TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00334-CR

Major Thomas Davis, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT
NO. 75209, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Major Thomas Davis was charged with evading arrest or detention "while using a vehicle" by "intentionally flee[ing] from . . . a person the defendant knew was a peace officer who was attempting lawfully to arrest or detain the defendant." *See* Tex. Penal Code § 38.04(a) (setting out elements of offense). After being charged, Davis pleaded guilty to the charged offense, and the district court sentenced Davis to five years' imprisonment. *See id.* § 38.04(b)(2) (providing that offense is third-degree felony if defendant uses vehicle); *see also id.* § 12.34 (listing permissible punishment range for third-degree felony). In its judgment, the district court also assessed Davis $251 in court costs. The bill of costs contained a list of the court costs imposed and stated that one of the costs was a $25 sheriff's fee, but nothing in the bill of costs or in the remainder of the record sets out how the amount of that fee was determined. In two issues on appeal, Davis challenges the

imposition of the $25 fee and asserts that there is an error on the face of the judgment requiring modification. We will affirm the district court's judgment of conviction.

DISCUSSION

Sheriff's Fee

In his first issue on appeal, Davis contends that "[t]he statute authorizing the imposition of a sheriff's fee does not support the amount actually assessed in this case, so the judgment should be reformed accordingly."

The payment of court costs is mandated by the legislature. *Houston v. State*, 410 S.W.3d 475, 477 (Tex. App.—Fort Worth 2013, no pet.); *see also* Tex. Code Crim. Proc. arts. 42.15(a) (applying to judgments that impose fines and requiring defendant to pay fine as well as "costs to the state"), .16 (requiring payment of costs when "punishment is any other than a fine"). However, the defendant may only be obligated to pay court costs that are "statutorily authorized." *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *see also* Tex. Code Crim. Proc. art. 103.002 (providing that "[a]n officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law"). Because court costs do not need to be incorporated into a judgment by reference or orally pronounced, defendants may challenge the imposition of court costs for the first time on appeal. *Johnson*, 423 S.W.3d at 389, 391. When a defendant challenges the imposition of court costs, reviewing courts determine if there is a basis for the costs but do not determine if sufficient evidence was offered during the trial to support each cost. *Id.* at 390; *see Martinez v. State*, 510 S.W.3d 206, 208 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

The imposition of sheriff's fees is authorized by article 102.011 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 102.011. That provision authorizes the imposition of various types of fees for services provided by law-enforcement personnel when a defendant is convicted of a felony or a misdemeanor. *See id.* In particular, the provision authorizes the imposition of the following types of fees:

> (1) $5 for issuing a written notice to appear in court following the defendant's violation of a traffic law, municipal ordinance, or penal law of this state, or for making an arrest without a warrant;
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> (2) $50 for executing or processing an issued arrest warrant, capias, or capias pro fine . . . ;
>
> (3) $5 for summoning a witness;
>
> (4) $35 for serving a writ not otherwise listed in this article;
>
> (5) $10 for taking and approving a bond and, if necessary, returning the bond to the courthouse;
>
> (6) $5 for commitment or release;
>
> (7) $5 for summoning a jury, if a jury is summoned; and
>
> (8) $8 for each day's attendance of a prisoner in a habeas corpus case if the prisoner has been remanded to custody or held to bail.

Id. art. 102.011(a). In addition to those fees, the provision also authorizes a court to charge a defendant "29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service," including conveying a prisoner and "traveling to execute criminal process, to summon or attach a witness, and to execute process not otherwise described by

this article." *Id.* art. 102.011(b); *see also id.* art. 102.011(c)-(e), (i) (allowing for imposition of additional fees for services provided by law-enforcement personnel).[1]

