

Nos. PD-

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

BRYANT EDWARD DULIN,

Appellant

v.

THE STATE OF TEXAS

Appellee

Appeal from Burnet County
Nos. 03-18-00523-CR & 03-18-00524-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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Oral Argument Requested

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Bryant Edward Dulin.
- * The trial judge was the Honorable Evan C. Stubbs, 424th District Court, Burnet County.
- * Counsel for the State at trial was Stacy M. Burke, 1701 East Polk, Suite 24, Burnet, Texas 78611.
- * Counsel for the State on appeal was R. Blake Ewing, 1701 East Polk, Suite 24, Burnet, Texas 78611.
- * Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.
- * Counsel for Appellant at trial was Richard D. Davis, 111 East Jackson Street, Burnet, Texas 78611.
- * Counsel for Appellant on appeal was Justin B. Smith, 2106 Bird Creek Drive, Temple, Texas 76502.

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Nos. PD-
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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Third Court of Appeals has joined the First Court of Appeals in *Kremplewski v. State*,¹ the Eleventh Court of Appeals in *King v. State*,² and the

¹ PD-0848-19, *petition from* __S.W.3d__, No. 01-19-00033-CR, 2019 WL 3720627 (Tex. App.—Houston [1st Dist.] 2019).

² PD-0779-19, *petition from* No. 11-17-00179-CR, 2019 WL 3023513, (Tex. App.—Eastland July 11, 2019) (not designated for publication).

Fourteenth Court of Appeals in *Johnson v. State*,³ in striking down the “Time Payment Fee” as unconstitutional. In this case, the fee should be struck because it was prematurely assessed. A “Time Payment Fee” may be assessed if an offender fails to pay court costs, fees, or restitution within thirty days. Alternatively, as the State Prosecuting Attorney has argued in *Kremplewski, King, and Johnson*, still pending before this Court, the fee is not unconstitutional on its face. The striking down of this fee, as well as all criminal court costs and fees, infringes on the Legislature’s and Governor’s assigned powers and is itself a violation of separation of powers. Contrary precedent should be overruled. Additionally, the fee serves a criminal justice purpose because it imposes a time frame for court-cost and fee payment and disincentivizes late payment and the failure to pay.

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument only if this Court grants Ground 2 because the issue involves the constitutionality of a statute and the State asks this Court to overrule its court-cost and fee jurisprudence. Whether the judiciary has itself violated separation of powers by infringing on powers assigned to the Legislature and Governor by striking down costs and fees is an important question of state law. Argument for Grounds 2 and 3 is not needed because they present a straight-forward

³ PD-0246-19, *petition from* 573 S.W.3d 328 (Tex. App.—Houston [14th Dist.] 2019).

issue under established precedent.

STATEMENT OF THE CASE

Appellant was convicted of one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of “super” aggravated sexual assault of a child. 1 CR 159-80. He was sentenced to punishment at 20 years’ imprisonment and a \$5,000 fine, 60 years’ imprisonment and a \$5,000 fine, 50 years’ imprisonment, and 35 years’ imprisonment and a \$5,000 fine, respectively. 1 CR 159-80. The first judgment reflects the trial court’s intent to impose court-costs and fees. 1 CR 159.

Appellant did not challenge his conviction or sentence on appeal but did mount a facial challenge to the imposition of ninety percent of a \$25 “Time Payment Fee” authorized by TEX. LOCAL GOV’T CODE § 133.103. *Dulin v. State*, __S.W.3d__, Nos. 03-18-00523-CR & 03-18-00524-CR, 2019 WL 3807866, at *1 (Tex. App.—Austin 2019). The court of appeals, agreeing with the Fourteenth Court of Appeals in *Johnson*, 573 S.W.3d at 336-40, which held that the fee is unconstitutional, modified the judgment and reduced it to \$2.50 from \$25.00. *Dulin*, 2019 WL 3807866, at *3.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals struck ninety percent of the \$25 “Time Payment Fee” and affirmed the judgment as modified. *Id.* The State’s petition is due by September 13,

2019.

