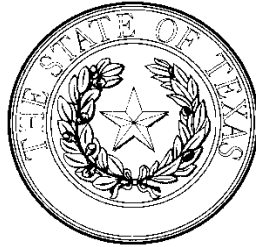


Opinion issued December 30, 2014



In The
Court of Appeals
For The
First District of Texas

NO. 01-12-00690-CR
NO. 01-12-00691-CR

OSMIN PERAZA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case Nos. 1305438 and 1305439

OPINION

Appellant, Osmin Peraza, without an agreed punishment recommendation from the State, pleaded guilty to two separate offenses of aggravated sexual assault

of a child less than fourteen years of age.¹ The trial court assessed his punishment at confinement for twenty-five years for each offense, with the sentences to run concurrently. In four issues, appellant contends that each judgment contains an erroneous and unsupported “Sheriff’s Fee” and an unconstitutional “DNA Record Fee,” the trial court erred in not permitting him to withdraw his guilty pleas, and it erred in denying him a hearing on his motions for new trial and in arrest of judgment.

We modify the trial court’s judgments and affirm as modified.

Background

A Harris County Grand Jury issued a true bill of indictment, accusing appellant of committing two separate offenses of aggravated sexual assault of a child less than fourteen years of age. After his arrest, appellant failed a polygraph test and then admitted to a police officer that he had committed the offenses. He subsequently pleaded guilty to committing the offenses. In his plea papers, appellant admitted that he had intentionally and knowingly caused both the mouth of the complainant, a person younger than fourteen years of age, to contact his sexual organ and the sexual organ of the complainant to contact his sexual organ. In each case, appellant also signed written admonishments, representing that he was mentally competent, understood the nature of the charge against him and the

¹ See TEX. PENAL CODE ANN. § 22.021 (Vernon Supp. 2014).

consequence of his plea, and freely and voluntarily pleaded guilty to the offense. Appellant's attorney signed the plea papers, affirming that she believed that appellant had executed his pleas knowingly, voluntarily, and after a full discussion of the consequences of his pleas. The trial court found sufficient evidence of appellant's guilt in both cases and that appellant had entered his guilty pleas freely, knowingly, and voluntarily. And it admonished appellant of his legal rights, accepted his guilty pleas, and ordered a presentence investigation in each case.

At the sentencing hearing, appellant moved to withdraw his guilty pleas, arguing that they had been coerced. After finding that appellant had pleaded guilty freely and voluntarily, the trial court denied his motion.

In its judgment of conviction in each case, the trial court ordered appellant to pay \$634 in court costs, including, as part of the "Sheriff's Fee," a \$50 charge for "serving capias"² and a \$5 charge for an arrest without a warrant or capias.³ The trial court also included within the \$634 of court costs a \$250 "DNA Record Fee."⁴

² See TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(2) (Vernon Supp. 2014) (imposing \$50 charge "for executing or processing an issued arrest warrant, capias, or capias pro fine").

³ See *id.* art. 102.011(a)(1) (imposing \$5 charge for arrest without warrant).

⁴ See TEX. CODE CRIM. PROC. ANN. art. 102.020(a)(1) (Vernon Supp. 2014) (authorizing collection of \$250 fee from persons convicted of offenses listed in Texas Government Code section 411.1471(a)(1)). We refer to the fee assessed pursuant to article 102.020(a)(1) as a "DNA Record Fee" because it is so labeled in the trial court clerk's bill of costs in each case.

Appellant then filed his motions for new trial and in arrest of judgment, which the trial court denied without a hearing.

Withdrawal of Guilty Pleas

In his first issue, appellant argues that the trial court erred in denying his motion to withdraw his guilty pleas because he did not enter the pleas voluntarily.

A defendant may withdraw his guilty plea at any time before judgment is pronounced or the trial court takes the plea under advisement. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979); *State v. Ellis*, 976 S.W.2d 789, 792 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Once a plea has been taken under advisement or guilt has been adjudicated, however, a request to withdraw the plea is untimely, and the withdrawal of the plea is within the sound discretion of the trial court. *Jackson*, 590 S.W.2d at 515; *Ellis*, 976 S.W.2d at 792. After the trial court has admonished the defendant and received the plea and evidence, the passage of the case for a presentence investigation constitutes taking the case under advisement. *See Jackson*, 590 S.W.2d at 514–15; *Wissinger v. State*, 702 S.W.2d 261, 262–63 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd). Because appellant did not request that his guilty pleas be withdrawn until after the trial court had taken his cases under advisement, we review the trial court's denial of his motion to withdraw his pleas for an abuse of discretion.

A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993); *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). To show that the trial court abused its discretion when it refused to allow appellant to withdraw his guilty pleas, he must show that “the trial court’s rulings lie outside the zone of reasonable disagreement.” *Jagaroo v. State*, 180 S.W.3d 793, 802 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d).

