

No. 01-13-00822-CR
**IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS**

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CHRISTOPHER A. PRINE
Clerk

GREGORIO GUERRERO

Appellant

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 1172095
From the 339th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Not Requested

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STATEMENT OF THE CASE

This is an appeal from a conviction for evading arrest with a motor vehicle. (C.R. at 59). Mr. Guerrero pleaded guilty and received deferred adjudication in March 2010. (C.R. at 35-37, 43). A motion to adjudicate was filed on March 12, 2013. (C.R. at 49). After hearing evidence, the trial court sentenced Mr. Guerrero to 2 years confinement in the State Jail Division - Texas Department of Criminal Justice. (C.R. at 59). An accompanying bill of costs lists court costs as \$334.00. (C.R. at 61). Timely notice of appeal was filed. (C.R. at 63).

Companion Case

On May 27, 2014, this case was abated to determine if Mr. Guerrero needed counsel. (Supp. C.R. at 4-5). Undersigned counsel was appointed this case on May 30, 2014. (Supp. C.R. at 5). This case was reinstated by this Court on December 11, 2014.

Mr. Guerrero's companion case is 01-13-00821-CR. ThAT trial court number is 1172094 from the 339th District County. This Court abated that case on March 18, 2014. Undersigned counsel was appointed that case on May 21, 2014. (See Supp. C.R. in 01-13-00821-CR). This companion case was reinstated on June 3, 2014. All briefs have been filed.

Filed concomitantly with this brief will be a motion to consolidate both cases. The one issue raised in the instant case was "Issue Two" raised in Cause Number 01-13-00821-CR. To make is easier for the court, the issue will be designated as Issue

Two in this brief, although only one issue is being raised - the exact same issue raised in the companion case.

ISSUE PRESENTED

Issue Two: Mr. Guerrero was charged \$133 for the consolidated court cost. Subsection six of those costs, the “comprehensive rehabilitation” fee does not fund any cost for the court’s function. Should this court find this fee unconstitutional?

STATEMENT OF FACTS

Mr. Guerrero was on deferred when he was alleged to have committed a new law offense. (1 R.R. at 7).¹ There were technical violations as well. (1 R.R. at 7-8). Before the hearing took place, the following colloquy occurred:

THE COURT: Okay. All right. I remember the Court did offer you -- make you give a recommendation or give you a recommended offer; is that correct?

MR. MIDDLETON: That is correct.

THE COURT: What was the offer?

MR. MIDDLETON: Previous offer by the State was ten years.

MR. PHANCO: That's correct, Judge, on all three cases, both the aggravated robbery prior, the evading arrest prior and the aggravated robbery that is currently pending. And he's turned all of that down.

THE COURT: Okay. So do you understand that going forward, the State has witnesses and this Court is going to hear all of the testimony. And you received probation on a first degree felony aggravated robbery with a deadly weapon, which the maximum amount you can receive is ninety-nine years, or life, in prison. You understand that?

THE DEFENDANT: Yes, ma'am.

¹ There are two reporter's records labeled "1." This is Volume 1 of 2, which is the hearing volume. The other volume is the hearing on whether Mr. Guerrero wished to pursue his appeal.

THE COURT: Okay. And is it your desire to reject the State's offer of ten years and go forward with the hearing?

THE DEFENDANT: Yes, ma'am.

(1 R.R. at 9-10).

After the presentation of evidence, the Court sentenced Mr. Guerrero to 2 years confinement on this state jail to run concurrently with his other 20 year sentence of imprisonment. (1 R.R. at 91-92).

On the court cost sheet for the adjudication, Mr. Guerrero was charged a \$133 consolidated court cost. (C.R. at 61).

SUMMARY OF THE ARGUMENT

A portion of the consolidated court cost that goes to rehabilitation services is an unconstitutional court cost.

ARGUMENT

Issue Two: Mr. Guerrero was charged \$133 for the consolidated court cost. Subsection six of those costs, the “comprehensive rehabilitation” fee does not fund any cost for the court’s function. Should this court find this fee unconstitutional?

A person convicted of a criminal offense must pay a court cost known as the consolidated court cost (CCC). TEX. LOC. GOV'T CODE ANN. § 133.102. The amount of the cost differs depending on the classification of the offense; in felony cases the amount is \$133. TEX. LOC. GOV'T CODE ANN. § 133.102(A)(1).