GROUNDNS FOR REVIEW

1. **Should an improper and prematurely assessed nonobligatory “Time Payment Fee” that penalizes the failure to timely pay a court-cost, fee, or restitution be struck?**
2. **In striking down court-costs and fees, does the judiciary violate separation of powers by infringing on the Legislature’s power to enact costs, fees, and the state’s budget and the Governor’s budget power?**
3. **Is the “Time Payment Fee” proper because it imposes a time-frame for court-cost and fee payment and disincentivizes late payment and the failure to pay?**

ARGUMENT

I. Statute at Issue

Texas Local Government Code § 133.103, titled “Time Payment Fee,” states:

(a) A person convicted of an offense shall pay, in addition to all other costs, a fee of \$25 if the person:

(1) has been convicted of a felony or misdemeanor; and

(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.

(b) Except as provided by Subsection (c-1), the treasurer shall send 50 percent of the fees collected under this section to the comptroller. The comptroller shall deposit the fees received to the credit of the general revenue fund.

TEX. LOCAL GOV’T CODE § 133.103(a)-(b). A county or municipality is entitled to

ten percent of the fees collected “for the purpose of improving the efficiency of the administration of justice in the county or municipality.” TEX. LOCAL GOV’T CODE § 133.103(c).

II. Court of Appeals’ Decision

Appellant challenged ninety percent of the “Time Pay Fee,” arguing that it violates separation of powers because it is deposited into the Comptroller’s general fund without limitation.⁴ *Dulin*, 2019 WL 3807866, at *1-4. The court of appeals, after rejecting the State’s suggestion to strike the premature late-fee,⁵ followed the Fourteenth Court’s decision in *Johnson*, 573 S.W.3d at 340, and held that the fee is unconstitutional. *Dulin*, 2019 WL 3807866, at *1 n.2, 2-3. The court therefore struck ninety-percent of the fee and affirmed the trial court’s judgment as modified. *Id.* at *4.

⁴ Appellant did not challenge the ten-percent of the fee deposited with the county. *Dulin*, 2019 WL 3807866, at *1.

⁵ The court of appeals reasoned that, at the time of its decision, more than thirty days had elapsed and nothing in the record showed that Dulin paid his outstanding balance. *Dulin*, 2019 WL 3807866, at *1 n.2.

III. Analysis

1. An improper and prematurely assessed nonobligatory “Time Payment Fee” that penalizes the failure to timely pay a court cost, fee, or restitution should be struck.

The “Time Payment Fee” appeared on the bill of cost the same day it was issued.⁶ 1 CR 40. It was therefore premature; no payment of costs or fees owed by Appellant could have possibly been late—let alone by thirty-one days. Because it was wrongly imposed, it should be stricken from the judgment. *Cf. Beedy v. State*, 250 S.W.3d 107, 113 (Tex. Crim. App. 2008) (remedy for unlawful cumulation order or condition of community supervision is deletion).

That Appellant had still, during the pendency of his appeal, failed to timely pay, *Dulin*, 2019 WL 3807866, at *1 n.2, does not retroactively cure the premature assessment. So any harmless-error-like argument must fail. Section 133.103’s applicability is conditioned on a lapse of thirty-one days, so without that condition precedent, it was improper.⁷ Not only is the premature assessment contrary to the statute’s plain text, it is bad public policy to encourage courts to enter inapplicable

⁶ The fee was effective on June 19, 2018 (the date the judgment was entered), even though the bill of costs was not issued until the request from Appellant’s counsel in December 2018. 1 Second Supp. CR 2-3. If the Court finds that the actual date the bill of costs was issued is controlling in this context, then the late-fee was not premature and Ground 1 should not be granted.

⁷ Logically, it is peculiar to justify a late fee on the failure to timely pay the complete bill when that bill already includes the fee.

fees.

