Affirmed and Memorandum Opinion filed June 19, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00286-CR

BRITTANY KESHAUN SIMMONS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 426th District Court
Bell County, Texas
Trial Court Cause No. 73412

M E M O R A N D U M O P I N I O N

Appellant Brittany Keshaun Simmons challenges the court costs assessed in connection with her conviction for possession of cocaine in an amount of 4 grams or more but less than 200 grams. Appellant contends that the trial court improperly assessed eleven different court costs twice—once when appellant received deferred adjudication and again when the trial court revoked her community supervision and adjudicated guilt. We conclude that the trial court properly assessed the challenged

fees twice because, under a decision of the Third Court of Appeals (from which this case was transferred), the deferred adjudication proceeding and subsequent adjudication of guilt are considered two separate criminal proceedings for purposes of assessing costs. *See* Tex. R. App. P. 41.3.

Appellant also contends in the alternative that article 103.003 of the Code of Criminal Procedure allows the district clerk to decide on her own whether to assess one or two sets of court costs, rendering the statute unconstitutionally vague as applied to her. We hold that article 103.003 is not unconstitutionally vague because the statute grants the clerk authority to collect only fees payable under the cost statutes and does not grant the clerk discretion in a manner that allows arbitrary or discriminatory enforcement. We therefore affirm the trial court's judgment.

BACKGROUND

The State charged appellant by indictment with possession of a controlled substance of four grams or more but less than 200 hundred grams, in violation of section 481.115 of the Texas Health and Safety Code. Pursuant to a written plea agreement, the trial court deferred adjudication on the possession charge and placed appellant on community supervision for seven years. At that time, the court ordered her to pay court costs as a term of her community supervision, and the district clerk of Bell County issued the official Bill of Costs. Less than a year later, the State alleged appellant violated the terms of her community supervision and filed a motion to revoke community supervision and adjudicate guilt. The trial court did so upon appellant's plea of true to the allegations in the motion to revoke, and it sentenced appellant to ten years in prison with a $500 fine. Upon appellant's conviction, the trial court again ordered appellant to pay court costs. The district clerk again issued a Bill of Costs, which included the following pertinent fees to be assessed in accordance with the trial court's order:

Fee Name	Date	Amount
District Clerk	9/10/15	40.00
District Clerk	8/24/16	40.00
Sheriff	8/24/16	25.00
Sheriff	9/10/15	25.00
Capias Warrant Fee	6/29/16	50.00
Capias Warrant Fee	5/23/16	50.00
Clerk Court Technology Fund	9/10/15	4.00
Clerk Court Technology Fund	8/24/16	4.00
Courthouse Security	8/24/16	5.00
Courthouse Security	9/10/15	5.00
DistClk Record Preservtn SB526	9/10/15	2.50
DistClk Record Preservtn SB526	8/24/16	2.50
Records Management	8/24/16	22.50
Records Management	9/10/15	22.50
Jury Service Fund SB1704	9/10/15	4.00
Jury Service Fund SB1704	8/24/16	4.00
Judiciary Support HB11	8/24/16	6.00
Judiciary Support HB11	9/10/15	6.00
Consolidated Court	9/10/15	133.00
Consolidated Court	8/24/16	133.00
Time Payments	10/13/15	25.00
Basic Criminal Legal Services	9/10/15	2.00
Basic Criminal Legal Services	8/24/16	2.00
Drug Court Fee HB530	9/10/15	60.00
Drug Court Fee HB530	8/24/16	60.00
Administrative Transaction Fee	9/10/15	2.00
Administrative Transaction Fee	8/24/16	2.00
State Elect Filing Fee – Criml	8/24/16	5.00
State Elect Filing Fee – Criml	9/10/15	5.00

This appeal followed.

ANALYSIS

With regard to the costs imposed, appellant does not challenge the capias warrant fees, the time payment fee, and the administrative transaction fees; she concedes they were properly assessed. As noted above, appellant argues that the

remainder of the fees should have been assessed only once; alternatively, if the district clerk had discretion under article 103.003 to collect the fees twice, appellant contends the statute is impermissibly vague.

