**IN THE**
**TENTH COURT OF APPEALS**

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**No. 10-17-00169-CR**

**BRIAN AUSTIN KELLEY,**

**Appellant**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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**From the 52nd District Court**
**Coryell County, Texas**
**Trial Court No. 16-23449**

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## MEMORANDUM OPINION

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In one issue, which we characterize as three, appellant, Brian Austin Kelley, complains that the judgment adjudicating guilt in this case should be reformed. Specifically, Kelley contends that the judgment: (1) incorporates a void order to withdraw funds; (2) erroneously describes terms of a plea bargain that did not exist; and (3) erroneously assesses a $500, rather than a $200, fine. We affirm as modified.

## I. BACKGROUND

Kelley was charged by information with intentionally or knowingly possessing a controlled substance—methamphetamine—in an amount less than one gram. As part of a plea bargain with the State, Kelley pleaded guilty to the charged offense. The trial court accepted Kelley's guilty plea, deferred an adjudication of guilt, and placed him on community supervision for five years with a $200 fine.

Approximately six months later, the State filed a motion to adjudicate guilt and revoke Kelley's community supervision, alleging that Kelley violated eight conditions of his community supervision. The trial court approved the modification of Kelley's community supervision; however, Kelley escaped from custody. Subsequently, the trial court entered an order withdrawing its approval of the modification of Kelley's community supervision.

The State filed a first amended motion to adjudicate guilt and revoke Kelley's community supervision shortly thereafter. In this motion, the State alleged that Kelley violated nine conditions of his community supervision. After a hearing, the trial court adjudicated Kelley guilty, revoked his community supervision, and sentenced him to two years' confinement in the State Jail Division of the Texas Department of Criminal Justice

with no fine.[1] The trial court also certified Kelley's right to appeal the revocation of his community supervision. This appeal followed.

## II. KELLEY'S INMATE ACCOUNT

In his first issue, Kelley contends that the order to withdraw funds from his inmate account is void because it was signed by the district clerk, rather than the district judge. As such, Kelley asserts that the judgment adjudicating guilt erroneously incorporated a void order to withdraw funds.

In support of his contention that the order to withdraw funds is void, Kelley relies heavily on an unpublished memorandum opinion from the Texarkana Court of Appeals. *See generally Edwards v. State*, No. 06-17-00009-CR, 2017 Tex. App. LEXIS 7159 (Tex. App.—Texarkana June 26, 2017, no pet.) (mem. op., not designated for publication). In *Edwards*, the Texarkana Court of Appeals addressed a challenge to the sufficiency of the evidence supporting the imposition of attorney's fees against an indigent defendant. *Id.* at *3. Because the record indicated that Edwards was indigent, and because there was never a finding by the trial court that Edwards was capable of paying any of the costs of his appointed counsel, the Texarkana Court of Appeals concluded that the evidence supporting the imposition of attorney's fees was insufficient. *See id.* at **3-4. Accordingly, the Court modified the judgment to remove any language imposing

[1] In his oral pronouncement of Kelley's sentence, the trial judge sentenced Kelley to "two years in the Texas Department of Criminal Justice state jail division, no fine, only cost of court. No attorney's fees will be assessed in this case. This is not a plea agreement."

attorney's fees. *Id.* at *4. However, rather than stop there, the *Edwards* Court proceeded to modify the order to withdraw funds that was incorporated in the judgment. *Id.* Specifically, the *Edwards* Court noted the following:

> Further, we note that the judgment provided, "Attachment A, Order to Withdraw Funds, is incorporated into this judgment and made a part hereof." As Edwards points out, Attachment A purports to be an order to withdraw funds and recites that the amount of court costs, fees, fines, or restitution equals $914.00. Since there were no fines or restitution ordered by the trial court, this amount necessarily includes the $500.00 in attorney fees and $414.00 in other costs assessed in the judgment. Therefore, since the purported order to withdraw funds was incorporated into the judgment, in order to modify the judgment, it would also be necessary to modify that order.
>
> However, the order to withdraw funds is not signed by the district judge. Rather it is signed by the district clerk. The order purports to be entered pursuant to Section 501.014 of the Texas Government Code. Although Section 501.014 authorizes a district court to enter an order to withdraw funds, it does not authorize a district clerk to do so. Since Section 501.014 does not authorize the district clerk to enter an order to withdraw funds, it is void. Therefore, we need not modify that order. However, since the order to withdraw funds is void, and since it would be improper for the judgment to incorporate a void order, we modify the judgment by removing the language incorporating Attachment A.

*Id.* at **4-5 (internal citations omitted). For reasons stated below, we are not persuaded by Kelley's argument in this issue or his reliance on *Edwards*.

First, we note that the conclusion that the order to withdraw funds from an inmate account is void due to the absence of the district judge's signature appears to be dicta and unnecessary to the ultimate disposition of that case, especially in light of the conclusion that the evidence supporting the assessment of attorney's fees was insufficient.

Furthermore, it also appears that the *Edwards* decision is in conflict with the *Goodspeed* opinion also originating in the Texarkana Court of Appeals. *See Goodspeed v. State*, 352 S.W.3d 714, 715 (Tex. App.—Texarkana 2011, pet. denied) (noting that a notice of withdrawal is not an order "in the traditional sense of a court order, judgment, or decree issued after notice and hearing in either a civil or criminal proceeding" and dismissing a challenge to the notice of withdrawal for want of jurisdiction).