But more importantly, even if an offender fails to timely pay, the assessment of the fee on the 31st day is not a foregone conclusion. Though 133.103's "shall" text appears to be absolute, TEX. CODE CRIM. PROC. art. 43.091 gives a district court the authority to waive payment of costs and fees if the offender is indigent or does not have sufficient resources to pay and alternative methods for discharging the cost or fee would impose undue hardship. TEX. CODE CRIM. PROC. art. 43.091; *see also* TEX. CODE CRIM. PROC. art. 42.15(a-1)(3) (court shall inquire into whether to grant a waiver in full or part if the offender has insufficient income to immediately pay and may establish designated intervals for payment). Thus, any outstanding fine, costs, and fees do not require the "Time Payment Fee" to be imposed. In this case, a waiver was (and is) not out of the question because Appellant was declared indigent after trial. 1 CR 189 (appointing counsel for appeal), 194 (order providing a free record). Because the premature fee cannot retroactively be cured or be deemed harmless, it must be struck.

Deleting the fee is the correct result but, more significantly, it is in keeping with the judicial doctrine that courts should avoid ruling on constitutional questions when possible. *Karenev v. State*, 281 S.W.3d 428, 431-32 (Tex. Crim. App. 2009). The remedy of vacating the lower court's judgment and striking the fee would eliminate

the need to rule on the facial validity of the “Time Payment Fee.”

The SPA requests that this Court summarily grant this ground, vacate the lower court’s constitutional “Time Payment Fee” determination, and delete the fee.

2. The striking down of statutory court costs and fees by courts violates powers granted to the Legislature and the Governor.

As in *Kremplewski*, PD-0848-19, *King*, PD-0779-19, and *Johnson*, PD-0246-19, the SPA asks this Court to reverse its court-cost and fee precedent. Because this is the SPA’s fourth petition on this issue and the prior arguments submitted have been lengthy, the SPA now submits an abbreviated version.⁸ If the Court grants this issue in the *Kremplewski*, *King*, and *Johnson* petitions, it should also grant it in this case (or hold it for a decision in the others).

The separation-of-powers categorization applied to costs and fees should be overruled. In operation, it is plainly wrong to hold that a legislatively mandated cost or fee is a tax if it is deposited into the State’s general fund. To say, as this Court has, that the inquiry into the legitimacy of a cost or fee is determined by the statute’s text, as opposed to whether the funds are actually used for a criminal justice purpose, begs the following: how is something a tax when indisputable evidence proves that

⁸ In *Allen v. State*, PD-1042-18, the State (represented by the Harris County Criminal District Attorney) has argued that fixing appropriate costs and fees by the Legislature is a constitutional exercise of its authority. The SPA adopts the arguments presented in *Allen* and will not reiterate the thorough and lengthy briefing here.

those funds are actually used for a criminal justice purpose? *See Salinas v. State*, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017). Costs and fees can be a tax only if no criminal justice purpose is actually served. In *Salinas*, this Court created a false distinction between direction at the time of collection and spending after collection. *Id.* at 109 n.26. Spending after collection actually verifies the existence of direction to a criminal justice purpose at the time of collection.⁹

Upon closer examination of the court-cost and fee controversy, it has become apparent that the Court's holdings in *Ex parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942), *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), and *Salinas* encroach on power assigned elsewhere and therefore violate separation of powers. The striking down of statutory criminal court costs and fees infringes on the Legislature's constitutional authority to establish uniform costs and fees and enact the State's budget. *See* TEX. CONST. Art. III, §§ 46, 49a(b). It also interferes with the Governor's exclusive role as the chief budget officer and his authority to alter the budget. *See* TEX. GOV'T CODE §§ 317.002-003 (Governor's ability to make proposals concerning appropriated funds), 401.041 ("The governor is the chief budget officer of the state.").

⁹ *See, e.g.*, 2018-2019 Biennium Budget, at ix, available at http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf.

