NUMBERS 13-19-00166-CR AND 13-19-00167-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SHANE LEE BRITT, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 198th District Court of Kerr County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Appellant Shane Lee Britt contends that the trial court abused its discretion by revoking his community supervision on two cases because the State failed to prove by a

preponderance of the evidence that he violated the conditions of his supervision.[1] Specifically, Britt submits that the State failed to show: (1) that he had the ability to pay his delinquent financial obligations, *see* TEX. CODE CRIM. PROC. ANN. art. 42A.751(i); and (2) that he "intentionally or knowingly" committed the new offense of failure to appear. *See* TEX. PENAL CODE ANN. § 38.10(a). We affirm.[2]

I. BACKGROUND

A. Procedure

Britt was indicted in 2016 on one count of possession of less than one gram of methamphetamine in a drug-free-zone, a third-degree felony. *See id.* 481.102(6), .115(b), .134. Pursuant to a plea-bargain agreement, Britt pleaded guilty, and the trial court deferred adjudication of guilt for four years under terms and conditions of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 27.13. While on community supervision, Britt was indicted for possession of more than one, but less than four, grams of methamphetamine in a drug-free-zone, a second-degree felony. *See* TEX. PENAL CODE ANN.§§ 481.102(6), .115(c), .134. Pursuant to another plea-bargain agreement, Britt pleaded guilty, and the trial court deferred adjudication of guilt for five years under terms and conditions of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 27.13.

In March 2018, prior to the second plea-bargain agreement, the State filed a motion to proceed with an adjudication of guilt on the first case. In addition to the new

[1] Because the issues in each appeal are identical, we granted Britt's motion to consolidate the appeals for purposes of briefing. In that same vein, we are issuing a single memorandum opinion in the interest of judicial economy.

[2] This case was transferred to us from the Fourth Court of Appeals in San Antonio pursuant to a docket equalization order by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

charge, the State alleged nineteen other violations of the conditions of Britt's supervision. The trial court found all of the allegations true, continued Britt on probation with a new "zero-tolerance" condition, and extended his probationary period for one year.

In January 2019, the State filed a motion to proceed with an adjudication of guilt in each case, alleging Britt violated the terms of his community supervision in both cases by (1) committing the new offense of failure to appear and (2) failing to pay supervision fees, court costs, the costs of legal services, and fines. *See id.* art. 42A.108. In the second case, the State also alleged that Britt failed to pay "restitution" and a Crime Stoppers fee.[3] Contested hearings were held on both motions on February 22, 2019.

B. Failure to Pay

Britt's probation officer, Katie Massey, confirmed that Britt owed the amounts alleged in the motions to proceed, including the entirety of the fine assessed in each case. Massey explained that since Britt was released from jail in July 2018 after his second arrest, he had only paid his monthly supervision and urinalysis fees. In other words, Britt had not paid any amount toward his other financial obligations.

During cross-examination, however, Massey acknowledged that she had no

[3] As a condition of supervision in Britt's second case, he was ordered to make "restitution" in the amount of $180 to the Texas Department of Public Safety as an "injured party." We note, however, that expenses incurred by the Department of Public Safety in performing its laboratory functions are not sustained as a result of being the victim of a crime, and are not, therefore subject to a restitution order. *See Aguilar v. State*, 279 S.W.3d 350, 353 (Tex. App.–Austin 2007, no pet.). Instead, as a condition of supervision, a court may order a defendant to "reimburse a law enforcement agency for the analysis . . . of . . . controlled substances." TEX. CODE CRIM. PROC. ANN. art. 42A.301(b)(18).

We also note that Britt was ordered to reimburse the county for the costs of legal services provided to him in each case, but the State mislabeled these costs as "restitution" in its motions to proceed. *See id.* art. 42A.301(b)(11). We refer to them in this appeal by their proper term—"costs of legal services." *See id.* art. 42A.751(i). As discussed *infra*, there are important substantive distinctions between costs, fees, restitution, and fines.

personal knowledge that Britt received notice of what amount he should have been paying each month to stay current:

> [Britt]: Ms. Massey, since he was released from jail last July, had he made all—what is he supposed to pay each month?
>
> [Massey]: The standard monthly payment is $60, but for him to try and get caught up on his prior fees, it would take some math to figure out what would need to be paid each month to get caught up.
>
> [Britt]: I mean, did you calculate that?
>
> [Massey]: I did not. That's calculated by the admin staff at the front office.
>
> [Britt]: I mean, do you have something that he was given to show what he is supposed to be making payments on to get caught up?
>
> [Massey]: I'm not aware of any forms that were given . . . from us with a specific amount.