I. Standards of review and law applicable to court costs

Court costs are considered "a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the 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)). Costs fall into two categories: (1) mandatory costs; and (2) discretionary costs. *Id.* at 389 (comparing Tex. Code Crim. Proc. arts. 102.001-.022 (a non-exhaustive list of various court costs a trial court must impose if certain conditions precedent are met), *with* Tex. Code Crim. Proc. Ann. art. 26.05(g) (requiring a court to determine whether a criminal defendant has financial resources to pay all or part of costs of legal services provided)). Mandatory court costs are legislatively-mandated obligations imposed upon conviction. *Id.* Only statutorily authorized costs may be imposed against a criminal defendant. Tex. Code Crim. Proc. Ann. art. 103.002; *Johnson*, 423 S.W.3d at 389. Criminal defendants are charged with constructive notice of the laws imposing costs because the costs are fixed by statute and published in the laws of the State. *Johnson*, 423 S.W.3d at 389.

A defendant generally may challenge the costs imposed in the bill of costs for the first time on appeal when, as in this case, those costs are not imposed in open court and the judgment does not contain an itemization of the costs.[1] *London v.*

[1] We note that our review of costs in this case is limited to the costs imposed at the time of adjudication of guilt, and not those imposed at the time of deferred adjudication, because appellant did not timely appeal the costs imposed at the time of deferred adjudication. *See Perez v. State*, 424 S.W.3d 81, 86 (Tex. Crim. App. 2014) (citing *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999)).

State, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016). When reviewing a challenge to the costs assessed against a defendant, we review the assessment to determine whether a basis for the costs exists, not whether there is sufficient evidence to prove each cost. *Johnson*, 423 S.W.3d at 390.

II. The trial court properly assessed the costs imposed at the time of revocation and adjudication of guilt.

In her first issue, appellant contends that article 102.073 of the Code of Criminal Procedure precludes the trial court from assessing the following fees more than one time: the $40 clerk fee authorized by article 102.005(a) of the Code of Criminal Procedure, the $25.00 sheriff's fee authorized by article 102.011 of the Code of Criminal Procedure,[2] the $4.00 clerk court technology fee authorized by article 102.0169(a) of the Code of Criminal Procedure, the $5.00 courthouse security fee authorized by article 102.017(a) of the Code of Criminal Procedure, the $25.00 fee for records management and record preservation authorized by article 102.005(f) of the Code of Criminal Procedure, the $4.00 jury service fund fee authorized by article 102.0045(a) of the Code of Criminal Procedure, the $6.00 judiciary support fee authorized by article 133.105(a) of the Government Code, the $133.00 consolidated court cost fee authorized by section 133.102(a)(1) of the Government Code,[3] the $2.00 basic criminal legal services fee authorized by section 133.107(a) of the Government Code, the $60.00 drug court fee authorized by article 102.0178(a)(2) of the Code of Criminal Procedure, and the $5.00 state electronic filing fee authorized by section 51.851(d) of the Government Code. In

[2] Appellant further challenges the $25.00 sheriff's fee as unsupported by the record.

[3] The Court of Criminal Appeals recently held facially unconstitutional two of the fees contained in the consolidated court cost statute. *See Salinas v. State*, 523 S.W.3d 103, 108-110 (Tex. Crim. App. 2017). The *Salinas* court limited the retroactive application of its decision and appellant concedes that, as a result, that decision provides no relief to her in this case.

other words, appellant acknowledges that the listed fees are authorized by statute, but argues that they may be assessed against her only one time under article 102.073.

Article 102.073 provides in pertinent part as follows:

> (a) 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. art. 102.073(a).

The Third Court of Appeals recently addressed article 102.073(a) in the context of costs assessed at the time of deferred adjudication and again at the time of adjudication of guilt. In *Diaz v. State*, the court held that the fees were properly assessed at both points because article 102.073 does not prohibit trial courts from assessing costs at the conclusion of both proceedings. *See* No. 03-15-00539-CR, 2016 WL 1084398, at *7 n.5 (Tex. App.—Austin Mar. 17, 2016, no pet.) (mem. op., not designated for publication). The court reasoned that:

> [C]osts assessed at the point of receiving deferred adjudication community supervision and then again at the point of adjudication of guilt are distinguishable from costs assessed for each count or offense in one criminal action. A violation of community supervision requires a new and separate court proceeding from the original proceeding resulting in deferred adjudication community supervision.

