NO. 12-15-00088-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SIDNEY C. LYNCH, APPELLANT	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Sidney C. Lynch appeals the trial court's order revoking community supervision. In four issues, Appellant argues that the trial court failed to consider the full range of punishment, and that the trial court and district clerk erred by assessing attorney's fees. We affirm.

BACKGROUND

Appellant was charged by indictment with unlawful possession of a firearm by a felon. Pursuant to a plea bargain agreement with the State, Appellant pleaded "guilty" to the offense, and the trial court assessed his punishment at imprisonment for eight years, suspended for a period of four years.

Subsequently, the State filed an application to revoke Appellant's community supervision. Appellant pleaded true to the allegations in the application. After giving both parties an opportunity to present evidence and arguments, the trial court granted the application to revoke and imposed the eight year prison sentence previously assessed. This appeal followed.

FAILURE TO CONSIDER FULL RANGE OF PUNISHMENT

In Appellant's first and second issues, he contends that he was denied due process and due course of law by the trial court's failure to consider the full range of punishment upon revocation of his community supervision.

Standard of Review and Applicable Law

Due process requires a neutral and detached hearing body or officer. ***Gagnon v. Scarpelli***, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761, 36 L. Ed. 2d 656 (1973). It is a denial of due process for a trial court to arbitrarily refuse to consider the entire range of punishment for an offense or to refuse to consider the evidence and impose a predetermined punishment. ***McClenan v. State***, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983). In the absence of a clear showing of bias, we will presume the trial judge was a neutral and detached officer. ***Earley v. State***, 855 S.W.2d 260, 262 (Tex. App.—Corpus Christi 1993, pet. dism'd). In applying our state constitutional guarantee of due course of law, we follow contemporary federal due process interpretations. ***U.S. Gov't v. Marks***, 949 S.W.2d 320, 326 (Tex. 1997); ***Fleming v. State***, 376 S.W.3d 854, 856 (Tex. App.—Fort Worth 2012), *aff'd*, 455 S.W.3d 577 (Tex. Crim. App. 2014), *cert. denied*, 135 S. Ct. 1159, 190 L. Ed. 2d 913 (2015).

Analysis

Appellant argues that the trial court violated his rights to due process and due course of law by imposing the agreed eight year sentence upon revocation of his community service without considering the entire range of punishment. Appellant further argues that the alleged error is structural, does not require preservation by objection, and is not subject to a harm analysis. The State responds that Appellant failed to preserve this issue by a timely objection, and that the issue is meritless because the trial court was merely enforcing the terms of the plea agreement.

Preservation of error is a systemic requirement on appeal. ***Wilson v. State***, 311 S.W.3d 452, 473 (Tex. Crim. App. 2010). It is the duty of the appellate courts to ensure that a claim is preserved in the trial court before addressing its merits. ***Id.*** In general, a claim is preserved for appellate review only if (1) the complaint was made to the trial court by a timely and specific request, objection, or motion, and (2) the trial court either ruled on the request, objection, or motion or refused to rule and the complaining party objected to that refusal. TEX. R. APP. P. 33.1(a); ***Geuder v. State***, 115 S.W.3d 11, 13 (Tex. Crim. App. 2003). If a party fails to properly object to errors at trial, even constitutional errors can be forfeited. ***Clark v. State***, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012).

But Rule of Appellate Procedure 33.1 is not absolute. ***Grado v. State***, 445 S.W.3d 736, 739 (Tex. Crim. App. 2014). Whether it applies to a particular complaint turns on the nature of the right allegedly infringed. ***Id.*** The court of criminal appeals has separated defendants' rights into three categories: (1) absolute requirements and prohibitions, which cannot lawfully be avoided even with partisan consent; (2) waivable-only rights, which must be implemented unless expressly waived;

and (3) forfeitable rights, which are forfeited unless requested by the litigant. ***Id.***; ***Marin v. State***, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), *overruled on other grounds by* ***Cain v. State***, 947 S.W.2d 262 (Tex. Crim. App. 1997). Rule 33.1's preservation requirement applies only to the last category. ***Id.***

