



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

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No. 06-20-00062-CR

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KENDALL BIGGS, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 241st District Court  
Smith County, Texas  
Trial Court No. 241-0691-19

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

## MEMORANDUM OPINION

Kendall Biggs pled guilty to burglary of a habitation and, pursuant to a plea bargain with the State, was placed on deferred adjudication community supervision for six years. After Biggs violated the terms and conditions of his community supervision, the trial court adjudicated his guilt, sentenced him to eleven years' imprisonment, and ordered him to pay \$174.00 in court costs.

In his first point of error on appeal,<sup>1</sup> Biggs argues that former subsections (b) and (d) of Section 133.103 of the Texas Local Government Code, on which the time payment fee included in the clerk's bill of costs is based, are facially unconstitutional.<sup>2</sup> While we need not address Biggs's constitutional argument, we conclude that the imposition of time payment fees was premature. As a result, we sustain Biggs's first point of error and modify the clerk's bill of costs accordingly.

In his last point of error, Biggs argues that we must delete an order to pay restitution contained in a separate order adjudicating guilt because restitution was not orally pronounced. Because the trial court's judgment contains no order to pay restitution, we overrule Biggs's last point of error. As a result, we affirm the trial court's judgment.

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<sup>1</sup>Originally 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.

<sup>2</sup>All references to the former version of Section 133.103 in this opinion are references to the Act of June 2, 2003, 78th Leg., R.S., ch. 209, § 62, sec. 133.103, 2003 Tex. Gen. Laws 979, 996–97 (amended 2005, 2011, 2013, 2019) (current version at TEX. CODE CRIM. PROC. art. 102.030). While the Legislature amended this statute, the amendments specified that “[a]n offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.” Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 2.54, 2019 Tex. Sess. Law Serv. 3982, 4010–11, 132, eff. Jan. 1, 2020.

## **I. We Modify the Bill of Costs by Deleting the Premature Time Payment Fees**

The clerk's bill of costs reflects a \$25.00 "Time Payment" fee. Citing former Section 133.103 of the Texas Local Government Code, it also states, "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 31<sup>ST</sup> day after the date the judgment assessing the fine, court costs or restitution is entered." Biggs argues that we should delete these fees from the clerk's bill of costs because the former versions of Section 133.103(b) and Section 133.103(d) were facially unconstitutional.

Here, we need not address Biggs's argument that the time payment fees are unconstitutional. Recently, the Texas Court of Criminal Appeals has determined that "[t]he pendency of an appeal stops the clock for purposes of the time payment fee" and, as a result, "the assessment of the time payment fees . . . [are] premature." *Dulin v. State*, 620 S.W.3d 129, 133 (Tex. Crim. App. 2021). Pursuant to *Dulin*, we strike the time payment fees "in their entirety, without prejudice to them being assessed later if, more than 30 days after the issuance of the appellate mandate, the defendant has failed to completely pay any fine, court costs, or restitution that he owes." *Id.*

We modify the bill of costs by deleting the time payment fees.

## **II. The Judgment Does Not Order Payment of Restitution**

In his last point of error, Biggs complains of a separate order entered by the trial court that included an order to pay restitution. Because the final judgment contains no order to pay restitution, we overrule Biggs's point of error.

Before Biggs was placed on deferred adjudication community supervision, his agreed punishment recommendation with the State stated, “As a result of negotiations between the parties, it is mutually recommended to the Court that: . . . A SPECIAL CONDITION of the recommended sentence be[] payment of RESITUTION in the amount **to be determined by the PSI.**” The order placing Biggs on deferred adjudication community supervision did not include any reference to restitution. Even so, as a term and condition of his deferred adjudication community supervision, Biggs was ordered to perform “450 hours of Community Service Restitution” and pay restitution in an amount “(To Be Determined).” On the State’s request, the trial court amended the terms and conditions of Biggs’s deferred adjudication community supervision to include an order to pay “restitution in the total amount of \$808.24 at the rate of \$50.00 each month beginning October 2019.” In addition to the judgment, the record also contains an “ORDER OF FINAL ADJUDICATION,” which sets forth the State’s allegations in its motion to adjudicate guilt, recites that the trial court granted the motion and revoked Biggs’s deferred adjudication community supervision, and appears to order payment of restitution of \$808.24 to the victim of the offense. Arguing that the trial court’s formal oral pronouncement did not include payment of restitution, Biggs asks that we modify the order of final adjudication.

During an informal pronouncement, the trial court stated, “Restitution ordered,” but did not state the amount of restitution and asked the parties if there was “[a]ny legal reason to bar formal sentence.” After both parties stated that there was no reason to bar formal sentencing, the trial court “formally pronounce[d]” Biggs’s sentence and found, “No restitution is indicated as due.” The trial court later “continued [Biggs] in the custody of the sheriff” to serve his sentence,

stated that the sentence was “assessed with credit for time served,” and added, “Restitution ordered as determined to be due.”

When a defendant receives deferred adjudication, no sentence is imposed. *Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004). Because restitution is considered punishment, it must be orally pronounced. *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006); *see also Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009); *Taylor*, 131 S.W.3d at 502. When guilt is adjudicated, the judgment adjudicating guilt sets aside the order deferring adjudication. *See Taylor*, 131 S.W.3d. at 501–02. A trial court’s final judgment must include any order to pay restitution. *See TEX. CODE CRIM. PROC. ANN.* art. 42.01, § 1(25) (Supp.), art. 42A.755(b) (“The judge shall enter in the judgment in the case the amount of restitution owed by the defendant on the date of revocation.”).

Biggs cites the rule that, when there is a conflict with the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014). Here, however, there is no such conflict.

The trial court’s formal pronouncement did not include an order to pay restitution. As a result, the judgment adjudicating Biggs’s guilt did not order payment of restitution. Consistent with the final judgment, the clerk’s bill of costs correctly reflects that no restitution is owed. Also, the order to withdraw funds does not contain a reference to restitution. Because there is no judgment imposing a payment of restitution, we overrule Biggs’s point of error.<sup>3</sup>

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<sup>3</sup>Biggs does not cite this Court to any authority indicating that the Tyler Court of Appeals would modify an order that is not a final judgment. In any case, because the judgment was required to, but did not, contain an order or restitution, we need not take this superfluous action.

### **III. Conclusion**

We modify the bill of costs by deleting the premature time payment fees. As modified, the trial court's judgment is affirmed.

Scott E. Stevens  
Justice

Date Submitted: June 8, 2021  
Date Decided: June 15, 2021

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