Id. (quoting *Weatherspoon v. State*, No. 03-15-00236-CR, 2016 WL 286384, at *2 (Tex. App.—Austin Jan. 22, 2016, no pet.) (mem. op., not designated for publication)). The court pointed out that the statutes authorizing the imposition of court costs upon conviction explain that a conviction occurs when adjudication of guilt is deferred or when a sentence is imposed. *Id.* at *8. In addition, given that costs are intended as a nonpunitive recoupment of expenditures in connection with the trial of a case, the *Diaz* court concluded that imposing costs for events occurring after adjudication was deferred "makes sense as a tool to recoup the costs of judicial

resources that were consumed in the process of adjudicating Diaz guilty and of revoking his community supervision." *Id*. As a result, the trial court had properly imposed the costs twice. *See id.*

The Third Court of Appeals' analysis finds support in a recent decision of the Tenth Court of Appeals construing the phrase "in a single criminal action" under article 102.073(a). In *Hurlburt v. State*, the court concluded that the phrase "a single criminal action" means "allegations and evidence of more than one offense. . . [which] are presented in a single trial or plea proceeding." 506 S.W.3d 199, 203 (Tex. App.—Waco 2016, no pet.) (relying on interpretation by Court of Criminal Appeals of same phrase used in Tex. Penal Code § 3.03(a) in *Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995)). The *Hurlburt* court ultimately held improper the multiple sets of fees assessed against the defendant because "[i]t is clear that all of Hurlburt's offenses were heard at one time." 506 S.W.3d at 203-04.

In this case, two plea proceedings occurred: the first when the trial court ordered deferred adjudication with community supervision after accepting a plea agreement between appellant and the State, and the second when the trial court adjudicated guilt upon acceptance of appellant's plea of true to the allegations in the motion to revoke. Because the trial court held two separate plea proceedings with respect to appellant's conviction, the court properly assessed costs at the conclusion of both proceedings. *See Diaz*, 2016 WL 1084398, at *8; *Hurlburt*, 506 S.W.3d at 203; *cf. Ex parte Pharr*, 897 S.W.2d at 796 (holding that in Penal Code Section 3.03 "[t]he Texas Legislature intended a 'single criminal action' to refer to a single trial or plea proceeding.").

With respect to the $25.00 sheriff's fee, appellant argues that a sheriff's fee of $25.00 is not supported by the record. She argues that only $20.00 is supported by the record because the record reflects only two bonds delivered and nothing else for

which the sheriff may lawfully charge a fee. The State correctly notes that the sheriff's fee record is not required to be included in the record to support the assessment of costs, *see Penright v. State*, 477 S.W.3d 494, 501 (Tex. App.—Houston [1st Dist.] 2015), *aff'd as modified on other grounds*, 537 S.W.3d 916 (Tex. Crim. App. 2017), but the record must still reflect a basis for the costs assessed. *See Johnson*, 423 S.W.3d at 395. The record in this case reflects, in addition to the two bonds delivered by the sheriff, two executed precepts to serve on appellant certified copies of the Motion to Revoke Probation and the First Amended Motion to Revoke Probation. As a result, the record reflects a basis for the sheriff's fee. *See Penright*, 477 S.W.3d at 501; *see also Wolfe v. State*, 377 S.W.3d 141, 147 (Tex. App.—Amarillo 2012, no pet.) (listing "precept to serve certified copy" of motions to support sheriff's fee).

All of the costs challenged by appellant are authorized by statute. The statutory authority, coupled with the certified bill of costs, provides a sufficient basis for the costs. *See Johnson*, 423 S.W.3d at 390, 394-96. Article 102.073 does not prohibit the assessment of costs for both the deferred adjudication plea proceeding and the adjudication of guilt plea proceeding. We overrule appellant's first issue.

III. Article 103.003 is not unconstitutionally vague as applied to appellant.

Article 103.003 of the Code of Criminal Procedure, titled "Collection," provides that a district clerk "may collect money payable under this title." Tex. Code Crim. Proc. art. 103.003. In her second issue, appellant contends that if the district clerk has discretion under article 103.003 to decide on her own whether to assess fees twice, then article 103.003 lacks the necessary standards and is unconstitutionally vague. We disagree that article 103.003 grants such discretion to the clerk and hold that it is constitutional.

The constitutionality of a criminal statute is a question of law that we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). We begin our review with the presumption that the statute is valid and that the Legislature did not act unreasonably or arbitrarily. *Id.* at 14-15. In challenges that do not involve the right to free speech, the party seeking to invalidate the statute carries the burden of establishing its unconstitutionality. *Id.* at 15.

