Opinion issued June 27, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-13-00441-CR

JOSHUA LONDON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1367861

O P I N I O N

The sole issue in this appeal is an as-applied constitutional challenge to the imposition of statutory court costs for witness subpoenas in a criminal case. The appellant contends that his constitutional rights to compulsory process to secure

favorable witnesses and to confront adverse witnesses[1] were violated by a statute which requires a defendant, upon conviction of a crime, to pay "$5 for summoning a witness."[2]

The appellant pleaded guilty before trial. He has failed to identify any witness he would have called but for the prospect of postjudgment liability for a $5 per witness fee. He also has failed to demonstrate how he was denied the opportunity to confront witnesses against him. As such, we conclude no constitutional harm has been shown by the assessment of court costs, as applied in this case. Accordingly, we affirm.

I

Appellant Joshua London was arrested for possession of cocaine. The trial court found that he was unable to afford an attorney and appointed counsel to represent him. London never attempted to subpoena or present any witnesses. Instead, on the eve of trial, he pleaded guilty to possession of a controlled substance in an amount between one and four grams,[3] without an agreed recommendation as to punishment.

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1 U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

2 TEX. CODE CRIM. PROC. art. 102.011(a)(3).

3 TEX. HEALTH & SAFETY CODE §§ 481.102(3)(D), 481.112(c).

The trial court sentenced him to 25 years in prison and ordered him to pay $329 in court costs. The judgment did not contain any itemization of how these costs were calculated.

London filed a notice of appeal. The district clerk provided him with a bill of costs that described each component of his court costs. These included $35 in fees for summoning seven witnesses for the State and paying for the expense of serving subpoenas, listed as "Summoning Witness/Mileage."[4] Because the statutory fee for each of the seven witnesses was $5, it does not appear any fees actually were assessed for mileage.

II

On appeal, London challenges the imposition of statutory court costs for witness subpoenas pursuant to article 102.011(a)(3) of the Code of Criminal Procedure, as applied to him in this case, as a violation of his constitutional rights to compulsory process and confrontation of witnesses.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses

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[4] *See* TEX. CODE CRIM. PROC. arts. 102.011(a)(3) & (b).

in his favor."[5] Using nearly identical language, the Texas Bill of Rights provides that "the accused . . . shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor . . . ."[6]

A litigant raising an "as applied" challenge to a statute concedes the statute's general constitutionality, "but asserts that the statute is unconstitutional as applied to his particular facts and circumstances."[7] The burden rests on the challenger to establish the statute's unconstitutionality.[8] "Courts must evaluate the statute as it has been applied in practice against the particular challenger."[9] Because the scope of an as-applied challenge is narrow, a court of appeals may not "entertain hypothetical claims" or consider the potential impact of the statute on a potential future claimant, third party, or anyone other than the challenger presently before the court.[10]

Article 102.011 provides, in relevant part:

> (a) A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer:

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5 U.S. CONST. amend. VI.

6 TEX. CONST. art. I, § 10.

7 *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011).

8 *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002).

9 *Lykos*, 330 S.W.3d at 912.

10 *See id.* at 912, 916.

. . . .

(3) $5 for summoning a witness;

. . . .

(b) In addition . . . a defendant required to pay fees under this article shall also pay 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service. . . . This subsection applies to:

. . . .

(3) traveling to execute criminal process, to summon or attach a witness, and to execute process not otherwise described by this article.[11]

London asserts that these statutory subpoena fees are unconstitutional as applied to him because he is indigent. He claims that the fees violate his constitutional right to compulsory process as well as his constitutional right to confront his accusers.

The Compulsory Process Clause guarantees "the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[12] This right is limited to compulsory process for obtaining witnesses "whose testimony would be both material and favorable to the defense."[13] In order to secure compulsory process,

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11 TEX. CODE CRIM. PROC. art. 102.011.

12 *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 1000 (1987); *see also* TEX. CONST. art. I, § 10.

