COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00318-CR

DOMINGO ONTIVEROSVALENCIA — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1412269D

MEMORANDUM OPINION[1]

Appellant Domingo OntiverosValencia pled guilty to the offense of possession with intent to deliver four hundred grams or more of cocaine and pled true to the deadly weapon allegation. *See* Tex. Health & Safety Code Ann. §§ 481.102(3)(D) (providing that cocaine is in Penalty Group 1), 481.112(a), (f)

[1]*See* Tex. R. App. P. 47.4.

(providing that a person commits an offense by knowingly possessing with intent to deliver a Penalty Group 1 controlled substance and that the range of punishment for possessing with intent to deliver 400 grams or more of that substance is fifteen to ninety-nine years or life and a maximum fine of $250,000) (West 2010). The trial court convicted Appellant, entered an affirmative deadly weapon finding, and sentenced him to twenty years' confinement. *See id*. § 481.112(f). The trial court also assessed $339 in court costs, including a consolidated fee of $133. *See* Tex. Loc. Gov't Code Ann. § 133.102(a) (West Supp. 2016).

In his sole point, Appellant contends that section 133.102 of the local government code is facially unconstitutional because it violates the Separation of Powers Clause of the Texas Constitution. *See* Tex. Const. art. II, § 1; Tex. Loc. Gov't Code Ann. § 133.102 (West Supp. 2016). Bound by precedent of the Texas Court of Criminal Appeals, we agree in part but can afford Appellant no remedy. We therefore affirm the trial court's judgment.

I. Appellant's Complaint About Fees Assessed After Conviction and Sentencing May Be Raised First on Appeal.

The State contends that Appellant has forfeited his point by failing to raise it first in the trial court, but we have held that this complaint may be raised for the first time on appeal. *See Ingram v. State*, 503 S.W.3d 745, 748 (Tex. App.—Fort Worth 2016, pet. ref'd). Accordingly, we shall address Appellant's point.

II. Appellant Argues That Section 133.102 Is Facially Unconstitutional Because It Violates the Separation of Powers Clause.

Specifically, Appellant argues that the statute's allocation of various minimum percentages of the $133 consolidated fee to "accounts and funds" for "abused children's counseling," "law enforcement officers standards and education," and "comprehensive rehabilitation" is unlawful taxation because those funds allow spending for purposes other than "legitimate criminal justice purposes." Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (5), (6) (West Supp. 2016); *see Peraza v. State*, 467 S.W.3d 508, 518 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1188 (2016). He therefore argues that section 133.102 violates the Separation of Powers Clause of the Texas Constitution because it makes the courts tax collectors, burdening the judicial branch with an executive branch function.

III. The Texas Court of Criminal Appeals Recently Held Section 133.102 Facially Unconstitutional in Part Based on Violations of the Separation of Powers Clause.

Recently in *Salinas v. State*, the Texas Court of Criminal Appeals partially upheld the same argument Appellant now advances. No. PD-0170-16, 2017 WL 915525, at *4, *5 (Tex. Crim. App. Mar. 8, 2017). The *Salinas* court declared section 133.102 facially unconstitutional in violation of the Separation of Powers Clause of the Texas Constitution to the extent that it allocates funds from the consolidated fees to the "comprehensive rehabilitation" account and the "abused children's counseling" account because those subsections do not serve a

"legitimate criminal justice purpose." 2017 WL 915525, at *4, *5 (invalidating Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (6)); *Hawkins v. State*, No. 02-16-00104-CR, slip op. at 3 (Tex. App.—Fort Worth Apr. 13, 2017, no pet. h.), *available at* http://www.search.txcourts.gov/Docket.aspx?coa=coa02&FullDate=04/13/2017 (following *Salinas* in holding the statute unconstitutional in part). We therefore sustain Appellant's point to the extent that it complains of the allocation of funds under those two subsections.

