# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-16-00811-CR**
**NO. 03-16-00812-CR**

**Carlos Santos Valdez, Appellant**

**v.**

**The State of Texas, Appellee**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 167TH JUDICIAL DISTRICT**
**NOS. D-1-DC-16-904081 & D-1-DC-15-207417**
**HONORABLE P. DAVID WAHLBERG, JUDGE PRESIDING**

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

Under two separate indictments, Carlos Santos Valdez was charged with unlawful possession of a firearm by a felon and with possession of a controlled substance (phencyclidine) in an amount between 4 and 200 grams. *See* Tex. Penal Code § 46.04(a), (e) (setting out elements of offense of unlawful possession of firearm and stating that offense is third-degree felony); Tex. Health & Safety Code §§ 481.102(8) (listing phencyclidine as substance included in "Penalty Group 1"), .115(a), (d) (providing that person commits offense by possessing "a controlled substance listed in Penalty Group 1" and that offense is second-degree felony if amount of controlled substance is between 4 and 200 grams). Originally, both indictments contained two enhancement paragraphs alleging that Valdez had previously been convicted of the following two felony offenses: assault on a public servant and possession of a controlled substance. *See* Tex. Penal Code § 22.01(a), (b)(1)

(setting out elements of offense of assault and elevating offense level to third-degree felony if victim is public servant and if offense occurs while "the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant"); Tex. Health & Safety Code § 481.115 (prohibiting possession of controlled substance); *see also* Tex. Penal Code § 12.42 (enhancing punishment ranges for defendants charged with felonies who have previously been convicted of one or more felony offenses). However, the State later abandoned the prior-possession enhancement because that prior conviction was for a state-jail felony, *see* Tex. Health & Safety Code § 481.115(b) (providing that offense is state-jail felony if amount is "less than one gram"), and, therefore, could not serve as a felony enhancement, *see* Tex. Penal Code § 12.42 (explaining that prior state-jail-felony convictions do not enhance punishment ranges for defendant charged with felony offense).

Initially, Valdez pleaded not guilty to the two charges; however, Valdez later changed his pleas to guilty pleas after voir dire had started but requested that the jury still assess his punishment. In addition, Valdez pleaded true to the enhancement allegation regarding his prior assault conviction. During the punishment hearing, the district court issued jury instructions directing the jury to find Valdez guilty of both offenses, explaining that Valdez's potential punishment had been enhanced due to his pleading true to an enhancement allegation, and setting out the enhanced punishment ranges for the offenses of unlawful possession of a firearm and possession of a controlled substance. *See id.* § 12.42(a), (b) (enhancing punishment range for third-degree and second-degree felonies to that of next highest offense level if individual has previously been convicted of another felony offense); *see also id.* §§ 12.32-.33 (listing permissible punishment ranges for first-degree

and second-degree felonies). At the end of the hearing, the jury sentenced Valdez to six years' imprisonment for both offenses, and the district court rendered its judgments of conviction in accordance with the jury's recommendations. Both judgments of conviction impose court costs on Valdez. In addition, the judgment for unlawful possession of a firearm states that Valdez pleaded true to one enhancement allegation, but the judgment for possession of a controlled substance states that Valdez pleaded true to two enhancement allegations.

In two issues on appeal, Valdez urges that the judgments of conviction in both causes should be reformed because they both "incorrectly state the degree of the offenses for which" he was convicted, that the judgment in the controlled-substance cause should be modified to remove the plea of true to a second enhancement allegation, and that the district court improperly imposed court costs on Valdez in both causes. We will modify the district court's judgments of conviction and, as modified, affirm the judgments.

## DISCUSSION

### Degree of Offenses and Enhancement Allegation

In his first issue on appeal, Valdez contends that each judgment should be modified to correctly reflect the degree of the offense for which he was convicted. When making this claim on appeal, Valdez acknowledges that the punishment range for both offenses was elevated due to his prior felony conviction, but he asserts that the enhancement did not raise the actual degree of the felonies for which he was convicted. In light of the preceding, Valdez contends that he was actually convicted of a third-degree felony for possession of a firearm and a second-degree felony for possession of a controlled substance but that the judgments of conviction incorrectly reflect that he

was convicted of felony offenses that were one offense level higher than the correct level in both causes. Accordingly, Valdez urges this Court to reform the judgments of conviction. In its brief, the State agrees that the judgments of conviction should be modified in the manner suggested by Valdez.

