



COURT OF APPEALS  
EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS

JIMMY THOMAS,	§	No. 08-17-00090-CR
Appellant,	§	Appeal from the
v.	§	432nd District Court
THE STATE OF TEXAS,	§	of Tarrant County, Texas
Appellee.	§	(TC#1358532D)
	§	

**OPINION**

Jimmy Thomas appeals the assessment of \$1,031 in reparations and \$133 in consolidated court costs against him, and asserts that his sentence is grossly disproportionate to his offense in violation of the Eighth Amendment.<sup>1</sup> Appellant contends that: (1) the \$1,031 in reparations listed as “Due to CSCD” should be stricken because the authority for the fees cannot be determined; (2) the \$133 “Consolidated Court Cost” should be stricken because of the recent decision in *Salinas* holding them unconstitutional; and (3) his sentence of 15 years’ confinement for possession of a controlled substance violates the Eighth Amendment’s prohibition of cruel and unusual punishment. For the following reasons, we modify and affirm the judgment as modified.

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<sup>1</sup> This appeal was transferred from the Fort Worth Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. We apply the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

## **BACKGROUND**

This case deals with the validity of certain fines imposed on the Appellant, the scope of retroactivity of a recent decision of the Texas Court of Criminal Appeals, and a claimed violation of the Eighth Amendment's prohibition on cruel and unusual punishments. Appellant Jimmy Thomas was indicted for possession of a controlled substance in 2014. He accepted a plea agreement and was placed on a five-year term of deferred adjudication community supervision. In 2016, the State petitioned the court to proceed to adjudication based on multiple alleged violations of the terms of Appellant's community supervision. Finding several of the allegations to be true, the trial court adjudicated Appellant guilty and sentenced him to 15 years. The trial court also assessed reparations money "Due to CSCD" in the amount of \$1,031 and \$133 as a "Consolidated Court Cost." This appeal followed.

## **DISCUSSION**

### ***Reparations and Money "Due to CSCD"***

Appellant first contends that the trial court violated his right to due process when it imposed money "Due to CSCD" as probation fees because those fees cannot be characterized as reparations under the Texas Code of Criminal Procedure. Alternatively, barring an explicit finding of a due-process violation, he contends that the \$1,031 should be stricken from the judgment because listing the fees as "Due to CSCD" does not allow the court to determine the authority for the fees. As to Appellant's second contention, we agree.

Although "reparations" is not defined in the current code of criminal procedure, it was used synonymously with restitution until the most recent version of the code. *See* Act of June 17, 2015, 84th Leg., R.S., ch. 770, § 2.12, 2015 TEX.GEN.LAWS 2301, 2370 (current version at TEX.CODE

CRIM.PROC.ANN. art. 42.03 (West Supp. 2017)) (“[i]n all revocations of a suspension of the imposition of a sentence the judge shall enter the restitution or reparation due and owing on the date of the revocation.”). The Fort Worth Court of Appeals has consistently held that probation fees can be appropriately characterized as reparations without violating due process or the code of criminal procedure. *Zamarripa v. State*, 506 S.W.3d 715, 716 (Tex.App.--Fort Worth 2016, pet. ref’d) (“this court has repeatedly rejected [the] primary argument that the assessment of community supervision fees as reparations violates due process or runs afoul of the code of criminal procedure.”).<sup>2</sup>

Here, Appellant contends that probation fees cannot be characterized as reparations because the commonly accepted definition of reparations is “the making of amends for a wrong or injury,” and the probation department is not a “victim” as that term is defined in the code. *See* TEX.CODE CRIM.PROC.ANN. art. 56.32(a)(11)(West Supp. 2017). As has been noted, the Fort Worth Court of Appeals has repeatedly rejected this argument by holding that probation fees can be properly characterized as reparations. *Zamarripa*, 506 S.W.3d at 716. Consequently, we find Appellant’s first contention to be meritless.