Appellant challenges article 103.003(a) as applied to a situation in which a defendant pleads guilty to an offense and is placed on community supervision, and later pleads true to violating her community supervision and is adjudicated guilty. To prevail on an as-applied challenge, the appellant must show that the statute operates unconstitutionally as applied to her situation. *London*, 490 S.W.3d at 507; *see also Ex parte Carter*, 514 S.W.3d 776, 779 (Tex. App.—Austin 2017, pet. ref'd) ("A claim that a statute is unconstitutional 'as applied' is a claim that the statute, although generally constitutional, operates unconstitutionally as to the claimant because of his particular facts and circumstances.").

Under constitutional due-process requirements, a statute is void for vagueness if the conduct it prohibits is not clearly defined. *Wagner v. State*, 539 S.W.3d 298, 313 (Tex. Crim. App. 2018). A statute will be declared void for vagueness if it (1) fails to define the criminal offense with sufficient detail such that ordinary people can understand the conduct that is prohibited; or (2) fails to provide sufficient detail to law-enforcement personnel to prevent arbitrary or discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Martinez v. State*, 323 S.W.3d 493, 507 (Tex. Crim. App. 2010); *Hooper v. State*, 106 S.W.3d 270, 275 (Tex. App.—Austin 2003, no pet.). Appellant does not address the first prong—whether article 103.003 provides sufficient notice to ordinary people. Instead, appellant argues that article 103.003(a) impermissibly grants discretion to the district

clerk to decide whether to assess one set of court costs or two.

We conclude that article 103.003 does not allow for discretionary enforcement for two reasons. First, article 103.003 expressly states that the clerk may collect fees that are "payable under this title." Tex. Code Crim. Proc. art. 103.003(a). Thus, by the express terms of the statute, a clerk has authority to collect only those fees that are payable under the law. Second, under article 103.002, fees may be imposed by a trial court only if the fees are authorized by statute. Tex. Code Crim. Proc. art. 103.002 (providing that "[a]n officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law"); *see Johnson*, 423 S.W.3d at 389 (stating "only statutorily authorized costs may be assessed against a criminal defendant"). As we have held above, imposing two sets of court costs in this situation is authorized by statute. District clerks, therefore, do not have discretion to impose any fees not authorized by statute. Moreover, "[b]ecause mandatory costs are fixed by statutes that are published publicly in the laws of the State of Texas, a criminal defendant has constructive notice of those laws, and courts should take judicial notice of those laws." *Johnson*, 423 S.W.3d at 389. Criminal defendants as well as courts are charged with knowledge of the only permissible fees that are payable, and thus collectible, under article 103.003.

In support of her argument, appellant cites *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). In *Giaccio*, the United States Supreme Court declared void for vagueness a Pennsylvania statute that allowed the jury to determine whether the county, the prosecutor, or the defendant should pay the court costs when a defendant is acquitted. 382 U.S. at 400-01. The Court declared the statute unconstitutionally vague because the law "contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him." *Id.* at 403. In

contrast, article 103.003(a) expressly states that a clerk may collect costs that are "payable under this title," and the cost statutes enacted by the Legislature provide the standards as to what costs may be imposed.[4] We therefore reject appellant's argument that the article 103.003 is void for vagueness because it grants discretion to the district clerk to decide what costs to assess.[5]

We overrule appellant's second issue.

CONCLUSION

Having overruled both issues raised by appellant, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Busby and Wise and Senior Justice Yates.[6]
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[4] We also note that these statutes, unlike the Pennsylvania statute in *Giaccio*, do not authorize the imposition of costs when a defendant is acquitted.

[5] We find another case cited by appellant similarly distinguishable. In *Bright v. State*, the court addressed a term of the defendant's community supervision, in which the defendant was ordered to pay costs in an amount "to be determined." No. 13-99-019-CR, 2000 WL 34251863, at *2 (Tex. App.—Beaumont 2000, no pet.) (mem. op., not designated for publication). The State conceded that the condition was "too vague to be enforced" and the court thus sustained the issue with no analysis. *Id.* The court did not address the void-for-vagueness doctrine and did not even address the constitutionality of a statute. *Id.* The *Bright* decision thus provides no support for appellant's argument.

[6] The Honorable Leslie B. Yates, Senior Justice of the Fourteenth Court of Appeals, sitting by assignment.