

Affirm as Modified and Opinion Filed January 11, 2022



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00386-CR

No. 05-20-00416-CR

BASHON ANTHONY SHULER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause Nos. F18-31754-J and F18-31753-J**

OPINION

Before Justices Schenck, Smith, and Garcia
Opinion by Justice Smith

Appellant, Bashon Anthony Shuler, was charged with two counts, in separate indictments, of possession of child pornography, a third-degree felony. *See* TEX. PENAL CODE ANN. § 43.26. After he waived his right to a jury trial and pleaded nolo contendere, the cases proceeded to a bench trial. The trial court found there was sufficient evidence to find appellant guilty of the offenses as charged, deferred findings of guilt, and placed him on deferred adjudication community supervision for a period of five years for each offense.

On appeal, appellant presents eight issues, and the State presents a cross point, all of which concern the fines and costs assessed against appellant. Because the fines were not orally pronounced by the trial court, some of the costs were not authorized by statute at the time appellant was placed on deferred adjudication, and the time payment fee was prematurely assessed, we modify the order in Cause No. F18-31753-J to delete the \$1,500 fine and \$157 in costs and modify the order in Cause No. F18-31754-J to delete the \$1,500 fine and \$690 in costs. We otherwise affirm.

\$1,500 Fine

In his first two issues, appellant contends that the order of deferred adjudication in each case should be modified to delete the \$1,500 fine because the fine was not orally pronounced by the trial court. The State agrees that the fine should be deleted from each order.

A fine is punitive in nature and intended to be part of a defendant's sentence; therefore, it must be orally pronounced. *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011); *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(a) (court shall pronounce sentence in defendant's presence). When there is a conflict between the oral pronouncement of a sentence and the written judgment, the oral pronouncement controls. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004); *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998). Although appellant was not sentenced in these cases but was instead placed on deferred adjudication, we agree

with the parties that a fine assessed against a defendant when placed on deferred adjudication must be orally pronounced and that the oral pronouncement, or lack thereof, controls over the written order of deferred adjudication. *Cf. Perez v. State*, No. 05-19-00574-CR, 2020 WL 2988638, at *3 (Tex. App.—Dallas June 4, 2020, no pet.) (mem. op., not designated for publication) (holding oral pronouncement of three-year period of community supervision controls over written order providing period was five years); *Tracy v. State*, No. 05-19-00218-CR, 2020 WL 948378, at *3 (Tex. App.—Dallas Feb. 27, 2020, pet. ref'd) (mem. op., not designated for publication) (holding the inclusion of restitution in the order of deferred adjudication was error where the trial court did not orally pronounce restitution).

In the proceeding below, the trial court did not orally pronounce a fine against appellant when it deferred findings of guilt and placed appellant on community supervision for a term of five years in each case. However, the orders of deferred adjudication in Cause Nos. F18-31753-J and F18-31754-J each reflect a fine in the amount of \$1,500. Therefore, we agree with the parties that the orders should be modified to delete the \$1,500 fine. Appellant's first and second issues are sustained.

Jury Fee

Appellant argues in his third issue that the \$1 jury fee should be deleted from the costs assessed in Cause No. F18-31753-J because he waived his right to a jury and proceeded to a trial before the bench. The State agrees that appellant should not have been assessed the \$1 jury fee but for a different reason than appellant asserts.

The State argues that appellant should not have been assessed the fee because section 134.101(b) of the Texas Local Government Code, the statute authorizing the fee, did not become effective until January 1, 2020, and applies only to offenses committed on or after that date. The State also proposes that another \$104 should be deleted from the order for the same reason. The additional \$104 includes the following: a \$40 clerk's fee, \$25 to county records management, a \$10 courthouse security fee, \$4 to CCDC technology fund, and \$25 to specialty court.

