



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-19-00269-CR

MICHAEL DEON WESLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 402nd District Court
Wood County, Texas
Trial Court No. 23,208-2017

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

Michael Deon Wesley pled true to allegations that he had violated the terms and conditions of his deferred adjudication community supervision. The trial court adjudicated him guilty of the offense of possession with intent to deliver a Penalty Group I controlled substance in an amount more than four, but less than 200, grams and sentenced him to twenty years' imprisonment. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d). Wesley now appeals, complaining that the \$1,000.00 fine and \$180.00 restitution fee included in the final judgment were not orally decreed by the trial court at sentencing and, therefore, were improperly assessed. We agree with Wesley, modify the trial court's judgment to strike the fine and restitution, and affirm the judgment, as modified.

I. Procedural History

In August 2017, Wesley pled guilty to possession with intent to deliver a Penalty Group I Controlled Substance in an amount more than four, but less than 200, grams. Pursuant to a plea-bargain agreement, the trial court accepted Wesley's guilty plea but deferred a finding of guilt and placed Wesley on community supervision. The plea agreement sentencing recommendation included a \$1,000.00 fine, various court costs, and a \$180.00 restitution fee to the Texas Department of Public Safety (DPS) for testing Wesley's illegal drugs. The trial court ordered Wesley to pay these sums as a term and condition of his community supervision.

On July 23, 2019, the State moved to adjudicate Wesley's guilt. The State alleged that Wesley had violated the terms and conditions of his community supervision in several respects, including that he failed to make regular payments towards his court costs, attorney fees, \$1,000.00

fine, and various other fees, including the DPS laboratory fee. The trial court held a hearing on the State's motion, and Wesley pled true to all allegations. The court found that the allegations were true, adjudicated Wesley guilty of possession with intent to deliver as charged in the indictment, and sentenced him to twenty years' imprisonment. However, the trial court did not pronounce any fine or restitution fee at the time of sentencing.

II. The Fine Must Be Deleted

Wesley's situation is controlled by the Texas Court of Criminal Appeals' decision in *Taylor v. State*, 131 S.W.3d 497 (Tex. Crim. App. 2004). In *Taylor*, the defendant was placed on deferred adjudication community supervision and assessed a fine of \$300.00. *Id.* at 498. When the trial court later revoked Taylor's community supervision, adjudicated him guilty of the offense charged, and sentenced him, it did not orally pronounce a fine. *Id.* Nevertheless, the written judgment included a \$300.00 fine. *Id.* at 499.

The Eastland Court of Appeals deleted the fine from Taylor's judgment, and the Texas Court of Criminal Appeals affirmed. *Id.* The Texas Court of Criminal Appeals held that when a defendant is placed on deferred adjudication community supervision, "there is no finding of guilt," "no final conviction," and "[t]he case is 'temporarily stilled and the accused . . . [is] permitted an opportunity to demonstrate his capacity for prescribed good behavior during a specified period.'" *Id.* at 500 (quoting *Ex parte Hernandez*, 705 S.W.2d 700, 702 (Tex. Crim. App. 1986); *McIntyre v. State*, 587 S.W.2d 413, 417 (Tex. Crim. App. 1979)). The Texas Court of Criminal Appeals reasoned that because a defendant placed on deferred adjudication community supervision has not been found guilty, convicted, or sentenced, when the trial court subsequently revokes the

defendant's community supervision and adjudicates him guilty, his sentence "must be pronounced orally in his presence." *Id.* In addition, the Texas Court of Criminal Appeals has held that "[w]hen there is a conflict between the oral pronouncement of sentence in open court and the sentence set out in the written judgment, the oral pronouncement controls." *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003).

In this case, the trial court adjudicated Wesley guilty and imposed a sentence of twenty years' imprisonment, but it did not orally pronounce a fine at sentencing; nevertheless, the written judgment included a fine. Therefore, under *Taylor* and *Thompson*, the \$1,000.00 fine listed in the written judgment must be deleted. *See Taylor*, 131 S.W.3d at 502; *Thompson*, 108 S.W.3d at 290.

III. The DPS Reimbursement is Likewise Not Authorized

Similarly, when the trial court adjudicated and sentenced Wesley, it did not orally impose a restitution fee of \$180.00, even though it originally assessed that fee in the initial order placing Wesley on deferred adjudication community supervision. On that basis, the restitution fee was improperly included in the judgment sentencing Wesley. *See Freeman v. State*, 554 S.W.3d 816, 817 (Tex. App.—Waco 2018, no pet.) (upon Freeman's adjudication of guilt, "the trial court did not orally pronounce an order for restitution," even though that \$180.00 restitution to DPS was assessed in the order placing Freeman on deferred adjudication community supervision; court of appeals held that the oral sentencing controlled and struck the restitution fee from the judgment). Moreover, even if the trial court had imposed the fee at sentencing, Wesley would have been entitled to have it deleted because "[a] trial court has no authority to order a defendant to reimburse the Texas Department of Public Safety for lab fees as a part of his sentence, and such fees are not

properly the subject of a restitution order under article 42.037(a) of the Texas Code of Criminal Procedure.” *Jackson v. State*, 562 S.W.3d 717, 724 (Tex. App.—Amarillo 2018, no pet.) (citing *Aguilar v. State*, 279 S.W.3d 350, 353 (Tex. App.—Austin 2007, no pet.)).

In *Jackson*, the appellant was sentenced to eight years’ confinement; the judgment imposed several costs, one of which was a \$180.00 restitution fee, “presumably for the cost of testing the controlled substance the subject of the State’s prosecution.” *Jackson*, 562 S.W.3d at 724. The Amarillo Court of Appeals found that fee unauthorized because “such fees are not properly the subject of a restitution order under article 42.037(a) of the Texas Code of Criminal Procedure.” *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 42.037(a) (Supp.)). The court in *Aguilar*, cited by *Jackson*, pointed out that restitution, as defined by Article 42.037(a), may only be ordered to a victim. *Aguilar v. State*, 279 S.W.3d 350, 352 (Tex. App.—Austin 2007, no pet.). “The expenses incurred by the Department of Public Safety in testing the methamphetamine found in Aguilar’s possession were not sustained as a result of being the victim of a crime.” *Id.* (citing *Uresti v. State*, 98 S.W.3d 321, 338 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (trial court erred to assess \$4,000.00 in investigative expenses incurred by Houston Police Department as restitution inasmuch as the Department “was not the direct recipient of an injury caused by appellant’s crime”)); *see also Cabala v. State*, 6 S.W.3d 543, 546 (Tex. Crim. App. 1999) (“This Court has concluded that the focus of restitution orders are limited to the individuals alleged and proven to be the victims of the charged offense”). Consequently, the judgment is further modified to delete any obligation to pay \$180.00 in restitution for DPS laboratory fees.

IV. Conclusion

For the foregoing reasons, we modify the judgment by deleting the \$1,000.00 fine and the \$180.00 restitution fee.

We affirm the trial court's judgment and sentence, as modified.

Ralph K. Burgess
Justice

Date Submitted: May 20, 2020
Date Decided: June 25, 2020

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