also argues that the evidence was insufficient to show that the attorney's fees that he was ordered to pay were the actual fees that the county paid, but we need not reach this alternative argument. *See* Tex. R. App. P. 47.1.

v. State, 309 S.W.3d 552, 554, 556–57 (Tex. Crim. App. 2010) (explaining that trial court's order requiring defendant to pay court-appointed attorney's fees may be challenged on ground that evidence is insufficient to support order). Appellant in June 2018 requested a court-appointed attorney in the trial court. Appellant represented that he did not have monthly income and provided information about his monthly expenses and credit card debt. The trial court appointed counsel for appellant, and the record does not contain additional evidence that would support a finding of material change in appellant's financial circumstances. Appellant's trial counsel filed a motion to withdraw in October 2018 and requested that the trial court appoint appellate counsel because appellant "is indigent and cannot afford to employ counsel." The trial court granted trial counsel's motion to withdraw and appointed appellate counsel to represent appellant.

This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Because the evidence is insufficient to support the assessed attorney's fees of $425.00 in the judgment, we sustain appellant's first issue and modify the judgment to delete the attorney's fees. *See Cates*, 402 S.W.3d at 252 (explaining that proper remedy for improperly imposed court-appointed attorney's fees is to reform judgment by deleting court-appointed attorney's fees from order assessing court costs); *Blackard v. State*, No. 03-15-00819-CR, 2016 WL 4506160, at *1–2 (Tex. App.—Austin Aug. 25, 2016, no pet.) (mem. op., not designated for publication) (modifying judgment to delete order to pay court-appointed attorney's fees because evidence was insufficient to support trial court's finding that defendant had ability to pay fees despite finding stated in judgment that defendant acknowledged ability to pay court-appointed attorney's fees in periodic payments).

Restitution

In his second issue, appellant challenges the restitution fee of $180.00 in the judgment. The judgment states that the restitution fee is payable to "DPS Restitution Accounting" and references "LAB# AUS-1609-17483."

Appellant argues that the fee, which is a lab fee, may not be imposed on appellant except as a condition of community supervision, which he did not receive. *See* Tex. Code Crim. Proc. art. 42A.301(b)(18) (authorizing judge as condition of community supervision to require defendant "to reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense"). Appellant also argues that the judgment should be modified to delete the fee because the Department of Public Safety is not a proper party to receive restitution as it was not a victim of the charged offense. *See id.* art. 42.037(a) (authorizing sentencing court to order defendant "to make restitution to any victim of the offense"). For purposes of the restitution statute, a trial court does not have authority to order restitution to anyone other than the victims of the offense for which the defendant is convicted. *Burt v. State*, 445 S.W.3d 752, 758 (Tex. Crim. App. 2014); *see Hanna v. State*, 426 S.W.3d 87, 94 (Tex. Crim. App. 2014) (defining "victim" for purposes of restitution statute as "any person who suffered loss as a direct result of the criminal offense").

On appeal, the State concedes that the Department of Public Safety is not a victim of the charged offense. *See Aguilar v. State*, 279 S.W.3d 350, 353–54 & n.1 (Tex. App.—Austin 2007, no pet.) (observing that DPS "was not the direct recipient of an injury caused by" defendant's crime of possession of controlled substance and, therefore, trial court lacked authority to order defendant to pay lab fees as restitution). The State also concedes that, because

appellant was sentenced to imprisonment and not community supervision, the trial court lacked statutory authority to order the challenged restitution. *See* Tex. Code Crim. Proc. art. 42A.301(b)(18). Accordingly, we sustain appellant's second issue and modify the judgment to delete the restitution of $180.00. *See* Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28.

Degree of Offense

In his third issue, appellant argues that the judgment erroneously describes the level of appellant's offense as "Third Degree Felony" when it should have reflected a state jail felony. *See* Tex. Health & Safety Code § 481.115(b) (explaining that offense of possession of penalty group one controlled substance is state jail felony if amount of controlled substance is less than one gram). The State agrees that the judgment erroneously shows the degree of the offense for which appellant was convicted and that it should be modified to reflect a conviction for a state jail felony.

