



**Fourth Court of Appeals**  
**San Antonio, Texas**

**OPINION**

No. 04-20-00253-CR

The **STATE** of Texas,  
Appellant

v.

Billy Ray **WHALEY**, Jr.,  
Appellee

From the County Court, Kinney County, Texas  
Trial Court No. 10231CR  
Honorable Tully Shahan, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Rebeca C. Martinez, Chief Justice  
Patricia O. Alvarez, Justice  
Beth Watkins, Justice

Delivered and Filed: August 4, 2021

**AFFIRMED AS MODIFIED**

The State appeals an order dismissing a misdemeanor complaint against Billy Ray Whaley, Jr., for want of prosecution. In three issues, the State argues the trial court erred by *sua sponte* dismissing the complaint without notice or a hearing, and for assessing court costs against the County Attorney of Kinney County. We modify the dismissal order to delete the assessment of costs against the County Attorney and affirm the order as modified.

## BACKGROUND

This appeal arises out of a misdemeanor prosecution. On February 5, 2020, the State filed a motion to dismiss the complaint. On May 1, 2020, the trial court signed an “Order Dismissing for Want of Prosecution.” The order reads as follows:

On this day, the 1st day of May, 2020 came on for consideration the Motions to Dismiss filed by the County Attorney of Kinney County, Mr. Todd Durden, seeking to have this Court dismiss the above and foregoing matters “In the interest of justice”. This Court has requested a more specific rational[e] for the dismissal of these cases and has made numerous attempts to communicate with Mr. Durden to ascertain the status of each case coming before this Court. See Letters # 1, 2, 3, & 4 attached. Mr. Durden has refused and has instead engaged in protracted efforts to frustrate the proper functioning of the County Court of Kinney County, Texas[.]

Attached to this Order as Exhibit A is a copy of an email, dated April 27, 2020, in which Mr. Durden suggests that he is seeking dismissal in order to meet qualification requirements for a federal law enforcement grant that involves misdemeanor violations in Kinney County. Dismissal of cases merely to obtain grant funding, although said grant is critical to law enforcement efforts in Kinney County, Texas, is an abuse of process.

Therefore, reluctantly but in the firm conviction that those accused of violations of law should be afforded timely due process and that the procedures utilized by Mr. Durden deny that opportunity to these individuals, this Court hereby makes the following Orders, to be filed in each case identified above:

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that each case identified above be, and the same are hereby **DISMISSED** for **WANT OF PROSECUTION**. Any money paid or deposited by the identified individuals shall be returned to them upon personal appearance with the Clerk of the appropriate Court for such refunds. Notice of this Dismissal shall be provided to each individual identified above, or any attorney of record. Cost of Court, including the cost of transcripts prepared of the docket calls at Mr. Durden’s request, are charged to Mr. Durden individually and in [his] official capacity, to be reimbursed from Mr. Durden’s available deferred prosecution or diversion of prosecution funds as cost of administration. All other relief is denied, and this Order is Final.

The State filed a timely notice of appeal, a request for findings of fact and conclusions of law, and a notice of past due findings of fact and conclusions of law. The trial court did not sign findings of fact and conclusions of law. The State filed no post-dismissal motion complaining of the trial court’s dismissal for want of prosecution.

### DISMISSAL FOR WANT OF PROSECUTION

In its first and third issues, the State argues the trial court erred by, *sua sponte* and without notice to the parties, dismissing the misdemeanor complaint against Whaley for want of prosecution. Generally, we may not reverse a trial court's order or judgment without preserved reversible error. *See* TEX. R. APP. P. 33.1, 44.2. We hold that because the State moved to dismiss, the State consented to dismissal, and has therefore failed to show preserved reversible error regarding the trial court's dismissal order. *See State v. Johnson*, 821 S.W.2d 609, 612–13 (Tex. Crim. App. 1991). We overrule the State's first and third issues.

### COURT COSTS

In its second issue, the State argues the trial court erred by assessing court costs against the County Attorney in his official and individual capacities. An appellant may challenge the assessment of court costs for the first time on appeal. *London v. State*, 490 S.W.3d 503, 507 (Tex. Crim. App. 2016). Generally, in a criminal case governed by the Texas Code of Criminal Procedure, trial court costs may be assessed only against a defendant after the defendant is convicted. *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *cf.* TEX. CODE CRIM. PROC. art. 44.01(f) (requiring the State to pay costs “of appeal” when appealing an order dismissing a misdemeanor complaint). Whaley declined to file an appellee's brief identifying any authority for a trial court to assess court costs against the State or a prosecutor individually when dismissing a misdemeanor complaint, and we have found no authority for the trial court to do so. We therefore sustain the State's second issue and modify the order of dismissal to delete the assessment of court costs.

**CONCLUSION**

We modify the order of dismissal to delete the assessment of court costs against the County Attorney in his individual and official capacities, and we affirm the order as modified. *See* TEX. R. APP. P. 43.2(b).

Patricia O. Alvarez, Justice

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