Section 134.101 imposes a \$105 court cost on felony convictions,¹ which is allocated to six different funds and accounts: (1) the clerk of the court account; (2) the county records management and preservation fund; (3) the county jury fund; (4) the courthouse security fund; (5) the county and district court technology fund; and (6) the county specialty court account. TEX. LOC. GOV'T CODE ANN. § 134.101. The statute became effective on January 1, 2020, and applies only to offenses committed on or after that date.²

The alleged offense date in each of appellant's cases was November 9, 2018, which is prior to the January 1, 2020 effective date. Therefore, we agree with the

¹ A person is considered to have been convicted under this section even when the person receives deferred adjudication. TEX. LOC. GOV'T CODE ANN. § 134.002(b)(2).

² See Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 1.05, 5.01, 5.04, 2019 Tex. Gen. Laws 3981, 3984–85, 4035 (codified at TEX. LOC. GOV'T CODE ANN. § 134.101); see also *Hayes v. State*, No. 12-20-00222-CR, 2021 WL 1418400, at *2 (Tex. App.—Tyler Apr. 14, 2021, no pet.) (mem. op., not designated for publication) (“The Local Consolidated Fee on Conviction of Felony only applies to defendants who are convicted of offenses committed on or after January 1, 2020.”) (citing TEX. LOC. GOV'T CODE ANN. § 134.101).

State that section 134.101 does not apply and that the entire \$105, including the \$1 jury fee, should be deleted from the costs assessed against appellant. Appellant's third issue is sustained.

Child Abuse Prevention Fund & DNA Testing Costs

In his fourth, fifth, and eighth issues, appellant argues that the child abuse prevention fund cost and the DNA testing costs should be deleted from the orders because they were not in effect at the time of his conviction. The State maintains that each was properly assessed.

The bill of costs in both cause numbers lists a \$100 charge for the child abuse prevention fund and a \$250 charge for a DNA fee. The criminal court fee docket in Cause No. F18-31754-J also lists a \$34 charge for a batch DNA fee; however, this \$34 fee is not reflected in the bill of costs.

The charge for the child abuse prevention fund was assessed pursuant to former article 102.0186 of the Texas Code of Criminal Procedure.³ The charges assessed for DNA testing were assessed pursuant to former articles 102.020(a)(1) and 102.020(a)(3).⁴

³ See Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.127(a), 2005 Tex. Gen. Laws 621, 684, *amended by* Act of May 18, 2007, 80th Leg., R.S., ch. 593, § 3.24, 2007 Tex. Gen. Laws 1120, 1137, *amended by* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 2.39, 2.40, 2019 Tex. Gen. Laws 3981, 4006 (current version at TEX. CODE CRIM. PROC. ANN. art. 102.0186).

⁴ See Act of May 25, 2001, 77th Leg., R.S., ch. 1490, § 6, 2001 Tex. Gen. Laws 5290, 5293 (enacting former article 102.020), *amended by* Act of May 30, 2009, 81st Leg., R.S., ch. 1209, §§ 1, 2, 2009 Tex. Gen. Laws 3865, 3865–66 (adding subsection (a)(3)), *amended by* Act of May 19, 2015, 84th Leg., R.S., ch. 221, § 1, 2015 Tex. Gen. Laws 1307, 1307–08, *amended by* Act of May 26, 2015, 84th Leg., R.S., ch. 770, § 2.29, 2015 Tex. Gen. Laws 2321, 2375–76, *repealed by* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 1.19, 2019 Tex. Gen. Laws 3981, 3992.

Former article 102.0186 provided in relevant part that a person convicted, or placed on deferred adjudication, for the offense of possession of child pornography shall pay a \$100 cost for deposit in the county child abuse prevention fund.⁵ Former article 102.020 provided in relevant part that a person shall pay a \$250 cost on conviction for possession of child pornography, which included defendants who received deferred adjudication, and a \$34 cost if placed on deferred adjudication community supervision.⁶ Both costs under former article 102.020 were to be sent to the Texas Department of Public Safety to help defray the cost of collecting or analyzing DNA samples.⁷

Senate Bill 346, effective January 1, 2020, reclassified the child abuse prevention fund cost as a fine and repealed the DNA testing costs.⁸ Senate Bill 346 also provided:

Except as otherwise provided by this Act, the changes in law made by this Act apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of this Act. An 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.^[9]

⁵ See Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 1.127(a), 2005 Tex. Gen. Laws 621, 684 (amended 2007, 2019).

