

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00256-CR

ALVIN LYN DERBY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 10-08099**

MEMORANDUM OPINION

Represented by court-appointed counsel, Alvin Lyn Derby argues that the trial court abused its discretion in ordering him to pay court-appointed attorney fees. The trial court appointed counsel to represent Derby because he is indigent.

Derby received deferred adjudication community supervision. One condition of the deferred adjudication order required him to pay attorney fees of \$1,000, and other fees. The State subsequently filed a motion to revoke. Derby pleaded “true” to two violations alleged in the motion: his failure to pay the fees and his failure to report. The

trial court found Derby guilty of aggravated assault on a public servant and sentenced him to two years of confinement. The judgment provided that Derby was to pay administrative fees and court costs. Attorney fees were included in the fees assessed in the judgment.

The Code of Criminal Procedure provides: “A defendant who is determined by the court 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. 2011); *see Mayer v. State*, 309 S.W.3d 552, 556-57 (Tex. Crim. App. 2010); *Roberts v. State*, 327 S.W.3d 880, 883-84 (Tex. App.—Beaumont 2010, no pet.). The Code of Criminal Procedure also provides:

If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay.

Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2011).

The Court of Criminal Appeals recently considered the issue of an assessment of attorney fees. *See Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011). Finding Armstrong indigent, the trial court appointed counsel. Armstrong was placed on deferred adjudication community supervision. As a condition of his community supervision, he was required to pay fees. On the day of the plea agreement, his appointed counsel submitted an attorney-fees-expense claim for \$900, which the trial court ordered paid. *Id.*

at 761-62. The \$900 was added to the bill of costs. Armstrong did not challenge the fees. Over the next two years, the trial court signed two supplemental orders, each time amending the conditions of Armstrong's community supervision and extending his community supervision. Armstrong "reaffirmed" that he would pay all court costs, including the court-appointed attorney fees. The State subsequently filed a motion to adjudicate, alleging that Armstrong had violated a condition of his community supervision. Armstrong again requested and was provided court-appointed counsel. Armstrong agreed to the continuation and modification of his community supervision for another year. One condition required him to pay a second fee-expense claim for \$500 in attorney fees. The trial court waived Armstrong's community supervision fee and signed a supplemental order amending the conditions. The supplemental order included an agreement that Armstrong would pay all court costs and court-appointed attorney fees. Armstrong did not challenge the fees. *Id.*

The State later filed another motion to adjudicate guilt, alleging that Armstrong again violated the conditions of his community supervision. Armstrong requested appointment of counsel for a third time. The trial court appointed counsel. Armstrong pleaded "true" to all of the allegations. The trial court found him guilty and sentenced him to six years of incarceration. Attorney fees were not addressed at the hearing, but the trial judge approved an additional payment of \$500 for attorney fees that same day. The judgment ordered Armstrong to pay "any remaining unpaid fines, court costs, and

restitution as ordered by the Court above[.]” No amount was specified in the place where the court costs were noted on the judgment. The following day, the district clerk prepared a bill of costs which included \$1,900 in attorney fees. *Id.*

Armstrong appealed the trial court’s assessment of costs on a number of grounds, including his claim that the evidence was insufficient to support the trial court’s assessment of attorney fees as part of court costs. *See Armstrong v. State*, 320 S.W.3d 479, 480-81 (Tex. App.—Amarillo 2011), *rev’d*, 340 S.W.3d 759. The Amarillo Court of Appeals viewed the attorney-fee issue as a civil matter and declined to address it. *Armstrong*, 320 S.W.3d at 481-82. The Court of Criminal Appeals concluded that the sufficiency of the evidence to support the assessment of attorney fees was a matter of criminal law, and reversed the lower court’s decision. *Armstrong*, 340 S.W.3d at 767. Although the State argued that appellant “affirmatively” accepted and waived any objection to the conditions, and that “apart from Appellant’s contractual agreement, there is no court order for him to pay appointed attorney fees from the adjudication forward,” the Court of Criminal Appeals concluded nevertheless that the lower court should address the insufficient evidence argument. *Id.* at 764-65, 767. In a footnote, the Court of Criminal Appeals instructed: “When addressing Appellant’s sufficiency argument on remand, the court of appeals should consider Texas Code of Criminal Procedure Article 26.04(p) and our decision in *Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010).” *Armstrong*, 340 S.W.3d at 766 n.13.

On remand, the court of appeals determined that the evidence was insufficient to support the assessment of the costs of appointed counsel. *Armstrong v. State*, No. 07-09-00091-CR, 2011 Tex. App. LEXIS 6637, at *3 (Tex. App.—Amarillo, Aug. 17, 2011). The court made no distinction between the attorney fees Armstrong agreed to repay as a condition of his community supervision and the additional attorney fees assessed at adjudication. *See id.* at **2-3. The court noted that Armstrong was found indigent and received appointed counsel at the time he was charged with the original offense, at subsequent adjudication proceedings, and on appeal. *Id.* at *2. The court concluded that the record was devoid of any evidence regarding any change in his ability to pay for legal services provided, and deleted the assessment. *Id.* at **2-3.

By statute, a trial court determines a defendant's ability to pay before the trial court taxes court-appointed attorney fees as costs in the judgment. *See* Tex. Code Crim. Proc. Ann. art. 26.05(g). When the trial court appointed trial counsel for Derby, the trial court determined that Derby was indigent. As part of the plea bargain, Derby agreed to repay \$1,000 in attorney fees as a condition of the deferred adjudication community supervision. *See id.*; Tex. Code Crim. Proc. Ann. art. 42.12, §§ 11(a), 19(a), 21(c) (West Supp. 2011). Derby is not attacking the revocation of his community supervision, however. He pleaded true to the failure-to-pay violation, as well as to the failure to report. He is attacking the sufficiency of the evidence supporting the assessment of the attorney fees. There is no evidence of a change in his ability to pay for legal services provided.

See Mayer, 309 S.W.3d at 556. The trial court appointed counsel to represent him on appeal because he is indigent.

The State concedes that the record does not support a finding that Derby's financial circumstances materially changed between the date the trial court appointed trial counsel and the date costs were assessed. *See* Tex. Code Crim. Proc. Ann. arts. 26.04(p), 26.05(g); *Armstrong*, 2011 Tex. App. LEXIS 6637. The State agrees under the circumstances that the judgment must be modified to delete the assessment of attorney fees. *See Armstrong*, 2011 Tex. App. LEXIS 6637, at **2-3; *but see Reyes v. State*, 324 S.W.3d 865, 867-68 (Tex. App.—Amarillo 2010, no pet.). Issue one is sustained.

In his second issue, Derby argues that the error in assessing attorney fees constitutes reversible error. The appropriate remedy, however, is the deletion of the attorney fees from the judgment, as the State suggests. *See Roberts*, 327 S.W.3d at 884; *Armstrong*, 2011 Tex. App. LEXIS 6637, at *3. Issue two is overruled.

The judgment is modified to delete the assessment of \$1,000 in attorney fees. The trial court's judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

DAVID GAULTNEY
Justice

Submitted on October 17, 2011
Opinion Delivered December 14, 2011
Do Not Publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.