



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-21-00010-CR

DANNY GENE PRATER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th District Court
Fannin County, Texas
Trial Court No. CR-15-25465

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Stevens

MEMORANDUM OPINION

In a single proceeding, Danny Gene Prater pled guilty on November 10, 2016, to two counts of burglary of a habitation¹ and one count of evading arrest or detention with a vehicle² and pled true to two prior felony convictions³ as alleged in each of the indictments. The trial court deferred adjudication of guilt in each of the cases, found the State's enhancement allegations true, and placed Prater on ten years' community supervision. On January 25, 2021, the trial court adjudicated Prater's guilt in each of the cases and sentenced Prater to fifty years' imprisonment, with the sentences to run concurrently.

In the judgment appealed in this case, the trial court convicted Prater of burglary of a habitation, sentenced him to fifty years' imprisonment, and assessed him \$364.00 in court costs.⁴ On appeal, Prater argues that the trial court erred in assessing costs in this case because (1) there was insufficient evidence supporting the assessment of court costs and, (2) since he was convicted of three offenses in a single criminal action, the trial court could only assess court costs in one of the convictions.⁵ The State concedes that any assessment for costs accruing after

¹See TEX. PENAL CODE ANN. § 30.02(c)(2).

²See TEX. PENAL CODE ANN. § 38.04(b)(2)(A).

³See TEX. PENAL CODE ANN. § 12.42(d).

⁴Prater also appeals a second conviction of burglary of a habitation in our cause number 06-21-00009-CR, and one count of evading arrest or detention with a vehicle in our cause number 06-21-00011-CR. Prater filed a single, consolidated brief in all three appeals. This opinion addresses Prater's issues related to his burglary of a habitation conviction challenged in this appeal.

⁵See TEX. CODE CRIM. PROC. ANN. art. 102.073(a) (providing that, when a defendant is convicted of two or more offenses in a single criminal action, "the court may assess each court cost or fee only once against the defendant"). In our opinion in cause number 06-21-00009-CR, issued on this date, we affirmed the trial court's costs assessment in that case.

the order of deferred adjudication was error. Nevertheless, the State argues that, because Prater did not appeal the costs assessed in the order of deferred adjudication, he forfeited any complaint up to the amount of those costs and that the trial court's judgment should be modified to reflect court costs of \$294.00. Because we find that there is a basis in the record to support an assessment of \$294.00 in court costs, we modify the judgment and affirm the judgment as modified.

I. Background

On November 10, 2016, Prater pled guilty to one count of burglary of a habitation and pled true to two prior felony convictions as alleged in the indictment. Pursuant to a plea agreement, the trial court deferred adjudication of guilt, found the enhancement allegations true, and placed Prater on ten years' community supervision. The order of deferred adjudication also assessed court costs of \$294.00. Prater did not appeal that order.⁶

On August 30, 2019, the State filed a motion to proceed with an adjudication of guilt. After the State filed an amended motion to adjudicate, and after a hearing, the trial court found all the violations alleged in the amended motion to adjudicate true, adjudicated Prater guilty, and sentenced him to fifty years' imprisonment, with court costs and any remaining restitution. The written judgment conformed with the trial court's oral pronouncement and assessed court costs of \$364.00.

⁶As part of his plea bargain, Prater waived his right to appeal the order of deferred adjudication, and the trial court certified that, because of his plea bargain and waiver, Prater did not have a right to appeal.

II. Analysis

“[W]e review the assessment of court costs on appeal to determine if there is a basis for the cost.” *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). Any complaints about the assessment of court costs, or the specific amounts of those costs, contained in an order of deferred adjudication must be made in a timely appeal of that order. *Perez v. State*, 424 S.W.3d 81, 85–86 (Tex. Crim. App. 2014). If the defendant has knowledge of the assessed court costs and fails to timely appeal the order of deferred adjudication, he forfeits his right to complain about the costs assessed in the order in a subsequent appeal of the judgment adjudicating his guilt. *Id.* at 86; *see Riles v. State*, 452 S.W.3d 333, 337 (Tex. Crim. App. 2015); *Wiley v. State*, 410 S.W.3d 313, 318 (Tex. Crim. App. 2013).

The record in this case shows that Prater’s right thumb print was embossed on the order of deferred adjudication. In addition, the order establishing Prater’s conditions of community supervision, also acknowledged by Prater with his signature, required that he pay \$294.00 in court costs as a term of his community supervision. Under this record, we conclude that Prater was aware that he was required to pay the court costs assessed in the deferred adjudication order. *See Wiley*, 410 S.W.3d at 320–21. Since he failed to timely appeal that order,⁷ any complaint regarding the \$294.00 in court costs assessed in that order has been forfeited. *See Riles*, 452 S.W.3d at 338; *Wiley*, 410 S.W.3d at 321.

