TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00031-CR

Casey James Garrett, Appellant

v.

The State of Texas, Appellee

FROM THE DISTRICT COURT OF BELL COUNTY, 264TH JUDICIAL DISTRICT
NO. 75239, HONORABLE MARTHA J. TRUDO, JUDGE PRESIDING

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

Appellant Casey James Garrett was convicted of assault on a public servant, a third-degree felony, and punishment was enhanced by a prior felony conviction. *See* Tex. Penal Code §§ 12.42(a), 22.01(b)(1). The trial court sentenced him to 20 years in prison and assessed court costs of $251, which included $133 as a consolidated court cost. In two issues, Garrett argues that the imposition of a portion of that fee is unconstitutional and that the judgment should be modified to reflect a conviction for a third-degree felony rather than a second-degree felony. We will affirm the judgment as modified.

DISCUSSION

I. Consolidated court costs

A. Recent changes to the statute governing consolidated court costs

Consolidated court costs are statutorily mandated by section 133.102 of the Texas Local Government Code. Under section 133.102(a)(1), a person convicted of a felony must pay $133 as "a court cost" in addition to all other costs. Tex. Loc. Gov't Code § 133.102(a)(1). Under the version of the statute in effect at the time of the underlying proceedings,[1] section 133.102(e) required the comptroller to allocate court costs to fourteen different accounts in percentages assigned to each account. *Id.* § 133.102(e).

However, the Texas Court of Criminal Appeals recently held section 133.102 facially unconstitutional. *See Salinas v. State*, ___ S.W.3d ___, ___, No. PD-0170-16, 2017 WL 915525, at *4, *5 (Tex. Crim. App. Mar. 8, 2017). The court determined that two of the accounts listed in section 133.102(e) violated the separation of powers clause of the Texas Constitution because they were not related to a legitimate criminal-justice purpose and were instead more accurately characterized as a tax. *Id.* (striking down subsections (e)(1) and (e)(6), which allocated portions of the $133 court cost to comprehensive rehabilitation and abused children's counseling). The remedy in that case was to modify the judgment to reduce the $133 consolidated court cost to $119.93 to delete the unconstitutional portions of the fee. *Id.* at *7. However, the court limited the retroactive application of its holding to certain defendants: (1) those who had raised the appropriate claim in

[1] The recent amendment of that statute is explained below.

a petition for discretionary review filed before, and still pending on, the date of the court's opinion, and (2) those whose trials end after the mandate in *Salinas* issued. *Id.* at *6.

The *Salinas* court further stated that if the legislature redirected the funds in subsections (e)(1) and (e)(6) to a legitimate criminal-justice purpose, then trial courts could continue to collect the entire consolidated court cost. *Id.* at *6 n.54. The court noted that, if the legislature amended the statute before mandate in that case issued, "the only cases that will be affected by this opinion will be the few that are now pending in this Court and are appropriate for relief." *Id.* The legislature has amended the statute as advised by the court: It deleted former subsections (e)(1) and (e)(6) and redirected those funds to the fair-defense account in former subsection (e)(14) (now subsection (e)(12)). *See* Tex. Loc. Gov't Code § 133.102(e) (amended by Act of Apr. 27, 2017, 85th Leg., R.S., ch. 966, § 1 (effective June 15, 2017)). That amendment went into effect on June 15, 2017, preceding the mandate in *Salinas*, which issued on June 30, 2017. *Id.*; *see also Hurtado v. State*, No. 02-16-00436-CR, 2017 WL 3188434, at *1 (Tex. App.—Fort Worth July 27, 2017, no pet. h.) (mem. op., not designated for publication) (observing same).

B. Garrett is not entitled to relief from the consolidated court costs

Here, the bill of costs shows that the $133 consolidated court cost was assessed in Garrett's case. However, because no petition for discretionary review is pending on Garrett's claim, and the underlying proceedings in the trial court ended on December 16, 2016—well before the *Salinas* mandate issued—the court's holding in *Salinas* does not apply to the present case. *See Salinas*, 2017 WL 915525, at *6. Further, because the legislature timely amended the

consolidated-court-costs statute, trial courts may continue to collect the entire consolidated court cost as authorized under section 133.102(a). *See id.* at *6 n.54.

Garrett asks that we reject the majority holding in *Salinas*, citing analysis advanced in the dissenting opinion. *See id.* at *12 n.2 (Newell, J., dissenting). However, as an intermediate court, we must follow the majority holding in that case, which prohibits retroactive application of its holding to Garrett's case. *See Pape v. Guadalupe-Blanco River Auth.*, 48 S.W.3d 908, 916 (Tex. App.—Austin 2001, pet. denied) (citing *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993)) (intermediate courts are bound to follow precedents of higher courts). Accordingly, we overrule Garrett's first issue.

II. Judgment modification

Garrett next contends that the judgment erroneously reflects that he was convicted of a second-degree felony. Currently, the judgment states as follows: "Degree of Offense: 3RD DEGREE FELONY ENHANCED TO A 2ND DEGREE FELONY." It further indicates that Garrett pled true to an enhancement paragraph and that the trial court found the enhancement paragraph true. Garrett argues that the judgment should be reformed to reflect that he was convicted of a third-degree offense. The State agrees.

Although the punishment range for an offense may be enhanced by proof of a prior felony conviction, the enhancement does not affect the grade of the primary offense. *See Ford v. State*, 334 S.W.3d 230, 234-35 (Tex. Crim. App. 2011). Therefore, to the extent that the judgment in this case suggests that Garrett was convicted of a second-degree offense, it is erroneous. *See id.* We therefore modify the judgment of conviction to delete, from the "Degree of Offense" field, the

language "ENHANCED TO A 2ND DEGREE FELONY."[2] *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993) (intermediate courts have authority to modify incorrect judgments when the necessary information is available to do so).

CONCLUSION

We affirm the judgment of the trial court as modified.

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Cindy Olson Bourland, Justice

Before Justices Puryear, Field, and Bourland

Modified and, as Modified, Affirmed

Filed: August 31, 2017

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[2] The State suggests that we modify the judgment to state that Garrett was "convicted of a third degree felony punished for a second degree felony" to avoid confusion as to the punishment assessed. However, because the judgment indicates that the trial court found the enhancement paragraph true, we conclude that simply deleting the reference to the second-degree enhancement will suffice.