This Court has the authority to modify incorrect judgments when it has the information necessary to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). In fact, "[a]ppellate courts have the power to reform whatever the trial court could have corrected by a judgment *nunc pro tunc* where the evidence necessary to correct the judgment appears in the record." *Youngstrom v. State*, No. 07-13-00385-CR, 2014 WL 2586351, at *3 (Tex. App.—Amarillo June 9, 2014, pet. ref'd) (mem. op., not designated for publication).

The indictment and the plea agreement for the firearm-possession offense both list the degree of the offense as a third-degree felony, and the Penal Code mandates that possession of a firearm by a previously convicted felon is a third-degree felony. *See* Tex. Penal Code § 46.04(e). Similarly, the plea agreement for the controlled-substance offense lists the offense as a second-degree felony, and the Health and Safety Code directs that possession of a controlled substance in the amount alleged in this case is a second-degree felony. *See* Tex. Health & Safety Code § 481.115(d).[1] Although there was an enhancement allegation in both causes stemming from a prior felony conviction and although section 12.42 of the Penal Code "increases the range of punishment

[1] The amended indictment lists the offense level as a first-degree felony. However, that indictment initially alleged that Valdez possessed the controlled substance with the intent to deliver, which is a first-degree felony. *See* Tex. Health & Safety Code § 481.112(a), (d). The "with intent to deliver" allegation was scratched through on the face of the indictment after the State elected to not pursue that allegation. Further, the judgment of conviction reflects that the conviction was under section 481.115 of the Health and Safety Code (possession of a controlled substance) and not under section 481.112 (possession with intent to deliver) as initially alleged in the indictment.

applicable to the primary offense[,] it does not increase the severity level or grade of the primary offense." *See Ford v. State*, 334 S.W.3d 230, 235 (Tex. Crim. App. 2011). Accordingly, we agree with Valdez that the judgments of conviction should be reformed by modifying the judgment for unlawful possession of a firearm to reflect that the offense was a third-degree felony and by modifying the judgment for possession of a controlled substance to reflect that the offense was a second-degree felony. *See Doolittle v. State*, No. 03-16-00685-CR, 2017 WL 2729670, at *9 (Tex. App.—Austin June 22, 2017, no pet.) (mem. op., not designated for publication) (addressing offense for which punishment level was enhanced to that of second-degree felony due to prior felony conviction and reforming judgment of conviction to reflect that defendant was actually convicted of third-degree felony and not second-degree felony).

In this issue, Valdez also argues that the judgment of conviction for possession of a controlled substance incorrectly states that he pleaded true to a second enchantment allegation and that the district court found the enhancement to be true. For that reason, Valdez contends that the judgment should be further modified to reflect that there was no second enhancement allegation. In its brief, the State agrees that the modification suggested by Valdez should be made.

As set out earlier, the State initially alleged two enhancement allegations in both causes. After recognizing that one of the prior convictions was for a state-jail felony and, therefore, could not serve as an enhancement for elevating the punishment level in either of the charged felonies, *see* Tex. Penal Code § 12.42, the State obtained a subsequent indictment for the unlawful-possession-of-a-firearm charge. The new indictment only listed one enhancement allegation. Although the record does not contain a similar amended indictment for the unlawful-possession-of-

a-controlled-substance charge, we do note that no mention of the prior conviction for possessing a controlled substance was made when the indictments were read to the jury, that the jury charge did not list that prior conviction as an enhancement, and that Valdez only entered a plea of true to the prior assault conviction. Accordingly, we agree with Valdez that the judgment of conviction for possession of a controlled substance should be modified by deleting the references to a second enhancement allegation. *See Youngstrom*, 2014 WL 2586351, at *3.

For all of these reasons, we sustain Valdez's first issue on appeal.