⁶ See Act of May 25, 2001, 77th Leg., R.S., ch. 1490, § 6, 2001 Tex. Gen. Laws 5290, 5293 (amended 2009, 2015; repealed 2019).

⁷ *Id.*

⁸ See Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 1.19, 2.39, 2.40, 5.04, 2019 Tex. Gen. Laws 3981, 3992, 4006, 4035 (§§ 2.39, 2.40 of the Act codified at TEX. CODE CRIM. PROC. ANN. art. 102.0186).

⁹ See Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01, 2019 Tex. Gen. Laws 3981, 4035.

Appellant argues that section 51.608 of the Texas Government Code supersedes articles 102.0186 and 102.020. Section 51.608 provides:

Notwithstanding any other law that establishes the amount of a court cost collected . . . from a defendant in a criminal proceeding based on the law in effect on the date the offense was committed, the amount of a court cost imposed on the defendant in a criminal proceeding must be the amount established under the law in effect on the date the defendant is convicted of the offense.

TEX. GOV'T CODE ANN. § 51.608. Appellant asserts that he, therefore, is subject to fees and fines that were in effect when he committed the offenses and court costs that were in effect on the date he was convicted. We do not disagree with this assertion, but appellant's conclusion that the child abuse prevention fund charge and the DNA testing charges were not costs in effect on the date of his conviction is misplaced.

Senate Bill 346 specifically provided 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.*”¹⁰ Because appellant committed the offenses for which he was placed on deferred adjudication prior to the effective date of the Act, the former law was still in effect as to appellant at the time he was placed on deferred adjudication and, thus, it is the law that governs whether court costs were properly imposed against him. *See Contreras v. State*, No.

¹⁰ *See* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01, 2019 Tex. Gen. Laws 3981, 4035 (emphasis added).

05-20-00185-CR, 2021 WL 6071640, at *6 (Tex. App.—Dallas Dec. 23, 2021, no pet. h.) (mem. op. on reh’g, not designated for publication) (declining to delete costs for child abuse prevention fund and DNA testing because appellant committed the offenses for which he was convicted in 2016 and 2018, prior to the January 1, 2020 effective date of the act that recategorized the cost for the child abuse prevention fund as a fine and repealed the statute authorizing costs for DNA testing).

Therefore, we agree with the State that the trial court properly assessed \$100 in costs under former article 102.0186 (child abuse prevention fund) and \$284 in costs under former article 102.020 (DNA testing). *See, e.g., Hayes v. State*, No. 02-20-00019-CV, 2021 WL 2978750, at *1–2, n.2 (Tex. App.—Fort Worth July 15, 2021, no pet.) (mem. op.) (rejecting defendant’s assertion that article 102.020 was not in effect at the time of his January 14, 2005 offense and applying language of former article 102.020 to uphold \$250 DNA-testing fee assessed against him); *Evans v. State*, No. 06-20-00035-CR, 2020 WL 6685038, at *10, n.14 (Tex. App.—Texarkana Nov. 13, 2020, pet. ref’d) (mem. op., not designated for publication) (explaining that \$100 for the child abuse prevention fund should be assessed as a cost because offense date was prior to January 1, 2020 amendment changing \$100 cost to a \$100 fine). Appellant’s fourth, fifth, and eighth issues are overruled.

Time Payment Fee

In his sixth issue, appellant argues that ninety percent of the \$25 time payment fee is facially unconstitutional and should be deleted, leaving a fee of \$2.50. The

State asserts that the time payment fee was prematurely assessed and should be struck in its entirety. We agree with the State.

The fee docket in both cause numbers includes a \$25 time payment fee, which are each listed as “IP PLN,” abbreviated for “INSTALLMENT PLAN,” and were assessed on April 11, 2020, thirty-one days after the dates of the orders placing appellant on deferred adjudication. The time payment fee is not reflected under the amounts assessed in the bill of costs; however, each bill of costs does provide that a time payment fee of \$25 will be assessed for any fines or court costs remaining on or after the 31st day from the date of judgment. The \$690 in costs listed in the orders of deferred adjudication do not appear to include the \$25 time payment fees.