IV. The Texas Court of Criminal Appeals Determined That Its Holding Has Narrow Retroactive Effect.

The Texas Court of Criminal Appeals specified in *Salinas*, however, that its holding has limited retroactive effect. 2017 WL 915525, at *6. The court applied the *Stovall* test in determining retroactivity because the offending subsections of the statute violated the powers of the judicial branch, not a personal right of the defendant. *Id.*; *see Stovall v. Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970 (1967) (noting in federal habeas proceeding that the retroactivity of a new constitutional rule of criminal procedure depends on (1) the new rule's purpose, (2) how much law enforcement relied on the old rule, and (3) the effect retroactivity would have on the administration of justice), *overruled by Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987); *Taylor v. State*, 10 S.W.3d 673, 679 (Tex. Crim. App. 2000) (recognizing that *Griffith* does not bind the states as to the retroactivity of new rules under state law and applying *Stovall*). The

Salinas court then determined that the three *Stovall* factors all weighed against applying its holding retroactively, reasoning:

- the costs a defendant pays have nothing to do with the truth-seeking purpose of a criminal trial, and there is nothing intrinsically wrong with requiring a losing defendant in a criminal case to pay a fee;
- the State's reliance interests are heavy because it depends on the money the fee generates, and
- imposing the holding retroactively could overburden court clerks throughout the State.

Salinas, 2017 WL 915525, at *6; *see Stovall*, 388 U.S. at 297, 87 S. Ct. at 1970. The *Salinas* court concluded that its holding applies (1) retroactively only to the parties in that case and to other defendants whose petitions for discretionary review properly raising the same claim were filed before the *Salinas* opinion was issued on March 8, 2017, and remained pending on that date; and (2) prospectively to trials ending after the mandate in *Salinas* issues. 2017 WL 915525, at *6. In a footnote, the Texas Court of Criminal Appeals emphasized that the only pending cases affected by its opinion are those that were already pending in the Texas Court of Criminal Appeals and appropriate for relief as of March 8, 2017. *Id.* at *6, n.54.

Accordingly, the Texas Court of Criminal Appeals has mandated that this court not modify the trial court's judgment here to reduce the consolidated fee assessed against Appellant. *See id.* at *6 & n.54; *Hawkins*, slip op. at 5.

V. Section 133.102(e)(5) Does Not Violate the Separation of Powers Clause Because Allocating a Percentage of the Consolidated Fee to the "Law Enforcement Officers Standards and Education" Account Pertains to the Operation of the Texas Criminal Justice System.

A. The *Salinas* Court Did Not Change the Test.

The *Salinas* court did not change the test we apply to determine whether a statute mandating the collection of fees in a criminal case violates the Separation of Powers Clause. *See* 2017 WL 915525, at *2. Statutes providing for the collection of fees in a criminal case do not violate the Separation of Powers Clause if they provide for apportioning the fees to be spent for "legitimate criminal justice purposes." *Id.*; *Peraza*, 467 S.W.3d at 518; *Ingram*, 503 S.W.3d at 749. A criminal justice purpose pertains "to the administration of our criminal justice system." *Peraza*, 467 S.W.3d at 518; *Ingram*, 503 S.W.3d at 749.

B. This Court Has Already Upheld This Subsection.

This court has already rejected the complaint Appellant raises about the statute's apportioning a percentage of the consolidated fee to the "law enforcement officers standards and education" account. *See Ingram*, 503 S.W.3d at 749. Neither the *Salinas* opinion nor Appellant's briefing compels a departure from our precedent. Accordingly, we again hold that the statutory allocation of 5.0034% of the consolidated fee to the "law enforcement officers standards and education" account provides funds to be spent for a "legitimate criminal justice purpose" related to the administration of the criminal justice system in Texas. *Hawkins*, slip op. at 6; *Ingram*, 503 S.W.3d at 749. Thus,

subsection 133.102(e)(5) does not violate the Separation of Powers Clause in the Texas Constitution. *Hawkins*, slip op. at 6; *Ingram*, 503 S.W.3d at 749. We overrule the remainder of Appellant's point.

VI. Conclusion

We follow the Texas Court of Criminal Appeals in holding unconstitutional the provisions of local government code section 133.102 requiring the allocation of funds from the consolidated fee to the "comprehensive rehabilitation account" and the "abused children's counseling account." Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (6); *Salinas*, 2017 WL 915525, at *4, *5; *Hawkin*s, slip op. at 3. However, we again uphold the provision apportioning a percentage of the consolidated fee to the "law enforcement officers standards and education" account. Tex. Loc. Gov't Code Ann. § 133.102(e)(5); *Hawkins*, slip op. at 6; *Ingram*, 503 S.W.3d at 749. Finally, we follow the directive of the Texas Court of Criminal Appeals barring us from applying its *Salinas* holding retroactively to reduce Appellant's consolidated fee. 2017 WL 915525, at *6 & n.54; *Hawkins*, slip op. at 5.

Accordingly, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

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

DELIVERED: April 13, 2017