**Court Costs**

In his second issue on appeal, Valdez contends that he was improperly "charged with court costs," including jury fees, in both causes. The judgments of conviction for possession of a controlled substance and possession of a firearm assessed $324 and $249 in court costs, respectively. The bill of costs accompanying each judgment specifies that the total costs include court costs, two types of jury fees, arrest fees, and commitment/release fees. The fees at issue in this case are the $284 in court costs and the $25 in jury fees imposed in the judgment of conviction for possession of a controlled substance and the $224 in court costs and the $25 in jury fees imposed in the judgment of conviction for unlawful possession of a firearm. In its brief, the State agrees that the district "court erred in assessing $224.00 in duplicative costs and fees for certain felony court costs." The State also agrees that some, but not all, of the jury fees were improperly imposed twice.

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, a 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). 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. *Id.* at 389, 391. When a defendant challenges the imposition of court costs, reviewing courts determine if there is a basis for the costs. *Id.* at 390; *see Martinez v. State*, 510 S.W.3d 206, 208 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

Although court costs are authorized by the legislature, the legislature also explained in article 102.073 of the Code of Criminal Procedure that if "a defendant is convicted of two or more offenses or of multiple counts of the same offense" "[i]n a single criminal action," "the court may assess each court cost or fee only once against the defendant." Tex. Code Crim. Proc. art. 102.073(a); *see also Williams v. State*, 495 S.W.3d 583, 589 (Tex. App.—Houston [1st Dist.] 2016, pet. dism'd) (explaining that defendant may challenge on appeal "basis for assessing costs three times when, under article 102.073(a), the costs should have only been assessed once"). The Code of Criminal Procedure does not define the phrase "a single criminal action," but two of our sister courts of appeals have recently determined that the legislature's intention in using that phrase in article 102.073 was for "the phrase to be interpreted as 'allegations and evidence of more than one offense . . . [which] are presented in a single trial or plea proceeding.'" *Hurlburt v. State*, 506 S.W.3d 199, 203 (Tex. App.—Waco 2016, no pet.) (alteration in *Hurlburt*) (quoting *Ex parte Pharr*, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995)); *see Vega v. State*, No. 08-16-00057-CR, 2017 WL 1511336, at *1 (Tex. App.—El Paso Apr. 26, 2017, no pet.) (not designated for publication) (agreeing with

construction made by court in *Hurlburt*). In addition, the amount of court costs must be determined with reference to "the highest category of offense that is possible based on the defendant's convictions." Tex. Code Crim. Proc. art. 102.073(b).

As set out above, the bills of costs for the convictions for possession of a controlled substance and for possession of a firearm show that Valdez was assessed $284 and $224 in court costs, respectively. Although the costs are not further broken down, there is statutory support for the imposition of $224 in court costs in this case. *See* Tex. Loc. Gov't Code §§ 133.102(a)(1) (authorizing imposition of "$133 on conviction of a felony"), .105(a) (requiring, with exceptions, "[a] person convicted of any offense" to "pay as a court cost . . . a fee of $6 to be used for court-related purposes for the support of the judiciary"), .107(a) (mandating, with exceptions, that "[a] person convicted of any offense . . . pay as a court cost . . . a fee of $2 to be used to fund indigent defense representation"); Tex. Code Crim. Proc. arts. 102.0045(a) (stating, with exceptions, that "[a] person convicted of any offense . . . shall pay as a court cost . . . a fee of $4 to be used to reimburse counties for the cost of juror services"), .005(a) (authorizing imposition of "fee of $40" "for the services of the clerk of the court"), (f) (requiring "defendant convicted of an offense" to "pay a fee of $25 for records management and preservation services"), .0169(a) (mandating that "[a] defendant convicted of a criminal offense . . . pay a $4 county and district court technology fee as a cost of court"), .017 (authorizing imposition of "a $5 security fee as a cost of court" on "[a] defendant convicted of a felony offense"); Tex. Gov't Code § 51.851(d) (stating that convicted person must pay $5 electronic-filing fee). In addition, individuals convicted of certain drug-related crimes, including possession of a controlled substance, are obligated to "pay $60 as a court cost of

conviction." Tex. Code Crim. Proc. art. 102.0178(a). Accordingly, there is a statutory basis for the imposition of $284 in court costs for Valdez's conviction for possession of a controlled substance.