Appellant first argues that there is no evidence that he voluntarily entered his pleas because there is no record of the trial court’s oral discussion with him of his legal rights. We consider the entire record in determining whether a plea was entered voluntarily. *Fimberg v. State*, 922 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, pet. ref’d). A prima facie presumption that a defendant voluntarily and knowingly pleaded guilty arises when the trial court finds that the defendant was properly admonished. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Supp. 2014) (guilty pleas may not be accepted unless mentally competent defendant enters plea freely and voluntarily). When the record presents a prima facie showing that the plea was entered voluntarily and knowingly, “the burden shifts to the defendant to show that he entered the plea without understanding the

consequences.” *Arreola v. State*, 207 S.W.3d 387, 391 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Here, the absence of a recorded plea colloquy, alone, does not overcome the presumption that appellant was properly admonished and understood the consequences and nature of his pleas. *See Dusenberry v. State*, 915 S.W.2d 947, 949–52 (Tex. App.—Houston [1st Dist.] 1996, pet. ref’d) (concluding guilty plea voluntary because defendant received written admonishments of legal rights). Although the plea colloquy was not recorded, appellant received written admonishments of his legal rights, affirmed that he was mentally competent and understood the nature of the charges against him and the consequences of his pleas, and agreed that he freely and voluntarily pleaded guilty in each case. Further, the plea papers show that appellant’s trial counsel and the trial court both verified that appellant entered his guilty pleas freely, knowingly, and voluntarily, after having fully discussed his pleas and their consequences with counsel. On this record, there is no evidence that appellant was not properly admonished or failed to understand the consequence or nature of his pleas.

In regard to appellant’s assertion that his guilty pleas were coerced, we note that “a plea is involuntary when it is ‘induced by threats, misrepresentations, or improper promises’” by the prosecutor, judge, or law enforcement officials. *Rios v. State*, 377 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2012, pet. ref’d)

(quoting *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006)). Moreover, we presume the regularity of the judgments and proceedings, and appellant has the burden of overcoming this presumption. *Dusenberry*, 915 S.W.2d at 949.

Appellant presented no evidence that his guilty pleas were actually coerced. At his sentencing hearing, appellant's trial counsel suggested that appellant was coerced into pleading guilty because the jury was "on the way" and appellant had failed a polygraph test immediately before admitting to a police officer that he had committed the sexual-assault offenses. The record, however, contains no evidence that anyone coerced appellant into pleading guilty. Appellant voluntarily submitted to a polygraph test, and neither his failure of the polygraph test, nor the immediacy of a jury trial, constituted a threat, misrepresentation, or improper promise. Thus, appellant has not overcome the presumption that he knowingly and voluntarily entered his pleas.

When appellant requested to withdraw his guilty pleas, the trial court had taken his cases under advisement and reset them for a punishment hearing. Because the trial court had already admonished appellant of his legal rights and he had already voluntarily pleaded guilty, his request to withdraw his pleas was untimely, and the trial court had discretion to accept or deny his motion. *See Jackson*, 590 S.W.2d at 515.

Accordingly, we hold that the trial court did not err in denying appellant's motion to withdraw his guilty pleas.

We overrule appellant's first issue.

Court Costs for Arrest

In his second issue, appellant argues that the trial court's judgments are invalid because they each contain an erroneous and unsupported "Sheriff's Fee." Appellant asserts that, "[a]t the very least, the \$50.00 Sheriff's Fee [for serving a *capias*] should be removed" from the \$634 in court costs assessed against him in each judgment.

A criminal defendant must pay certain statutorily mandated costs and fees, which vary depending on the type of offense, the underlying facts, and the procedural history of the case. *See* TEX. GOV'T CODE ANN. § 102.021 (Vernon Supp. 2014) (listing court costs upon conviction); TEX. LOC. GOV'T CODE ANN. § 133.102 (Vernon Supp. 2014) (same). The district court clerk must keep a record of each fee or cost charged for a service rendered in a criminal action or proceeding. TEX. CODE CRIM. PROC. ANN. art. 103.009(a)(1) (Vernon 2006). If a criminal action is appealed, an officer of the court must certify and sign a bill of costs and send it to the appellate court. TEX. CODE CRIM. PROC. ANN. art. 103.006 (Vernon 2006).

Court costs do not constitute part of the guilt or sentence of a criminal

defendant—“they are ‘a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of a case.’” *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014) (quoting *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011)). Therefore, we review the assessment of court costs to determine whether there is a basis for the cost; we do not undertake an evidentiary-sufficiency review. *Id.*

Here, the trial court clerk’s bills of costs each include a \$50 charge for “serving *capias*” as part of the “Sheriff’s Fee” assessed against appellant. *See* TEX. CODE CRIM. PROC. ANN. art. 102.011(a)(2) (Vernon Supp. 2014) (“A defendant convicted of a felony or a misdemeanor shall pay . . . \$50 for executing or processing an issued arrest warrant, *capias*, or *capias pro fine* . . .”). They also include a \$5 charge for an arrest without a warrant/*capias*. *See id.* art. 102.011(a)(1) (authorizing \$5 charge for arrest without warrant). The State agrees that the records do not support the \$50 charge for “serving *capias*.” And the records contain no basis to conclude that *capiases* were issued for appellant’s arrest.

The proper remedy for such an unsupported fee is for the appellate court to modify the judgment, not to grant a new trial as appellant has requested. *See* TEX. R. APP. P. 43.2(b); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (agreeing “appellate court has authority to reform a [trial court] judgment

to . . . make the record speak the truth when the matter has been called to its attention by any source”); *see also Nolan v. State*, 39 S.W.3d 697, 698 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (“An appellate court has the power to correct and reform a trial court judgment ‘to make the record speak the truth when it has the necessary data and information to do so’” (quoting *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref’d))).

Because there is no basis in the record to support the \$50 charge for “serving *capias*” assessed against appellant as part of the “Sheriff’s Fee” in both of appellant’s cases, we modify each judgment to delete the \$50 charge from the court costs.