When presenting this issue, Davis acknowledges that the Code of Criminal Procedure authorizes the imposition of sheriff's fees in varying amounts, *see id.* art. 102.011, but contends that most of the provisions listed above do not apply in this case because "no bond was issued,"[2] because "no witnesses were summoned," because "no jury trial was held," because "this is not a habeas case," and because he "was not arrested pursuant to a warrant." In fact, he asserts that only three provisions could apply in this case. Specifically, he suggests that the imposition of a $5 fee would have been appropriate because he was arrested without a warrant, *see id.* art. 102.011(a)(1), that the imposition of a $5 fee for commitment or release would have been appropriate because he "was committed to jail before trial," *see id.* art. 102.011(a)(6), and that he could have been assessed a fee for mileage for being transferred from jail to the courthouse, *see id.* art. 102.011(b)(1). Regarding the mileage fee, Davis encourages this Court to "take judicial notice of the locations of the Bell

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[1] On appeal, Davis notes that article 102.001 of the Code of Criminal Procedure also authorizes the imposition of sheriff's fees and repeats arguments made in other recent cases that the provision "does not apply to this case, and arguably does not apply to any defendant's case." *See Whary v. State*, No. 03-16-00737-CR, 2017 WL ____, at *__ n.2 (Tex. App.—Austin May 24, 2017, no pet. h.) (mem. op., not designated for publication); *Love v. State*, No. 03-15-00462-CR, 2016 WL 1183676, at *1 n.1 (Tex. App.—Austin Mar. 22, 2016, no pet.) (mem. op., not designated for publication). As in those cases, we need not make any determination regarding whether article 102.001 applies, but we again note that "the deletion of various subarticles of the statute have rendered the viability of the remaining portions questionable because the remaining portions refer to and in some cases rely on the deleted subarticles." *See Love*, 2016 WL 11783676, at *1 n.1.

[2] In his brief, Davis notes that "there is an Order Setting Bond in the record" but argues that the fee "for taking and approving a bond" should not apply because he was never released and, therefore, because the order was "conditional." In any event, Davis contends that even if the fee could have been applied, it would only have been an "additional ten dollars." *See* Tex. Code Crim. Proc. art. 102.011(a)(5).

County jails and their distances from the Bell County Courthouse" and conclude that he owes, at most, $0.87 for mileage. Accordingly, Davis urges that there is no basis for the imposition of the $25 sheriff's fee and asks this Court to reduce the amount of that fee.

Recently, this Court addressed similar complaints in an appeal from the same county about the imposition of a $25 sheriff's fee and upheld the imposition of the fee because the applicable statute "authorizes fees for law-enforcement personnel," because the statute "allows for the imposition of more than one fee," and because the fee "at issue . . . generally fall[s] within the range of permissible fees." *Love v. State*, No. 03-15-00462-CR, 2016 WL 1183676, at *2 (Tex. App.—Austin Mar. 22, 2016, no pet.) (mem. op., not designated for publication). Further, we noted that although the defendant insisted that only certain sheriff's fees applied and that those fees did not add up to $25, the record indicated that two additional sheriff's fees applied and could "have both served as a basis for a fee." *Id.* at *2 (citing provisions authorizing imposition of $35 fee and $50 fee); *see also Martinez*, 510 S.W.3d at 209 (overruling issue regarding sheriff's fees and concluding that record arguably provided basis for imposition of $255 in sheriff's fees where record showed that there were "five instances of serving capias," which allows for imposition of $50 fee each time, and that defendant was also arrested without warrant, which allows for imposition of $5 fee). The analysis from *Love* was approved of and applied by an even more recent opinion by this Court. *See Whary v. State*, No. 03-16-00737-CR, 2017 WL ____, at *__ (Tex. App.—Austin May 24, 2017, no pet. h.) (mem. op., not designated for publication) (discussing analysis from *Love* and similarly noting that record established that capias was executed in case and could have served as basis for imposition of sheriff's fee beyond amount of fee imposed and beyond amount defendant contended could have been imposed).