13 *Coleman v. State*, 966 S.W.2d 525, 528 (Tex. Crim. App. 1998).

the defendant must make a preliminary showing of the "materiality and favorableness" of the witnesses he seeks.[14] "Were the burden of showing materiality and favorableness not placed on the defendant, 'frivolous and annoying requests [c]ould make the trial endless and unduly burdensome on the Court and all officers thereof.'"[15]

London has not identified, either at trial or on appeal, any material and favorable witnesses he wished to present. He did not attempt to issue any subpoenas or compel process for any potential witnesses. Instead, he asserts on appeal that his "constructive notice" of the $5 witness fee precluded him from presenting an adequate defense.[16] This argument ignores precedent that to exercise the right to compulsory process, the defendant bears the burden to "make a plausible showing to the trial court, by sworn evidence or agreed facts, that the witness' testimony would be both material and favorable to the defense."[17] Without a showing that material, favorable witnesses were available to be called by London, we cannot

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14 *Id.*

15 *Id*. (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983)).

16 *See Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014).

17 *Coleman*, 966 S.W.2d at 528.

conclude that, as applied in this case, constructive notice of the $5 witness fee operated to deny his right to "have compulsory process for obtaining witnesses in his favor."[18]

The Confrontation Clause "provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."[19] The Confrontation Clause's key purpose is

> to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand fact to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[20]

The Confrontation Clause generally requires face-to-face confrontation at trial, and "an encroachment upon face-to-face confrontation is permitted only when necessary

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[18] U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *see also Coleman*, 966 S.W.2d at 528.

[19] *Ritchie*, 480 U.S. at 51, 107 S. Ct. at 998; *see also* TEX. CONST. art. I, § 10; *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010).

[20] *Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011) (quoting *Mattox v. U.S.*, 156 U.S. 237, 242–43, 15 S. Ct. 337, 339 (1895)).

to further an important public interest and when the reliability of the testimony is otherwise assured."[21]

London does not provide a clear argument about how the statutory $5 witness fee operated to deny him his right to confrontation. The fees were assessed only after he pleaded guilty, as specified by the statute.[22] Because these fees are only "assessed on conviction," his opportunity to confront or cross-examine the State's witnesses was not contingent on his postjudgment ability to pay the witness fees.[23] Beyond the bare assertion that requiring him to pay the costs for summoning witnesses is "unfair and unconstitutional," London has not established how, as applied in this case, constructive notice of the $5 witness fee operated to prevent him from exercising his rights to "be confronted" with or by "the witnesses against him."[24]

London asserts that the constitutional harm to him is apparent from his indigence. He relies on the Sixth Amendment and *Gideon v. Wainwright*[25] for the proposition that "a man too poor to hire a lawyer should not be left at the mercy of

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21 *Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005).

22 *See* TEX. CODE CRIM. PROC. art. 102.011(e).

23 *See id.*

24 U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

25 372 U.S. 335 (1963).

the power of the State." He further suggests that his indigence itself is the constitutional "harm." Yet he provides no argument or evidence that he was deprived of his confrontation rights because of the prospect of being assessed a $5 witness fee after the conclusion of trial, if he were convicted.[26] He also provides no explanation of how his indigence itself could constitute the relevant harm when he does not suggest that the $5 witness fee caused him to become indigent.

London's appeal is premised on a conclusory assertion that it is "unfair and unconstitutional" to assess court costs against an indigent defendant. That assertion is not supported by any legal analysis. Some courts of appeals have held that indigence does not preclude the recovery of court costs, so long as they are not required to be paid in advance.[27] London's counsel did not disclose these contrary

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[26] *Cf. James v. Strange*, 407 U.S. 128, 134, 92 S. Ct. 2027, 2031 (1972) (in context of constitutional challenge to state statute permitting recoupment of costs of legal defense fees from indigent defendants, distinguishing *Gideon* and observing that with respect to the recoupment scheme, "[t]here is certainly no denial of the right to counsel in the strictest sense"). To the extent appellant's counsel relied at oral argument on the Supreme Court of Idaho's 1923 decision in *State v. Montroy* for the suggestion that charging court costs to a criminal defendant would deter the exercise of procedural rights, *see* 217 P. 611, 614 (Idaho 1923), the *Montroy* opinion explicitly stated that the defendant had not asserted any constitutional violation, *id*. at 613, and the decision rested on an Idaho statute which required witness fees to be "paid out of the county treasury," *id*. at 614 (citing and quoting statute, now codified as Idaho Code § 19-3008).

