



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00163-CR

TERRELL LADEL DAVIS

APPELLANT

V.

THE STATE OF TEXAS

STATE

**FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1308456D**

MEMORANDUM OPINION¹

Appellant Terrell Ladel Davis appeals from his conviction for burglary of a habitation.² In two points, he contends that the trial court erred by including an unauthorized fine in its judgment and that part of the court costs contained in the

¹See Tex. R. App. P. 47.4.

²See Tex. Penal Code Ann. § 30.02(a) (West 2011).

judgment are illegal because the statute authorizing them is unconstitutional. We modify the trial court's judgment and affirm it as modified.

Background Facts

A grand jury indicted appellant for burglary of a habitation; the indictment alleged that he had entered the habitation while intending to commit theft. Appellant received appointed counsel, waived several constitutional and statutory rights, judicially confessed to the offense, and pled guilty. In accordance with a plea bargain agreement, the trial court deferred adjudication of appellant's guilt and placed him on community supervision for four years. The deferred adjudication order recited a fine of "\$400 Not Suspended" and required appellant to pay court costs. A separate document included payment of the \$400 fine and \$284 in court costs as part of appellant's conditions of community supervision.

Less than two years later, the State filed a petition for the trial court to adjudicate appellant's guilt. The State alleged that he had violated his community supervision conditions by not participating in a substance abuse treatment program and by using illegal drugs on several occasions.

The trial court held a hearing on the State's petition. Appellant pled true to not participating in the substance abuse treatment program and not true to using illegal drugs. After receiving evidence from four witnesses (including appellant), the trial court found that both allegations were true. The court found appellant guilty and sentenced him to ten years' confinement. On the record at the hearing, the trial court did not impose a fine. Appellant brought this appeal.

Validity of Fine

In his first point, appellant contends that the judgment adjudicating his guilt includes a fine that was not pronounced orally and that must therefore be deleted. In response, the State argues only that the judgment adjudicating guilt does not contain a fine.

The trial court's "Judgment Adjudicating Guilt" reflects appellant's conviction and sentence and shows on its face that he owes \$309 in court costs. Although the judgment does not expressly include a fine,³ it incorporates an attached "Order to Withdraw Funds."⁴ That order states that appellant has been assessed "[c]ourt costs, fees[,] and/or fines" in the amount of \$468.80. The order requires payment of that amount out of appellant's inmate trust account. The difference between the total amount owed, \$468.80, and the court costs owed, \$309 (as stated in the judgment), is \$159.80. The clerk's record contains a document that designates \$159.80 as the "[t]otal of all [r]eparations [o]wed." That document establishes that the \$159.80 sum comprises \$13 due to the community supervision and corrections department, \$120 of probation fees, and \$26.80 in "fines." Another document in the record, which appears to have been generated by the district clerk, establishes that appellant paid \$373.20 of his

³In the place of the judgment where a fine could be expressly included, the judgment says "N/A."

⁴The judgment states, "Attachment A, Order to Withdraw Funds, is incorporated into this judgment and made a part thereof."

original \$400 fine (which the deferred adjudication order recited) and therefore had \$26.80 in “[f]ines [r]emaining.”

We conclude that when considered collectively, these documents establish that by incorporating into the judgment the Order to Withdraw Funds, which requires appellant to pay \$468.80 out of his trust account, the trial court necessarily included the remaining, unpaid fine of \$26.80—part of the “[r]eparations” of \$159.80—in the judgment. Thus, we cannot agree with the State that the “judgment adjudicating guilt does not contain a fine.”

Appellant contends that the \$26.80 fine must be deleted because although that amount was included as part of the larger \$400 fine in the order deferring adjudication of his guilt, the judgment adjudicating guilt superseded that order and therefore also superseded the fine. Citing the same case upon which appellant principally relies—*Taylor v. State*, 131 S.W.3d 497 (Tex. Crim. App. 2004)—the State concedes that because a judgment adjudicating guilt “sets aside an order deferring adjudication of guilt, a trial court cannot impose a fine at adjudication—even one previously imposed as a condition of community supervision—unless it orally pronounces one.” The State also acknowledges that the trial court did not pronounce a fine when it adjudicated appellant’s guilt.

We agree with the parties’ shared understanding of *Taylor* as holding that a judgment adjudicating guilt sets aside a fine that is contained in an order deferring adjudication and that is not announced orally by the court when it revokes community supervision and convicts and sentences a defendant. See