⁷Prater’s waiver of his right to appeal the order of deferred adjudication “does not excuse his failure to appeal the assessment of court costs at the time of the original imposition of community supervision.” *Perez*, 424 S.W.3d at 85–86.

Prater timely appealed the assessment of \$364.00 in court costs contained in the judgment of adjudication. However, he has forfeited his right to complain about \$294.00 of those court costs.⁸ *Perez*, 424 S.W.3d at 86. As a result, we find there is a basis in the record that supports \$294.00 in court costs assessed in the judgment of adjudication.

Because Prater has forfeited his complaint as to \$294.00 of the \$364.00 in court costs assessed in the judgment of adjudication, this appeal properly challenges only the \$70.00 of court costs that were added to the \$294.00 initially assessed. *See id.* As to that amount, Prater argues that that assessment of costs was duplicative of the costs assessed in the judgment of conviction appealed under our cause number 06-21-00009-CR and that it was improper under Article 102.073(a) of the Texas Code of Criminal Procedure. We agree.

Article 102.073(a) provides that, “[i]n a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.” TEX. CODE CRIM. PROC. ANN. art. 102.073(a). In this case, the trial court adjudicated Prater’s guilt in, and convicted him of, three offenses in a single proceeding.⁹ Nevertheless, the trial court assessed \$364.00 in court costs in each of the three judgments adjudicating guilt. In response to our request, the district clerk supplemented the record in this case with an itemized, certified bill of costs. Part of the bill of costs would support a conclusion that the clerk added \$70.00 in sheriff’s fees to the \$294.00 in court costs assessed in the order of deferred adjudication to arrive at the \$364.00 total costs.

⁸Testimony at the hearing on the State’s motion to adjudicate showed that Prater had not paid any of those court costs during his community supervision.

⁹*See supra* note 4. The trial court’s cause numbers in the three cases are CR-15-25365, CR-15-25465, and CR-15-25467.

In the same proceeding in which the trial court convicted Prater in this case, it also convicted him under trial court cause numbers CR-15-25365 and CR-15-25467. In our cause number 06-21-00009-CR, we affirmed the trial court’s assessment of \$364.00 in court costs in the trial court’s cause number CR-15-25365. That amount included \$70.00 for sheriff’s fees incurred after Prater was placed on deferred adjudication community supervision. For that reason, the trial court’s assessment of the additional \$70.00 of sheriff’s fees in this case was impermissible under Article 102.073(a). *See id.* As a result, we find that the trial court erred in this matter to the extent it assessed \$70.00 in court costs in excess of the \$294.00 initially assessed. To that extent, we sustain this issue, in part.¹⁰

The certified bill of costs reflects charges of \$249.00 for “Court Costs” and \$115.00 for “Sheriff’s Fees” for a total of \$364.00. Because there is a basis for \$294.00 in court costs in the record, but the record does not provide a basis for the sheriff’s fees, we modify the bill of costs to reflect charges of \$294.00 for “Court Costs” and delete the charges for “Sheriff’s Fees.”

III. Disposition

“[A]ppellate courts ‘have the authority to reform judgments and affirm as modified in cases where there is nonreversible error.’” *Sharpe v. State*, 607 S.W.3d 446, 448 (Tex. App.—Texarkana 2020, no pet.) (quoting *Ferguson v. State*, 435 S.W.3d 291, 293 (Tex. App.—Waco 2014, pet. struck) (“comprehensively discussing appellate cases that have modified judgments”)); *see Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (finding that

¹⁰In his brief, Prater also complains that there is no support in the record for imposing restitution and requests that we modify the judgment to remove any reference to the payment of restitution. At Prater’s sentencing, the trial court stated, “There’ll be court costs and any remaining restitution, if he’s not yet paid them.” Nevertheless, neither the written judgment of adjudication nor the certified bill of costs shows any amount assessed for restitution. For that reason, we find that this issue is without merit.

court of appeals should modify judgment and delete improperly assessed costs). Accordingly, we modify the trial court’s judgment and the bill of costs to correctly reflect court costs of \$294.00 and by deleting the charges for “Sheriff’s Fees” from the bill of costs. As modified, we affirm the trial court’s judgment.

Scott E. Stevens
Justice

Date Submitted: August 30, 2021
Date Decided: October 7, 2021

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