Massey also acknowledged that Britt receives Social Security disability benefits and does not otherwise maintain steady employment. She also acknowledged that Britt lives with and cares for his elderly parents but denied that Britt had ever expressed concern about his ability to meet his monthly obligations.

Britt testified about his various health problems, including how he became disabled in 2012 after a heat stroke. He receives $750 a month in disability benefits. Britt explained that, in addition to making payments, he has completed community service in the past to earn credit towards his payment obligations. He further testified that he was told that he was only $200 in arrears, which he was prepared to pay.

C. Failure to Appear

Erica Hughes testified that in 2018 she was employed as a deputy clerk for the Kerr County Court at Law. On October 28, 2018, based on the information contained on

Britt's bail bond,[4] Hughes personally prepared and sent by regular mail a summons to Britt's home address. According to the summons, a copy of which was entered into evidence, Britt was ordered to appear on November 20, 2018, at 9:00 a.m. for arraignment on a charge of driving while license suspended with a previous conviction. Hughes testified that she was present in the courtroom when the docket was called on November 20th and that Hughes did not appear.

Kendra Tillson, a deputy with the Kerr County Sherriff's Office, was the bailiff for the county court on November 20th. Tillson testified that when Britt was not present in the courtroom during docket call, she proceeded to call his name three times on the courthouse steps. There was no response, and Tillson reported the same to the court.

Britt did not dispute that the address on the summons was correct or that he failed to appear at his arraignment. Instead, Britt denied that he received actual notice of the summons. He pointed to the fact that he had been in jail for four months and speculated that his parents, who also reside at the address and suffer from dementia, may have thrown it away. However, Britt acknowledged on cross-examination that he was released from jail on July 18, 2018, three months before the summons was allegedly mailed to his address. Nevertheless, Britt unequivocally denied that he received actual notice and insisted that he would have appeared had he received such notice. None of the State's

[4] Britt's bail bond was not admitted into evidence. An instanter bail bond that directs the defendant to appear at a specific time and place is prima facie evidence that the defendant received notice and therefore "intentionally or knowingly" failed to appear. *Euziere v. State*, 648 S.W.2d 700, 702 (Tex. Crim. App. 1983); *Johnson v. State*, 416 S.W.3d 602, 606 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Otherwise, "the State must produce further evidence sufficient to justify a rational factfinder in finding that appellant had actual notice." *Johnson*, 416 S.W.3d at 607 (citing *Etchison v. State*, 880 S.W.2d 191, 192 (Tex. App.—Texarkana 1994, no pet.)).

witnesses, including Britt's probation officer, had personal knowledge that Britt received actual notice of the arraignment.

D. Adjudication

The trial court concluded that Britt violated the conditions of community supervision as alleged in the State's motions and adjudicated him guilty on the underlying offenses. The court assessed punishment at eight and ten years, respectively, in the Institutional Division of the Texas Department of Corrections. Britt perfected his right to appeal in each case.

II. Standard of Review

We review a trial court's decision revoking community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In a revocation proceeding, it is the State's burden to prove by a preponderance of the evidence that a probationer violated the terms of his community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The trial judge is the sole judge of the credibility of the witnesses and the weight given to their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). The trial court abuses its discretion when it revokes community supervision after the State has failed to meet its burden of proof. *Cardona*, 665 S.W.2d at 493–94. Proof by a preponderance of the evidence of any one of the alleged violations of the conditions of community supervision will support revocation on appeal. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980);

Sanchez v. State, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

III. ANALYSIS

By his first issue, Britt contends that the State failed to prove that his failure to pay was willful under the Texas ability-to-pay statute. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.751(i).

A. Applicable Law

"Over the last twenty [plus] years, three sources of legal authority—the federal Constitution as interpreted by Supreme Court precedent; Texas statutes; and Texas common law—have addressed the permissibility of revocation or incarceration when a defendant is unable to pay amounts due under community supervision." *Gipson v. State*, 383 S.W.3d 152, 156 (Tex. Crim. App. 2012) ("*Gipson I*").

