



In The
Eleventh Court of Appeals

No. 11-10-00183-CR

KERVIN ROBERTS, Appellant

V.

STATE OF TEXAS, Appellee

**On Appeal from the 19th District Court
McLennan County, Texas
Trial Court Cause No. 2010-214-C1**

MEMORANDUM OPINION

Kervin Roberts appeals his conviction by a jury of the offense of robbery. After finding an enhancement paragraph true, the jury assessed his punishment at sixty years in the Texas Department of Criminal Justice, Institutional Division. He contends in two issues that the trial court erred by ordering him to pay court costs, including the fees of his court-appointed attorney, and that the trial court denied him equal protection of the law by failing to order the State to turn over to him the criminal history of the jury panel members. We modify and affirm.

Roberts urges in Issue One that the trial court erred by ordering him to pay all of the costs of court, including the fees for his court-appointed counsel, even though the court found him to be indigent. He asserts that the evidence is insufficient to support the trial court's order for him to pay the court costs, which included the cost of his court-appointed investigator and his court-appointed attorney. In connection with his request for the appointment of counsel, Roberts

declared that his total monthly income consisted of \$691 supplemental security income (SSI) and \$62 in food stamps and that his monthly expenses were \$542. The State concedes that the evidence fails to support the trial court's order that Roberts pay all of the costs of court.

On the same date that the trial court ordered that Roberts pay all of the court costs, including the costs of his court-appointed investigator and attorney, the court filed a directive to the Inmate Trust Account of the Texas Department of Criminal Justice, in which the court notes the inability of Roberts to pay on that date and orders the fund to pay funds toward the costs of court by withdrawing 20% of the first month's deposit that Roberts has to the fund, or the total amount due, whichever is less, and 10% of any subsequent month's deposit, or the total amount due, whichever is less. Payments would continue until the amount of costs are paid or until Roberts is released from confinement.

Article 26.05 of the Texas Code of Criminal Procedure provides that, if the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including the expenses and costs, the court shall order the defendant to pay, if convicted, as court costs the amount that it finds the defendant is able to pay. TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2011). We construe the trial court's order to be that, while the defendant might lack other resources to reimburse the cost of his court-appointed attorney and investigator, he could at least make reimbursement from a small percentage of any funds he might have in his inmate trust account while incarcerated. *See Cates v. State*, No. 11-10-00187-CR, 2012 WL 2159411 (Tex. App.—Eastland June 14, 2012, no pet. h.) (mem. op., not designated for publication). The evidence supports the trial court's order because it is undisputed that Roberts will be incarcerated for a period of time and that, if there were any funds in his inmate trust account, a small portion of the account would be available to reimburse all or a portion of the expenses of his court-appointed investigator and attorney. *See id.*

We agree with the State and Roberts that there is insufficient evidence to support an order that he pay the court costs, except for the payments from his inmate trust fund. To the extent that the trial court's judgment might order Roberts to pay the full amount of the court costs, if any are remaining due after Roberts is released, we modify the judgment to limit his liability for the court costs to the payments made through his inmate trust fund while he is incarcerated, as set forth in the trial court's communication with the Inmate Trust Account of the Department of Criminal Justice.

Roberts relies upon the case of *Morris v. State*, No. 10-10-00158-CR, 2010 WL 4983491 (Tex. App.—Waco Dec. 8, 2010, no pet.) (mem. op., not designated for publication). In *Morris*, the court deleted the order that required the defendant to pay attorney’s and investigator’s fees, even though Morris was indigent. 2010 WL 4983491. However, in *Morris*, there was no evidence of a communication to the inmate trust account from the trial court ordering it to withdraw a small percentage of the deposits in the defendant’s inmate trust account for payment of all or a portion of the attorney’s or investigator’s fees. We agree that *Morris* requires us to modify the judgment so that Roberts is not required to pay the full amount of the court costs except as might be paid from the inmate trust account while he is incarcerated, but we find that it is not inconsistent with *Morris* for us to modify the judgment in this case to require payments from a small percentage of any funds available in Roberts’s inmate trust account during the time that he is incarcerated, in accordance with the trial court’s order to the Inmate Trust Account of the Texas Department of Criminal Justice.

Because this case was transferred from the Tenth Court of Appeals, Roberts refers us to Rule 41.3 of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 41.3. Rule 41.3 provides that we, as a transferee court, must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court’s decision otherwise would have been inconsistent with the precedent of the transferor court. Because, in *Morris*, there was no order by the trial court to the inmate trust account providing for payment of fees from a small percentage of the funds available to the defendant while incarcerated, the opinion in this case is not inconsistent with the precedent of *Morris*. We overrule Issue One.

Roberts urges in Issue Two that the trial court denied him equal protection of the law by failing to order the State to turn over the criminal history of the jury panel members. In his discussion of the issue, he also appears to contend that the State’s failure to provide him with the information is a violation of his rights to due process. The State was able to obtain the criminal history of the prospective jury panel. Roberts, who was indigent, requested that he have access to the information acquired by the State. The trial court denied Roberts access to the information obtained by the State, requiring only that the State disclose which jurors, if any, were legally disqualified.

As we have noted, Roberts appears to contend on appeal that the denial of his motion to obtain the information constitutes a violation of his rights under the Equal Protection Clause or the Due Process Clause of the United States Constitution, or both. As a prerequisite to

presenting a claim for appellate review, Roberts must show that his request stated the grounds for the ruling that he sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a).

The Texas Court of Criminal Appeals has held that the State has no obligation to make information in its possession with respect to prospective jurors available to the defense. *Armstrong v. State*, 897 S.W.2d 361, 365 (Tex. Crim. App. 1995); *Martin v. State*, 577 S.W.2d 490, 491 (Tex. Crim. App. 1979). Roberts's request for the jury information possessed by the State did not make the trial court aware that he was basing his request on the Equal Protection Clause or the Due Process Clause of the United States Constitution, or both. Given the fact that the Texas Court of Criminal Appeals has held that such information is not discoverable, a mere request for the information without putting the trial court on notice that the request is based upon a denial of the defendant's rights under the Equal Protection Clause or the Due Process Clause of the United States Constitution, or both, does not state the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint. We do not find the grounds to be apparent from the context.

In urging that he has preserved this error, Roberts relies on the opinions in the cases of *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992), and *Lewis v. State*, 191 S.W.3d 335, 338 (Tex. App.—Waco 2006, pet. ref'd). We find both cases distinguishable because neither involves an appellate complaint of a violation of equal protection or due process in the trial court's denial of a discovery motion where the defendant did not make the trial court aware that the basis for the discovery was the Equal Protection Clause or the Due Process Clause of the United States Constitution, or both. We overrule Issue Two.

We modify the judgment to limit Roberts's liability for court costs as set out above. As modified, the judgment of the trial court is affirmed.

July 19, 2012

PER CURIAM

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

Panel consists of: Wright, C.J.,
McCall, J., and Hill.¹

¹John G. Hill, Former Chief Justice, Court of Appeals, 2nd District of Texas at Fort Worth, sitting by assignment.