



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

No. 06-20-00059-CR

JOSH BLAKE BOSTIC, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 7th District Court
Smith County, Texas
Trial Court No. 007-1376-19

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

MEMORANDUM OPINION

Josh Blake Bostic pled guilty to driving while intoxicated, third or more. Pursuant to a plea bargain agreement with the State, Bostic was sentenced to ten years' imprisonment and ordered to pay \$757.40 in court costs, but the trial court suspended Bostic's sentence in favor of placing him on community supervision for eight years. After Bostic pled true to violating the terms and conditions of his community supervision, the trial court revoked his community supervision, imposed its originally assessed sentence of ten years' imprisonment, and ordered Bostic to pay \$457.40 in court costs.

On appeal, Bostic argues that the trial court erred by failing to orally pronounce, at the revocation hearing, the sentence he was originally assessed when he was placed on community supervision.¹ Bostic also challenges the constitutionality of fees he agreed to pay when he was placed on community supervision and argues that his sentence violated the Eighth Amendment because it was grossly disproportionate to the offense and constituted cruel and unusual punishment. Finally, Bostic complains about the bill of costs, which mistakenly failed to omit \$300.00 in attorney fees that the trial court deleted from the costs assessed against Bostic when he was placed on community supervision.

Because the trial court executed the sentence it had originally assessed when it placed Bostic on community supervision, we find Bostic's first complaint meritless. We also find that we do not have jurisdiction over Bostic's constitutional challenges to the "EMS/Trauma Fund"

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.

and “time payment” fees assessed against him or his Eighth Amendment complaint related to his agreed sentence. However, because we find that the bill of costs mistakenly includes a \$300.00 assessment for attorney fees that was not included in the trial court’s judgment, we modify the bill of costs by deleting that fee. We affirm the trial court’s judgment.

I. Bostic’s Complaint that the Trial Court Did Not Orally Pronounced the Sentence in His Presence is Meritless

On appeal, Bostic argues that “the trial court never stated the sentence imposed” and, as a result, failed to pronounce the sentence in his presence. We disagree.

“A defendant’s sentence must be pronounced orally in his presence.” *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). Here, the record shows that Bostic’s sentence of ten years’ imprisonment was pronounced in his presence but suspended when he was placed on community supervision. *See id.* at 502; *Davis v. State*, 977 S.W.2d 859, 861 (Tex. App.—Dallas 1998, no pet.). That sentence was based on Bostic’s written plea bargain agreement with the State, which was again introduced at the revocation hearing. After the revocation hearing, the trial court announced that it was imposing the full sentence that it originally imposed when it placed Bostic on community supervision. It stated, “I told you, if you came back, you’d get the full sentence.” The court continued, “Court finds there’s no reason to depart from what the original plea bargain was. . . . You told the Court that if you didn’t do your probation correctly, you were prepared for that. So that’s the sentence the Court imposes.”

Because the trial court revoked “a suspension of the imposition of [Bostic’s] sentence” and “order[ed] that the punishment be carried into execution in the manner prescribed by law,” we find that Bostic’s claim that the trial court did not pronounce the sentence in his presence is

meritless. TEX. CODE CRIM. PROC. ANN. art. 42.02; *see Davis*, 977 S.W.2d at 861. We overrule Bostic’s first point of error.

II. We Do Not Have Jurisdiction Over Bostic’s “EMS/Trauma Fund” Fee, Time Payment Fee, and Eighth Amendment Complaints

“[T]he right to appeal is not of constitutional magnitude, but is derived entirely from statute.” *Rushing v. State*, 85 S.W.3d 283, 285 (Tex. Crim. App. 2002) (citing *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997)). The Legislature may “confer or withhold jurisdiction in its entirety” or “place limits upon that jurisdiction.” *Id.* “Thus our lawmakers may deny the right to appeal entirely or the right to appeal only some things or the right to appeal all things only under some circumstances.” *Id.* at 286 (quoting *Marin*, 851 S.W.2d at 278). When a defendant is convicted of a crime and placed on community supervision, the Legislature has placed restrictions on his right to appeal certain matters. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.755(e).

