



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-16-00696-CR & 04-16-00697-CR

David Kennard **VASBINDER, III**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 198th Judicial District Court, Banderita County, Texas
Trial Court Nos. CR-14-069 & CR-15-021
Honorable M. Rex Emerson, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: September 6, 2017

AFFIRMED; AFFIRMED AS MODIFIED

David Vasbinder, III, appeals the trial court's judgments adjudicating him guilty of the offenses of aggravated assault on a public servant and failure to appear, and sentencing him to twenty years' imprisonment. We affirm the trial court's judgments, but modify the judgment on the aggravated assault-public servant conviction to delete the assessment of \$487.50 in appointed attorney's fees due to Vasbinder's indigence.

BACKGROUND

Vasbinder was charged with committing the offenses of aggravated assault on a public servant and failure to appear. *See* TEX. PENAL CODE ANN. § 22.02(a), (b)(2)(B) (West 2011) (first degree felony); *id.* § 38.10(a)(f) (West 2016) (third degree felony). On February 17, 2015, Vasbinder pled guilty to both offenses and received deferred adjudication community supervision for concurrent terms of seven years (aggravated assault-public servant) and five years (failure to appear). Within less than one month, the State filed a motion to proceed with an adjudication of guilt in both cases alleging that Vasbinder violated the conditions of his community supervision by testing positive for marijuana and amphetamine/methamphetamine on February 20, 2015. The State subsequently filed an amended motion to proceed adding an additional violation based on use of alcohol. Vasbinder pled “not true” to the alleged violations. A hearing on the State’s motion to proceed with an adjudication and revocation of community supervision was held on May 11, 2015. At the conclusion of the evidentiary hearing, the trial court found the violations to be true and revoked Vasbinder’s community supervision in both cases. The court proceeded to adjudicate him guilty of aggravated assault on a public servant and failure to appear, and sentenced him to twenty years’ imprisonment and five years’ imprisonment, respectively, with the sentences to run concurrently. The May 12, 2015 judgment convicting Vasbinder of aggravated assault-public servant also assesses \$487.50 in attorney’s fees against him. On September 14, 2016, the Court of Criminal Appeals granted Vasbinder an out-of-time appeal from the judgments of conviction.

ANALYSIS

Vasbinder raises two issues on appeal, alleging that the trial court was required to conduct a formal competency trial before accepting his guilty pleas in both cases, and that the trial court erred in assessing attorney’s fees against him because he is indigent.

Competency Trial

In his first issue, Vasbinder argues the trial court abused its discretion in accepting his guilty pleas on February 17, 2015 without first conducting a formal competency trial under Chapter 46B of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.005 (West 2006). Vasbinder asserts that because his counsel filed a motion suggesting incompetency and the trial court ordered a competency evaluation prior to the February 17, 2015 plea hearing, the court was prohibited from accepting his guilty pleas without first holding a formal competency trial.¹ *See id.* art. 46B.004 (West Supp. 2016) (means of raising issue of incompetency to stand trial).

The State replies that we lack jurisdiction to consider this issue arising from acceptance of Vasbinder's pleas because this appeal is limited to issues arising from the revocation/adjudication proceeding and the judgments of conviction signed on May 12, 2015. We agree. In its opinion granting the out-of-time appeal, the Court of Criminal Appeals addressed Vasbinder's contention that "adjudication-of-guilt counsel failed to timely file notice of appeal," and granted Vasbinder the right to "file out-of-time appeals of the judgments of conviction." *Ex parte Vasbinder*, Nos. WR-85,071-01 & WR-85,071-02, 2016 WL 8808821 (Tex. Crim. App. Sept. 14, 2016) (per curiam). It is well established that a defendant may raise issues relating to the original plea proceeding only in an appeal taken directly from the order granting deferred adjudication/community supervision, not in a later appeal from a judgment based on revocation and adjudication. *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999); *Few v. State*, 136 S.W.3d 707, 711 (Tex. App.—El Paso 2004, no pet.) (issues relating to original plea

¹ Vasbinder's counsel first filed a suggestion of incompetency on June 3, 2014. The record reflects an informal competency evaluation was performed and Vasbinder was civilly committed for restoration of competency on June 30, 2014. Vasbinder was bench warranted back to the trial court on July 17, 2014 after regaining competency. On December 8, 2014, defense counsel filed another motion suggesting incompetency, which is the subject of Vasbinder's argument in Issue No. 1. We note that the record does not contain a finding of incompetency by the trial court, which is a prerequisite to the duty to hold a formal competency trial. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.005(a) (West 2006).