We sustain appellant’s second issue.

Constitutionality of “DNA Record Fee”

In his third issue, appellant argues that the trial court’s judgments are invalid because they each assess an unconstitutional \$250 “DNA Record Fee.” *See* TEX. CODE CRIM. PROC. ANN. art. 102.020(a)(1) (Vernon Supp. 2014) (authorizing collection of \$250 from persons convicted of offenses listed in Texas Government Code section 411.1471(a)(1)). Appellant asserts that the fee required by article 102.020 is facially unconstitutional under the separation of powers clause of the Texas Constitution. *See* TEX. CONST. art. II, § 1.

Whether a statute is facially constitutional is a question of law that we review de novo. *Ex Parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Maloney v. State*, 294 S.W.3d 613, 626 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). When reviewing a constitutional challenge, we “presume that the statute is valid and that the legislature was neither unreasonable nor arbitrary in enacting it.” *Curry v. State*, 186 S.W.3d 39, 42 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). If the statute can be construed in two different ways, one of which sustains its validity, we apply the interpretation that sustains its validity. *Maloney*, 294 S.W.3d at 625.

The party challenging the statute bears the burden of establishing the statute’s unconstitutionality. *Rosseau*, 396 S.W.3d at 557; *Curry*, 186 SW.3d at 42. “A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid.” *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); *see also Rosseau*, 396 S.W.3d at 557. We “must uphold the challenged statute if it can be reasonably construed in a manner consistent with the legislative intent and is not repugnant to the Constitution.” *Curry*, 186 S.W.3d at 42.

Article 102.020(a)(1), titled “Costs Related to DNA Testing,” provides that a defendant convicted of certain offenses, including aggravated sexual assault of a

child less than fourteen years of age, “shall pay as a cost of court: \$250 [upon] conviction” TEX. CODE CRIM. PROC. ANN. art. 102.020(a)(1). Thirty-five percent of the revenue received from this “DNA Record Fee” is dedicated to the state highway fund, while sixty-five percent of the revenue is dedicated to the general revenue fund of the criminal justice planning account. *Id.* art. 102.020(h).

Appellant argues that the “DNA Record Fee” is an impressible tax collected by the judiciary, rather than a legitimate court cost, because revenue from this fee is dedicated to the state highway fund and criminal justice planning account and, thus, used for services that are neither necessary nor incidental to the trial of a criminal case. In support of his argument, appellant principally relies on *Ex Parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126 (1942).

In *Carson*, the Texas Court of Criminal Appeals considered whether it was constitutionally permissible to impose a \$1 fee as a court cost in all cases filed in counties with more than eight district courts or more than three county courts at law. 159 S.W.2d at 127. The revenue collected from the \$1 fee was directed to the “County Law Library Fund” and “available to be used for certain costs and expenses in acquiring, maintaining and operating a law library available to the judges of the courts and to the attorneys of litigants.” *Id.* The court held that the fee constituted an unconstitutional tax, not a legitimate court cost, because it was

“neither necessary nor incidental to the trial of a criminal case.” *Id.* at 127, 130.

The court cautioned that to hold otherwise,

would lead into fields of expenditures which may as well include the cost of the court houses, the automobiles which officers use to apprehend criminals and even the roads upon which they ride. If something so remote as a law library may be properly charged to the litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties, it occurs to us that we might as logically tax an item of cost for the education of such attorneys and judges and even the endowments of the schools which they attend.

Id. at 127.

Appellant, likening the “DNA Record Fee” to the law library fee in *Carson*, first asserts that the portion of the “DNA Record Fee” dedicated to the state highway fund “is used . . . [to] provide services that are neither necessary nor incidental to the trial of a criminal case.”

By law, “[m]oney that is required to be used for public roadways by the Texas Constitution or federal law and that is deposited in the state treasury to the credit of the *state highway fund*, . . . may be used only: (1) to improve the state highway system; (2) to mitigate adverse environmental effects that result directly from construction or maintenance of a state highway by the department; or (3) by the Department of Public Safety to police the state highway system and to administer state laws relating to traffic and safety on public roads.” TEX. TRANSP. CODE ANN. § 222.001(a) (Vernon 2011) (emphasis added). Section 222.002

supplements this instruction and provides that “[m]oney in the *state highway fund* that is not required to be spent for public roadways by the Texas Constitution or federal law may be used for any function performed by the department.” *Id.* § 222.002 (Vernon 2011) (emphasis added). “[T]he department” referenced in section 222.002 is the Texas Department of Transportation (“TxDOT”). *Id.* § 201.001(a)(2) (Vernon Supp. 2014); *see also State v. Montgomery Cnty.*, 338 S.W.3d 49, 56 (Tex. App.—Beaumont 2011, pet. denied) (noting “[d]epartment’ means the Department of Transportation”).

Here, the “DNA Record Fee” revenue dedicated to the state highway fund does not constitute money that is required, by either the Texas Constitution or federal law, to be used for public roadways. *See* TEX. CODE CRIM. PROC. ANN. art. 102.020(a)(1); TEX. TRANSP. CODE ANN. § 222.001(a). Therefore, pursuant to section 222.002, such money may be used for *any function of TxDOT*. *See* TEX. TRANSP. CODE ANN. §§ 201,001, 222.002.

