



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

No. 06-16-00109-CR

BOBBY C. JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 188th District Court
Gregg County, Texas
Trial Court No. 40942-A

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

MEMORANDUM OPINION

Having pled guilty to aggravated sexual assault of a child,¹ having the adjudication of his guilt deferred by the trial court, and being ordered to complete a probated ten-year sentence on community supervision and to pay a \$3,000.00 fine, Bobby C. Johnson was then accused of violating various terms of his community supervision, his guilt was adjudicated, and he was sentenced to eleven years' imprisonment.

On appeal, Johnson challenges the sufficiency of the evidence supporting the trial court's finding that he violated the terms of his community supervision, complains that the trial court erred when it did not consider his ability to comply with the financial requirements of his community supervision, and asserts that his right to due process was violated when the trial court based its revocation on the discretion of his sex-offender-treatment counselor. Because we find that (1) sufficient evidence supports at least one ground for revocation, (2) we have no jurisdiction to consider Johnson's complaint regarding his alleged inability to meet the financial requirements of his community supervision, and (3) the judgment must be modified to reflect Johnson's plea of not true, we modify the judgment and affirm it as modified.

(1) Sufficient Evidence Supports at Least One Ground for Revocation

Johnson contends that there is insufficient evidence to support the trial court's findings that he violated the terms and conditions of his community supervision. In its judgment, the trial court found that Johnson violated the terms and conditions of his community supervision by failing to perform community service as ordered, to pay the supervision fee as ordered, to pay his fine as

¹See TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(i) (West Supp. 2016).

scheduled, to pay court costs as ordered, to successfully complete sex-offender treatment as ordered, to pay a sex-offender fee as ordered, to become current on his ordered fees, and to openly admit the underlying offense and not be in denial in order to successfully complete sex-offender treatment.

Johnson asserts the insufficiency of the evidence regarding the findings regarding his community service work and his sex-offender treatment, but makes no argument regarding the evidence of his nonpayment of the supervision fee, fine, court costs, and sex-offender fee as alleged.

We review an order revoking community supervision under an abuse-of-discretion standard. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Pierce v. State*, 113 S.W.3d 431, 436 (Tex. App.—Texarkana 2003, pet. ref'd). The State's burden of proof in community supervision revocation cases is by a preponderance of evidence. *Rickels*, 202 S.W.3d at 763; *Pierce*, 113 S.W.3d at 436. The revocation order is "supported by a preponderance of evidence" if the "greater weight of the credible evidence . . . would create a reasonable belief that the defendant has violated a condition of his probation." *Rickels*, 202 S.W.3d at 763–64 (quoting *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974)). The witnesses' credibility and the weight to be given their testimony is within the province of the trial court. *In re T.R.S.*, 115 S.W.3d 318, 321 (Tex. App.—Texarkana 2003, no pet.) (citing *Jones v. State*, 787 S.W.2d 96, 97 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd)). We examine the evidence in the light most favorable to the trial court's judgment. *Id.* (citing *Jackson v. State*, 645 S.W.2d 303, 305 (Tex. Crim. App. 1983)). We will uphold the revocation if the State has proved at least one of the alleged

violations. *Id.* (citing *Stevens v. State*, 900 S.W.2d 348, 351 (Tex. App.—Texarkana 1995, pet. ref'd)).

Among violations found true and not challenged on appeal, the State alleged that Johnson failed to pay his fine of \$3,000.00 at the rate of \$26.00 per month for the month of March 2015, in violation of condition 13b of his community supervision. The trial court's order establishing the conditions of Johnson's community supervision provided that he must pay the assessed fine in monthly installments beginning in May 2013. Kali Faber, Johnson's community supervision officer, testified that she did not receive Johnson's payment for the fine for the month of March 2015. On cross-examination, Johnson admitted that this allegation was true. Since the only evidence at trial supports a reasonable belief that Johnson violated this condition of his community supervision, and since Johnson made no argument challenging this evidence, the trial court did not abuse its discretion in revoking Johnson's community supervision. *See id.* We overrule this point of error.

(2) *We Have No Jurisdiction to Consider Johnson's Complaint Regarding His Alleged Inability to Meet the Financial Requirements of His Community Supervision*

Johnson also complains that the trial court erred in not considering his ability to comply with the financial requirements of his community supervision. Johnson argues that, under *Mathis v. State*, 424 S.W.3d 89 (Tex. Crim. App. 2014), and former Article 42.12, Section 11, of the Texas Code of Criminal Procedure, the trial court was obligated to inquire into his ability to comply with the financial conditions both when he was placed on community supervision and at other times during the course of these proceedings. *See* Act of May 12, 2015, 84th Leg., R.S., ch. 106, § 2(b)(3), 2015 Tex. Gen. Laws 1104, 1105–06, *repealed by* Act of May 26, 2015, 84th Leg., R.S.,

ch. 770, § 3, sec. 3.01, 2015 Tex. Gen. Laws 2321, 2395 (repeal eff. Jan. 1, 2017). The State argues that we have no jurisdiction to consider this point of error, and, alternatively, that *Mathis* requires a defendant to tender evidence of his inability to pay any proposed payments before the trial court is required to consider whether to impose any financial requirements. We agree that we do not have jurisdiction to hear this complaint.

