COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00391-CR

BENNIE J TARRANT III — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 1429442D

MEMORANDUM OPINION[1]

In two points, Appellant Bennie J. Tarrant III appeals his conviction for aggravated robbery. *See* Tex. Penal Code Ann. § 29.03 (West 2011). We affirm.

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

Background

In 2014, after graduating from high school, Maida Zavala worked as a cashier at a convenience store on East Lancaster Avenue in Fort Worth. Shortly before midnight one evening, a man wearing a hooded sweatshirt and a hat came into the convenience store, pointed a gun at her, and told her to pull the cash tray out of the register. The man purposely avoided looking at Zavala directly, so she never saw his face. Zavala followed the man's instructions and gave him the money. As soon as the man left, she called the police.

Appellant was subsequently arrested and charged with the 2014 robbery. However, when Zavala was called as a witness during the trial of that offense, she could not identify Appellant as the man who committed the robbery. Following her testimony, the State elected to dismiss the charge against Appellant for the 2014 robbery.

On the evening of August 29, 2015, Zavala was working at another convenience store on East Lancaster when Appellant, whom she recognized from the 2014 robbery trial, entered the store. According to Zavala, on that occasion Appellant was wearing sunglasses, a hat, jeans, and a white shirt. Zavala testified that Appellant kept "coming in and out" of the store and that she was "kind of scared" but also "didn't really think anything of it because it was daylight." Eventually Appellant approached Zavala at the cash register, and Zavala twice asked him, "[H]ow can I help you?" Both times Appellant did not respond, but instead turned to look at the door, "[as if he was] making sure

nobody was going to come in." Appellant then pulled out a note and placed it on the counter. According to Zavala, the note instructed her "to take out the money from the register, that this was a robbery[,] and that he did have a gun."[2]

Zavala testified that she "freak[ed] out" and froze in shock. In response, Appellant pulled up his shirt and showed her the gun tucked into his waistband, so Zavala "immediately . . . pulled out the money, put it on the counter, and [Appellant] took it." Zavala testified that because she was pregnant at the time, she feared not only for her own life but also for the life of her unborn child.

According to Zavala, Appellant picked up the money, hesitated for a moment, and then walked out of the store. Zavala immediately called the police.

When police arrived, Zavala was able to provide Officer Travis Ward with Appellant's name based upon her previous interaction with him in connection with the 2014 robbery charge. She also identified him in a photo provided by the police.[3]

Appellant was subsequently arrested and charged with aggravated robbery with a deadly weapon. At trial, Zavala again identified Appellant as the man who committed the robbery in August 2015. The jury convicted Appellant of

[2]A copy of the note was admitted into evidence at trial. It read, "Give me [t]he money. I have a gun under my shi[r]t. No loud [t]alking just give me [t]he money!"

[3]Officer Ward was familiar with Appellant as well, because earlier in the morning of August 29, he had interacted with Appellant as a witness to the burglary of a vehicle not far from the convenience store.

aggravated robbery with a deadly weapon and sentenced him to 10 years' confinement.

Discussion

I. Jury charge

In his first point, Appellant argues that the inclusion of the following instruction regarding good conduct time in the jury charge on punishment was error:

> Under the law applicable in this case, the defendant may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular

> defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

In our review of a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). Appellant argues that it was error to include the above instruction because a person serving a sentence for aggravated robbery with a deadly weapon is not eligible to accumulate good conduct time credits for release on parole. *See* Tex. Gov't Code Ann. § 508.145(d) (West Supp. 2016); Tex. Code Crim. Proc. Ann. art. 42.12 § 3g (West Supp. 2016).

The above-recited jury instruction is authorized by statute. *See* Tex. Code. Crim. Proc. Ann. art. 37.07 § 4(a) (West Supp. 2016). Additionally, Appellant acknowledges that the court of criminal appeals has already addressed this issue in *Luquis v. State*, 72 S.W.3d 355, 362–68 (Tex. Crim. App. 2002), and held that the inclusion of an instruction regarding good conduct time and parole did not violate the appellant's due process rights even though the instruction only "marginally appl[ied] to one in appellant's position." In so holding, the court noted that the instruction clearly and explicitly directed the jury to not apply the general concepts of parole or "good conduct time" in assessing the appellant's sentence. *Id.* at 369. We are bound by the precedent of the court of criminal appeals and have no authority to disregard or overrule it. *See Sierra v. State*, 157 S.W.3d 52, 60 (Tex. App.—Fort Worth 2004), *aff'd*, 218 S.W.3d 85 (Tex. Crim. App. 2007). We therefore overrule Appellant's first point.