Taking into account the complex budget process, it is indisputable that the appropriations are grounded in firm, fact-based requirements and needs identified by the Governor and Legislature.¹⁰ Criminal-justice-related state and local requirements and needs are among the many matters of public affairs addressed in the budget.¹¹ The deposit in the general fund does not mean that the funds are divorced from serving our criminal justice system. The funding used to support the criminal justice system surpasses the court costs and fees collected.¹² General revenue enables our large and diverse criminal justice system to function. Unless and until the amount collected exceeds the State's criminal justice operating costs, there is no actual taxation conversion and violation of separation of powers.¹³ So when courts second-guess the well-informed budget determinations and accounting protocols of the other two branches, they violate separation of powers.

¹⁰ *See, generally*, 2018-2019 Biennium Budget, at ix, *available at* http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ *See* A History of State Taxes and Fees in Texas, 1972 to 2018, at 89, *available at* <https://comptroller.texas.gov/transparency/revenue/sources.php>; 2018-2019 Biennium Budget, at ix, *available at* http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf.

2. The “Time Payment Fee” is a proper exercise of legislative authority and does not constitute a tax.

If the Court declines to reconsider its court-cost and fee jurisprudence, the SPA asks that the “Time Payment Fee” be upheld on its own merit because it serves a legitimate criminal justice purpose. The one-time \$25 fee is assessed when other properly assessed statutory costs and fees are unpaid “on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.” TEX. LOCAL GOV’T CODE § 133.103(a)(2). It serves two purposes: first, it acts as an enforcement mechanism by establishing a reasonable deadline for payment; and (2) it promotes timely payment and disincentivizes untimely payment and the failure to pay. Further, presumably, it costs money to administer an installment payment plan. Therefore, the “Time Payment Fee” is consistent with general private-industry billing principles.

Payment of restitution and a fine is important for numerous reasons. It is part of the offender’s punishment and assists with rehabilitation, helps restores the victim to the status quo before the offense, and stands as a deterrent. *Burt v. State*, 445 S.W.3d 752, 756 (Tex. Crim. App. 2014). Without the imposition of a deadline or a penalty for failure to timely pay, the interests served by restitution and fines may go unrealized.

Moreover, if costs and fees serve the criminal justice system, as the Legislature has determined, then a provision that advances that interest is proper. Indeed, no criminal justice purpose, whether reimbursement or otherwise, can be served when the balance of costs and fees is unsatisfied. Contrary to the court of appeals' holding, as explained above, deposit into the general revenue fund does not make the fee a tax. *See Dulin*, 2019 WL 3807866, at *2-3. Any fees collected are consumed by the State's criminal-justice-related obligations.

PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals grant Ground 1 and strike the late fee. Alternatively, the SPA asks this Court to overrule its court-cost and fee precedent and uphold this fee. Further, the State prays that the Court grant Ground 3 and hold that the fee serves a criminal justice purpose.

Respectfully submitted,

/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 1,903 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on August 16, 2019 *via* email or certified electronic service provider to:

Hon. R. Blake Ewing
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Hon. Justin Bradford Smith
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/s/ Stacey M. Soule
State Prosecuting Attorney

APPENDIX

(Court of Appeals' Opinion)

2019 WL 3807866

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Austin.

Bryant Edward DULIN, Appellant

v.

The STATE of Texas, Appellee

NO. 03-18-00523-CR, NO. 03-18-00524-CR

|
Filed: August 14, 2019

**FROM THE 424TH DISTRICT COURT OF BURNET
COUNTY, NOS. 46489, 46491, THE HONORABLE
EVAN C. STUBBS, JUDGE PRESIDING**

Attorneys and Law Firms

Justin Bradford Smith, Temple, for Appellant.

Stacey M. Soule, R. Blake Ewing, for Appellee.

Before Justices Goodwin, Baker, and Kelly

OPINION

Chari L. Kelly, Justice

*1 A jury found appellant Bryant Edward Dulin guilty of one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of “super” aggravated sexual assault of a child. The jury assessed punishment at 20 years' imprisonment and a \$5,000 fine for the count of indecency with a child, 60 years' imprisonment and a \$5,000 fine for each count of aggravated sexual assault of a child, 50 years' imprisonment for the count of continuous sexual abuse of a child under the age of 14, and 35 years' imprisonment and a \$5,000 fine for the count of “super” aggravated sexual assault. The trial court sentenced Dulin in accordance with the jury's verdicts. The judgment for the count of indecency with a child assesses court costs of \$589,

and the judgment for “super” aggravated sexual assault of a child assesses court costs of \$639.