id. at 502; see also *Abron v. State*, 997 S.W.2d 281, 281–82 (Tex. App.—Dallas 1998, pet. ref’d) (modifying a judgment to delete a fine that was imposed in an order deferring adjudication but was not orally pronounced upon the revocation of community supervision, conviction, and sentencing). Thus, because the trial court included \$26.80 as part of the \$400 fine in the order deferring adjudication but did not announce any fine orally when it revoked appellant’s community supervision and convicted and sentenced him, we hold that the fine must be deleted. *Taylor*, 131 S.W.3d at 502; *Abron*, 997 S.W.2d at 281–82; see also *Noonkester v. State*, No. 02-14-00147-CR, 2015 WL 831421, at *2 (Tex. App.—Fort Worth Feb. 26, 2015, no pet.) (mem. op., not designated for publication) (“[B]ecause the trial court did not include the fine previously assessed in its order deferring adjudication in its oral pronouncement of sentence at the revocation hearing, we reform the judgment adjudicating guilt to delete the \$1,500 fine”); *Washington v. State*, No. 02-11-00152-CR, 2012 WL 1345743, at *2 (Tex. App.—Fort Worth Apr. 19, 2012, no pet.) (mem. op., not designated for publication) (“[W]e reform the trial court’s judgment to delete the language regarding the payment of the portion of reparations that is made up of a previously assessed fine.”). We sustain appellant’s first point.

Validity of Court Costs

In his second point, appellant argues that \$133 of the \$309 in court costs was imposed under section 133.102(a)(1) of the local government code, which he asserts is facially unconstitutional. That section states that a person

“convicted of an offense shall pay,” in addition to all other costs, “\$133 on conviction of a felony.” Tex. Loc. Gov’t Code Ann. § 133.102(a)(1) (West Supp. 2014). The section also states that this cost must be remitted to the comptroller for use in several funds, including funds concerning abused children’s counseling, crime stoppers assistance, breath alcohol testing, criminal justice planning, and judicial training. *Id.* § 133.102(b), (e). A bill of costs in the clerk’s record includes \$133 as a cost labeled as “CCC-Felony.”

Appellant contends that section 133.102(a)(1) violates the separation of powers provision in the Texas Constitution. See Tex. Const. art. II, § 1. He asserts that none of the uses for the cost authorized by section 133.102 are “necessary or incidental” to the trial of a criminal case, that the cost therefore operates as a tax and makes courts tax gatherers, and that a 1942 decision from the court of criminal appeals precludes the cost. See *Ex parte Carson*, 143 Tex. Crim. 498, 500–01, 505, 159 S.W.2d 126, 127, 130 (1942), *overruled by Peraza v. State*, Nos. PD-0100-15, PD-0101-15, 2015 WL 3988926, at *7 (Tex. Crim. App. July 1, 2015) (“We therefore reject *Carson*’s requirement that, in order to pass constitutional muster, the statutorily prescribed court cost must be ‘necessary’ or ‘incidental’ to the ‘trial of a criminal case.’”).

Appellant did not present any of these arguments in the trial court. The State contends that he therefore did not preserve them for our review. Generally, to preserve a complaint for our review, a party must have presented to the trial court a timely objection that states the specific grounds for the desired ruling if

they are not apparent from the context of the objection. Tex. R. App. P. 33.1(a)(1); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013); *Sanchez v. State*, 418 S.W.3d 302, 305 (Tex. App.—Fort Worth 2013, pet. ref'd). Further, the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt*, 407 S.W.3d at 263. Even most constitutional issues, including facial challenges to the constitutionality of a statute, may be forfeited by failing to raise them in the trial court.⁵ *Ibenyenwa v. State*, 367 S.W.3d 420, 422 (Tex. App.—Fort Worth 2012, pet. ref'd) (op. on reh'g); see *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (“We conclude that a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute.”). We should not address the merits of an issue that has not been preserved for our review. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

⁵While the court of criminal appeals has stated that a “penal statute’s . . . compliance with the separation of powers section of our state constitution” is a systemic requirement that may be raised for the first time on appeal, see *Henson v. State*, 407 S.W.3d 764, 768 (Tex. Crim. App. 2013), cert. denied, 134 S. Ct. 934 (2014), appellant does not contend that a penal statute violated separation of powers. In contexts other than challenges to the facial validity of penal code provisions, we have held that separation of powers arguments must be preserved in the trial court. See *Gamble v. State*, Nos. 02-13-00573-CR, 02-13-00574-CR, 2015 WL 221108, at *4 (Tex. App.—Fort Worth Jan. 15, 2015, pet. ref'd) (mem. op., not designated for publication); *Russell v. State*, No. 02-11-00478-CR, 2013 WL 626983, at *2 (Tex. App.—Fort Worth Feb. 21, 2013, pet. ref'd) (mem. op., not designated for publication).

