Affirmed and Majority and Dissenting Opinions filed October 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00955-CR

JOE LEE BOWDEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1422757

D I S S E N T I N G O P I N I O N

Today the panel holds that a criminal defendant may challenge the constitutionality of court costs for the first time on direct appeal because they were not imposed in open court nor itemized in the trial court's judgment. In reaching this holding, the panel concludes that in *London v. State*,[1] the Court of Criminal Appeals implicitly overruled this court's precedent in *Johnson v. State*.[2] *London*

[1] 490 S.W.3d 503 (Tex. Crim. App. 2016).

[2] *See* 475 S.W.3d 430 (Tex. App.—Houston [14th Dist.] 2015, pet. filed).

did not overrule *Johnson*. The panel should apply our holding in *Johnson* to today's case and hold that appellant failed to preserve error on his constitutional claims and therefore may not raise them for the first time in this appeal. Because the majority incorrectly concludes that appellant need not preserve error in the trial court, I respectfully dissent.

The defendant must preserve error when the defendant has knowledge of an issue.

In *London*, the Court of Criminal Appeals reiterated the familiar rule that a party generally must complain in the trial court to preserve that complaint for appellate review.[3] The high court recapped the rule's rationale, explaining that the error-preservation requirement

> (1) ensures that the trial court will have an opportunity to prevent or correct errors, thereby eliminating the need for a costly and time-consuming appeal and retrial; (2) guarantees that opposing counsel will have a fair opportunity to respond to complaints; and (3) promotes the orderly and effective presentation of the case to the trier of fact.[4]

According to the high court, a party satisfies the requirement of a timely trial-level complaint if the party makes the complaint "'as soon as the grounds for it become apparent,'" which means "'as soon as the [objecting party] knows or should know that an error has occurred.'"[5] If a party had no opportunity to raise an objection in the trial court when the party first knew or should have known of the alleged error, then preservation of error in the trial court is not required.[6] The *London* court concluded that the appellant in that case "was not required to raise his as-applied

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[3] *See* 490 S.W.3d at 506–07.

[4] *Id.*

[5] *Id*. at 507 (quoting *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006) and *Hollins v. State*, 805 S.W.2d 475, 476 (Tex. Crim. App. 1991)).

[6] *Id*.

challenge in the trial court because his first opportunity to do so was on direct appeal."[7]

A defendant generally has constructive knowledge of mandatory court costs.

The Court of Criminal Appeals has held that convicted persons have constructive notice of mandatory court costs imposed by statute.[8] A defendant who has constructive notice of these mandatory court costs should know that the court costs will be imposed as required by statute.[9] Appellant had constructive knowledge of the $133 in consolidated court costs assessed against him because appellant was convicted of a felony.[10] And, because appellant had constructive notice of the court costs, appellant had an opportunity to object in the trial court.[11] *London* presented a different set of facts.

The appellant in *London* did not have constructive knowledge of the court costs he challenged.

The Court of Criminal Appeals did not explain its reasoning for determining that the appellant in *London* did not have an opportunity to object to the imposition of court costs in the trial court, but the appellant in *London* did not have constructive knowledge of the court costs to be imposed against him.[12] The appellant in *London* challenged the court costs imposed under articles 102.011(a)(3) and 102.011)(b) of the Code of Criminal Procedure as applied to

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[7] *See id*. at 505.

[8] *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014).

[9] *See Johnson*, 423 S.W.3d at 389; *Cardenas*, 423 S.W.3d at 399.

[10] *See* Tex. Loc. Gov't Code § 133.102(a)(1) (West, Westlaw through 2015 R.S.); *Johnson*, 423 S.W.3d at 389; *Cardenas*, 423 S.W.3d at 399.

[11] *See Johnson*, 475 S.W.3d at 435.