In two appellate issues, Dulin contends that the time payment fee assessed against him must be reduced because a portion of it is unconstitutional and that duplicative court costs must be deleted.¹ We will modify the judgments of convictions to reduce the time payment fee and delete duplicative court costs and affirm the convictions as modified.

¹ We note that Dulin may challenge the imposition of court costs for the first time on appeal. *See Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Llorens v. State*, 520 S.W.3d 129, 143 (Tex. App.—Austin 2017, pet. ref'd).

Time Payment Fee

In his first appellate issue, Dulin contends that the \$25 time payment fee assessed against him should be reduced by \$22.50 because 90% of the fee is facially unconstitutional.² “A facial challenge is an attack on the statute itself as opposed to a particular application.” *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). “Except when First Amendment freedoms are involved, a facial challenge to a statute is a challenge to the statute in all of its applications.” *Id.* “Whether a statute is facially constitutional is a question of law that we review *de novo*.” *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

² The State argues that we should not reach Dulin's constitutional challenge because the trial court prematurely assessed the time payment fee. According to the State, “the fee remains statutorily unauthorized to this day since the record is devoid of any indication that Appellant has ‘[paid] any part of a fine, court costs or restitution on or after the 31st day after the date on which [the] judgment [was] entered,’ the statutory condition precedent to the imposition of the fee.” *See* Tex. Loc. Gov't Code § 133.103(a)(2). However, although it may have been premature for the trial court to assess the time payment fee before the 31st day after the judgment was entered, more than 30 days have now elapsed since the date of the judgment, and nothing in the record before us indicates that Dulin has paid all his fines and costs. Accordingly, we decline to follow the State's recommendation of striking the time payment fee from the judgments. *See Edwards v. State*, No. 06-17-00009-CR, 2017 WL 3255255, at *2 (Tex. App.—Texarkana Aug. 1, 2017, no pet.) (mem. op., not designated for publication) (rejecting appellant's argument that the

time payment fee could not be assessed against him because it was prematurely imposed); *Davis v. State*, No. 04-13-00413-CR, 2013 WL 5950128, at *1 (Tex. App.—San Antonio Nov. 6, 2013, no pet.) (mem. op., not designated for publication) (same).

*2 The time payment fee is mandated by statute. The Local Government Code provides:

(a) A person convicted of an offense shall pay, in addition to all other costs, a fee of \$25 if the person:

(1) has been convicted of a felony or misdemeanor; and

(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.

(b) Except as provided by Subsection (c-1), the treasurer shall send 50 percent of the fees collected under this section to the comptroller. The comptroller shall deposit the fees received to the credit of the general revenue fund.

(c) Except as provided by Subsection (c-1), the treasurer shall deposit 10 percent of the fees collected under this section in the general fund of the county or municipality for the purpose of improving the efficiency of the administration of justice in the county or municipality. The county or municipality shall prioritize the needs of the judicial officer who collected the fees when making expenditures under this subsection and use the money deposited to provide for those needs.

....

(d) The treasurer shall deposit the remainder of the fees collected under this section in the general revenue account of the county or municipality.

Tex. Loc. Gov't Code § 133.103.

Although Dulin does not challenge the constitutionality of subsection (c), he argues that subsections (b) and (d) violate the separation of powers found in the Texas Constitution. *See* Tex. Const. art. II, § 1 (providing that no branch of government “shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted”). Dulin relies on *Johnson v. State*, 573 S.W.3d 328 (Tex. App.—Houston [14th Dist.] 2019, pet. filed). In *Johnson*, our sister court applied the distinction articulated by the Texas Court of Criminal Appeals in *Salinas v. State* between a permissible court cost, which is “used for