Appellant acknowledges these general principles of error preservation but cites *Johnson v. State*, a 2014 decision from the court of criminal appeals, to argue that a “complaint . . . regarding the imposition of court costs upon the revocation of community supervision can be raised for the first time on appeal.” 423 S.W.3d 385 (Tex. Crim. App. 2014). There, Johnson appealed the assessment of \$234 in court costs, contending that the record “contained no bill of costs or other evidence supporting the \$234 amount.” *Id.* at 388. Although a court of appeals held that the costs had been included in the judgment erroneously because no evidence supported them, the court of criminal appeals held that a supplemental record that contained a bill of costs sufficiently supported the costs. *Id.* at 388, 395–96. In reaching that holding, the court also addressed preservation of error. *Id.* at 390–91. The court held that a “criminal defendant need not preserve an objection in the trial court to raise a claim challenging the bases for the imposition of court costs for the first time on appeal.” *Id.* at 390 (emphasis added). In so holding, the court relied on one of its previous opinions, which similarly concerned the factual basis for court-ordered reimbursement of appointed attorney’s fees. See *id.* (citing *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010)).⁶ The court emphasized

⁶In *Mayer*, the court explained,

We conclude that appellant’s complaint about the sufficiency of evidence of his financial resources and ability to pay were likewise not waived by his failure to raise such a complaint at trial. We

that “while some defendants in some cases may have an opportunity to recognize a basis to object to the imposition of court costs in open court if an itemized bill is available to them, most defendants . . . will not.” *Id.* at 390–91.

While the holding in *Johnson* signifies that a defendant need not object to the factual bases for an aggregate amount of costs to contest that amount on appeal, the holding does not explicitly or necessarily affect the more general rule that a facial challenge to the constitutionality of a statute—a legal claim that is independent of weighing facts that appear in the record—must be brought in a trial court to be raised on appeal.⁷ See *Karenev*, 281 S.W.3d at 434 (“Statutes are presumed to be constitutional until it is determined otherwise. The State and the trial court should not be required to anticipate that a statute may later be held to be unconstitutional.” (footnote omitted)). Here, upon appellant’s conviction, he had all the information needed to challenge the constitutionality of section 133.102(a)(1) while the trial court had authority to rule on the challenge.⁸ See Tex. Loc. Gov’t Code Ann. § 133.102(a)(1) (stating that a person “shall pay” \$133

reiterate that *no trial objection is required to preserve an appellate claim of insufficient evidence . . .*

309 S.W.3d at 556 (emphasis added).

⁷A facial challenge to a statute is predicated only on the language of a statute, not how the statute applies to the circumstances of a particular case. See *State v. Rousseau*, 396 S.W.3d 550, 558 n.9 (Tex. Crim. App. 2013).

⁸We note that the district clerk’s cost bill, which includes the \$133 “CCC-Felony” cost, bears a date of April 21, 2015. The trial court sentenced appellant on April 16, 2015, and the trial court signed its judgment on April 22, 2015.

“on conviction of a felony”); *see also State v. Aguilera*, 165 S.W.3d 695, 697–98 (Tex. Crim. App. 2005) (explaining that “[a]t a minimum,” a trial court has plenary power over a criminal case thirty days after sentencing occurs).

Accordingly, while acknowledging the holding in *Johnson*, one of our sister courts recently held that a facial challenge to the constitutionality of section 133.102 cannot be raised for the first time on appeal. *Guerrero v. State*, Nos. 01-13-00821-CR, 01-13-00822-CR, 2015 WL 2266247, at *3–4 (Tex. App.—Houston [1st Dist.] May 14, 2015, pet. filed) (mem. op., not designated for publication) (“[Johnson] did not address the constitutionality of court costs, and, therefore, [does] not support Guerrero’s contention that he may assert his constitutional claim for the first time on appeal. . . . [W]e hold that Guerrero failed to preserve his constitutional challenge to . . . section 133.102’s allocation of funds”); *see also Thias v. State*, No. 07-12-00513-CR, 2014 WL 6556530, at *2 (Tex. App.—Amarillo Nov. 20, 2014, no pet.) (mem. op., not designated for publication) (likewise holding that a defendant forfeited a constitutional challenge to section 133.102 by raising it for the first time on appeal); *cf. Salinas v. State*, 464 S.W.3d 363, 365, 368 (Tex. Crim. App. 2015) (remanding a case to a court of appeals to consider the merits of a constitutional challenge to section 133.102 when after sentencing, a defendant objected to the section’s constitutionality).

Because appellant had an opportunity upon his conviction in the trial court to challenge the constitutionality of section 133.102 but instead brought the challenge for the first time in this court, we hold that he forfeited the challenge,

and we overrule his second point. See Tex. R. App. P. 33.1(a); *Karenev*, 281 S.W.3d at 434; *Guerrero*, 2015 WL 2266247, at *3–4; *Thias*, 2014 WL 6556530, at *2; see also *Holmes v. State*, 380 S.W.3d 307, 308 (Tex. App.—Fort Worth 2012, pet. ref'd) (“[A] challenge to the constitutionality of a statute is a forfeitable right and must be preserved in the trial court during *or after trial.*” (emphasis added)).

Conclusion

Having sustained appellant's first point and having overruled his second point, we modify the trial court's judgment to exclude \$26.80 from the total amount of \$468.80 of “[c]ourt costs, fees[,] and/or fines” that the judgment orders appellant to pay. We reform the judgment so that the “Order to Withdraw Funds,” which the judgment expressly incorporates, requires appellant to pay \$442. As modified, we affirm the judgment. See Tex. R. App. P. 43.2(b); *Alexander*, 301 S.W.3d at 364.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; DAUPHINOT and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 1, 2015