The stated mission of TxDOT is to “[w]ork with others to provide safe and reliable transportation solutions for Texas.”⁵ *Inside TxDOT: Mission, Goals and*

⁵ Although our dissenting colleague calls into question the reliance on information available through the Texas Department of Transportation’s website, we note that this Court and others have repeatedly taken judicial notice of information available on various websites, including governmental websites. *See* TEX. R. EVID. 201; *see, e.g., Payan v. State*, 199 S.W.3d 380, 383 & n.4 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d) (taking judicial notice of information available on “[t]he State Library and Archives Commission website”); *see also Chen v. Hernandez*,

Values, TEX. DEP'T TRANSP., <http://www.txdot.gov/inside-txdot/contact-us/mission.html> (last visited Dec. 16, 2014); *see also* Glenn T. Hasler, *Dangerous Distractions: The Problematic Use of Wireless Communication Devices While Driving*, 12 TEX. TECH. ADMIN. L.J. 155, 168 (2010) (“TxDOT’s purpose is to facilitate effective movement throughout the state by providing safe, efficient transportation systems.”); Kyle R. Baum, Comment, *Rollin’ on Down the Rail: Can Texas Lead the Nation in Developing Efficient High-Speed Rail this Time Around?*, 45 TEX. TECH. L. REV. ONLINE 1, 2 (2013) (TxDOT’s “core mission is to ‘provide safe and efficient movement of people and goods, enhance economic viability and improve the quality of life for people that travel in the state of Texas by maintaining existing roadways and collaborating with private and local entities to plan, design, build and maintain expanded transportation infrastructure’”).

TxDOT is divided into twenty-two divisions, ranging from aviation to maritime to public transportation and rail, which are tasked with handling the responsibilities of the department. *See* TEX. TRANSP. CODE ANN. § 201.202(a) (Vernon Supp. 2014) (“The commission shall organize the department into divisions to accomplish the department’s functions . . . including divisions for: (1)

No. 03-11-00222-CV, 2012 WL 3793294, at *14 (Tex. App.—Austin Aug. 28, 2012, pet. denied) (mem. op.) (noting trial court took judicial notice of “government websites,” including “website for the U.S. Department of State”); *Hayden v. State*, 155 S.W.3d 640, 647 (Tex. App.—Eastland 2005, pet. ref’d) (taking judicial notice of information available on “website of the United States Naval Observatory”).

aviation; (2) highways and roads; and (3) public transportation.”); *Inside TxDOT: Divisions*, TEX. DEP’T TRANSP., <http://www.txdot.gov/inside-txdot/division.html> (last visited Dec. 16, 2014) (“From rail crossings to right of way, traffic cameras to travel maps, and bridge inspections to bid opportunities, TxDOT’s divisions handle a diverse range of services for the agency.”).

TxDOT is responsible for developing a statewide transportation plan for addressing all modes of transportation, including highways and turnpikes, aviation, mass transportation, railroads, high-speed railroads, and water traffic. *See* TEX. TRANSP. CODE ANN. § 201.601(a) (Vernon Supp. 2014); *Robbins v. Limestone Cnty.*, 114 Tex. 345, 268 S.W. 915, 920 (1925) (agency created to “formulate and execute plans and policies for the location, construction and maintenance of a comprehensive system of state highways and public roads”); *see also* TEX. TRANSP. CODE ANN. §§ 201.6011–622 (Vernon 2011 & Supp. 2014) (listing plans and projects of TxDOT); Brian K. Carroll, *The Road Goes on Forever and the Claims Process Never Ends: An Approach for Success in Handling Texas Department of Transportation Construction Claims*, 13 TEX. TECH. ADMIN. L.J. 233, 234 (2012) (“The projects range from small landscaping and guardrail projects to major interchanges TxDOT also supervises the construction of buildings for rest areas, area engineer’s offices, district offices, visitor’s centers, and other special purpose buildings”).

The court in *Carson*, which constitutes binding precedent on this Court,⁶ held that fees which are “neither necessary nor incidental to the trial of a criminal case” are not legitimate courts costs that may be assessed against a defendant. 159 S.W.2d at 127, 130. As discussed above, the responsibilities of TxDOT, which under the Code of Criminal Procedure is entitled to use thirty-five percent of the revenue collected by the “DNA Record Fee,” do not relate to the trial of a criminal case. Instead, the responsibilities of TxDOT are far more remote from a criminal trial than the county law libraries which were to be used by the judges and attorneys for trial preparation in *Carson*. Thus, it cannot be reasonably concluded that the portion of the revenue collected through the “DNA Record Fee” and dedicated to the state highway fund constitutes a proper court cost to be assessed against appellant or any other criminal defendant.

Accordingly, we hold that the portions of articles 102.020(a)(1) and 102.020(h) requiring the collection of the “DNA Record Fee” from appellant to be dedicated the state highway fund constitute an unconstitutional tax. *See Carson*, 159 S.W.2d at 127, 130. *But see O’Bannon v. State*, 435 S.W.3d 378, 380–82 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

⁶ *See Reed v. Buck*, 370 S.W.2d 867, 870–71 (Tex. 1963) (explaining simply because certain cases had “not been cited in recent years,” such “ancient cases” do not “just fade[] away”; instead, “unless there is some good reason for overruling them, they should not be disregarded”); *Purchase v. State*, 84 S.W.3d 696, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d) (“[W]e are bound by the decisions of our state’s highest criminal court.”).