something that is a legitimate criminal justice purpose,” and an unconstitutional tax, which is not. *See id.* at 340 (citing *Salinas*, 523 S.W.3d at 109 n.26). The *Johnson* court thus “look[ed] to whether section 133.103 directs that the funds be used for something that is a legitimate criminal justice purpose.” *Id.* Because it concluded that the portions of the time payment fee authorized by subsections (b) and (d) are “general revenue not sufficiently related to a legitimate criminal justice purpose,” the court held subsections (b) and (d) facially unconstitutional and reduced the appellant’s time payment fee from \$25 to \$2.50. *Id.* Another of our sister courts recently agreed with the *Johnson* court and held that subsections (b) and (d) are facially unconstitutional. *King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *5 (Tex. App.—Eastland July 11, 2019, no pet. h.) (mem. op., not designated for publication).

We conclude that the *Johnson* court correctly applied the constitutional analysis of *Salinas*. We therefore join the Fourteenth Court of Appeals and the Eleventh Court of Appeals in holding that subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional because they violate the separation of powers embodied in article II, section 1 of the Texas Constitution. Accordingly, we sustain Dulin’s first appellate issue.³

³ The Texas Legislature has passed legislation, effective January 1, 2020, that deletes subsections (c) and (d) from section 133.103 and revises subsection (b) to provide that all of the fees collected under the section are “to be used for the purpose of improving the collection of outstanding court costs, fines, reimbursement fees, or restitution or improving the efficiency of the administration of justice in the county or municipality.” *See* Act of May 23, 2019, 86th Leg., R.S., S.B. 346, § 2.54 (transferring Tex. Loc. Gov’t Code § 133.103 to Tex. Code Crim. Proc. art. 102.030).

Duplicative Court Costs

*3 In his second point of error, Dulin contends that the trial court should not have assessed the same court costs against him in both cause numbers because he was convicted of two offenses in a single criminal action. The State concedes that “each authorized court cost should have been assessed against Appellant only once.” We agree. *See* Tex. Code of Crim. Proc. art. 102.073(a) (“In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.”).

Dulin states that “[i]t is a matter of indifference which judgment retains the court costs.” The State, while declaring that the decision is arbitrary, recommends deleting the duplicative costs from the judgment in count I of cause number 46489 “since that judgment reflects a conviction for the second degree felony offense of indecency with a child, a less serious offense than the offense reflected in the judgment for count I of cause number 46491.” Under Texas Code of Criminal Procedure article 102.073(b), “each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest category of offense that is possible based on the defendant's convictions.” Here, both causes have the same category of offense for the purpose of determining fees. Only the \$100 Child Abuse Prevention Fee is tied to the category of offense, and the trial court could have assessed it under either cause under Texas Code of Criminal Procedure article 102.0186(a). We therefore see no reason not to follow the State's recommendation. Accordingly, we sustain Dulin's second appellate issue and

will modify the judgment in count I of cause number 46489 to delete the duplicative court costs.

CONCLUSION

Having sustained Dulin's two appellate issues, we hold that subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional. We modify the judgment in cause number 46491 to reduce the time payment fee from \$25 to \$2.50. We also modify the judgment in count I of cause number 46489 to delete the duplicative court costs. After deleting the duplicative costs, the judgment in count I of cause number 46489 should retain a warrant fee of \$40 and a warrant fee of \$10. We affirm the judgments as modified.

All Citations

--- S.W.3d ----, 2019 WL 3807866

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-18-00523-CR
NO. 03-18-00524-CR**

Bryant Edward Dulin, Appellant

v.

The State of Texas, Appellee

**FROM THE 424TH DISTRICT COURT OF BURNET COUNTY
NOS. 46489, 46491, THE HONORABLE EVAN C. STUBBS, JUDGE PRESIDING**

OPINION

A jury found appellant Bryant Edward Dulin guilty of one count of indecency with a child, nine counts of aggravated sexual assault of a child, one count of continuous sexual abuse of a child under the age of 14, and one count of “super” aggravated sexual assault of a child. The jury assessed punishment at 20 years’ imprisonment and a \$5,000 fine for the count of indecency with a child, 60 years’ imprisonment and a \$5,000 fine for each count of aggravated sexual assault of a child, 50 years’ imprisonment for the count of continuous sexual abuse of a child under the age of 14, and 35 years’ imprisonment and a \$5,000 fine for the count of “super” aggravated sexual assault. The trial court sentenced Dulin in accordance with the jury’s verdicts. The judgment for the count of indecency with a child assesses court costs of \$589, and the judgment for “super” aggravated sexual assault of a child assesses court costs of \$639.