A defendant placed on community supervision may appeal his “conviction and punishment . . . at the time the defendant is placed on community supervision.” *Id.* However, when his community supervision is revoked “and he is called on to serve a sentence in a jail or in the Texas Department of Criminal Justice, the defendant may appeal the revocation.” *Id.* Thus, with limited exceptions not present in this case, “an appeal from an order revoking probation is limited to the propriety of the revocation and does not include a review of the original conviction.” *Traylor v. State*, 561 S.W.2d 492, 494 (Tex. Crim. App. 1978) (citing *Corley v. State*, 782 S.W.2d 859, 860 n.2 (Tex. Crim. App. 1989); *Hoskins v. State*, 425 S.W.2d 825, 828

(Tex. Crim. App. 1968)); *Stafford v. State*, 63 S.W.3d 502, 508 (Tex. App.—Texarkana 2001, pet. ref'd).

In this case, the trial court imposed a \$100.00 “EMS/Trauma Fund” fee when it placed Bostic on community supervision. Citing Section 133.103 of the Texas Local Government Code, the bill of costs also included the following language: “An additional time payment fee of \$15.00 will be assessed if any part of a fine, court costs, or restitution is paid on or after the 31st day after the date the judgment assessing the fine, court costs or restitution is entered.” The record showed that Bostic agreed to pay the “EMS/Trauma Fund” fee as a term and condition of his community supervision. Also, since the “judgment assessing the . . . court costs” was the judgment placing him on community supervision, Bostic also agreed to pay the time payment fee.² As a result, Bostic should have challenged the imposition of those fees when he was placed on community supervision. Because he did not, we are without jurisdiction to address his constitutional challenges to those fees.

Next, Bostic argues that his sentence violated the Eighth Amendment’s prohibition on cruel and unusual punishment because it was grossly disproportionate to his community supervision violations. However, although his sentence was suspended, it was based on his plea bargain agreement with the State and was pronounced when the trial court placed Bostic on community supervision. As a result, the claim that his sentence is disproportionate is necessarily an attack on the punishment he received at the time he was placed on community supervision and was required to be appealed at that time. *See King v. State*, 161 S.W.3d 264, 266 (Tex. App.—

²Nothing in the record shows that the time payment fee was actually assessed.

Texarkana 2005, pet. ref'd) (citing *Bailey v. State*, 160 S.W.3d 11, 13, 16 (Tex. Crim. App. 2004); *Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999)). Therefore, we are without jurisdiction to address the Eighth Amendment issue. *See id.*

III. We Modify the Bill of Costs by Deleting the Assessment of Attorney Fees

“[O]nce a criminal defendant has been determined to be indigent, [h]e ‘is presumed to remain indigent for the remainder of the proceedings unless a material change in [his] financial circumstances occurs.’” *Johnson v. State*, 405 S.W.3d 350, 354 (Tex. App.—Tyler 2013, no pet.) (citing TEX. CODE CRIM. PROC. ANN. art. 26.04(p)). “Thus, the trial court must determine that the defendant has financial resources which enable h[im] to offset in part or in whole the costs of the legal services provided, and that determination must be supported by some factual basis in the record before attorney’s fees are imposed.” *Id.* “If the record does not show that the defendant’s financial circumstances materially changed after the previous determination that [h]e was indigent, the evidence will be insufficient to support the imposition of attorney’s fees.” *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 26.04(p); *Mayer v. State*, 309 S.W.3d 552, 553 (Tex. Crim. App. 2010)).

The trial court’s judgment deleted a \$300.00 assessment against Bostic for court-appointed attorney fees because he was presumed indigent and there was no evidence of a change in his financial circumstances. Even so, the bill of costs still includes that \$300.00 attorney fee. As a result, Bostic argues that this fee should be deleted from the bill of costs, and the State agrees.

We may “make the record speak the truth when we have the necessary data and information to do so.” *Patterson v. State*, 525 S.W.3d 896, 898 (Tex. App.—Tyler 2017, no pet.) (citing TEX. R. APP. P. 43.2(b); *Ingram v. State*, 261 S.W.3d 749, 754 (Tex. App.—Tyler 2008, no pet.); *Davis v. State*, 323 S.W.3d 190, 198 (Tex. App.—Dallas 2008, pet. ref’d)). Because the judgment properly omitted the assessment of fees for Bostic’s court-appointed attorney, but the bill of costs mistakenly included them, we delete the \$300.00 assessment for attorney fees from the bill of costs.

IV. Conclusion

We delete the \$300.00 assessment of attorney fees from the bill of costs and affirm the trial court’s judgment.

Ralph K. Burgess
Justice

Date Submitted: September 8, 2020
Date Decided: November 10, 2020

Do Not Publish