Former section 133.103(a), which applies to appellant’s cases, provided that a convicted person shall pay a fee of \$25 if the person “pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, courts costs, or restitution.”¹¹ However, the Texas Court of Criminal Appeals has recently held that a trial court’s assessment of the \$25 time payment fee during the pendency of an appeal is premature because the appeal stops the clock and suspends a defendant’s obligation to pay court costs. *Dulin v. State*, 620 S.W.3d 129, 132–33 (Tex. Crim. App. 2021). The court instructed that the entire

¹¹ See Act of June 2, 2003, 78th Leg., R.S., ch. 209, § 62(a), sec. 133.103(a), 2003 Tex. Gen. Laws 979, 996–97 (amended 2005, 2011, 2013; subsection (c-1) repealed 2019), *transferred and amended by* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, §§ 2.54, 5.04, 2019 Tex. Gen. Laws 3981, 4010, 4035 (current version at TEX. CODE CRIM. PROC. ANN. art. 102.030 and effective January 1, 2020) (amended 2021).

fee should be struck without prejudice, allowing for the time payment fee to be assessed after the issuance of the appellate mandate if the defendant has failed to completely pay the amount he owes within thirty days of the mandate. *Id.* at 133.

As in *Dulin*, the time payment fee assessed against appellant was premature. Appellant filed his notice of appeal on March 11, 2020. The \$25 time payment fee was not assessed in each of his cases until April 11, 2020. Therefore, the time payment fees should be struck in their entirety. *Id.*; *Contreras*, 2021 WL 6071640, at *7–8 (following *Dulin* and striking prematurely assessed time payment fee); *Vasquez v. State*, No. 05-20-00432-CR, 2021 WL 4726523, at *1–2 (Tex. App.—Dallas Oct. 11, 2021, no pet.) (mem. op., not designated for publication) (same).

Duplicative Costs

Appellant argues in his seventh issue that the \$715 in costs should be deleted from the order of deferred adjudication in Cause No. F18-31754-J because both causes were tried together and the costs are duplicative of those assessed in Cause No. F18-31753-J. The State agrees.

“In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.” TEX. CODE CRIM. PROC. ANN. art. 102.073(a). For purposes of this rule, a person convicted of two or more offenses in the same trial or plea proceeding is convicted of those offenses in a “single criminal action.” *Hurlburt v. State*, 506 S.W.3d 199, 201–04 (Tex. App.—Waco 2016, no

pet.). Generally, the cost should be assessed in the case with the highest category offense but, when the convictions are for the same category of offense and the costs are the same, the costs should be assessed in the case with the lowest trial court cause number. *Thomas v. State*, No. 05-20-00114-CR, 2021 WL 2948550, at *2 (Tex. App.—Dallas June 30, 2021, pet. ref'd) (mem. op., not designated for publication) (citing TEX. CODE CRIM. PROC. ANN. art. 102.073(b); *Johnson v. State*, No. 05-19-00641-CR, 2020 WL 4745552, at *5 (Tex. App.—Dallas Aug. 17, 2020, no pet.) (mem. op., not designated for publication)).

Here, appellant pleaded nolo contendere to both third-degree felony offenses of possession of child pornography, and the cases proceeded together in a single bench trial. The costs assessed in the bill of costs in Cause No. F18-31754-J are also listed in the bill of costs in Cause No. F18-31753-J, the case with the lower trial court cause number. Both orders provide for court costs in the amount of \$690, which does not appear to include the \$34 DNA batch fee in Cause No. F18-31754-J or, as discussed earlier, the \$25 time payment fees. The \$34 DNA batch fee and the time payment fees are, however, included in the criminal court fee dockets. The fee docket in Cause No. F18-31753-J provides that the total amount of costs assessed is \$715 (\$690 plus \$25), and the fee docket in Cause No. F18-31754-J provides that the amount of costs assessed is \$749 (\$690 plus \$34 plus \$25).

We agree with the parties that appellant should not have been assessed duplicative costs and fees. Therefore, appellant’s seventh issue is sustained as to all costs listed on the bill of costs in Cause No. F18-31754-J.