II. Consolidated court cost

In his second point, Appellant challenges the constitutionality of section 122.102(a)(1) of the local government code in assessing a $133 "consolidated court cost." *See* Tex. Local Gov't Code Ann. § 133.102(a)(1) (West Supp. 2016).

Section 133.102 states that the comptroller must allocate the court costs received under that section to fourteen accounts and assigns percentages to each account. Tex. Local Gov't Code Ann. § 133.102(e). Appellant specifically complains of the percentage allocations of funds to "abused children's counseling," *id.* § 133.102(e)(1), "law enforcement officers standards and education," *id.* § 133.102(e)(5), and "comprehensive rehabilitation," *id.* § 133.102(e)(6). Appellant contends that these provisions of section 133.102 are unconstitutional because they violate the separation of powers clause of the Texas Constitution and allow money to be gathered and spent for purposes that are too remote from criminal justice. *See* Tex. Const. art. II, § 1; *Peraza v. State*, 467 S.W.3d 508, 517 (Tex. Crim. App. 2015) ("[I]f the statute under which court costs are assessed . . . provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not . . . violat[e] . . . the separation of powers clause." (footnote omitted)), *cert. denied*, 136 S. Ct. 1188 (2016).

A. Sections 133.102(e)(1) and (6)

We have recently addressed Appellant's exact arguments in *Horton v. State*, No. 02-16-00229-CR, 2017 WL 1953333, at *2 (Tex. App.—Fort Worth

May 11, 2017, no pet. h.), and *Hawkins v. State*, No. 02-16-00104-CR, 2017 WL 1352097, at *5 (Tex. App.—Fort Worth Apr. 13, 2017, no pet. h.). In both, we recognized the recent decision of the court of criminal appeals in *Salinas v. State*, No. PD-0170-16, 2017 WL 915525, at *4, *5 (Tex. Crim. App. Mar. 8, 2017), that partially upheld Appellant's arguments. In *Salinas*, the court declared section 133.102 facially unconstitutional in violation of the separation of powers clause of the Texas Constitution to the extent it allocates funds from the consolidated fees to the "comprehensive rehabilitation" account and the "abused children's counseling" account because these subsections do not serve a "legitimate criminal justice purpose." *Id.* (invalidating Tex. Loc. Gov't Code Ann. § 133.102(e)(1), (6)). However, the court of criminal appeals expressly limited the retroactive application of its decision to only the parties before it and "to any defendant who ha[d] raised the appropriate claim in a petition for discretionary review before the date of [the *Salinas*] opinion," if the petition was pending on the date of the opinion. *Id.* The court of criminal appeals further emphasized in a footnote that only those cases pending in its court as of the date of the opinion were appropriate for relief. *Id.* at *6, n.54.

Thus, although we sustain Appellant's point to the extent that it complains of the constitutionality of the allocation of funds under sections 133.102(e)(1) and (6), we must follow the directive of the court of criminal appeals which precludes us from retroactively modifying Appellant's court costs to delete those fees. *Id.* *See also Horton*, 2017 WL 1953333 at *5; *Hawkins*, 2017 WL 1352097 at *2.

B. Section 133.102(e)(5)

Appellant additionally argues that section 133.102(e)(5) of the local government code, which allocates funds to "law enforcement officers standards and education," is unconstitutional for the same reasons he argues with respect to sections 133.102(e)(1) and (6). We have previously rejected the precise challenge brought by Appellant and held that section 133.102(e)(5) is facially constitutional. *Ingram v. State*, 503 S.W.3d 745, 748–49 (Tex. App.—Fort Worth, 2016); *Horton*, 2017 WL 1953333 at *3; *Hawkins*, 2017 WL 1352097 at *2. We are not persuaded to revisit this issue now, and therefore again hold that section 133.102(e)(5) is facially constitutional. We overrule the remainder of Appellant's second point.

Conclusion

Having sustained Appellant's second point to the extent that sections 133.102(e)(1) and (6) are unconstitutional but also recognizing the limitation placed on our ability to reform Appellant's judgment to delete the costs related to those sections, and having overruled the remainder of Appellant's points, we affirm the judgment of the trial court.

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

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

LIVINGSTON, C.J.; concurring and dissenting.[4]

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

DELIVERED: May 25, 2017

[4]Chief Justice Livingston joins the majority opinion in all respects except as to the remedy applied to resolve the issue regarding unconstitutionality of a portion of the court costs, all as set forth in her dissent in *Horton*, 2017 WL 1953333 at *6–9 (Livingston, C.J., dissenting).