The right to be sentenced after consideration of the full range of punishment is a category two waivable-only right. ***Grado***, 445 S.W.3d at 743. Therefore, Appellant's complaint that the trial court failed to consider the full range of punishment was not forfeited by his failure to object at trial. *See* ***id.*** We therefore consider the merits of Appellant's complaint. *See* ***id.***

Here, Appellant's punishment was assessed at his plea hearing when he was placed on community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3(a) (West Supp. 2015); ***Wiltz v. State***, 863 S.W.2d 463, 465 (Tex. Crim. App. 1993). When Appellant made the plea agreement with the State for eight years of imprisonment, he waived his right to be punished after consideration of the full range of punishment. *See* ***Grado***, 445 S.W.3d at 740 ("In a negotiated plea bargain that contemplates a particular offense of conviction and punishment to be imposed, a defendant is expressly giving up a whole host of rights, including the right to be sentenced by a judge considering the entire range of punishment."). Thus, Appellant's rights to due process and due course of law were not violated by the trial court's failure to sentence him after considering the full range of punishment.

In arguing that he had a due process right to a revocation hearing before a judge who had not predetermined that a particular punishment should be imposed, Appellant cites ***Gonzales v. Johnson***, 994 F. Supp. 759, 762 (N.D. Tex. 1997) and ***Ex parte Brown***, 158 S.W.3d 449, 454 (Tex. Crim. App. 2005). However, those cases are inapposite here because the defendants there had been granted deferred adjudication community supervision, in which no punishment is assessed until after an adjudication of guilt. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (West Supp. 2015).

Although Appellant waived his due process right to be sentenced after consideration of the full range of punishment, we may review the trial court's failure to reduce his punishment upon the revocation of his community service for an abuse of discretion. Under Texas law, when regular community supervision is revoked, a trial court may proceed to dispose of the case as if there had been no community supervision. ***Id.*** art. 42.12 § 23(a) (West Supp. 2015). In other words, the judge may impose the sentence originally assessed. ***Guzman v. State***, 923 S.W.2d 792, 799 (Tex. App.—Corpus Christi 1996, no pet.). Or, if the trial court determines that the best interests of

society and the defendant would be served by a shorter term of confinement, it may reduce the term of confinement originally assessed to any term not less than the minimum prescribed for the offense. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 23(a). Such reduction is left to the sound discretion of the trial court. ***Cannon v. State***, 537 S.W.2d 31, 32 (Tex. Crim. App. 1976).

Appellant contends that the trial court erred when it imposed the agreed eight year sentence at the revocation hearing after having told him at the plea hearing it would not entertain negotiations upon revocation of his community supervision. At Appellant's plea hearing, he asked the trial court to follow his agreement with the State for eight years of imprisonment, suspended for a period of four years. The trial court ordered a presentence report and set a sentencing hearing for a later date. At the sentencing hearing, the trial court stated that it had reviewed the presentence report and did not believe Appellant could be successful on community supervision. The court opined that anyone who uses drugs during the pretrial period, lies to the pretrial supervision officer, and has the officer send his sample away to confirm the results is a horrible candidate for community supervision. Appellant responded that the reason he tested positive for cocaine metabolites was because he took a Vicodin tablet for back pain. The court did not accept Appellant's excuse.