As in *Love* and in *Whary*, the $25 sheriff's fee here falls within the range of permissible fees, and the record supports the imposition of fees beyond those that Davis concedes could have been applied and beyond what the district court imposed. *See id.* at *__; *Love*, 2016 WL 1183676, at *2. In particular, although Davis seems to suggest that an arrest warrant could not justify the imposition of a sheriff's fee in this case because he was arrested after an officer observed him committing a felony, *see* Tex. Code Crim. Proc. art. 14.01 (authorizing police officer to arrest offender without warrant "when the offense is committed in" officer's "presence or within his view"), the record in this case does contain an arrest warrant and a sheriff's return affidavit stating that the warrant was executed and that Davis was arrested and placed in county jail, *see id.* art. 102.011(a)(2) (allowing for imposition of fee of "$50 for executing or processing an issued arrest warrant"). Moreover, the record also contains a "Precept to Serve Copy of Indictment" and a sheriff's return affidavit demonstrating that Davis was served with a copy of the indictment. *See id.* arts. 25.01 (requiring clerk of trial court to "make a certified copy of the" indictment and direct sheriff "to deliver such certified copy to the accused"), 102.011(a)(4) (authorizing imposition of $35 fee "for serving a writ not otherwise listed in this article").[3] Either of those could have served as a basis for the imposition of a sheriff's fee in excess of the $25 fee imposed here. As explained in *Whary*, "[i]f the district court elected to impose as a sheriff's fee an amount that was less than the amount statutorily authorized, that would not seem to warrant a determination that the amount of the fee should be even further reduced." 2017 WL ___, at *__. Finally, as discussed in *Whary*, "in

[3] Davis acknowledges that the record contains the "Precept to Serve Copy of Indictment" and further acknowledges that the "Precept to Serve" could have served as a basis for a sheriff's fee, but Davis states that the district clerk "declined to assess the fee."

resolving this issue we must be aware of the presumption of regularity in trial proceedings, and we observe that nothing in the record presented to this Court persuades us that the presumption should not apply to the fee imposed and listed in the bill of costs." *Id.* at *__; *cf. Leon v. State*, 25 S.W.3d 841, 843 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (stating that "[a]bsent any showing to the contrary, we assume regularity in the proceedings").[4]

For all of these reasons, we overrule Davis's first issue on appeal.

Error in Judgment

In his second issue on appeal, Davis asserts that "[t]he judgment does not correctly specify the statute for the offense, and should be reformed accordingly." Specifically, Davis notes that "the judgment lists the statute for the offense merely as '38.04 Penal Code.'" Although Davis acknowledges that section 38.04 generally governs the offense of "Evading Arrest or Detention," *see* Tex. Penal Code § 38.04, he asserts that the statutory provisions that should have been listed in the "Statute for Offense" portion of the judgment are subsection 38.04(a), which sets out the elements for the offense, and subsection 38.04(b)(2)(A), which sets out the offense level for the offense as alleged in the indictment. *See id.* § 38.04(a), (b)(2)(A).

Similar claims were also presented in *Whary*, and this Court overruled the issue on appeal because the judgment in that case complied with the requirements of the provision of the Code of Criminal Procedure setting out what information must be included in the judgment.

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[4] In this case, Davis urges that our opinion in *Love* was incorrectly decided and presents many of the same claims that were presented in *Whary* challenging the reasoning in *Love*. Having addressed those issues in *Whary*, we incorporate the analysis from *Whary* reaffirming the reasoning in *Love*. *See Whary*, 2017 WL ___, at *__ n.4.

2017 WL ___, at *__ (discussing article 42.01 of Code of Criminal Procedure). In particular, we noted that the judgment correctly listed the offense for which Whary had been convicted, the statute for the offense, and the offense level and explained that it was not "error for a judgment to generally list the applicable statute rather than specifically state which particular subsection or subsections apply." *Id.* at *__. Like the judgment in *Whary*, the judgment in this case also correctly lists the offense for which Davis was convicted, the statute for that offense, and the offense level. Accordingly, we do not believe that there is an error present in the judgment that requires correction. *Id.* at *__ (distinguishing cases relied on by defendant as support for her assertion that judgment should be modified).

For these reasons and in light of our analysis from *Whary*, we overrule Davis's second issue on appeal.

CONCLUSION

Having overruled both of Davis's issues on appeal, we affirm the district court's judgment of conviction.

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David Puryear, Justice

Before Chief Justice Rose, Justices Puryear and Goodwin

Affirmed

Filed: May 25, 2017

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