We note that our dissenting colleague would not hold that the portion of the “DNA Record Fee” revenue dedicated to the state highway fund is an unconstitutional tax. In doing so, he relies on Texas Government Code section 411.145(c), which provides that “[a] fee collected under this section shall be deposited in the state treasury to the credit of the state highway fund, and money deposited to the state highway fund under this section and under Articles 42.12 and 102.020(h), Code of Criminal Procedure, may be used only to defray the cost of administering [chapter 411, subchapter G] and Section 411.0205.” TEX. GOV’T CODE ANN. § 411.145(c) (Vernon 2012); *see also id.* § 411.0205 (Vernon Supp. 2014) (crime laboratory accreditation process). Because “[s]ubchapter G governs the collection and management of DNA samples, including [a]ppellant’s, by [the Texas Department of Public Safety (“DPS”)]” and “[s]ection 411.0205 regulates the accreditation of forensic crime laboratories by DPS,” our dissenting colleague concludes that “the portion of the DNA Record Fee credited to the state highway fund is used to defray the costs associated with collecting, storing, and testing DNA samples” and, thus, “paying for DNA sampling and crime-lab accreditation is a valid, constitutional use of the DNA Record Fee under *Carson*.”

In reaching his conclusion, however, our dissenting colleague fails to consider the entire breadth of subchapter G. For instance, the “DNA Database” provided for in chapter 411, subchapter G is used for a wide variety of purposes,

including “assisting in the recovery or identification of human remains from a disaster or for humanitarian purposes,” “assisting in the identification of living or deceased missing persons,” “establishing a population statistics database,” “assisting in identification research, forensic validation studies, or forensic protocol development,” and “retesting to validate or update the original analysis or assisting in database or DNA laboratory quality control.” *Id.* § 411.143(c) (Vernon 2012). And the database contains DNA records from a whole host of individuals, such as “an unidentified missing person or unidentified skeletal remains or body parts,” “a close biological relative of a person who has been reported missing,” and “a person at risk of becoming lost, such as a child or a person declared . . . mentally incapacitated.” *Id.* § 411.142(g) (Vernon 2012). Notably, none of the above statutory purposes or the individual records in the DNA Database relate to appellant’s criminal trial, despite the fact that thirty-five percent of the revenue collected via the “DNA Record Fee” may be utilized by DPS to “defray the cost of administering” chapter 411, subchapter G.⁷ *See id.* § 411.145(c).

⁷ We also note that under chapter 411, subchapter G, the DPS director is assigned numerous responsibilities, including “develop[ing] biennial plans” to “improve the reporting and accuracy of the DNA [D]atabase,” “audit[ing] the records, reports, procedures, or other quality assurance matters of any DNA laboratory,” and providing “training for collection of DNA samples,” none of which are responsibilities that are “necessary [or] incidental to the trial of a criminal case.” *See* TEX. GOV’T CODE ANN. §§ 411.142(e), 411.144(c), 411.146(b) (Vernon

The Texas Court of Criminal Appeals has clearly favored a strict definition of what constitutes a legitimate court cost that may be assessed against a criminal defendant. *See Carson*, 159 S.W.2d at 127; *see also Salinas v. State*, 426 S.W.3d 318, 329–30 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (Jamison, J., dissenting) (explaining *Carson* constitutes binding precedent and “the *Carson* Court clearly favored a strict definition of permissible ‘court costs’ in a criminal case”). And the revenue collected via the “DNA Record Fee” to be used by DPS for anything covered by chapter 411, subchapter G, or for crime laboratory accreditation under Government Code section 411.0205, is not closely enough related to appellant’s criminal trial to be considered constitutional.

Appellant, again relying on *Carson*, next asserts that the portion of the “DNA Record Fee” dedicated to the general revenue fund of the criminal justice planning account also constitutes an unconstitutional tax.

The criminal justice planning account is administered by the Criminal Justice Division (“CJD”) of the Governor’s Office. *See* TEX. GOV’T CODE ANN. § 772.006(a)(2) (Vernon 2012). Appellant asserts that the CJD’s “mission is to create and support programs that protect people from crime, reduce the number of crimes committed, and to promote accountability, efficiency, and effectiveness within the criminal justice system.” He notes that it “focuses on the enhancement

2012); *Ex Parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126, 127, 130 (1942) (discounting notion funds for training constitute legitimate court costs).

of Texas'[s] capacity to prevent crime, provide service and treatment options, enforce laws, train staff and volunteers, and the restoration of crime victims to full physical, emotional and mental health.” Appellant argues that because “the courts [are] never mentioned” as part of the CJD’s mission or focus, the revenue collected via the “DNA Record Fee” is not used by the CJD for services that are necessary or incidental to the trial of a criminal case.