The trial court noted that Appellant's criminal history included eight felony arrests, eighteen misdemeanor arrests, two felony convictions, twenty-three misdemeanor convictions, and four community supervision revocations. The court then inquired whether Appellant would prefer to negotiate a low end prison sentence with the State. Appellant reaffirmed that he wanted community supervision. The court then made the following statements:

> TRIAL COURT: Because what I'm going to do is—I'll put in my PSI that I had this discussion—I do it—unfortunately, it seems to be more and more regularly, unfortunately—but I put in my presentence that the person has, number one, I feel, lied to me; number two, that they're a horrible candidate for probation based upon their history; and that we've had this discussion about the State maybe giving them a minimum sentence offer to not waste the system's resources on that person.
>
> And that if they come back and if the State can prove that you violated your probation, I don't entertain any negotiations. Instead, you're telling me today, that if you're not completely successful on your probation, you want me to sentence you to eight years in the penitentiary when you come back.
>
> APPELLANT: Yes, sir.
>
> TRIAL COURT: And that will be what will happen.
>
> APPELLANT: Yes, sir.

After taking pains to ensure that the information in the presentence report was accurate, the trial court took judicial notice of it and assessed Appellant's punishment in accordance with the plea agreement.

Five months later, the State filed its application to revoke, alleging that Appellant violated the terms of his community supervision by failing to perform community service, report to his supervision officer, submit to a substance abuse evaluation, or pay his fees and court costs for the prior three months. Before accepting Appellant's pleas to the allegations, the trial court made the following statements:

> TRIAL COURT: I looked back at the presentence, and we had discussions about—really, at that point, I thought that it might be better for you to negotiate a shorter sentence with the State and just go on to the penitentiary. You said you promised—
>
> APPELLANT: Yes, sir.
>
> TRIAL COURT: —to be successful on your probation—
>
> APPELLANT: Absolutely.
>
> TRIAL COURT: —and that you wouldn't be back here on that probation.
>
> I made a note on my presentence that I wouldn't entertain any agreements between the State and the Defense if you did come back on a probation revocation. Do you understand that?
>
> APPELLANT: Yes, sir.
>
> TRIAL COURT: The law doesn't—again, sometimes lawyers negotiate things that the courts approve. Sometimes lawyers negotiate things that the courts don't approve.
>
> I cover that at this stage because State's 1 shows that you're planning to plead true to all the State's allegations in their application. If you do so, then that puts the Court in a position to grant their application, revoke your probation, and assess that 8-year sentence that I've just mentioned to you. Do you understand that?
>
> APPELLANT: Yes, sir.
>
> TRIAL COURT: All right. That's still what you wish to do?
>
> APPELLANT: Yes, sir.

The trial court accepted Appellant's pleas of true and gave the parties an opportunity to present evidence. The court admitted the State's exhibits and took judicial notice of the file, prior proceedings, and the presentence report. Appellant offered no evidence. His counsel argued that Appellant had stopped reporting in order to try to clear his name in a new theft case in which he was a suspect. The court granted the State's application to revoke, found that the eight year sentence

was appropriate, and sentenced Appellant accordingly. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 § 23(a); ***Guzman***, 923 S.W.2d at 799.

We have reviewed the record and found no reason to conclude that the trial court abused its discretion by failing to reduce Appellant's punishment. Although the court told Appellant that it would not entertain negotiations in any revocation of his community supervision, it nonetheless gave him the opportunity to present evidence in favor of a punishment reduction. Appellant presented no such evidence. The trial court then expressly found that the eight year sentence to which Appellant had agreed was appropriate. Under these circumstances, the record reflects no abuse of discretion in the failure of the trial court to reduce the term of punishment originally assessed. *See* ***Cannon***, 537 S.W.2d at 32. Accordingly, we overrule Appellant's first and second issues.

ATTORNEY'S FEES

In Appellant's third and fourth issues, he contends that the trial court and the district clerk erred by imposing attorney's fees as court costs. We do not consider Appellant's fourth issue because this court does not correct actions of district clerks unless such actions interfere with our jurisdiction. *See* ***In re Revels***, 420 S.W.3d 42, 43 (Tex. App.—El Paso 2011, orig. proceeding).