In two appellate issues, Dulin contends that the time payment fee assessed against him must be reduced because a portion of it is unconstitutional and that duplicative court costs must be deleted.¹ We will modify the judgments of convictions to reduce the time payment fee and delete duplicative court costs and affirm the convictions as modified.

Time Payment Fee

In his first appellate issue, Dulin contends that the \$25 time payment fee assessed against him should be reduced by \$22.50 because 90% of the fee is facially unconstitutional.² “A facial challenge is an attack on the statute itself as opposed to a particular application.” *Salinas v. State*, 523 S.W.3d 103, 106 (Tex. Crim. App. 2017). “Except when First Amendment freedoms are involved, a facial challenge to a statute is a challenge to the statute in all of its applications.” *Id.* “Whether a statute is facially constitutional is a question of law that we review *de novo.*” *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

¹ We note that Dulin may challenge the imposition of court costs for the first time on appeal. *See Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Llorens v. State*, 520 S.W.3d 129, 143 (Tex. App.—Austin 2017, pet. ref’d).

² The State argues that we should not reach Dulin’s constitutional challenge because the trial court prematurely assessed the time payment fee. According to the State, “the fee remains statutorily unauthorized to this day since the record is devoid of any indication that Appellant has ‘[paid] any part of a fine, court costs or restitution on or after the 31st day after the date on which [the] judgment [was] entered,’ the statutory condition precedent to the imposition of the fee.” *See* Tex. Loc. Gov’t Code § 133.103(a)(2). However, although it may have been premature for the trial court to assess the time payment fee before the 31st day after the judgment was entered, more than 30 days have now elapsed since the date of the judgment, and nothing in the record before us indicates that Dulin has paid all his fines and costs. Accordingly, we decline to follow the State’s recommendation of striking the time payment fee from the judgments. *See Edwards v. State*, No. 06-17-00009-CR, 2017 WL 3255255, at *2 (Tex. App.—Texarkana Aug. 1, 2017, no pet.) (mem. op., not designated for publication) (rejecting appellant’s argument that the time payment fee could not be assessed against him because it was prematurely imposed); *Davis v. State*, No. 04-13-00413-CR, 2013 WL 5950128, at *1 (Tex. App.—San Antonio Nov. 6, 2013, no pet.) (mem. op., not designated for publication) (same).

The time payment fee is mandated by statute. The Local Government Code provides:

(a) A person convicted of an offense shall pay, in addition to all other costs, a fee of \$25 if the person:

(1) has been convicted of a felony or misdemeanor; and

(2) pays any part of a fine, court costs, or restitution on or after the 31st day after the date on which a judgment is entered assessing the fine, court costs, or restitution.

(b) Except as provided by Subsection (c-1), the treasurer shall send 50 percent of the fees collected under this section to the comptroller. The comptroller shall deposit the fees received to the credit of the general revenue fund.

(c) Except as provided by Subsection (c-1), the treasurer shall deposit 10 percent of the fees collected under this section in the general fund of the county or municipality for the purpose of improving the efficiency of the administration of justice in the county or municipality. The county or municipality shall prioritize the needs of the judicial officer who collected the fees when making expenditures under this subsection and use the money deposited to provide for those needs.

....

(d) The treasurer shall deposit the remainder of the fees collected under this section in the general revenue account of the county or municipality.

Tex. Loc. Gov't Code § 133.103.