The Texas Government Code reveals that the CJD was established to:

- (1) advise and assist the governor in developing policies, plans, programs, and proposed legislation for improving the coordination, administration, and effectiveness of the criminal justice system;
- (2) administer the criminal justice planning fund;
- (3) prepare a state comprehensive criminal justice plan, to update the plan annually based on an analysis of the state’s criminal justice problems and needs, and to encourage identical or substantially similar local and regional comprehensive criminal justice planning efforts;
- (4) establish goals, priorities, and standards for programs and projects to improve the administration of justice and the efficiency of law enforcement, the judicial system, prosecution, criminal defense, and adult and juvenile corrections and rehabilitation;
- (5) award grants to state agencies, units of local government, school districts, and private, nonprofit corporations from the criminal justice planning fund for programs and projects on consideration of the goals, priorities, and standards recommended by the Criminal Justice Policy Council;

- (6) apply for, obtain, and allocate for the purposes of this section any federal or other funds which may be made available for programs and projects that address the goals, priorities, and standards established in local and regional comprehensive criminal justice planning efforts or assist those efforts;
- (7) administer the funds provided by this section in such a manner as to ensure that grants received under this section do not supplant state or local funds;
- (8) monitor and evaluate programs and projects funded under this section, cooperate with and render technical assistance to state agencies and local governments seeking to reduce crime or enhance the performance and operation of the criminal justice system, and collect from any state or local government entity information, data, statistics, or other material necessary to carry out the purposes of this section;
- (9) submit a biennial report to the legislature reporting the division's activities during the preceding biennium including the comprehensive state criminal justice plans and other studies, evaluations, crime data analyses, reports, or proposed legislation that the governor determines appropriate or the legislature requests; and
- (10) perform other duties as necessary to carry out the duties listed in this subsection and adopt rules and procedures as necessary.

Id.

In regard to the CJD's administration of the criminal justice planning account, the legislature determines and appropriates the necessary amount of money from the criminal justice planning fund to the CJD. TEX. CODE CRIM. PROC. ANN. art. 102.056(a) (Vernon Supp. 2014). The CJD then uses this money to “[s]upport a wide range of projects designed to reduce crime and improve the

criminal and juvenile justice systems.”⁸ *CJD Funding Sources*, OFFICE OF GOVERNOR, CRIMINAL JUSTICE DIV., 1, http://governor.state.tx.us/files/cjd/CJD_Funding_Sources.pdf (last visited Dec. 16, 2014); *see also* TEX. CODE CRIM. PROC. ANN. art. 102.056(a) (money from criminal justice planning fund used by CJD “for state and local criminal justice projects,” with not less than twenty percent of such money going to juvenile justice programs); *Financial Services: Grants over \$25,000 Administered by the Office of the Governor*, OFFICE OF GOVERNOR, <http://governor.state.tx.us/financial-services/grants/> (last visited Dec. 16, 2014) (grants from criminal justice planning fund “support a wide range of projects designed to reduce crime and improve the criminal [and] juvenile justice systems”); *Helpful Questions and Answers for Managing Grants*, OFFICE OF GOVERNOR, CRIMINAL JUSTICE DIV., B-12 (Feb. 2014), http://governor.state.tx.us/files/cjd/CJD_Guide_to_Grants_v7.pdf (same).

Numerous entities are eligible to apply for grants from the criminal justice planning fund, including “[s]tate agencies, units of local government, independent school districts, nonprofit corporations, Native American tribes, COGs, universities, colleges, hospital districts, juvenile boards, regional education service

⁸ We again note that our dissenting colleague calls into question the reliance on information available through the website of the Office of the Governor. However, as stated previously, this Court and others have repeatedly taken judicial notice of information available on various websites, including governmental websites. *See* TEX. R. EVID. 201; *see, e.g., Payan*, 199 S.W.3d at 383 & n.4; *see also Chen*, 2012 WL 3793294, at *14; *Hayden*, 155 S.W.3d at 647.

centers, community supervision and corrections departments, crime control and prevention districts, and faith-based organizations.” *CJD Funding Sources, supra*, at 1; *see also* TEX. GOV’T CODE ANN. § 772.006(a)(5) (CJD awards grants from criminal justice planning fund “to state agencies, units of local government, school districts, and private, nonprofit corporations”); Press Release, Office of Governor, Gov. Perry Awards \$195,000 From State Criminal Justice Planning Funds (Jan. 28, 2008), <http://governor.state.tx.us/news/press-release/5133/> (grant recipients from criminal justice planning fund “include local units of government, independent school districts, non-profit corporations, hospitals, universities, colleges, community supervision and corrections departments, law enforcement agencies and councils of governments”).

Moreover, the CJD has awarded money from the fund to a variety of recipients, such as the Alamo Area Council of Governments for Regional Police Training Academy, the Bastrop County Women’s Shelter for SAINT: Sexual Assault Integrated Nursing Team, Fort Bend County for the “Saved by the Bell” Delinquency Reduction Program, the Katy Christian Ministries for Counseling Services for Victims of Domestic Violence, and The Family Place for S.T.A.R.T. (Students Tackling Abusive Relationships Together). *See, e.g.*, Press Release, Office of Governor Tex., Gov. Perry Awards \$8 Million in Grants to Improve Criminal Justice Systems (Sept. 10, 2008), <http://governor.state.tx.us/news/press->

release/11114/ (listing seventy-nine recipients that received more than \$8 million in grants from criminal justice planning fund); Press Release, Office of the Governor of Tex., Gov. Perry Awards \$195,000 From State Criminal Justice Planning Fund, *supra* (stating more than \$195,000 in grants from criminal justice planning fund awarded to Wood County for Wood County Rural Prosecutor Project and BeyondMissing Inc. for Texas Amber Alert Network); Press Release, Office of Governor, Governor Rick Perry Announces Statewide Grant to Reduce School Dropouts (Nov. 7, 2001), <http://governor.state.tx.us/news/press-release/4229/> (announcing \$168,146 criminal justice planning fund grant to Behavioral Health Institute of Waco to assist with “efforts to reduce school failure, dropout rates, and juvenile crime”); *see also Helpful Questions and Answers for Managing Grants, supra*, at B-12 (listing activities eligible for grants from criminal justice planning fund, such as job training, professional therapy and counseling, school based delinquency prevention, substance abuse, and peer support groups).