[27] *See, e.g.*, *In re Baker*, No. 05-17-00408-CV, 2017 WL 2276749, at *2 (Tex. App.—Dallas May 25, 2017, orig. proceeding) (mem. op.); *Allen v. State*, 426

authorities, nor did counsel attempt to distinguish them or argue that they were wrongly decided.

Finally, London notes that indigent litigants in other contexts are not charged a witness fee, such as under the Federal Rules of Criminal Procedure and the recently amended Texas Rules of Civil Procedure.[28] London may have identified an evolving policy trend toward not charging court costs of this type, but that is no argument that the opposite policy choice, to charge the $5 witness fee, is unconstitutional.[29]

In this particular case, which is an as-applied challenge, we need not decide whether indigence is a categorical barrier to assessing (or ultimately collecting) any particular cost of court.[30] London has not met his burden of showing that his

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S.W.3d 253, 258–59 & n.14 (Tex. App.—Texarkana 2013, no pet.) (citing *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780 (1971)); *Williams v. State*, 332 S.W.3d 694, 700 (Tex. App.—Amarillo 2011, pet. denied) ("fees are properly collectable by means of a withdrawal notification regardless of a defendant's ability to pay").

28 *See* FED. R. CRIM. P. 17; TEX. R. CIV. P. 145.

29 *Cf. Martinez v. State*, 507 S.W.3d 914, 917–18 (Tex. App.—Waco 2016, no pet.) (holding that the assessment of court costs against indigent criminal defendants but not against indigent civil litigants is not an equal-protection violation).

30 *Cf. Fuller v. Oregon*, 417 U.S. 40, 47, 94 S. Ct. 2116, 2122 (1974) (affirming constitutionality of statutory scheme for recouping state's expenses incurred in prosecuting a defendant, including the convicted person's legal defense, and noting that a feature of the approved scheme was that "[t]he convicted person from whom recoupment is sought . . . retains all the exemptions

constructive notice of the contingent possibility that in the event of his conviction he would be assessed a fee of $5 per witness had the actual effect, as applied to him in this case, of denying him compulsory process or confrontation of the witnesses against him.[31]

The idea that London was compelled to abandon his rights to compulsory process and confrontation of adverse witnesses by the prospect of a $5 witness fee fails for yet another reason. Pleading guilty in this case did not allow London to avoid the $5 witness fee. To the contrary, by pleading guilty, London assured that

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accorded other [civil] judgment debtors"). Beyond the scope of the as-applied challenge before us, appellant's counsel has suggested, without providing any evidentiary support, that the imposition of court costs on indigents is unconstitutional because convicted indigents face a prospect, after completing their punishments, of being jailed for failure to pay court costs. We note that even prior to the 2017 amendments to the Code of Criminal Procedure, *see infra* note 32, the Code provided alternative methods of compliance when an indigent person was unable to pay fines and costs, and to prevent the imprisonment of an indigent person solely because of inability to pay. *See* TEX. CODE CRIM. PROC. arts. 42.15, 43.03, 43.09, 43.091; *see also Tate v. Short*, 401 U.S. 395, 398, 91 S. Ct. 668, 671 (1971) (holding that an indigent could not be imprisoned for failure to pay traffic fines); *Ex parte Tate*, 471 S.W.2d 404, 406 (Tex. Crim. App. 1971) (noting the enactment of the 1971 revisions to the Code of Criminal Procedure to provide "alternative means" for collection of fines and costs); *cf.* Op. Tex. Att'y Gen. No. GA-0147 (2004) (explaining that the 1971 amendments to articles 42.15 and 45.041 were responsive to the U.S. Supreme Court's *Tate* opinion). Appellant's counsel has presented no legal argument analyzing these procedural protections or suggesting their constitutional inadequacy.