Although Dulin does not challenge the constitutionality of subsection (c), he argues that subsections (b) and (d) violate the separation of powers found in the Texas Constitution. *See* Tex. Const. art. II, § 1 (providing that no branch of government “shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted”). Dulin relies on *Johnson v. State*, 573 S.W.3d 328 (Tex. App.—Houston [14th Dist.] 2019, pet. filed). In *Johnson*, our sister court applied the distinction articulated by the Texas Court of Criminal Appeals in *Salinas v. State* between a permissible court cost, which is “used for

something that is a legitimate criminal justice purpose,” and an unconstitutional tax, which is not. *See id.* at 340 (citing *Salinas*, 523 S.W.3d at 109 n.26). The *Johnson* court thus “look[ed] to whether section 133.103 directs that the funds be used for something that is a legitimate criminal justice purpose.” *Id.* Because it concluded that the portions of the time payment fee authorized by subsections (b) and (d) are “general revenue not sufficiently related to a legitimate criminal justice purpose,” the court held subsections (b) and (d) facially unconstitutional and reduced the appellant’s time payment fee from \$25 to \$2.50. *Id.* Another of our sister courts recently agreed with the *Johnson* court and held that subsections (b) and (d) are facially unconstitutional. *King v. State*, No. 11-17-00179-CR, 2019 WL 3023513, at *5 (Tex. App.—Eastland July 11, 2019, no pet. h.) (mem. op., not designated for publication).

We conclude that the *Johnson* court correctly applied the constitutional analysis of *Salinas*. We therefore join the Fourteenth Court of Appeals and the Eleventh Court of Appeals in holding that subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional because they violate the separation of powers embodied in article II, section 1 of the Texas Constitution. Accordingly, we sustain Dulin’s first appellate issue.³

Duplicative Court Costs

In his second point of error, Dulin contends that the trial court should not have assessed the same court costs against him in both cause numbers because he was convicted of

³ The Texas Legislature has passed legislation, effective January 1, 2020, that deletes subsections (c) and (d) from section 133.103 and revises subsection (b) to provide that all of the fees collected under the section are “to be used for the purpose of improving the collection of outstanding court costs, fines, reimbursement fees, or restitution or improving the efficiency of the administration of justice in the county or municipality.” *See* Act of May 23, 2019, 86th Leg., R.S., S.B. 346, § 2.54 (transferring Tex. Loc. Gov’t Code § 133.103 to Tex. Code Crim. Proc. art. 102.030).

two offenses in a single criminal action. The State concedes that “each authorized court cost should have been assessed against Appellant only once.” We agree. *See* Tex. Code of Crim. Proc. art. 102.073(a) (“In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.”).

Dulin states that “[i]t is a matter of indifference which judgment retains the court costs.” The State, while declaring that the decision is arbitrary, recommends deleting the duplicative costs from the judgment in count I of cause number 46489 “since that judgment reflects a conviction for the second degree felony offense of indecency with a child, a less serious offense than the offense reflected in the judgment for count I of cause number 46491.” Under Texas Code of Criminal Procedure article 102.073(b), “each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest category of offense that is possible based on the defendant’s convictions.” Here, both causes have the same category of offense for the purpose of determining fees. Only the \$100 Child Abuse Prevention Fee is tied to the category of offense, and the trial court could have assessed it under either cause under Texas Code of Criminal Procedure article 102.0186(a). We therefore see no reason not to follow the State’s recommendation. Accordingly, we sustain Dulin’s second appellate issue and will modify the judgment in count I of cause number 46489 to delete the duplicative court costs.

CONCLUSION

Having sustained Dulin’s two appellate issues, we hold that subsections (b) and (d) of Texas Local Government Code section 133.103 are facially unconstitutional. We modify

the judgment in cause number 46491 to reduce the time payment fee from \$25 to \$2.50. We also modify the judgment in count I of cause number 46489 to delete the duplicative court costs. After deleting the duplicative costs, the judgment in count I of cause number 46489 should retain a warrant fee of \$40 and a warrant fee of \$10. We affirm the judgments as modified.

Chari L. Kelly, Justice

Before Justices Goodwin, Baker, and Kelly

Modified and, as Modified, Affirmed

Filed: August 14, 2019

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