[12] *See London*, 490 S.W.3d at 506.

him, arguing that the costs violated his constitutional rights because his inability to pay the costs prevented him from establishing a defense.[13] Article 102.011(a)(3) imposes a five-dollar fee for the peace officer's services in summoning a witness. Article 102.011(b) imposes a fee of "29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service. . . . The defendant shall also pay all necessary and reasonable expenses for meals and lodging incurred by the officer in the performance of services under this subsection to the extent such expenses meet the requirements of Section 611.001."[14] Unlike the court costs appellant challenges today, of which he had constructive notice, the costs imposed under article 102.011 vary and may not be known to a defendant until they are assessed. Accordingly, the appellant in *London* did not have the opportunity to challenge the court costs assessed against him in the trial court. The *London* court's conclusion that he was not required to object to court costs is thus consistent with the high court's jurisprudence allowing an appellant to present a challenge for the first time on appeal if the appellant did not have the opportunity to object in the trial court.

The majority's interpretation of *London* is inconsistent with binding precedent.

The Court of Criminal Appeals's holding in *London* is consistent with its precedent in *Johnson* and *Cardenas* and with this court's precedent in *Johnson* that a defendant must preserve error unless he had no opportunity to do so.[15] The appellant in *London* did not have constructive knowledge of the court costs imposed upon him in the trial court and thus did not have an opportunity to object.

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[13] *See* Tex. Code Crim. Ann. arts. 102.011(a)(3), (b) (West 2016).

[14] *See* Tex. Code Crim. Ann. art. 102.011(b).

[15] *See Johnson*, 475 S.W.3d at 435; *Cardenas*, 423 S.W.3d at 399; *Johnson*, 423 S.W.3d at 389.

Interpreting *London* as holding that a defendant need not ever object to court costs in the trial court, unless those costs are imposed in open court or detailed in the final judgment, flies in the face of the Court of Criminal Appeals's holdings in both *Johnson* and *Cardenas* that a defendant has constructive notice of mandatory court costs.[16] The majority's interpretation creates a jurisprudential incongruity.

In *Cardenas*, the high court concluded that a defendant's rights to due process of law were not violated by the State's failure to provide a bill of costs because the defendant had constructive notice of the costs.[17] And, notably, the high court deemed this constructive notice sufficient to provide the defendant with notice and an opportunity to be heard.[18] If, as the panel holds today, constructive notice is insufficient to provide a defendant with enough knowledge to trigger the defendant's obligation to object in the trial court, then constructive notice would be insufficient to provide a defendant with an opportunity to be heard, contrary to what the Court of Criminal Appeals concluded in *Cardenas*.[19] Thus, the majority's interpretation of *London* undermines the *Cardenas* court's holding that the failure to provide a defendant with a bill of costs does not violate the defendant's right to due process of law.[20]

Instead of interpreting *London in* a way that clashes with *Cardenas*, the panel should read *London* as dovetailing with the high court's precedent. *London* turns on the defendant's lack of opportunity to raise the complaint in the trial court.[21] Rather than overruling this court's opinion in *Johnson* and the high court's

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[16] *See Johnson*, 475 S.W.3d at 435; *Cardenas*, 423 S.W.3d at 399.

[17] *See Cardenas*, 423 S.W.3d at 399.

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *London*, 490 S.W.3d at 505–07.

precedent in *Johnson* and *Cardenas*, the *London* court, after reciting the requirement that a party object "as soon as the grounds for [objection] become apparent," concluded that the appellant in that case had no opportunity to object to the imposition of court costs in the trial court.[22] By contrast, in today's case, appellant had constructive notice that $133 in consolidated court costs would be assessed against him. With this knowledge, appellant had an opportunity to object in the trial court and appellant was required to preserve error on this complaint. Yet, he failed to do so.

Because appellant forfeited his constitutional complaints, this court should not address them.

Because appellant failed to preserve error for appellate review, he forfeited his constitutional complaints and cannot raise them for the first time on appeal.[23] For this reason, this court should overrule appellant's challenges and not address the merits of his claims under the Takings Clause of the United States Constitution or under Article 1, Section 17 of the Texas Constitution.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan (Christopher, J., Majority).
Publish — TEX. R. APP. P. 47.2(b).

[22] *See London*, 490 S.W.3d at 507.

[23] *See* Tex. R. App. P. 33.1; *Johnson*, 475 S.W.3d at 435.