



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

No. 06-20-00017-CR

QUANDATEZ BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 114th District Court
Smith County, Texas
Trial Court No. 114-1750-17

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

MEMORANDUM OPINION

After waiving his right to a jury trial, Quandatez Brown pled guilty to the felony offense of aggravated assault with a deadly weapon. The trial court¹ deferred a finding of guilt and placed Brown on deferred adjudication community supervision for a period of ten years. Brown was subsequently adjudicated guilty and sentenced to ten years' confinement in prison. Brown appeals, maintaining that the time payment fee assessed against him in the bill of costs was unconstitutional. We agree and sustain Brown's sole point of error.

I. Background

In December 2017, Brown was indicted for aggravated assault with a deadly weapon.² On March 12, 2018, Brown pled guilty to the charged offense. The trial court deferred a finding of guilt and placed Brown on deferred adjudication community supervision for a period of ten years. The trial court ordered Brown to comply with a series of conditions, including that Brown avoid all contact with the victim, Robert Avery. Brown was also assigned to intensive supervision for a period of six months. On March 13, 2018, the State filed a violation report, alleging that Brown had violated a condition of his community supervision by testing positive for marihuana on the date of his original sentencing. The trial court modified Brown's community supervision

¹Originally appealed to the Twelfth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001. We follow the precedent of the Twelfth Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

²Brown was originally indicted for aggravated assault with a deadly weapon when he "intentionally and knowingly threaten[ed] Robert Avery with imminent bodily injury by pointing a knife toward [him] and telling [him] to 'get out of the way,' and did then and there use or exhibit a deadly weapon, namely [a] firearm, during the commission of the assault." The indictment against Brown was later amended, deleting the designation of a "firearm" as the deadly weapon and replacing it with a "knife."

conditions by requiring him to spend ten days in jail. After Brown was released from jail, the trial court continued him on deferred adjudication community supervision.

On March 21, 2018, the trial court entered an order amending the conditions of Brown's community supervision, requiring him to pay \$850.00 in restitution and submit to an evaluation to determine the appropriateness of substance abuse treatment and, if it was necessary, to submit to that treatment. On May 9, 2018, Brown's conditions of supervision were again amended, requiring Brown to report to level II intensive supervision biweekly or as directed by his community supervision officer. After complying with the terms of intensive supervision, on September 12, 2018, the trial court placed Brown back on regular supervision.

Yet, on February 15, 2019, the State filed a motion to adjudicate Brown's guilt, alleging, among other violations, that Brown tested positive for marihuana use, possessed marihuana, failed to attend an anger management program, and failed to pay his supervision fees.³ On May 13, 2019, the trial court held a hearing on the State's motion to adjudicate and then entered an order denying the State's request. Instead, it amended Brown's conditions of community supervision, requiring Brown to submit to a mental health evaluation and attend an outpatient treatment program.

On July 1, 2019, the State filed another violation report against Brown, alleging that he had been unsuccessfully discharged from the outpatient treatment program. On July 17, 2019, the State filed another motion to adjudicate Brown, maintaining, among other things, that Brown failed to submit to a mental health evaluation and failed to abide by the rules of the drug treatment

³On April 17, 2019, the State filed its first amended motion to adjudicate guilt, alleging additional violations.

program. Following a hearing on August 26, 2019, the trial court again denied the State's motion to adjudicate and placed Brown on intensive supervision for a period of one year.

On November 15, 2019, the State again filed a motion to adjudicate Brown's guilt, alleging, among other things, that he possessed and used marihuana. On December 13, 2019, the trial court held a hearing on the State's motion. Brown pled true to several of the State's allegations against him, and the trial court adjudicated Brown guilty of aggravated assault with a deadly weapon. Brown was sentenced to ten years' confinement in prison. In the bill of costs, Brown was assessed, among other things, a time payment fee in the amount of \$25.00. Brown appeals, maintaining that the time payment fee was unconstitutional. As a consequence, Brown contends that the time payment fee must be deleted from the costs assessed against him. We agree.

II. Discussion

Texas courts have consistently held that a challenge to the constitutionality of court costs may be raised for the first time on appeal. *London v. State*, 490 S.W.3d 503, 506–07 (Tex. Crim. App. 2016) (citing *Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Landers v. State*, 402 S.W.3d 252, 255 (Tex. Crim. App. 2013); *Wiley v. State*, 410 S.W.3d 313, 321 (Tex. Crim. App. 2013)). In *London*, the Texas Court of Criminal Appeals stated, “As we explained in *Johnson*, an appellant may generally challenge the imposition of even mandatory court costs for the first time on direct appeal when those costs are not imposed in open court and the judgment does not contain an itemization of the imposed costs.” *London*, 490 S.W.3d at 507 (citing *Johnson*, 423 S.W.3d at 390–91). In this case, the trial court did not orally pronounce the imposition of court costs and did not include an itemization of the costs in its judgment against Brown.

Whether a statute is constitutional is a question we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When we resolve challenges to “the constitutionality of a statute, we must presume a statute is valid and that the legislature did not act unreasonably or arbitrarily in enacting it.” *Belcher v. State*, 474 S.W.3d 840, 843 (Tex. App—Tyler 2015, no pet.) (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)). We must uphold the statute if we can apply a reasonable construction that will render it constitutional. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. [Panel Op.] 1979).

It is the appellant’s burden to show there has been a due process violation. *Belcher*, 474 S.W.3d at 844. “[T]o prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances.” *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). Courts are to “consider the statute only as it is written, rather than how it operates in practice.” *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011); *Karenev v. State*, 281 S.W.3d 428, 441 (Tex. Crim. App. 2009) (Cochran, J., concurring) (holding that facial attack “can and must be made without reference to evidence”).