[31] *See Lykos*, 330 S.W.3d at 910.

the fee would be imposed. Thus he would have been in no worse position with respect to his exposure to court costs if he had insisted on his right to a trial by jury, at which time he could have taken advantage of his right to compulsory process to secure favorable witnesses and his right to confront adverse witnesses. Put another way, on the morning of trial, if London ultimately were to be convicted, he would be assessed the $5 fee for witnesses summoned by the State whether or not the trial occurred, whether or not he subpoenaed witnesses in his own defense, and whether or not he took advantage of the opportunity to cross-examine the State's witnesses. As such, the suggestion that, as the statute was applied in this case, it was the prospect of being assessed the $5 witness fee that caused London not to call or confront witnesses is farcical.

III

With respect to most of the dissenting opinion, there is no controversy. The relevant procedural facts, including the indigence of the appellant, are undisputed. We stipulate the basic legal principles that the dissent postulates at considerable length, as if they were decisive of this appeal: the standard of review; that the fundamental rights to confrontation and compulsory process in criminal proceedings enjoy a historical pedigree; that they apply with equal force to proceedings in Texas courts; and that the rules governing fees in federal courts and in Texas civil proceedings are different than those provided by the Texas Code of Criminal

Procedure. On these matters, which occupy well over 80% of the dissent's text, there is no disagreement among the panel.[32]

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[32] To the extent the dissent "urge[s] the legislature to reevaluate the fee system currently in place," Dissent at 17, in the interest of completeness we note that since the argument and submission of this appeal, the recently concluded regular session of the 85th Legislature amended the Code of Criminal Procedure to improve procedural protections relating to the collection of criminal court costs from indigent persons, such as requiring judges to consider a convicted defendant's ability to pay fines and costs at the time of sentencing instead of waiting until default, providing new alternatives to payment in money by adding participation in rehabilitative, educational, and vocational programs to the qualifying community-service activities, and mandating that a defendant be informed of these alternatives. *See* Act of May 26, 2017, 85th Leg., R.S., H.B. 351, § 4 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 42.15), eff. Sept. 1, 2017 (requiring court to inquire at time of sentencing about defendant's ability to pay fine and costs, and authorizing court to order alternative to repayment at same time, instead of waiting for default); *id.* § 7 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 43.09(h)), eff. Sept. 1, 2017 (adding participation in rehabilitative, educational, and vocational programs to list of activities considered "community service"); *id.* § 9 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 45.014), eff. Sept. 1, 2017 (requiring court to inform defendant of alternatives to payment of fine or costs prior to issuance of arrest warrant in certain circumstances); *id.* § 11 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 45.041(a-1), (b)), eff. Sept. 1, 2017 (requiring court to inquire at time of sentencing about defendant's ability to pay fine and costs, and authorizing court to order alternative to repayment at same time, instead of waiting for default); *id.* § 16 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 45.049), eff. Sept. 1, 2017 (adding participation in rehabilitative, educational, and vocational programs to list of activities considered "community service"); *id.* §§ 19, 20 (to be codified as an amendment to TEX. CRIM. PROC. CODE art. 45.0492), eff. Sept. 1, 2017 (adding participation in rehabilitative, educational, and vocational programs to list of activities considered "community service").

The dissent's abundant chaff fails to obscure the absence of wheat: a near complete failure to engage our legal reasoning.

The entire substance of the dissent's legal reasoning is this conclusory assertion: "although appellant has a fundamental constitutional right to physically confront witnesses who were to testify against him, the only way he was able to secure that right was by bearing the State's costs for it." Dissent at 12–13. Only in a footnote does the dissent acknowledge that the confrontation of witnesses at trial was not actually contingent on the payment of the witness fee. The dissent dismisses that consideration as "irrelevant" despite the fact that it directly contradicts the assertion that "the only way" for appellant to exercise his confrontation rights was to pay a fee. Dissent at 13 & n.11. Though not acknowledged by the dissent, the witness fees are not assessed against every defendant, but only in the event of a conviction.[33] Because the witness fee in this case was not charged in advance, inability to pay the fee did not prevent the appellant from actually confronting any witness.