With this background in mind, we turn to the propriety of the portion of the revenue collected via the “DNA Record Fee” dedicated to the criminal justice planning account and to be used by the CJD. As the Texas Court of Criminal Appeals explained in *Carson*, adopting a less than strict definition of what constitutes a legitimate court cost “would lead into fields of expenditures which

may as well include the cost of the court houses, the automobiles which officers use to apprehend criminals and even the roads upon which they ride.” 159 S.W.2d at 127.

Here, sixty-five percent of the revenue received through the “DNA Record Fee” is dedicated by law to the general revenue fund of the criminal justice planning account in order to “[s]upport a wide range of projects designed to reduce crime and improve the criminal and juvenile justice systems.” *See CJD Funding Sources, supra*, at 1. The recipients of money from the criminal justice planning fund are vastly diverse and range from state agencies to schools to hospitals and faith-based organizations. Notably, the money from the criminal justice planning fund is not required to be directed to the courts or to services necessarily or incidentally related to criminal trials. And often times such revenue is given to programs that, as the court in *Carson* specifically noted, could not possibly relate to legitimate court costs. *See* 159 S.W.2d at 127 (costs for training and education not legitimate court costs that may be assessed against criminal defendants). Accordingly, we cannot conclude that the criminal justice planning account, which is funded by the “DNA Record Fee,” passes constitutional muster. *See Salinas*, 426 S.W.3d at 330–31 (Jamison, J., dissenting) (concluding court costs assessed pursuant to Texas Local Government Code section 133.102, which directs

approximately thirteen percent of its revenue to the criminal justice planning fund, unconstitutional).

The State argues that appellant has not shown that the “DNA Record Fee” is unconstitutional because it “is a one-time fee of \$250” and “is certainly applicable to appellant, as he was court-ordered to provide a DNA specimen in both sexual assault cases.” The State asserts that the “DNA Record Fee” was ordered “to reimburse the State for expenses incurred as a result of the felony prosecution [of appellant], specifically costs spent to obtain DNA specimens in certain cases.” And “[s]ince this statutory assessment is reasonably related to the costs of administering the criminal justice system, appellant has failed to show how the statute authorizing this court cost is unconstitutional.”

DPS is required to collect a DNA specimen from persons convicted of certain crimes, including aggravated sexual assault of a child less than fourteen years of age, and maintain a database that includes, among others, these DNA specimens. *See* TEX. GOV’T CODE ANN. § 411.142 (directing DPS to maintain “computerized database that serves as the central depository in the state for DNA records”); *id.* § 411.1471 (Vernon 2012) (requiring collection of DNA specimen from those convicted of certain crimes). As asserted by the State, funds from the criminal justice planning account may be used by the CJD to reimburse DPS and other law enforcement agencies for expenses incurred in performing duties

required by Texas Government Code section 411.1471, namely the taking of a DNA specimen from a defendant, preserving of the specimen, and maintaining a collection of the specimen. *See* TEX. CODE CRIM. PROC. ANN. art. 102.056(e); TEX. GOV'T CODE ANN. § 411.1471.

Notably though, reimbursement for expenses related to the collection and maintenance of DNA specimens is not automatic or guaranteed under Texas Code of Criminal Procedure article 102.056(e); the statute only provides that DPS will be reimbursed with funds from the criminal justice planning account after it complies with certain procedures. *See* TEX. CODE CRIM. PROC. ANN. art. 102.056(e) (law enforcement agency, incurring expenses in previous calendar quarter, must, on first day after end of calendar quarter, send certified statement of costs incurred to CJD). Thus, although appellant provided a DNA specimen to DPS in accordance with section 411.1471 in conjunction with his cases, it cannot be assumed that DPS was automatically reimbursed by virtue of the “DNA Record Fee” for any expenses associated with the collection of his specimen.

Further, we note that even if we presume that some of the revenue collected pursuant to the “DNA Record Fee” is actually used to reimburse DPS or other law enforcement agencies for collecting DNA specimens from criminal defendants, preserving such specimens, and maintaining a record of such collections, it is readily apparent that this is not the only way in which the revenue is used. Sixty-

five percent of the revenue collected through the “DNA Record Fee” is dedicated to the general revenue fund of the criminal justice planning account. As outlined above, money in the criminal justice planning fund is given to a vast number of diverse entities, almost of none of which have any relation to the collection of a defendant’s DNA specimen or a criminal trial. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 102.056(a) (money from criminal justice planning fund is used for “state and local criminal justice projects,” with not less than twenty percent of such funds directed to juvenile justice programs); TEX. GOV’T CODE ANN. § 772.006(a)(5) (CJD awards grants from criminal justice planning fund “to state agencies, units of local government, school districts, and private, nonprofit corporations”); Press Release, Office of Governor, Gov. Perry Awards \$8 Million in Grants to Improve Criminal Justice Systems, *supra* (listing seventy-nine recipients that received more than \$8 million in grants from criminal justice planning fund); Press Release, Office of Governor, Gov. Perry Awards \$195,000 from State Criminal Justice Planning Funds, *supra* (stating more than \$195,000 in grants from criminal justice planning fund awarded to Wood County for Wood County Rural Prosecutor Project and BeyondMissing Inc. for Texas Amber Alert Network); Press Release, Office of Governor, Governor Rick Perry Announces Statewide Grant to Reduce School Dropouts, *supra* (announcing \$168,146 criminal justice planning fund grant to Behavioral Health Institute of Waco to assist with “efforts to reduce school

