Affirmed and Majority and Dissenting Opinions filed October 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00955-CR

JOE LEE BOWDEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1422757

MAJORITY OPINION

When we decided this case on original submission, we held that appellant, by not objecting in the trial court, had failed to preserve error on his complaint that a portion of his mandatory court costs amounted to an unconstitutional taking. *See Bowden v. State*, No. 14-14-00955-CR, 2016 WL 1128182, at *7 (Tex. App.—Houston [14th Dist.] Mar. 22, 2016) (mem. op., not designated for publication), *vacated*, No. PD-0394-16, 2016 WL 4938245 (Tex. Crim. App. Sept. 14, 2016) (per curiam) (not designated for publication). Relying on this court's decision in

Johnson v. State, 475 S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2015, pet. filed), we explained that appellant had an opportunity to object in the trial court because the mandatory court costs were statutory, which meant that appellant had prior constructive notice that he would be taxed with those costs in the event of his conviction. *See Bowden*, 2016 WL 1128182, at *7.

We issued our opinion without the benefit of *London v. State*, 490 S.W.3d 503 (Tex. Crim. App. 2016), which was decided nearly two months later. In *London*, the Court of Criminal Appeals explained that a defendant may "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 court costs." *Id.* at 507.

Appellant filed a petition for discretionary review in the wake of *London*. The Court of Criminal Appeals granted appellant's petition, vacated our judgment, and remanded the case to us for reconsideration. Following *London*, we hold that appellant may bring his court-costs challenge for the first time on direct appeal because his costs were not imposed in open court, nor were they itemized in the court's judgment. We accordingly address the merits of appellant's complaint.

The trial court assessed $133 in consolidated court costs because appellant was convicted of a felony. *See* Tex. Loc. Gov't Code § 133.102(a)(1) ("A person convicted of an offense shall pay as a court cost, in addition to all other costs . . . $133 on conviction of a felony . . . ."). Appellant challenges 5.5904% of those court costs (or roughly $7.44 if the court costs are paid in full), which are to be allocated by statute to an emergency radio infrastructure account. *Id.* § 133.102(e)(11). Appellant contends that this fractional amount represents an unconstitutional taking in violation of both the United States and Texas Constitutions.

We begin our analysis with appellant's state constitutional argument. The Texas Constitution provides:

> No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:
>
> (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:
>
> (A) the State, a political subdivision of the State, or the public at large;
>
> (B) an entity granted the power of eminent domain under law; or
>
> (2) the elimination of urban blight on a particular parcel of property.

Tex. Const. art. I, § 17(a).

Appellant contends that money is property, and that the taking of money as a court cost is therefore encompassed by this state constitutional provision. Appellant's argument is difficult to harmonize with the provision's plain text, which references the "power of eminent domain" and the "elimination of urban blight." These matters relate to the taking of real property, not personal property. *See State ex rel. Pan Am. Prod. Co. v. Texas City*, 157 Tex. 450, 453, 303 S.W.2d 780, 782 (1957) ("The constitutional inhibition against taking private property for public use without compensation has reference solely to the exercise of the right of eminent domain and not to taxation for public use."). Another subsection in this provision even uses the word "money" in juxtaposition with "property," indicating that the two words do not have the same meaning and that a mere financial obligation would not be subject to a traditional takings analysis. *See* Tex. Const. art. I, § 17(d) ("When a person's property is taken under Subsection (a) of this

section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money . . . .").

The Amarillo Court of Appeals recently addressed a very similar takings challenge. In *Denton v. State*, the court was asked to consider whether a taking occurred in the portion of the defendant's court costs that must be allocated to the law enforcement and custodial officer supplemental retirement fund. *See Denton v. State*, 478 S.W.3d 848, 851–52 (Tex. App.—Amarillo 2015, pet. ref'd) (addressing Tex. Loc. Gov't Code § 133.102(e)(7)). The court held that there was no taking because the court costs were more akin to a levy of a tax than to the exercise of eminent domain. *Id.* We agree with the analysis in *Denton* and conclude that appellant's challenge falls outside the scope of the state constitutional prohibition against the taking of property without adequate compensation.

We reach the same conclusion with regards to appellant's federal constitutional argument.

The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." *See* U.S. Const. amend. V. Appellant argues that this clause applies because he has been ordered to bear a cost that should be borne by the public as a whole. Appellant has not cited to any authority that directly supports his position that court costs can amount to a taking in violation of the clause.

To our knowledge, the Supreme Court has not directly addressed that issue either. However, the Court has had occasion to consider the relationship between economic regulations and the Takings Clause. In *Eastern Enterprises v. Apfel*, Justice Kennedy opined that the Takings Clause should not apply to government-imposed financial obligations that do "not operate upon or alter an identified property interest." *See E. Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J.,

concurring). Justice Kennedy's position was shared by four justices in dissent, who asserted that "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property." *Id.* at 554 (Breyer, J., dissenting). There has been no showing or argument that the court costs assessed in this case would affect any of appellant's physical or intellectual property interests.

Lower federal courts have specifically rejected the argument that money payments could be considered a taking. *See BEG Invs., LLC v. Alberti*, 34 F. Supp. 3d 68, 87–88 (D.D.C. 2014); *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 40 (Fed. Cl. 2000); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990). In *Alberti*, for instance, the court reasoned that it would be "circular and nonsensical" to treat financial obligations as takings because the government would then be required to compensate the obligor with the fair market value of the property taken, which, in the case of money, would always be the same amount that was exacted in the first place. *See Alberti*, 34 F. Supp. 3d at 88.

In light of these authorities, we hold that the trial court's assessment of court costs is a mere financial obligation, which does not effect a taking within the meaning of the United States and Texas Constitutions. Therefore, we reject appellant's court-costs challenge and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan. (Frost, C.J., dissenting).
Publish — Tex. R. App. P. 47.2(b).