proceeding may not be raised in appeal from revocation and adjudication). Under an exception to the general rule stated in *Manuel*, a defendant who is appealing a judgment adjudicating guilt may attack the original deferred adjudication order if that order is void. *Few*, 136 S.W.3d at 711 (citing *Nix v. State*, 65 S.W.3d 664, 667 (Tex. Crim. App. 2001)). The void judgment exception only applies in rare situations in which the trial court's judgment is a "nullity" due to the "complete lack of power to render the judgment," such as when the charging instrument is constitutionally defective, the court lacks jurisdiction over the offense, there was no evidence to support the conviction, or an indigent defendant was not appointed counsel. *Id.*; *Nix*, 65 S.W.3d at 667-68. None of those situations exist in this case, and Vasbinder does not contend they do. Finally, even a meritorious claim that a defendant's plea was involuntary does not render a judgment void. *Few*, 136 S.W.3d at 712.

Vasbinder was required to raise his challenge to the plea proceeding in an appeal from the Order of Deferred Adjudication signed on February 17, 2015. *Manuel*, 994 S.W.2d at 661-62; *Few*, 136 S.W.3d at 711. We have no jurisdiction to consider Vasbinder's issue related to the original plea proceeding in this appeal from the judgment revoking and adjudicating guilt.

Attorney's Fees

In his second issue, Vasbinder asserts the trial court erred in requiring him to pay appointed attorney's fees in Trial Court Cause No. CR14-069 (aggravated assault-public servant) because he is presumed indigent and the record contains no evidence of his financial ability to pay. In his appellant's brief, Vasbinder discusses both the \$945.00 in attorney's fees assessed in the Order of Deferred Adjudication and the \$487.50 in attorney's fees assessed in the judgment of conviction. To the extent that Vasbinder challenges the Order of Deferred Adjudication's imposition of \$945.00 in attorney's fees, he has procedurally defaulted on that issue because he did not appeal from the initial imposition of attorney's fees in the Order of Deferred Adjudication. *See Riles v.*

State, 452 S.W.3d 333, 337 (Tex. Crim. App. 2015); *see also Wiley v. State*, 410 S.W.3d 313, 320-21 (Tex. Crim. App. 2013) (challenges to attorney's fees that are assessed as a condition of community supervision must be brought up on appeal from the original imposition of the community supervision). The record shows that \$945.00 in appointed attorney's fees were assessed in the Order of Deferred Adjudication and included as a condition of Vasbinder's community supervision. Vasbinder had knowledge of both the amount and the requirement that he pay the attorney's fees as a condition of his community supervision and could have challenged assessment of those attorney's fees in a direct appeal from the Order of Deferred Adjudication. *See Wiley*, 410 S.W.3d at 320-21; *see also Riles*, 452 S.W.3d at 337 (challenge to attorney's fees imposed in deferred adjudication order was procedurally defaulted even though the amount of the fees was not yet known). Because he did not raise his sufficiency challenge to the \$945.00 in attorney's fees at the time they were originally imposed, i.e., in the Order of Deferred Adjudication, he has forfeited his ability to raise this argument.

We may, however, address the merits of Vasbinder's challenge to the sufficiency of the evidence to support the assessment of \$487.50 in attorney's fees in the May 12, 2015 judgment. The record shows that Vasbinder filed an affidavit of indigence and the trial court appointed counsel to represent him in April 2014, shortly after his indictment. After the out-of-time appeal was granted as to the revocation/adjudication proceeding, the trial court appointed counsel to represent Vasbinder on appeal based on his indigent status. A defendant who the trial court has found to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West Supp. 2016). Article 26.05(g) permits a trial court to assess court-appointed attorney's fees against a defendant upon a determination that the defendant has the financial resources to pay. *Id.* art. 26.05(g) (West Supp. 2016); *Cates v. State*, 402 S.W.3d 250,

251 (Tex. Crim. App. 2013). Here, the record does not contain any finding by the trial court or any evidence to show that Vasbinder's financial circumstances had materially improved to support the assessment of the court-appointed attorney's fees. *See Cates*, 402 S.W.3d at 251-52 (no factual basis in the record to support assessment of attorney's fees after defendant was determined to be indigent); *see also Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (sufficiency of the evidence to support assessment of court-appointed attorney's fees may be raised for first time on appeal). The State concedes the judgment should be reformed to delete the assessment of \$487.50 in court-appointed attorney's fees.

Based on the foregoing analysis, we affirm the trial court's judgment in Trial Court Cause No. CR-15-021, modify the trial court's judgment in Trial Court Cause No. CR-14-069 (aggravated assault-public servant) to delete the assessment of \$487.50 in attorney's fees, and affirm that judgment as modified. *See* TEX. R. APP. P. 43.2(a), (b).

Rebeca C. Martinez, Justice

DO NOT PUBLISH