Federal constitutional law "sets forth a mandatory judicial directive that requires the trial court to (1) inquire as to a defendant's ability to pay and (2) consider alternatives to imprisonment if it finds that a defendant is unable to pay." *Id.* (citing *Bearden v. Georgia*, 461 U.S. 660, 672 (1983)). "[I]f the probationer has made all reasonable bona fide efforts to pay . . . and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke community supervision automatically without considering whether adequate alternative methods of punishing the probationer are available to meet the State's interest in punishment and deterrence." *Bearden*, 461 U.S. at 660–61; *Gipson I*, 383 S.W.3d at 156–57 (noting that "*Bearden* does not categorically prohibit incarceration of indigent defendants"). This is because revocation of community supervision for failure to pay when a defendant is unable to pay denies due process of law. *Bearden*, 461 U.S. at 665.

Texas, on the other hand, has an ability-to-pay statute, which governs the burden of proof in the revocation of community supervision when the only violations alleged are for failure to pay court costs, community supervision fees, or the costs of legal services. TEX. CODE CRIM. PROC. ANN. art. 42A.751(i). In such cases, "the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge." *Id.* By its plain language, however, the ability-to-pay-statute does not apply to fines. *Gipson v. State*, 428 S.W.3d 107,108–09 (Tex. Crim. App. 2014) ("*Gipson II*") (noting that, unlike costs and fees, fines are penal in nature). Thus, where the ability to pay a fine is at issue, the probationer should raise an objection under the Fourteenth Amendment as articulated in *Bearden*. *See Gipson II*, 428 S.W.3d at 111 (Alcala, J., concurring). In other words, although each objection concerns due process, the Fourteenth Amendment offers broader protections than the ability-to-pay statute and focuses on the trial court's actions instead of the sufficiency of the State's evidence; therefore, failing to raise the Fourteenth Amendment as an issue can be outcome determinative in certain cases. *Id.*

B. Application

In this case, the State alleged that Britt failed to pay supervisory fees, court costs, the costs of legal services, *and* fines. Although Britt generally raised his inability to pay as an issue in the trial court, he never specifically mentioned the Texas ability-to pay statute or the Fourteenth Amendment. Even if we assume that Britt's general objection was sufficient to preserve both errors in the trial court, *see Bryant v. State*, 391 S.W.3d 86, 91–92 (Tex. Crim. App. 2012) (concluding probationer's general objection in trial court

regarding his inability to pay was sufficient to preserve error under restitution statute without specifically invoking the statute), Britt *only* argues on appeal that the State failed to carry its burden under the ability-to-pay statute as to *all* of his financial violations, even though the statute does not govern Britt's ability to pay his fines. *See Gipson II*, 428 S.W.3d at 108–09. Thus, Britt's sufficiency challenge concerning his ability to pay his fine in each case necessarily fails as a matter of law. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.751(i); *Gipson II*, 428 S.W.3d at 108–09.

Moreover, in his brief to this Court, Britt does not cite the Fourteenth Amendment, *Bearden*, *Gipson I*, *Gipson II*, or any other authority that could be liberally construed as raising a federal due process challenge. Therefore, Britt has failed to preserve on appeal any error under the Fourteenth Amendment. *See* TEX. R. APP. P. 38.1; *Martinez v. State*, 563 S.W.3d 503, 513 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.) (declining to address probationer's ability to pay under the Fourteenth Amendment because he only raised a sufficiency challenge on appeal) (citing *Gipson II*, 428 S.W.3d at 110–11 (Alcala, J., concurring)).

Because "proof of a single violation will support revocation," *Garcia v. State*, 387 S.W.3d 20, 26 (Tex. Crim. App. 2012) (citing *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980)), including failure to pay a fine, *Gipson II*, 428 S.W.3d at 109, and Britt does not otherwise challenge the proof that he failed to pay his fines, we affirm both revocations without reaching the merits of Britt's other sufficiency challenges. *See* TEX. R. APP. P. 47.1.

IV. CONCLUSION

The judgments are affirmed.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
28th day of May, 2020.