TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00341-CR
NO. 03-16-00342-CR

Leon Jackson, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF MCCULLOCH COUNTY, 452ND JUDICIAL DISTRICT
NOS. 6100 & 6101, HONORABLE ROBERT R. HOFMANN, JUDGE PRESIDING

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

Under two separate indictments, Leon Jackson was charged with a state-jail felony for forgery of a financial instrument in cause number 6101 and with a third-degree felony for forgery of a financial instrument involving an elderly victim in cause number 6100. *See* Tex. Penal Code § 32.21(a)-(b) (setting out elements of offense of forgery), (d) (explaining that, in general, forgery of financial instrument is state-jail felony), (e-1) (elevating offense level "to the next higher category of offense if it is shown on the trial of the offense that the offense was committed against an elderly individual"). Jackson entered pleas of guilty to both charges and agreed to have the district court assess his punishment. In addition, Jackson waived his right to appeal his guilty pleas but not his right to appeal the sentences imposed by the district court. At the conclusion of the punishment hearing, the district court sentenced Jackson to two years' imprisonment for the state-jail-felony offense and to four years' imprisonment for the third-degree-felony offense. *See id.* §§ 12.34-.35

(setting out permissible punishment range for third-degree felonies and state-jail felonies). The written judgment in cause number 6100 required Jackson to pay $1,017.24 in restitution and $1,652.00 in court-appointed attorney's fees. In two issues on appeal, Jackson challenges the portions of that judgment requiring him to pay restitution and attorney's fees. We will modify the district court's judgment in cause number 6100 to remove the requirements that Jackson pay restitution and attorney's fees, and we will affirm that judgment as modified and affirm the district court's judgment in cause number 6101.[1]

DISCUSSION

Restitution

In his first issue on appeal, Jackson contends that the district court's judgment in cause number 6100 "should be reformed to delete the requirement that [he] pay restitution since the [district] court did not orally pronounce a restitution award as part of" its sentence. In its appellate filing, the State "agrees the judgment . . . should be reformed as requested by" Jackson.

Generally speaking, a district court's sentence is pronounced orally, and the judgment, including the sentence, "is merely the written declaration and embodiment of that oral pronouncement." *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002); *see* Tex. Code Crim. Proc. art. 42.01, § 1 (providing that "[a] judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant"). This

[1] Although the notice of appeal filed in this case indicates that Jackson was appealing his convictions in cause numbers 6100 and 6101, he does not present any issue regarding his conviction in cause number 6101.

distinction stems from the idea "that the imposition of sentence is the crucial moment when all of the parties are physically present at the sentencing hearing and able to hear and respond to the imposition of sentence." *Ex parte Madding*, 70 S.W.3d at 135. For that reason, if there is a discrepancy between the written judgment and the oral pronouncement of sentence, "the oral pronouncement controls." *Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014); *Ex parte Madding*, 70 S.W.3d at 135. In other words, defendants have legitimate due-process expectations that the orally-pronounced sentences will be the punishments that they have to serve, and a defendant's due-process rights are violated if a trial court chooses to enter a written judgment that contains a harsher sentence than the one that it orally pronounced and also does not provide the defendant with notice or an opportunity to be heard. *Ex parte Madding*, 70 S.W.3d at 136-37. Accordingly, a trial court may not "orally pronounce one sentence in front of the defendant, but enter a different sentence in his written judgment, outside the defendant's presence." *Id.* at 136; *see also Burt*, 445 S.W.3d at 757 (explaining that "[a] trial judge has neither the statutory authority nor the discretion to orally pronounce one sentence . . . but then enter a different written judgment . . . . Rather, due process requires that the defendant be given fair notice of all of the terms of his sentence, so that he may object and offer a defense to any terms he believes are inappropriate" (internal footnote omitted)). However, in this context, the requirement that the "oral pronouncement match the written judgment applies only to sentencing issues, such as the term of confinement assessed." *Ex parte Huskins*, 176 S.W.3d 818, 820 (Tex. Crim. App. 2005).