Because the jury found the two enhancement paragraphs true, appellant was required to be punished for a third degree felony, but the degree of the charged offense did not change. *See* Tex. Penal Code § 12.425(a) ("If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two state jail felonies punishable under Section 12.35(a), on conviction the defendant shall be punished for a felony of the third degree."); *Henderson v. State*, 582 S.W.3d 349, 355–56 (Tex. App.—Amarillo 2018, pet. ref'd) (explaining that defendant's prior felony conviction did not increase degree of current offense "but rather increased only the punishment level that applies to the primary state jail felony offense"); *see also Ford v. State*, 334 S.W.3d 230, 234–35 (Tex. Crim. App. 2011) (explaining that section 12.42 of Texas Penal Code "increases the range of

punishment applicable to the primary offense; it does not increase the severity level or grade of the primary offense"). Accordingly, we sustain appellant's third issue and modify the judgment to reflect that the "Degree of Offense" is "State Jail Felony." *See* Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28.

Clerical Errors in Judgment

In his fourth issue, appellant argues that the judgment contains clerical errors that should be corrected, and the State agrees. The judgment erroneously states "N/A" as to both appellant's plea and the jury's finding as to the second enhancement paragraph. The record reflects that appellant pleaded "not true" to that paragraph and that the jury found the allegation in that paragraph to be "true." Accordingly, we sustain appellant's fourth issue and modify the trial court's judgment to reflect that appellant entered a plea of "not true" to the second enhancement paragraph and that the jury found the allegation in that paragraph to be "true." *See* Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27–28; *Runels v. State*, No. 03-18-00036-CR, 2018 WL 6381537, at *11 (Tex. App.—Austin Dec. 6, 2018, pet. ref'd) (mem. op., not designated for publication) (modifying judgment to correct defendant's plea and jury's finding as to allegation in enhancement paragraph).

Court Costs

In his fifth issue, appellant challenges the facial constitutionality of the statutes authorizing the following assessed court costs: criminal clerk fee, time payment fee (90% only), jury reimbursement fee, indigent defense fee (10% only), and capias/warrant fee in county. Although the judgment reflects total court costs of $535.00 without further itemization, the District Clerk's bill of costs itemizes the charged amounts. Relevant to this appeal, the bill of

costs includes the following: (i) $40.00 for criminal clerk fee; (ii) $22.50 for 90% of time payment fee;[2] (iii) $4.00 for jury reimbursement fee; (iv) $0.20 for 10% of indigent defense fee; and (v) $235.00 for capias/warrant fee in county. Appellant primarily contends that the statutes authorizing the challenged costs violate the Separation of Powers provision of the Texas Constitution because the collected fees are deposited into a general fund without limitation and, thus, are not directed to a legitimate criminal justice purpose.

"Whether a statute is facially constitutional is a question of law that we review de novo." *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). "A facial challenge is an attack on the statute itself as opposed to a particular application." *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). The party bringing a facial challenge to a statute's constitutionality carries the burden to "establish that no set of circumstances exists under which that statute would be valid." *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015); *see Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (explaining that party challenging statute carries burden to establish its unconstitutionality). We presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. *Rodriguez*, 93 S.W.3d at 69; *see Ex parte Morales*, 212 S.W.3d 483, 489 (Tex. App.—Austin 2006, pet. ref'd) (explaining that statute will be upheld if reviewing court can apply reasonable construction that will render statute constitutional and carry out legislative intent).