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<sup>2</sup> In *Tucker v. State*, the Fort Worth Court of Appeals listed a collection of its previous cases holding that unpaid probation fees may be included as reparations: “*See, e.g., Steen v. State*, No. 02–13–00559–CR, 2014 WL 4243702, at \*2 (Tex.App.--Fort Worth Aug. 28, 2014, pet. ref’d)(mem. op., not designated for publication); *Strange v. State*, No. 02–14–00055–CR, 2014 WL 3868225, at \*1 (Tex.App.--Fort Worth Aug. 7, 2014, no pet.)(mem. op., not designated for publication)(citing *Boyd v. State*, No. 02–11–00035–CR, 2012 WL 1345751, at \*2 (Tex.App.--Fort Worth Apr. 19, 2012, no pet.)(mem. op., not designated for publication)); *McKinney v. State*, No. 02–12–00479–CR, 2014 WL 1510095, at \*1–2 (Tex.App.--Fort Worth Apr. 17, 2014, pet. ref’d); *Brown v. State*, No. 02–08–00063–CR, 2009 WL 1905231, at \*2 (Tex.App.--Fort Worth July 2, 2009, no pet.)(mem. op., not designated for publication).” *Tucker v. State*, No. 02-15-00265-CR, 02-15-00266-CR, 2016 WL 742087, at \*2 (Tex.App.--Fort Worth Feb. 25, 2016, pet ref’d)(mem. op., not designated for publication).

But Appellant’s second argument—that the fees marked “Due to CSCD” should be stricken because their authority cannot be determined—is meritorious, and here the State agrees. The Fort Worth Court of Appeals has repeatedly stricken reparations “Due to CSCD” because, absent additional information, it is not possible from the record to determine the authority for the fees. *Smith v. State*, No. 02-16-00412-CR, 02-16-00413-CR, 2017 WL 2276751, at \*3 (Tex.App.--Fort Worth May 25, 2017, pet. ref’d)(mem. op., not designated for publication); *Sanchez v. State*, No. 02-15-00215-CR, 2016 WL 7405798, at \*4 (Tex.App.--Fort Worth December 22, 2016, no pet.)(mem. op., not designated for publication); *Lewis v. State*, 423 S.W.3d 451 (Tex.App.--Fort Worth 2013, pet. ref’d). Likewise, here the record does not provide an indication of the authority for imposing the \$1,031 “Due to CSCD.” Thus, Appellant’s first issue is sustained.

#### ***Consolidated Court Cost***

Appellant next asserts that because the Texas Court of Criminal Appeals recently found the section of the code authorizing “Consolidated Court Cost” to be unconstitutional, the decision should be retroactively applied to his case and the corresponding costs stricken from the judgment. We disagree.

Under Section 133.102(a)(1), a person convicted of a felony must pay \$133 as a court cost, which is to be remitted to the comptroller and allocated to certain accounts and funds. TEX.LOC.GOV’T CODE ANN. § 133.102 (West Supp. 2017). In its recent *Salinas* decision, the Texas Court of Criminal Appeals found this section unconstitutional to the extent that it allocated funds to the “comprehensive rehabilitation” account and the “abused children’s counseling” account because they do not serve a legitimate criminal justice purpose. *Salinas v. State*, 523 S.W.3d 103, 108-110 (Tex.Crim.App. 2017). Using a *Stovall* analysis, the court applied the

constitutional holding retroactively to appellants who had raised the issue before the date of the *Salinas* opinion—March 8, 2017—provided the petition was still pending on that date. *Id.*, at 113. Otherwise, the decision applies prospectively to trials ending after the mandate in *Salinas* issued. *Id.*

Here, Appellant was assessed \$133 in “Consolidated Court Costs” under Section 133.102(a)(1) of the Texas Local Government Code. The judgment was entered against Appellant on February 23, 2017. *Salinas* was handed down on March 8, 2017, and Appellant filed his appeal on June 23, 2017. Thus, Appellant did not raise this issue before the *Salinas* decision was handed down, and by its terms the decision does not grant him the relief he seeks. *Salinas*, 523 S.W.3d at 113. This holding is in line with the recent decisions of the Fort Worth Court of Appeals. *See Horton v. State*, No. 02-16-00229, 2017 WL 1953333, at \*5 (Tex.App.--Fort Worth May 11, 2017, pet. ref’d)(holding that the *Salinas* directive precludes the court from retroactively modifying court costs of appellants who did not have that issue pending on appeal at the time of the *Salinas* decision or whose cases at the trial court level ended before *Salinas* was decided); *Hawkins v. State*, No. 02-16-00104-CR, 2017 WL 1352097, at \*2 (Tex.App.--Fort Worth April 13, 2017, pet. ref’d)(same). Appellant urges us to adopt the dissent’s view in *Horton*, which argued that the *Salinas* decision made Section 133.102(a)(1) void *ab initio*, thus making it unenforceable from its inception and requiring full retroactive relief. *Horton*, 2017 WL 1953333, at \*7. Given the clear directive in *Salinas* and the supporting decisions in *Horton* and *Hawkins*, we decline to do so. Accordingly, we sustain Appellant’s second issue but do not grant the relief requested.