Although there is a statutory basis for the amount of the court costs assessed, the punishment for both offenses was determined in the same proceeding in which Valdez and the State called all of their witnesses to testify, and Valdez's punishment in both causes was assessed at the same time at the conclusion of the hearing. "Thus, because allegations and evidence of more than one offense were presented in a single trial or plea proceeding, the trial court erred in assessing costs in each conviction." *See Hurlburt*, 506 S.W.3d at 203-04. For that reason as well as the fact that the conviction for possession of a controlled substance is the more serious offense, *see* Tex. Penal Code § 46.04(e); Tex. Health & Safety Code § 481.115(d), the judgment of conviction for possession of a firearm needs to be modified to delete the imposition of court costs that were also assessed in the judgment of conviction for possession of a controlled substance, *see* Tex. Code Crim. Proc. art. 102.073(b); *see also* Tex. R. App. P. 43.2(b) (allowing court of appeals to "modify the trial court's judgment and affirm it as modified"); *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013) (stating that when trial court improperly included fees in assessed court costs, proper remedy was to reform judgment to delete improper fees).

As set out above, in this issue, Valdez also challenges the imposition of jury fees in the judgments for both convictions. The Code of Criminal Procedure authorizes the imposition of two types of jury fees relevant to this case. The first is a sheriff's jury fee for summoning a jury, *see* Tex. Code Crim. Proc. art. 102.011(a)(7), and the second is a jury fee that may be assessed when a defendant is "convicted by a jury," *see id.* art. 102.004(a). Regarding those fees, the bill of costs in both causes specifies that Valdez owes $20 for a criminal jury fee and $5 for a sheriff's jury fee.

When challenging the imposition of the jury fees, Valdez alleges that the $20 fee was improperly imposed in each cause because he pleaded guilty to the offense and was, therefore, not convicted by a jury. On the contrary, Valdez contends that the jury simply assessed his punishment. Regarding the $5 fee imposed in both cases, Valdez acknowledges that a jury was summoned in this case before he changed his plea to guilty but argues that it was improper for the district court to impose the fee in both judgments. *See id.* art. 102.073(a). For these reasons, Valdez urges that the judgments in both causes should be modified to delete the $20 fee and that the judgment for possession of a firearm should be further modified to remove the $5 fee. In its brief, the State urges that the $5 sheriff's fee for summoning a jury was improperly assessed twice and should be deleted from the judgment for unlawful possession of firearm, but the State contends that the remainder of the imposed jury fees should not be modified.

Regarding the $5 fee, as acknowledged by Valdez, a jury was summoned in this case, and there is a statutory basis for the imposition of the $5 fee. *See id.* art. 102.011(a)(7) (authorizing imposition of $5 fee "for summoning a jury, if a jury is summoned"). However, only one jury was summoned, and the same jury heard the punishment evidence for both offenses and determined Valdez's punishments in the same proceeding. For that reason, the district court erred by imposing the $5 fee in both causes, *see id.* art. 102.073(a), and the judgment of conviction for possession of a firearm needs to be modified to delete the $5 jury fee from the court costs, *see Williams*, 495 S.W.3d at 590 (modifying judgments in multiple cause-number case to delete, among other fees and costs, "$5 sheriff's jury fee" imposed in more than one cause).

Regarding the $20 fee, the Code of Criminal Procedure does state that a fee may be imposed when a defendant is "convicted by a jury." Tex. Code Crim. Proc. art. 102.004(a). The current version of article 102.004, which is the version that was in effect when the judgments in both cases were rendered, authorizes the imposition of a $40 jury fee, *see id.*, but the prior version allowed for the imposition of only a $20 fee, *see* Act of May 18, 1989, 71st Leg., R.S., ch. 1080, § 3, sec. 102.004(a), 1989 Tex. Gen. Laws 4354, 4355 (last amended 2015) (current version at Tex. Code Crim. Proc. art. 102.004(a)). When assessing court costs, the district court only imposed a $20 fee in each case rather than the $40 fee authorized by the current statute.[2]