The Texas Constitution section addressing separation of powers provides that no branch of government "shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. II, § 1. "Two types of

[2] Three itemized charges appear on the bill of costs for the time payment fee as follows: (i) $12.50 (50%); (ii) $2.50 (10%); and (iii) $10.00 (40%). Appellant does not challenge the charge of $2.50 for the time payment fee (10%).

constitutionally-permissible court costs" that do not violate the separation of powers provision are: "(1) those that reimburse criminal justice expenses incurred in connection with the defendant's particular criminal prosecution, and (2) those that are to be expended to offset future criminal justice costs." *Allen v. State*, __ S.W.3d __, No. PD-1042-18, 2019 Tex. Crim. App. LEXIS 1172, *17 (Tex. Crim. App. Nov. 20, 2019); *see Johnson v. State*, 573 S.W.3d 328, 333–34 (Tex. App.—Houston [14th Dist.] 2019, pet. filed) (recognizing two types of court costs that have been found to pass constitutional muster—"(1) statutes under which a court recoups expenditures necessary or incidental to criminal prosecutions; and (2) statutes providing for an allocation of the costs to be expended for any legitimate criminal justice purpose").

"The courts are delegated a power more properly attached to the executive branch if a statute turns the courts into 'tax gatherers,' but the collection of fees in criminal cases is a part of the judicial function 'if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes.'" *Salinas*, 523 S.W.3d at 107 (quoting *Peraza*, 467 S.W.3d at 517). Concerning costs that are expended to offset future criminal justice costs, "[w]hat constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statute/case-by-case basis." *Id.* (citing *Peraza*, 467 S.W.3d at 517–18); *see Allen*, 2019 Tex. Crim. App. LEXIS 1172, at *17 (explaining that "*Salinas* solely addressed the second category of court costs—those to be expended in the future to offset the general costs of running the criminal justice system"). "And the answer to that question is determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose." *Salinas*, 523 S.W.3d at 107.

Guided by these principles, we turn to the challenged court costs.

Criminal Clerk Fee

Appellant argues that the statute authorizing the criminal clerk fee is facially unconstitutional because former article 102.005(a) of the Texas Code of Criminal Procedure is not statutorily directed to a "particular destination" and cites a study by the Office of Court Administration to support his position that the clerk fee is directed to a county general fund and, thus, that it is not directed to a legitimate criminal justice purpose. *See* former Tex. Code Crim. Proc. art. 102.005(a).[3] Former article 102.005(a) requires a defendant convicted of an offense in district court to pay a fee of $40.00 for clerk services. *Id.*

Courts that have addressed similar challenges to the facial constitutionality of former article 102.005(a) have concluded that the clerk fee is constitutional. *See Johnson*, 573 S.W.3d at 336–37 (collecting cases in which courts have held that clerk fee was constitutional). In *Johnson*, our sister court concluded that the clerk fee is "not an impermissible tax collected by the judiciary" and that it falls within the first type of court costs that have been found to pass constitutional muster because "it is collected to recoup costs expended in the trial of the case." *See id.*; *see also Allen*, 2019 Tex. Crim. App. LEXIS 1172, at *19 (holding that "reimbursement-based court costs pose no separation of powers problem, regardless of where the funds are directed once received"). Following this reasoning, we similarly conclude that the statute authorizing the clerk fee is not facially unconstitutional.

[3] In 2019, the legislature addressed the consolidation, allocation, classification and repeal of certain criminal court costs and other related costs, fees, and fines. *See generally* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, 2019 Tex. Gen. Laws 3981 (effective January 1, 2020). Article 102.005 was among the repealed provisions. *See id.* at 3992. An offense committed before the effective date of the Act, however, is governed by the law that was in effect on the date the offense was committed. *Id.* at 4035. Thus, we cite the version of article 102.005(a) as it existed in September 2016. *See* Act of May 28, 2005, 79th Leg., R.S., ch. 804, § 2, 2005 Tex. Gen. Laws 2775 (repealed 2019).