As pointed out by Jackson, when the district court orally pronounced its judgment, it made no mention of restitution. "[R]estitution is punitive and 'must be pronounced orally in order

to be included in the written judgment.'" *Elam v. State*, No. 03-08-00501-CR, 2010 WL 668897, at *2 (Tex. App.—Austin Feb. 26, 2010, no pet.) (mem. op., not designated for publication) (quoting *Weir v. State*, 252 S.W.3d 85, 87 (Tex. App.—Austin 2008), *rev'd in part on other grounds*, 278 S.W.3d 364 (Tex. Crim. App. 2009)); *see also Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006) (stating that "restitution is punishment"). "Because the district court failed to order restitution at the time it pronounced the judgment, the inclusion of a restitution requirement in the written judgment was error." *Elam*, 2010 WL 668897, at *2.

For these reasons, we sustain Jackson's first issue on appeal.

Attorney's fees

In his second issue on appeal, Jackson contends that "[t]he evidence is insufficient to support the [district] court's judgment against [him] for court-appointed attorney's fees because the presumption of [his] indigence was never rebutted."[2] As with the first issue, the State agrees that the attorney's fees should be deleted from the judgment.

Under the Code of Criminal Procedure, a trial court may order a defendant to pay "as court costs" "in part or in whole the costs of the legal services provided to the defendant" by

[2] We note that when the district court orally pronounced its judgment, it did not specify that Jackson was ordered to pay fees for his appointed counsel. However, "attorneys' fees are not punitive, are not part of the sentence, and, therefore, need not be pronounced orally in order to be included in the written judgment." *Cornelison v. State*, No. 03-07-00664-CR, 2008 WL 3540085, at *2 (Tex. App.—Austin Aug. 14, 2008, no pet.) (mem. op., not designated for publication); *see also Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (explaining that "no trial objection is required to preserve an appellate claim of insufficient evidence, thus the court of appeals did not err in addressing appellant's complaint about the order to reimburse court-appointed attorney fees").

his appointed counsel if the trial court "determines that a defendant has financial resources that enable the defendant" to pay those costs. Tex. Code Crim. Proc. art. 26.05(g); *see Cates v. State*, 402 S.W.3d 250, 251 (Tex. Crim. App. 2013) (explaining that Code of Criminal Procedure "allows the trial court to order a defendant to re-pay costs of court-appointed legal counsel that the court finds the defendant is able to pay"). Under that provision, "the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). However, a "defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs," Tex. Code Crim. Proc. art. 26.04(p), and the provision allowing a trial court to order a defendant to pay some or all of the fees for his appointed counsel "requires a present determination of financial resources and does not allow speculation about possible future resources," *Cates*, 402 S.W.3d at 252.[3]

In this case, approximately six months before the trial, the district court determined that Jackson was too "poor to employ counsel" and appointed an attorney to represent Jackson during the trial. After Jackson was appointed trial counsel, no further determination regarding Jackson's financial status was made until Jackson elected to pursue this appeal, and the district court again found that Jackson "is indigent and that appointment of an attorney . . . is warranted." Accordingly, "there was never a finding by the court that he was able to re-pay any amount of the costs of

[3] During the punishment hearing, Jackson testified that his financial situation might improve because he was feeling healthier, because he was finally on disability, and because a manager at a retail store suggested that she might be able to give him a part-time position.

court-appointed legal counsel," and "there was no factual basis in the record to support a determination that [Jackson] could pay the fees." *See id.* at 251-52.

For these reasons, we sustain Jackson's second issue on appeal.

CONCLUSION

Having sustained Jackson's two issues on appeal, we modify the district court's judgment of conviction in cause number 6100 to delete those portions of the judgment obligating Jackson to pay restitution and attorney's fees. *See Burt*, 445 S.W.3d at 759-60 (explaining that in situations in which restitution was never mentioned "during the sentencing hearing or as part of the oral pronouncement of sentence," "the defendant was entitled to have the restitution order deleted because the written judgment did not match the oral pronouncement of sentence"); *Cates*, 402 S.W.3d at 252 (explaining that "the proper remedy is to reform the . . . judgment by deleting the . . . court-appointed attorney's fees from the order assessing court costs"); *Mayer*, 309 S.W.3d at 557 (noting that "[w]hen claims of insufficient evidence are made, the cases are not usually remanded to permit supplementation of the record to make up for alleged deficiencies in the record evidence" and concluding that appellate court did not commit any error by "determining that the trial court erred in ordering reimbursement of attorney fees without remanding the case to the trial court"). As modified, the district court's judgment of conviction in cause number 6100 is affirmed. The district court's judgment of conviction in cause number 6101 is affirmed.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Goodwin

6100: Modified and, as Modified, Affirmed
6101: Affirmed

Filed: February 23, 2017

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