Article 102.004 provides that "[i]n this article, 'conviction' has the meaning assigned by Section 133.101, Local Government Code." Tex. Code Crim. Proc. art. 102.004(c). Section 133.101 explains that "a person is considered to have been convicted" if, among other ways, "a judgment, a sentence, or both a judgment and a sentence are imposed on the person." Tex. Loc. Gov't Code § 133.101(1). In light of this broadly written legislative definition, we must conclude that the jury summoned in this case did convict Valdez for purposes of the imposition of jury fees when it determined his sentence. *Cf. Griggs v. State*, No. 06-15-00047-CR, 2015 WL 5098973, at *1, *2 (Tex. App.—Texarkana Aug. 31, 2015, no pet.) (mem. op., not designated for publication) (determining that jury fee was improperly assessed when defendant pleaded guilty, when trial court

[2] Although Valdez does not argue on appeal that the $20 jury fees should be deleted because the amount imposed differs from the amount authorized by statute, we note that this Court has explained that the imposition of fees in "an amount that was less than the amount statutorily authorized . . . would not seem to warrant a determination that the amount of the fee should be even further reduced." *See Whary v. State*, No. 03-16-00737-CR, 2017 WL 2333266, at *3 (Tex. App.—Austin May 24, 2017, no pet.) (mem. op., not designated for publication).

determined punishment, and when no jury was summoned).[3] Accordingly, there is a statutory basis for the imposition of a jury fee.

In its brief, the State agrees that there is a statutory basis for the imposition of a jury fee and recognizes that a jury fee was imposed in both cases, but the State argues that because the statute authorized the imposition of a $40 jury fee, the assessment of a $20 jury fee in both cases was not error. In other words, the State urges that because the total amount imposed in jury fees was the amount authorized by statute, it should not matter whether that total amount was split between the two cases or imposed as a single fee in the judgment for possession of a controlled substance.

We agree with the State. Although it appears that the district court intended to impose identical jury fees in both cases and although trial courts "may assess each court cost or fee only once against the defendant" when "a defendant is convicted of two or more offenses" in a single criminal proceeding, *see* Tex. Code Crim. Proc. art. 102.073(a), the total amount of the two jury fees imposed in these cases is the amount authorized by the statute in effect when the district court rendered its judgments, *see id.* § 102.004(a). Accordingly, there is a statutory basis for the imposition

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[3] As support for his argument that no jury fee should have been imposed in this case, Valdez points to a recent decision by one of our sister courts of appeals. *See Willis v. State*, __ S.W.3d __, No. 06-16-00040-CR, 2017 WL 526378 (Tex. App.—Texarkana Feb. 9, 2017, no pet.). In that case, the defendant pleaded "guilty to two counts of sexual assault of a child and elected jury-assessed punishment." *Id.* at *1 (internal footnote omitted). On appeal, our sister court determined that a $40 jury fee was "not supported by the record" because the defendant "was convicted by the trial court" and not by a jury even though the jury determined the punishment in the case. *Id.* at *6.

As an initial matter, we note that our sister court did not address in its analysis the fact that the jury-fee provision expressly incorporated the definition of conviction set out in the Local Government Code. *See* Tex. Code Crim. Proc. art. 102.004(c). As discussed above, that definition is broader than simply a determination of guilt. *See* Tex. Loc. Gov't Code § 133.101(1). In any event, we are not bound by the analysis from our sister court.

of $40 in jury fees. *See Johnson*, 423 S.W.3d at 389 (explaining that "when a specific amount of court costs is written in the judgment, an appellate court errs when it deletes the specific amount if there is a basis for the cost").

For these reasons, we overrule in part and sustain in part Valdez's second issue.

## CONCLUSION

Having sustained Valdez's first issue on appeal, we modify the judgment of conviction in cause number D-1-DC-16-904081 to reflect that Valdez was convicted of a third-degree felony and modify the judgment of conviction in cause number D-1-DC-15-207417 to reflect that Valdez was convicted of a second-degree felony and to delete the word "TRUE" from both the plea and the finding regarding a second enhancement allegation. Having overruled in part and sustained in part Valdez's second issue, we modify the judgment of conviction in D-1-DC-16-904081 to delete $229 from the amount assessed as court costs, including the $5 jury fee for summoning a jury. As modified, we affirm the judgments of conviction.

David Puryear, Justice

Before Justices Puryear, Field, and Bourland

D-1-DC-16-90481 Modified and, as Modified, Affirmed

D-1-DC-15-207417 Modified and, as Modified, Affirmed

Filed: October 6, 2017

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