90% of Time Payment Fee

Appellant argues that 90% of the time payment fee is facially unconstitutional because the applicable statutory provisions—former Texas Local Government Code section 133.103(b) and (d)—provide for this percentage of the fee to be deposited into a general fund, at either the state or local level, without limitation. *See* former Tex. Loc. Gov't Code § 133.103(b) (requiring 50% of fees collected under section to be sent to comptroller for deposit "to the credit of the general revenue fund"), (d) (requiring remainder of fees collected under section for deposit "in the general revenue account of the county or municipality").[4] This Court has addressed the facial constitutionality of these statutory provisions and concluded that they are facially unconstitutional because they violate the Texas Constitution's separation of powers provision. *See Dulin v. State*, 583 S.W.3d 351, 353 (Tex. App.—Austin 2019, pet. granted). We follow this Court's holding in *Dulin* that former subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional. *Id.*; *see also Ovalle v. State*, 592 S.W.3d 615, 617–18 (Tex. App.—Dallas 2020, pet. filed) (following cases with similar reasoning to conclude that subsections (b) and (d) of former section 133.103 of Texas Local Government Code are facially unconstitutional). Thus, we conclude that the assessed court costs in this case should be reduced by 90% of the time payment fee, which amounts to $22.50.

[4] Appellant does not challenge former section 133.103(c) of the Texas Local Government Code, which addressed the remaining 10% of the time payment fee. *See* Act of June 1, 2003, 78th Leg., R.S., ch. 209, § 62(a), 2003 Tex. Gen. Laws 979, 996–97 (requiring 10% of fees collected under section to be deposited in general fund of county or municipality "for the purpose of improving the efficiency of the administration of justice in the county or municipality"). Effective January 1, 2020, the substance of section 133.103 has been transferred to article 102.030 of the Texas Code of Criminal Procedure, but the former law applies to this case. *See* 2019 Tex. Gen. Laws at 4010, 4035.

Jury Reimbursement Fee

Appellant argues that the statute authorizing the jury reimbursement fee is facially unconstitutional and cites the Texas Comptroller's website to support his position that the fee in practice goes into a general revenue account. The applicable statutory provision requires a convicted defendant to pay as a court cost a $4.00 fee "to be used to reimburse counties for the cost of jury services." *See* former Tex. Code Crim. Proc. art. 102.0045;[5] *see also* Tex. Gov't Code § 61.0015 (addressing reimbursement of counties for jury service payments).

Courts also have addressed similar facial constitutional challenges to the one that appellant raises about this $4.00 fee and concluded that the fee is constitutional. *See Johnson*, 573 S.W.3d at 337 (holding that article 102.0045(a) is not facially unconstitutional); *Jackson v. State*, Nos. 10-17-00333-CR & 10-17-00334-CR, 2020 Tex. App. LEXIS 1349, at *5 (Tex. App.—Waco Feb. 19, 2020, pet. filed) (mem. op., not designated for publication) (collecting cases that have upheld facial constitutionality of jury fee). Following the reasoning in those cases, we similarly conclude that the statute authorizing the jury reimbursement fee is not facially unconstitutional.

10% of Indigent Defense Fee

As to the indigent defense fee of $2.00, appellant does not challenge 90% of the fee, stating that portion "appears to go to a legitimate criminal justice purpose in more than name only." *See* former Tex. Local Gov't Code § 133.107(a) (requiring convicted defendant to pay as

[5] Article 102.0045 of the Texas Code of Criminal Procedure was among the repealed provisions in 2019. *See* 2019 Tex. Gen. Laws at 3992. We cite the version of article 102.0045 as it existed in September 2016. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1360, § 5, 2005 Tex. Gen. Laws 4255, 4256 (repealed 2019).

court cost a $2.00 fee "to be used to fund indigent defense representation").[6] Appellant argues the statute authorizing 10% of the indigent defense fee, however, is facially unconstitutional because it "may be retained by the county and deposited into [a] general fund."