Pursuant to Section 133.103(a) of the Texas Local Government Code, defendants convicted of a felony or misdemeanor shall pay, in addition to all other costs, a time payment fee of \$25.00 if the defendant pays “any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.” Act of June 2, 2003, 78th Leg., R.S., ch. 209, § 62, sec. 133.103, 2003 Tex. Gen. Laws 979, 996–97 (amended 2005, 2011, 2013, 2019) (current version at TEX. CODE CRIM. PROC. art. 102.030). The statute allots the fee between three sources, directing the treasurer to (1) send fifty percent of the fee to the comptroller who shall deposit it to the credit of the general revenue fund, (2) deposit forty

percent of the fee in the general revenue account of the county or municipality, and (3) deposit the remaining ten percent of the fees in the general fund of the county or municipality “for purpose of improving the efficiency of the administration of justice.”⁴

Brown does not challenge the ten percent of the fee allocated under former Section 133.103(c).⁵ Thus, we will consider Brown’s challenge to the remaining ninety percent of allocated fee that is directed to the general funds and his argument that the assessment of fees according to subsections (b) and (d) violated the separation-of-powers provision in the Texas Constitution, prohibiting one branch of government from assuming or delegating a power more properly attached to another branch. TEX. CONST. art. II, § 1; *Lo*, 424 S.W.3d at 28. A court’s assessment of court costs in a criminal case violates the separation-of-powers clause when a court is delegated the executive branch’s power to collect taxes. *Salinas v. State*, 523 S.W.3d 103, 106–07 (Tex. Crim. App. 2017). If, for example, a statute contains a provision by which courts are turned into “tax gatherers,” then the effect of the statute is to delegate to the courts a power more properly attached to the executive branch. *Id.* at 107.

⁴The Legislature recently repealed Section 133.103, subsections (b) and (d), of the Local Government Code, Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 4.04, 2019 Tex. Sess. Law Serv. 3982, 4034–35, and transferred Section 133.103 from the Local Government Code to Chapter 102 of the Texas Code of Criminal Procedure; re-designated 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, Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 2.54, 2019 Tex. Sess. Law Serv. 3982, 4010–11 (codified at TEX. CODE CRIM. PROC. art. 102.030). The Legislature provided that the changes “apply only to a cost, fee, or fine on conviction for an offense committed on or after [January 1, 2020].” Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01, 2019 Tex. Sess. Law Serv. 3982, 4035–36. The record in this case shows that the offense occurred prior to January 1, 2020. Therefore, the former statute, rather than the revisions, applies in this case.

⁵Brown states, “This Court should follow *Johnson v. State* and find that §§ 133.103(b) and (d) are facially unconstitutional.”

Yet, a court’s assessment of costs is a proper judicial function when “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 purposes.” *Id.* (quoting *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015)). Similarly, a reviewing court must determine whether the fee is a disguised tax on a criminal defendant, which is unconstitutional. *See Casas v. State*, 524 S.W.3d 921, 925–27 (Tex. App.—Fort Worth 2017, no pet.). “What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statute basis.” *Salinas*, 523 S.W.3d at 107. “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 judicial purpose.” *Id.*

In *Salinas*, the Texas Court of Criminal Appeals held that certain fees were unconstitutional because the collected fees were sent into general revenue and were not sufficiently related to the criminal justice system. *Id.* at 107–09. The Fourteenth Court of Appeals cited *Salinas* in *Johnson* when it determined that former Section 133.103, subsections (b) and (d), were unconstitutional. *See Johnson v. State*, 573 S.W.3d 328, 340 (Tex. App. [14th Dist.] 2019, pet. filed). Because subsections (b) and (d) directed that the funds be collected and sent to a general revenue fund without limitations or restrictions, the court determined that the time payment fee was little more than a late fee that had nothing to do with reimbursing the county or State for the defendant’s criminal trial or criminal resources generally. *Id.* Based on that finding, the court concluded that subsections (b) and (d) were unconstitutional. *Id.* Relying on the reasoning of *Salinas* and *Johnson*, other courts of appeals have reached the same conclusions. *See Dulin v. State*, 583 S.W.3d 351 (Tex. App.—Austin 2019, pet. granted); *Kremplewski v. State*, No. 01-19-00033-CR,

2019 WL 3720627 (Tex. App.—Houston [1st Dist.] Aug. 8, 2019, pet. filed); *King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *1 (Tex. App.—Eastland, July 11, 2019, pet. filed) (mem. op., not designated for publication).

We sustain Brown’s sole point of error. We agree with and adopt the reasoning of our sister court in *Johnson*. See *Johnson*, 573 S.W.3d at 340. We conclude that in regard to the collection and allocation of funds under subsections (b) and (d), which were allocated “to a general revenue fund without limitations or restrictions,” the statute is facially unconstitutional. See *id.* As explained in *Johnson*, this holding does not apply to the ten percent allocation specified in former Section 133.103(c). See *id.* Accordingly, we sustain Brown’s sole point of error and modify the trial court’s judgment by changing the time payment fee from \$25.00 to \$2.50.

III. Conclusion

We modify the trial court’s judgment and bill of costs by changing the time payment fee from \$25.00 to \$2.50. We affirm the judgment, as modified.

Ralph K. Burgess
Justice

Date Submitted: July 2, 2020
Date Decided: July 9, 2020

Do Not Publish