

Opinion issued November 17, 2011.



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-10-00561-CR

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**CHRISTOPHER ALAN LEVINGSTON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 163rd District Court  
Orange County, Texas  
Trial Court Cause No. B-070701-R**

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**MEMORANDUM OPINION**

Christopher Alan Levingston pleaded guilty to the felony offense of aggravated assault causing serious bodily injury. TEX. PENAL CODE ANN. § 22.02 (West 2011). The trial court deferred a finding of guilt and assessed

punishment of six years' deferred adjudication community supervision. The State subsequently moved to adjudicate guilt. After finding that Levingston had violated the terms of his community supervision, the trial court granted the State's motion and assessed Levingston's punishment at twelve years' confinement, allowing credit for time served. On appeal, Levingston contends the trial court erred (1) in assessing a fine and ordering court costs in its written final judgment and (2) in failing to credit him for time served in the Orange County Jail between January 17, 2008 and March 31, 2008.

The State concedes error in Levingston's first issue. Accordingly, we modify the judgment to exclude the fine and the court costs awarded against Levingston. We hold that the trial court did not err in failing to credit Levingston for time served between January 2008 and March 2008, because the record does not establish that Levingston was in custody during that time frame. We affirm the judgment as modified.

### **Background**

In November 2007, the State indicted Levingston for aggravated assault. Levingston entered a guilty plea, but the trial court deferred adjudication of guilt. Before sentencing, but after entering his guilty plea, Levingston was incarcerated in the Orange County Jail, from October 2007 to January 2008. The Orange County Sheriff's records reflect that the

Sheriff's Department released Levingston on January 17, 2008.

In April 2010, the State moved to adjudicate guilt, alleging that Levingston had violated the terms of his probation. Levingston pleaded true to several violations, including failing to report to his probation officer on at least three occasions, possessing and consuming alcohol, and failing to provide his probation officer with his prescription medicine containers. The Sheriff's Department re-arrested Levingston upon the State's filing of the motion to adjudicate.

After a hearing, the trial court revoked Levingston's community supervision and sentenced him to twelve years' confinement, applying credit for the time Levingston served while awaiting sentencing in 2008 and pending the adjudication of the State's motion to revoke his community supervision in 2011. The trial court did not assess a fine orally. However, the final judgment adjudicating guilt included a fine and ordered Levingston to pay court costs.

### **Discussion**

Levingston raises two issues on appeal. First, Levingston contends that the trial court erred in assessing a fine and ordering him to pay court costs in its final written judgment. Second, Levingston claims that the trial court erred in failing to credit for time that he alleges he served in the

Orange County Jail from January 2008 through March 2008.

*Court Costs and Fine*

A trial court must pronounce a defendant's sentence orally in the defendant's presence. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(a) (West 2011); *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). If variation exists between the oral pronouncement of sentence and the written judgment, the oral pronouncement controls. *Thompson v. State*, 108 S.W.3d 287, 290 (Tex. Crim. App. 2003); *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998) (en banc). Due process prohibits the trial court from orally pronouncing a sentence and then later, without notice or hearing, signing a written judgment imposing a harsher sentence. *Ex parte Madding*, 70 S.W.3d 131, 136–37 (Tex. Crim. App. 2002). Nonetheless, the Court of Criminal Appeals has held that, because court costs are not punitive in nature, a trial court may charge court costs against a defendant in the court's written judgment even when the court's oral pronouncement does not include an assessment of costs. *Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009).

The State in this case, however, concedes error with respect to both the fine and the costs, and requests that we reform the judgment to delete both. Accordingly, we modify the judgment to delete the imposition of the

fine and the court costs.

*Credit for Time Served*

A trial court must credit a criminal defendant for the time that the defendant has spent in jail for the case excluding time served as a condition of community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 2(a) (West Supp. 2011). When a trial court revokes a criminal defendant's community supervision and imposes guilt for the underlying offense, no part of the time that the defendant was on community supervision may be considered as any part of the time that he is sentenced to serve. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 23(b) (West Supp. 2011); *see Taylor v. State*, 126 S.W.3d 201, 204 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Levingston contends the trial court erred in not crediting him for time served in the Orange County Jail from January 17, 2008 to March 31, 2008.

The record, however, does not show that Levingston was in custody during that time. Rather, the record indicates that Levingston was in custody from October 2007 through January 2008. In January 2008, Levingston was released from the Orange County Jail on deferred adjudication; he did not return until April 2008 when he reported to serve 180 days in compliance with the terms of his community supervision. Levingston's probation agreement required him to serve 180 days in the Orange County Jail

beginning April 1, 2008. Levingston reported to the Orange County Jail on April 1, 2008 and was released early on August 4, 2008. Because the record does not show that Levingston was in custody between January 2008 and March 2008, we hold that he is not entitled to credit for any time served between those dates. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 23(b).

## **Conclusion**

The State concedes that the written judgment does not comport with the trial court's oral pronouncement and requests that we reform the written judgment to delete the assessment of court costs and fines. We therefore modify the trial court's judgment to delete the \$480 fine and the \$1,680 in court costs. Because the record does not show that Levingston was in custody during the relevant time frame, we reject Levingston's contention that he is entitled to more credit for time served. We modify the trial court judgment to delete court costs and fines, and affirm the judgment of the trial court as modified.

Jane Bland  
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

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