Courts have addressed constitutional challenges to the statute authorizing the $2.00 fee, including challenges similar to the one that appellant raises about 10% of the fee, and concluded that the statute is facially constitutional. *See Johnson*, 573 S.W.3d at 337–38 (holding that former article 133.107 is not facially unconstitutional and that it does not violate Texas Constitution's separation of powers provision and explaining that "inquiry focuses only on what the statute says about intended use of funds, not how the funds are actually used"); *see also Salinas*, 523 S.W.3d at 107; *Jackson*, 2020 Tex. App. LEXIS 1349, at *5–6 (collecting cases that have upheld facial constitutionality of indigent defense fee). Following the reasoning in those cases, we similarly conclude that the statute authorizing the indigent defense fee, including the 10% that appellant challenges, is not facially unconstitutional.

Capias/Warrant Fee in County

Appellant argues that the statute authorizing the capias/warrant fee is facially unconstitutional because the fee is deposited into a general fund. The applicable statute is article 102.011 of the Texas Code of Criminal Procedure, and it requires a convicted defendant to pay "fees for services performed in the case by a peace officer," including costs to execute or process

[6] Section 133.107 of the Texas Local Government Code was among the repealed provisions in 2019. *See* 2019 Tex. Gen. Laws at 3992. We cite the version of section 133.107 as it existed in September 2016. *See* Act of May 27, 2007, 80th Leg., R.S., ch. 1014, § 6, 2007 Tex. Gen. Laws 3540, 3542 (repealed 2019).

an issued arrest warrant or capias. Tex. Code Crim. Proc. art. 102.011(a)(2).[7] Because these fees fall within the first category of court costs—"those that reimburse criminal justice expenses incurred in connection with the defendant's particular criminal prosecution," they "pose no separation of powers problem, regardless of where the funds are directed once received." *See Allen*, 2019 Tex. Crim. App. LEXIS 1172, at *17, 19; *see also Lopez v. State*, 565 S.W.3d 879, 890–91 (Tex. App.—Houston [14th Dist.] 2018, pet. ref'd) (concluding that sheriff fee "for services performed" under article 102.011 is facially constitutional). Following this reasoning, we conclude that the statute authorizing the capias/warrant fee is not facially unconstitutional.

Conclusion on Assessed Court Costs

We sustain appellant's fifth issue to the extent that he challenges the facial constitutionality of subsections (b) and (d) of former section 133.103 of the Texas Local Government Code and otherwise overrule his fifth issue.

Withdrawal Order

In his sixth issue, appellant argues that the withdrawal order must be modified to conform with this Court's modifications, if any, to the trial court's judgment of conviction. The withdrawal order requires payment deductions from appellant's inmate trust account until release or the total sum of $3,640.00 is paid. *See* Tex. Gov't Code § 501.014(e) (authorizing amounts to be withdrawn from inmate's account based on court order).

[7] The legislature amended article 102.011 of the Texas Code of Criminal Procedure in 2019. *See* 2019 Tex. Gen. Laws at 4001–03. We cite the version of article 102.011 as it existed in September 2016. *See* Act of May 11, 2009, 81st Leg., R.S., ch. 87, § 6.008, 2009 Tex. Gen. Laws 208, 231 (amended 2019).

The State agrees that, should this Court modify the trial court's judgment, the withdrawal order should be modified accordingly. Thus, we sustain appellant's sixth issue and modify the withdrawal order to reflect the total sum of $3,012.50, the amount remaining after the deletion of $627.50 from $3,640.00.[8] *See Hill v. State*, No. 06-12-00163-CR, 2013 WL 1750902, at *5 (Tex. App.—Texarkana Apr. 24, 2013, no pet.) (mem. op., not designated for publication) (concluding that appellate court had jurisdiction to modify trial court's withdrawal order and modifying amount of court costs in order).

Conclusion

We modify the judgment and withdrawal order as stated above and, as modified, affirm the trial court's judgment of conviction.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Kelly

Modified and, As Modified, Affirmed

Filed: June 4, 2020

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[8] The amount to be deleted from the total sum reflected on the withdrawal order is based on the deletion of $425.00 (court-appointed attorney's fees), $180.00 (restitution), and $22.50 (90% of time payment fee).