



In The

Eleventh Court of Appeals

No. 11-12-00292-CR

DONTAVIS GOWAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 54th District Court

McLennan County, Texas

Trial Court Cause No. 2011-1805-C2

MEMORANDUM OPINION

Dontavis Gowan originally pleaded guilty to the offense of possession of cocaine, and the trial court deferred the adjudication of Gowan's guilt and placed him on community supervision for four years pursuant to the terms of a plea bargain. The State subsequently filed a motion to adjudicate guilt. Upon Gowan's plea of true to the motion to adjudicate, the trial court adjudicated his guilt and assessed his punishment at confinement in a state jail facility for twenty-four months and a fine of \$1,000. The judgment nunc pro tunc reflects that the trial court also assessed court costs of \$966 and restitution of \$140. We modify and affirm.

Gowan presents nine issues for review. In the first three issues, Gowan complains of the trial court's assessment of restitution of \$140 payable to the DPS. In his fourth issue, Gowan complains of the trial court's assessment of an "intoxication/drug fee" of \$60 and a "time payment fee" of \$25 as court costs because these fees are not compensatory and were not included in the sentence orally pronounced by the trial court in open court. The State has filed a letter brief conceding that these "points are well taken" and stating that "the proper remedy is to delete the DPS lab fee, the time payment fee, and the intoxication/drug fee." We sustain Gowan's first, second, third, and fourth issues, and we modify the judgment accordingly.

In his fifth issue, Gowan asserts, alternatively, that the trial court erred in assessing any court costs at all because the bill of costs is not signed. The supplemental clerk's record contains a bill of costs signed by the McLennan County District Clerk. Gowan's fifth issue is overruled.

In his sixth, seventh, and eighth issues, Gowan complains of the trial court's inclusion of his court-appointed attorney's fees as court costs to be paid by Gowan, who was indigent. In its letter brief, the State asserts that these issues have been rendered moot by the judgment nunc pro tunc, which reflects court costs of \$966—as opposed to \$1,466 as reflected in the original judgment. The original judgment included attorney's fees of \$900. The district clerk's bill of costs reflects a credit of \$500 for attorney's fees: the amount credited by the trial court's judgment nunc pro tunc. We agree that Gowan's sixth issue, in which he addressed the particular attorney's fees that have now been credited, was rendered moot by the judgment nunc pro tunc.

However, we do not agree that the seventh and eighth issues are moot. The judgment nunc pro tunc does not render these issues moot because, as reflected in the bill of costs, the court costs of \$966 assessed in the judgment nunc pro tunc still include attorney's fees of \$400 from December 8, 2011, the date of Gowan's original plea. Gowan complains of the imposition of this fee as court costs in his seventh and eighth issues.

In the seventh issue, Gowan asserts that, because he was indigent when he pleaded guilty and continued to be indigent, the trial court erred in assessing as court costs the court-appointed attorney's fees that were associated with Gowan's initial plea. We agree. Prior to Gowan's initial plea and again prior to the revocation proceeding, the trial court found that Gowan was indigent. A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings unless a material change occurs in his financial circumstances. TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West Supp. 2012). There is nothing

in the clerk's records or the reporter's record indicating a material change in Gowan's financial circumstances. The evidence is insufficient to show that Gowan had the financial resources to reimburse the county for his court-appointed attorney's fees. *See Mayer v. State*, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010); *Armstrong v. State*, No. 07-09-00091-CR, 2011 WL 3629191 (Tex. App.—Amarillo Aug. 17, 2011, no pet.) (mem. op., not designated for publication). We sustain Gowan's seventh issue and modify the trial court's judgment accordingly. Because we have sustained Gowan's seventh issue, we need not address the eighth issue. *See* TEX. R. APP. P. 47.1.

In his final issue, Gowan complains that he was not given credit for time spent in jail prior to the revocation of his guilt. We disagree. The trial court gave Gowan the appropriate credit for his time served. The first page of the judgment and the judgment nunc pro tunc set out the following dates that Gowan spent in jail as "Time Credited:" from May 15, 2011, to May 16, 2011; September 1, 2011; from November 28, 2011, to January 18, 2012; and from August 8, 2012, to August 30, 2012 (the date of adjudication). Furthermore, on the second page of the judgments, the trial court ordered that Gowan be "given credit noted above on this sentence for the time spent incarcerated." Gowan's ninth issue is overruled.

The trial court's judgment nunc pro tunc is modified to delete the restitution of \$140 and to reflect court costs of \$481, which includes credits of \$60 for the intoxication/drug fee, \$25 for the time payment fee, and \$400 for attorney's fees.¹ As modified, that judgment is affirmed.

TERRY McCALL
JUSTICE

March 21, 2013

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

Panel consists of: Wright, C.J.,
McCall, J., and Willson, J.

¹We note that the order to withdraw funds from Gowan's inmate trust account is included in the supplemental clerk's record and that it reflects that Gowan has "been assessed court costs, fees, and/or fines and/or restitution" in the amount of \$2,106. The trial court shall amend that order in accordance with this opinion to reflect a total assessment of \$1,481, which includes the \$1,000 fine and \$481 in court costs.