failure, dropout rates, and juvenile crime”). Thus, it cannot be reasonably concluded that the revenue dedicated to the criminal justice planning account provides services that are necessary or incidental to the trial of a criminal defendant’s case. *See Carson*, 159 S.W.2d at 127, 130; *see also Salinas*, 426 S.W.3d at 332 (Jamison, J., dissenting) (“Although it appears some of the funds that go to the fair defense account may ultimately help provide counsel for indigent criminal defendants, it does not appear that this is the sole use that can be made for these funds. . . . It therefore cannot be said that either the training fund or the fair defense account are necessary or incidental expenses in the trial of appellant’s criminal case.”).

Accordingly, we hold that the portions of article 102.020(a)(1) and article 102.020(h) requiring the collection of the “DNA Record Fee” from appellant to be dedicated to the general revenue fund of the criminal justice planning account constitute an unconstitutional tax. *See Carson*, 159 S.W.2d at 127, 130. *But see O’Bannon*, 435 S.W.3d at 381.

We note that our sister court has recently criticized the reasoning of the Texas Court of Criminal Appeals opinion in *Carson* as “both abbreviated and bereft of citations to supporting authority.” *O’Bannon*, 435 S.W.3d at 381 (quoting *Salinas*, 426 S.W.3d at 326). In “[a]ssuming arguendo that *Carson* requires a statute imposing court costs to be ‘necessary or incidental to the trial of a

criminal case,” the Fourteenth Court of Appeals held that the defendant’s facial constitutional challenge to article 102.020 failed because he did not “establish[] how the funds will be used once they are distributed to the state highway fund and the criminal justice planning account.” *Id.* at 381–82. It asserted that the defendant merely “infer[ed]” that revenue collected pursuant to article 102.020(a)(1) will “flow ‘directly to the executive branch [to be] used for policy purposes’” or to the state highway fund, “not [to] be used for purposes necessary or incidental to DNA collection or testing.” *Id.* at 382.

We respectfully disagree with our sister court for the reasons outlined above. In short, we first note that the reasoning of the Texas Court of Criminal Appeals in *Carson* is sound and it constitutes binding precedent upon it and lower courts. *See Reed v. Buck*, 370 S.W.2d 867, 870–71 (Tex. 1963) (explaining simply because certain cases had “not been cited in recent years,” such “ancient cases” do not “just fade[] away”; instead, “unless there is some good reason for overruling them, they should not be disregarded”); *Purchase v. State*, 84 S.W.3d 696, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. ref’d) (“[W]e are bound by the decisions of our state’s highest criminal court.”). Second, we note that criminal defendants similarly situated to appellant are not asking appellate courts to “infer” how the revenue from the “DNA Record Fee” will be directed. As discussed above, the revenue, by statute, is dedicated by law for expenditures that are far removed from

actual “court costs.” A plain reading of the pertinent statutes reveals this undeniable fact.

We sustain appellant’s third issue.⁹

Conclusion

Having held that the “DNA Record Fee” assessed against appellant pursuant to article 102.020(a)(1) and article 102.020(h) constitutes an unconstitutional tax, we modify each judgment to delete the \$250 charge from the assessed court costs. *See Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (holding proper remedy when trial court erroneously includes amounts as court costs is to modify judgment to delete erroneous amounts); *Sturdivant v. State*, Nos. 01-12-00089-CR, 01-12-00184-CR, 2014 WL 1258813, at *7 (Tex. App.—Houston [1st Dist.] Mar. 27, 2014, pet. ref’d) (holding trial court erroneously included attorney pro tem fees as court costs and modifying judgment accordingly); *see also* TEX. R. APP. P. 43.2(b).

⁹ In his fourth issue, appellant argues that the trial court erred in not granting him a hearing on his motions for new trial and in arrest of judgment because “[t]o properly challenge the constitutionality of the DNA fees and the faulty Sheriff’s fee, a hearing was necessary.” Appellant filed his motions in the trial court asserting that “[t]he fees from the Sheriff reflected on the bill[s] of costs are wholly unsupported and erroneous” and “[t]he DNA court costs are unconstitutional.” Given our disposition of appellant’s second and third issues, we do not reach the issue of whether the trial court erred in not granting appellant a hearing on his motions for new trial and in arrest of judgment. *See* TEX. R. APP. P. 47.1.

Further, as noted above, having held that there is no basis in the record to support the charge for “serving *capias*,” we also modify each judgment to delete the \$50 charge from the assessed court costs. *See French*, 830 S.W.2d at 609 (agreeing “appellate court has authority to reform a [trial court] judgment to . . . make the record speak the truth when the matter has been called to its attention by any source”); *Nolan*, 39 S.W.3d at 698 (“An appellate court has the power to correct and reform a trial court judgment ‘to make the record speak the truth when it has the necessary data and information to do so’” (quoting *Asberry*, 813 S.W.2d at 529)); *see also* TEX. R. APP. P. 43.2(b).

We affirm the judgment of the trial court as modified.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

Justice Brown, concurring and dissenting.

Publish. TEX. R. APP. P. 47.2(b).