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[33] *See* TEX. CODE CRIM. PROC. art. 102.011(a) ("A defendant convicted of a felony or a misdemeanor shall pay the following fees . . . .").

Like the appellant's brief, the dissent is unable to produce any legal authority—none—for the proposition that the postjudgment assessment of a nominal witness fee constitutes an impermissible burden on his confrontation rights. Most of the authorities collected by the dissent to extoll the fundamental nature of the confrontation right involved an actual deprivation of the opportunity to confront adverse witness.[34] The other such cases noted by the dissent found no confrontation

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[34] *See Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798 (1988) (placement of screen between defendant and child sexual-assault accuser at trial violated confrontation rights); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973) (invalidating murder conviction when defendant was not permitted to cross-examine a witness who confessed to committing the same crime, or to introduce evidence from the people who heard the confession); *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318 (1968) (invalidating robbery conviction based on transcribed testimony from a preliminary hearing, based on determination that the witness was unavailable for trial); *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1965) (invalidating robbery conviction based on use of a transcript at trial to present witness testimony from a preliminary hearing); *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400 (1959) (revocation of security clearance based on undisclosed classified information prevented a meaningful hearing including the confrontation of confidential witnesses); *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499 (1948) (invalidating summary criminal contempt conviction rendered without a trial, including no opportunity to confront adverse witnesses); *Alford v. United States*, 282 U.S. 687, 51 S. Ct. 218 (1931) (invalidating mail-fraud conviction after defendant was prevented from conducting reasonable cross-examination of adverse witness); *Kirby v. United States*, 174 U.S. 47, 19 S. Ct. 574 (1899) (invalidating federal law that made the prior conviction of another conclusive evidence of an element of a crime, thus preventing a defendant from confronting the witnesses who testified in the prior trial); *Shelby v. State*, 819 S.W.2d 544 (Tex. Crim. App. 1991) (invalidating aggravated sexual assault conviction based on denial of opportunity to cross-examine adverse outcry witness on allegations of bias); *Ex parte Johnson*, 654 S.W.2d 415 (Tex. 1983) (invalidation of civil contempt

violation at all.[35] None of those authorities, including the lone compulsory-process case noted by the dissent,[36] involved a fee imposed after trial.

Also like the appellant's brief, the dissent completely fails to acknowledge, distinguish, or take issue with the reasoning articulated in the authorities that have considered and found no constitutional infirmity in assessing postjudgment fees against an indigent criminal defendant.[37]

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based on violation of judgment debtor's right to confront adverse witnesses); *Coulter v. State*, 494 S.W.2d 876 (Tex. Crim. App. 1973) (invalidating drug conviction based on denial of opportunity to cross-examine narcotics agents about an exhibit that did not satisfy the business-records hearsay exception).

35 *See Pennsylvania v. Ritchie*, 480 U.S. 39, 50–54, 107 S. Ct. 989, 998–1000 (1987) (plurality op.) (failure to disclose investigation file to defendant charged with rape of a child did not violate Confrontation Clause, when defendant was "able to cross-examine all of the trial witnesses fully"); *In re R.S.*, No. 01-98-00939-CV, 1999 WL 417347, at *1 (Tex. App.—Houston [1st Dist.] June 24, 1999, no pet.) (not designated for publication) (no deprivation of confrontation right when motion for new trial was heard in defendant's absence, but record did not reflect any request for defendant to be present or denial of that right).

36 *Smith v. Rankin*, 661 S.W.2d 152, 153 (Tex. App.—Houston [1st Dist.] 1983, orig. proceeding) (constable required advance payment of $10 service fee before serving subpoenas in juvenile delinquency proceeding).

37 *See, e.g.*, *Allen*, 426 S.W.3d at 259.

Conclusion

We conclude that London has not established constitutional harm from articles 102.011(a)(3) and 102.011(b) as applied to him. We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Brown.

Publish. TEX. R. APP. P. 47.4.

Justice Jennings, dissenting.