Second, we recognize that section 501.014 of the Government Code authorizes the withdrawal of court costs and fees from an inmate's account. *See* TEX. GOV'T CODE ANN. § 501.014(e) (West Supp. 2017). More specifically, section 501.014(e) provides, in relevant part:

> On notification by a court, the department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection. On receipt of a valid court order requiring an inmate to pay child support, the department shall withdraw the appropriate amount from the inmate's account under this subsection, regardless of whether the court order is provided by a court or another person. The department shall make a payment under this subsection as ordered by the court to either the court or the party specified in the court order. The department is not liable for withdrawing or failing to withdraw money or making payments or failing to make payments under this subsection. . . .

*Id.* This Court has noted that the "order" addressed in section 501.014(e) "is nothing more than the notice to the Texas Department of Criminal Justice that a judgment has been rendered against [appellant] and that, pursuant to the statute, the Department should withdraw money from his inmate account." *Ramirez v. State*, 318 S.W.3d 906, 907 (Tex. App.—Waco 2010, no pet.). And because the document contemplated in section

501.014(e) is merely a notification to TDCJ, the "order" to withdraw funds is not a final, appealable order; therefore, in accordance with *Ramirez*, this Court lacks jurisdiction to address a complaint about an "order" to withdraw funds. *See Harrell v. State*, 286 S.W.3d 315, 316 n.1 (Tex. 2009); *Goodspeed*, 352 S.W.3d at 715; *Ramirez*, 318 S.W.3d at 907; *see also Jones v. State*, Nos. 10-10-00006-CV & 10-10-00007-CV, 2011 Tex. App. LEXIS 8742, at *2 (Tex. App.—Waco Oct. 26, 2011, no pet.) (mem. op., not designated for publication) ("And last year (after the briefing was completed in these two cases), this Court determined that a trial court's 'order' under subsection 501.014(e) is a notice, not an appealable order, and that we lack jurisdiction over direct appeals from subsection 501.014(e) notices.").

And finally, it is worth mentioning that the Texas Supreme Court and the Court of Criminal Appeals have stated that proceedings under section 501.014(e) regarding the withdrawal of funds from inmate accounts are civil in nature.[2] *Harrell*, 286 S.W.3d at 321; *see Armstrong v. State*, 340 S.W.3d 759, 766 (Tex. Crim. App. 2011) (noting that a withdrawal order entered into pursuant to section 501.014(e) of the Government Code is a civil-law matter). Therefore, because this is a criminal proceeding, and because Kelley's complaint is ostensibly a challenge to the validity of the "order" to withdraw funds, we conclude that this criminal appeal is not the proper vehicle to make such a complaint. *See*

[2] The complained-of "order" to withdraw funds in this case specifically states that it was "entered and incorporated into the Judgment and Sentence of this Court and pursuant to Government Code, Section 501.014, on this 10th Day of APRIL, 2017."

*Harrell*, 286 S.W.3d at 321; *see also Armstrong*, 340 S.W.3d at 766; *In re Johnson*, 280 S.W.3d 866, 873-74 (Tex. Crim. App. 2008). Accordingly, we overrule Kelley's first issue.

## III. THE PLEA-BARGAIN AND FINE LANGUAGE IN THE JUDGMENT ADJUDICATING GUILT

In his second and third issues, Kelley argues that the judgment adjudicating guilt erroneously states the terms of a plea bargain when there was no plea bargain. Additionally, Kelley asserts that this judgment erroneously recites that he was assessed a fine of $500 when he was placed on community supervision when the fine was actually $200. The State concedes error in these two issues.

An appellate court has authority to reform a judgment to make the record speak the truth when the matter has been called to its attention by any source. *See* TEX. R. APP. P. 43.2(b); *see also Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992). Here, the record does not reflect that there was an agreement between Kelley and the State in exchange for Kelley's guilty plea at the revocation hearing. Nevertheless, the judgment adjudicating guilt states the following: "Terms of Plea Bargain: TWO (2) YEARS TDCJ STATE JAIL DIVISION; $331.58 COURT COST." Because the judgment adjudicating guilt was not the product of a plea bargain between Kelley and the State, we reform the judgment to delete the language under the "Terms of Plea Bargain" section. *See* TEX. R. APP. P. 43.2(b); *see also Bigley*, 865 S.W.2d at 27-28; *French*, 830 S.W.2d at 609.

With regard to the imposed fine, we recognize that the order of deferred adjudication indicates that the trial court imposed a $200 when placing Kelley on community supervision. However, after stating that the fine to be imposed was "N/A," the judgment adjudicating guilt provides that:

> After hearing and considering the evidence presented by both sides, the Court FINDS THE FOLLOWING: (1) The Court previously found the Defendant to be qualified for community supervision; (2) The Court DEFERRED further proceedings, made no finding of guilt, and rendered no judgment; (3) The Court issued an order placing Defendant on community supervision for a period of FIVE (5) YEARS; (4) *The Court assessed a fine of $500.00* . . . .

(Emphasis added).

Because the order of deferred adjudication reflects that the trial court imposed a $200 fine when Kelley was first placed on community supervision, and because the amount of the fine did not change when Kelley's community supervision was revoked, we modify the complained-of language in the judgment adjudicating guilt to reflect that a $200 fine was imposed by the trial court. *See* TEX. R. APP. P. 43.2(b); *see also Bigley*, 865 S.W.2d at 27-28; *French*, 830 S.W.2d at 609. We therefore sustain Kelley's second and third issues.

## IV. CONCLUSION

Based on the foregoing, we modify the judgment adjudicating guilt to delete the language under the "Terms of Plea Bargain" section and to demonstrate that the fine

imposed when Kelley was placed on community supervision was $200, rather than $500.

We affirm the judgment adjudicating guilt in all other respects.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed as modified
Opinion delivered and filed January 3, 2018
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