Consolidated Fees on Conviction

The State argues in a cross point that the \$185 charge for consolidated fees on conviction, which is listed as “CONS STATE FEES” on the bill of costs, should be reduced from \$185 to \$133. We agree.

Section 133.102(a)(1) of the Texas Local Government Code was amended in 2019 to increase the amount of costs assessed on conviction of a felony from \$133 to \$185; however, like the other statutes discussed above, the amendment did not become effective until January 1, 2020, and applied only to costs, fees, or fines assessed on convictions for offenses committed on or after the effective date.¹² Therefore, only \$133 in costs are authorized for the consolidated fee on conviction charge. We sustain the State’s cross point.

Authority to Modify Orders

This Court has the power to modify a judgment to speak the truth when we have the necessary information to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d) (en banc). We also have the power to

¹² *See* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 1.03, sec. 133.102(a)(1), §§ 5.01, 5.04, 2019 Tex. Gen. Laws 3981, 3981–82, 4035 (current version at TEX. LOC. GOV’T CODE ANN. § 133.102(a)(1)).

modify an order deferring adjudication. *Whitaker v. State*, No. 05-12-00361-CR, 2013 WL 2641485, at *1–2 (Tex. App.—Dallas June 10, 2013, pet. ref’d) (mem. op., not designated for publication) (holding that an appellate court has the authority to modify an order of deferred adjudication just as it has the authority to modify a judgment because the trial court can issue an order *nunc pro tunc* to correct a deferred adjudication order just as it can issue a judgment *nunc pro tunc* to correct a judgment).

Therefore, based on our holdings above, the order of deferred adjudication and bill of costs in Cause No. F18-31753-J are modified to delete the \$1,500 fine that was not orally pronounced and \$157 in court costs that were not in effect at the time of appellant’s conviction,¹³ leaving court costs in the amount of \$533. The order of deferred adjudication and bill of costs in Cause No. F18-31754-J are modified to delete the \$1,500 fine that was not orally pronounced and \$690 in duplicative costs. To the extent the \$25 time payment fees and the \$34 DNA testing fee have been assessed against appellant as the parties contend, the time payment fees are stricken as premature.¹⁴

¹³ This includes the \$1 jury fee, \$40 clerk’s fee, \$25 to county records management, \$10 courthouse security fee, \$4 to CCDC technology fund, \$25 to specialty court, and \$52 of the \$185 consolidated fees on conviction as assessed in the bill of costs.

¹⁴ Court costs “need neither to be orally pronounced nor incorporated by reference in the judgment to be effective.” *Armstrong*, 340 S.W.3d at 766. However, it is the issuance of the certified bill of costs that makes costs payable under article 103.001 of the Texas Code of Criminal Procedure. *Id.* at 765. In this case, the \$25 time payment fees and the \$34 DNA testing fee are not included in either the judgment or the bill of costs. They are included only in the unsworn criminal court fee docket. Therefore, while there is statutory authority to support a \$34 DNA testing fee being assessed against appellant, it is not currently payable. *See* TEX. CODE CRIM. PROC. ANN. art. 103.001(b).

Conclusion

As modified, we affirm the orders of the trial court.

/Craig Smith/

CRAIG SMITH
JUSTICE

Publish
TEX. R. APP. P. 47.2(b)
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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

BASHON ANTHONY SHULER,
Appellant

No. 05-20-00386-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District
Court No. 3, Dallas County, Texas
Trial Court Cause No. F18-31754-J.
Opinion delivered by Justice Smith.
Justices Schenck and Garcia
participating.

Based on the Court's opinion of this date, the order of deferred adjudication of the trial court is **MODIFIED** as follows:

to delete "\$1500" and replace with "N/A" under "Fine" and

to delete "\$690" and replace with "N/A" under "Court Costs."

As **REFORMED**, the order of deferred adjudication is **AFFIRMED**.

Judgment entered January 11, 2022



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

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to delete "\$690" and replace with "\$533" under "Court Costs."

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Judgment entered January 11, 2022