### ***Cruel and Unusual Punishment***

In his final issue, Appellant asserts that his sentence for possession of a controlled substance—15 years’ imprisonment—violated the Eighth Amendment’s prohibition on cruel and unusual punishment because the sentence was grossly disproportionate to the offense. As we will discuss below, this issue was not properly preserved for appeal and we affirm the judgment of the trial court.

The well-known bar to imposing cruel and unusual punishment is derived from the Eighth Amendment of the United States Constitution: “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. AMEND. VIII. The Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. AMEND. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”). The Eighth Amendment prohibits punishments that are “grossly disproportionate” to the offense for which a defendant has been found guilty. *Harmelin v. Michigan*, 501 U.S. 957, 959, 111 S.Ct. 2680, 2683, 115 L.Ed.2d 836 (1991); *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992); *Hicks v. State*, 15 S.W.3d 626, 632 (Tex.App.--Houston [14th Dist.] 2000, pet. ref’d).

To preserve a complaint that a sentence is grossly disproportionate to the offense, the issue must be raised at the trial court level. *Kim v. State*, 283 S.W.3d 473, 475 (Tex.App.--Fort Worth 2009, pet. ref’d); *Acosta v. State*, 160 S.W.3d 204, 211 (Tex.App.--Fort Worth 2005, no pet.). This can be accomplished by (1) objecting at the punishment hearing, (2) objecting when the sentence is pronounced, or (3) raising the issue in a motion for new trial. *Burt v. State*, 396 S.W.3d 574, 577 (Tex.Crim.App. 2013); *Kim*, 283 S.W.3d at 475; *Hansana v. State*, No. 02-15-00119-

CR, 2016 WL 741976, at \*1 (Tex.App.--Fort Worth Feb. 25, 2016, no pet.)(mem. op., not designated for publication).

Here, Appellant did not object during the punishment hearing or when his sentence was pronounced by the trial court. Appellant's only other option to preserve the issue for review was to raise it in a motion for a new trial, which he did not request. *Kim*, 283 S.W.3d at 475. Consequently, Appellant did not preserve his disproportionality complaint for our review. Even if we were to reach the issue, possession of a controlled substance is a second-degree felony, which is punishable by a term of between two and twenty years in the Texas Department of Criminal Justice. TEX.HEALTH & SAFETY CODE ANN. § 481.115(b)(West 2017); TEX.PENAL CODE ANN. § 12.33(a)(West 2011). Once the trial court revokes deferred adjudication community supervision, the trial court may impose any punishment within the relevant statutory range. *Von Schounmacher v. State*, 5 S.W.3d 221, 223 (Tex.Crim.App. 1999)(per curiam). Although Appellant notes that his sentence of 15 years is on the high end of the spectrum, it is well within the statutory range of two to twenty years' confinement. TEX.PENAL CODE ANN. § 12.33(a). Because the issue was not preserved for appeal, we overrule Appellant's third issue.

### **CONCLUSION**

The decision of the trial court is reversed to the extent that reparations were improperly classified as "Due to CSCD," and we modify the judgment by striking the \$1,031 so categorized from the reparations total. We sustain Appellant's claim that the \$133 assessed as "Consolidated Court Costs" was unconstitutional in part, but do not grant the relief requested. As to Appellant's claim that his sentence violated the Eighth Amendment, the claim was not properly preserved for appeal and consequently we affirm as modified the decision of the trial court.

November 30, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Palafox, JJ.

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