Standard of Review and Applicable Law

The imposition of court costs upon a criminal defendant is a "nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case." ***Johnson v. State*** 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). When the imposition of court costs is challenged on appeal, we review the assessment of costs to determine if there is a basis for the costs, not to determine if sufficient evidence to prove each cost was offered at trial. ***Id.***

A trial court has the authority to assess attorney's fees against a criminal defendant who received court-appointed counsel. TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2015). But once a criminal defendant has been determined to be indigent, he "is presumed to remain indigent for the remainder of the proceedings unless a material change in his financial circumstances occurs." TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West Supp. 2015). Before attorney's fees may be imposed, the trial court must make a determination supported by some factual basis in the record that the defendant has the financial resources to enable him to offset in part or in whole the costs of the legal services provided. *See* ***Johnson v. State***, 405 S.W.3d 350, 354 (Tex. App.—Tyler 2013, no pet.). If the record does not show that the defendant's financial

circumstances materially changed, there is no basis for the imposition of attorney's fees. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04(p); ***Mayer v. State***, 309 S.W.3d 552, 553, 557 (Tex. Crim. App. 2010); ***Johnson***, 405 S.W.3d at 354.

Analysis

Appellant argues that the original judgment and the bill of costs in his case contain improperly assessed attorney's fees. He argues that his final judgment should be modified to reflect the proper amount of court costs, but that the record is unclear as to what that amount is. Appellant acknowledges that the amount of court costs assessed in the final judgment is $345 less than that in the original judgment. But he contends that the $345 difference could mean that he paid $345 in court costs, including attorney's fees, while he was on community supervision. Appellant therefore contends that we should remand his case for a hearing to determine how much he paid the community service department and how much of that amount was transferred to the district clerk's office. We decline to do so.

In reviewing a challenged assessment of court costs, we review the record to determine whether there is a basis for the costs. ***Johnson***, 423 S.W.3d at 390. Here, the assessment of court costs in the final judgment is $269. We therefore review the record to determine whether there is a basis for that amount. *See* ***id.***

The bill of costs in this case lists court costs initially totaling $614, including $300 in attorney's fees. Appellant does not dispute that $314 of the initial amount of court costs is proper. Thus, there is a basis in the record for $314 in court costs. *See* ***id.***

We need not explain why the amount assessed in the final judgment is $45 less than the amount of proper court costs. However, the bill of costs in this case contains an itemized listing of the various court costs assessed, a column showing the initial amount assessed for each cost, and a column showing the remaining balance for each cost as of March 2015. The totals for the columns are $614 and $594, respectively. The difference between these amounts is $20. All of the amounts in the balance column are lower than their initial amounts, except the amount for attorney's fees. It is listed as $300 in both columns. Thus, the bill of costs indicates that Appellant paid $20 toward his court costs, and none of that amount was toward attorney's fees.

The $20 reduction in the balance is likely the result of a payment Appellant made while on community supervision. The record shows that he was ordered to pay his court costs at a rate of $20 per month beginning in October 2014. At the revocation hearing, Appellant pleaded "true" to

the State's allegation that he failed to pay his court costs in November 2014, December 2014, and January 2015. Thus, Appellant likely paid $20 of his court costs in October and nothing more.

Subtracting $20 from the $314 in proper court costs leaves $294. A plausible explanation for the remaining $25 reduction is that the $269 assessment was made prior to the assessment of the $25 time payment fee[1] listed in the bill of costs.

Because there is a basis for the amount of court costs assessed in the judgment, we overrule Appellant's third issue. *See* ***id.***

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered January 20, 2016
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

[1] Texas law provides that a person convicted of a felony shall pay a fee of $25 if he pays any part of his court costs on or after the 31st day after the date the judgment is entered assessing the court costs. TEX. LOC. GOV'T CODE ANN. § 133.103(a) (West Supp. 2015).

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 20, 2016

NO. 12-15-00088-CR

SIDNEY C. LYNCH,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 7th District Court
of Smith County, Texas (Tr.Ct.No. 007-0526-14)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.