Former Article 42.12, Sections 11(a) and (b), set forth the basic conditions of community supervision a trial court could impose, as well as what types of financial obligations the court could impose on a defendant placed on community supervision. Act of May 12, 2015, 84th Leg., R.S., ch. 106, § 2(a), (b), 2015 Tex. Gen. Laws 1104, 1104–06 (repealed 2015) (repeal eff. Jan. 1, 2017). Section 11(b)(3) provided that, before a trial court orders a defendant to make payments under former Article 42.12, “[t]he court shall consider the ability of the defendant to make payments.” Act of May 12, 2015, 84th Leg., R.S., ch. 106, § 2(b)(3), 2015 Tex. Gen. Laws 1104, 1106 (repealed 2015) (repeal eff. Jan. 1, 2017). Section 11 applied when the court originally determined the conditions of community supervision and when it altered or modified the conditions. Act of May 12, 2015, 84th Leg., R.S., ch. 106, § 2(a), 2015 Tex. Gen. Laws 1104, 1104 (repealed 2015) (repeal eff. Jan. 1, 2017). In *Mathis*, the Court of Criminal Appeals held that, at least where the trial court has determined that the defendant is indigent,² Section 11(b)(3) was mandatory. *Mathis*, 424 S.W.3d at 94.

In this case, the trial court imposed the condition that Johnson pay a \$3,000.00 fine in monthly payments in its original order deferring adjudication and establishing the conditions of

²Johnson made no claim of indigency in the trial court.

community supervision, entered April 22, 2013. Except in limited circumstances not present in this case, *see Nix v. State*, 65 S.W.3d 664, 667–68 (Tex. Crim. App. 2001), a defendant placed on deferred adjudication community supervision may raise issues relating to the original deferred adjudication proceeding and the community supervision order only in an appeal taken when community supervision is originally imposed. *Daniels v. State*, 30 S.W.3d 407, 408 (Tex. Crim. App. 2000); *Manuel v. State*, 994 S.W.2d 658, 661–62 (Tex. Crim. App. 1999); *Jones v. State*, 42 S.W.3d 143, 148 (Tex. App.—Amarillo 2000, no pet.); *Clark v. State*, 997 S.W.2d 365, 368–69 (Tex. App.—Dallas 1999, no pet.). Here, if Johnson had appealed the order placing him on deferred adjudication community supervision, he could have claimed in that appeal that the trial court did not consider his ability to make payments. *See Mathis*, 424 S.W.3d at 92–93. Since he waited until his community supervision was revoked and his guilt adjudicated, Johnson’s appeal on this point of error is untimely, and we lack jurisdiction to consider it. *See Daniels*, 30 S.W.3d at 408.³ We overrule this point of error.⁴

(3) *The Judgment Must Be Modified to Reflect Johnson’s Plea of Not True*

The judgment adjudicating guilt entered by the trial court states that the plea to the motion to adjudicate was true. However, the record clearly reflects that Johnson pled not true to the

³We recognize that former Section 21 of Article 42.12 provided that, when the only basis alleged for revoking community supervision was that the defendant failed to pay community supervision fees, court costs, or costs of legal services, the State had to prove by a preponderance of the evidence that the defendant “was able to pay and did not pay.” Act of May 12, 2015, 84th Leg., R.S., ch. 106, § 3(c), 2015 Tex. Gen. Laws 1104, 1106 (repealed 2015) (repeal eff. Jan. 1, 2017); TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(c) (West Supp. 2016). Even if Johnson’s brief could be construed to include a claim under Section 21(c), additional grounds for revocation were alleged. Further, Section 21(c) does not apply to fines. *Gipson v. State*, 428 S.W.3d 107, 109 (Tex. Crim. App. 2014).

⁴Since we have found that sufficient evidence supports one other ground alleged for revocation, we need not consider Johnson’s third point of error.

allegations contained in the motion. The Texas Rules of Appellate Procedure give this Court authority to modify judgments to correct errors and make the record speak the truth. TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992); *Rhoten v. State*, 299 S.W.3d 349, 356 (Tex. App.–Texarkana 2009, no pet.). Therefore, we modify the trial court’s judgment to reflect that the plea to the motion to adjudicate was not true.

We affirm the so-modified judgment of the trial court.

Josh R. Morriss III
Chief Justice

Date Submitted: February 15, 2017
Date Decided: March 23, 2017

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