Statutory Division of Consolidated Court Cost

While Harris County is charged with collecting the \$133 CCC, most of the money is to be remitted to the State of Texas. TEX. LOC. GOV'T CODE ANN. § 133.051. Harris County is permitted to retain ten percent of the consolidated court cost (\$13.30) as a service fee for collecting the money. TEX. LOC. GOV'T CODE ANN. § 133.058(A). The remaining ninety percent of the consolidated court cost (\$119.70) is sent to the state. *Id.*

Comprehensive Rehabilitation

Within the consolidated court cost is a the “comprehensive rehabilitation” cost with 9.8218 percent of the \$133 cost going for this “court cost.” TEX. LOC. GOV'T CODE ANN. § 133.102(e)(6). After the cost to the county, the amount is about \$11.75. Money directed to this program does not stay within the judicial branch, rather, this money is used to provide rehabilitation services to eligible individuals. *See* TEX. HUM. RES. CODE ANN. § 115.001. The money is spent at the direction of the Department of Assistive and Rehabilitative Services - another executive branch agency. *Id.*

The rehabilitation of individuals is a general government program that has nothing to do with the trial of a criminal case. A cursory review of the statute for this agency establishes:

- (a) The comprehensive rehabilitation fund is created in the state treasury. Money in the fund is derived from court costs collected under Subchapter D, Chapter 102,1 Code of Criminal Procedure. Money in the fund may be appropriated only to the commission for the purposes provided by Section 111.052.

TEX. HUM. RES. CODE ANN. § 111.060. A review of the “purposes” of this money under current Texas law is:

(a) The commission shall, to the extent of resources available and priorities established by the board, provide rehabilitation services directly or through public or private resources to individuals determined by the commission to be eligible for the services under a vocational rehabilitation program or other program established to provide rehabilitative services.

b) In carrying out the purposes of this chapter, the commission may:

(1) cooperate with other departments, agencies, political subdivisions, and institutions, both public and private, in providing the services authorized by this chapter to eligible individuals, in studying the problems involved, and in planning, establishing, developing, and providing necessary or desirable programs, facilities, and services, including those jointly administered with state agencies;

(2) enter into reciprocal agreements with other states;

(3) establish or construct rehabilitation facilities and workshops, contract with or provide grants to agencies, organizations, or individuals as necessary to implement this chapter, make contracts or other arrangements with public and other nonprofit agencies, organizations, or institutions for the establishment of workshops and rehabilitation facilities, and operate facilities for carrying out the purposes of this chapter;

(4) conduct research and compile statistics relating to the provision of services to or the need for services by disabled individuals;

(5) provide for the establishment, supervision, management, and control of small business enterprises to be operated by individuals with significant disabilities where their operation will be improved through the management and supervision of the commission;

(6) contract with schools, hospitals, private industrial firms, and other agencies and with doctors, nurses, technicians, and other persons for training, physical restoration, transportation, and other rehabilitation services; and

(7) assess the statewide need for services necessary to prepare students with disabilities for a successful transition to employment, establish collaborative relationships with each school district with education service centers to the

maximum extent possible within available resources, and develop strategies to assist vocational rehabilitation counselors in identifying and reaching students in need of transition planning.

TEX. HUM. RES. CODE ANN. § 111.052. There is no mention of any money used for any court costs.

Preservation of Error

The Court of Criminal Appeals explained that challenges to court costs can be raised for the first time on appeal and “[c]onvicted defendants have constructive notice of mandatory court costs set by statute and the opportunity to object to the assessment of court costs against them for the first time on appeal or in a proceeding under Article 103.008 of the Texas Code of Criminal Procedure.” *Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014). In a companion case decided the same day, *Johnson v. State*, the Court further explained that because the cost bill is most likely unavailable at the time of the judgment, an “[a]ppellant need not have objected at trial to raise a claim challenging the bases of assessed costs on appeal.” *Johnson v. State*, 423 S.W.3d 385, 391 (Tex. Crim. App. 2014).

Ex parte Lo and Separation of Powers

The Court of Criminal Appeals’ recently issued opinion on rehearing in *Ex parte Lo* is the perfect complement to this constitutional challenge of a violation of the separation of powers clause with the consolidated court cost:

We have viewed the Texas provision as generally susceptible to violation in one of two ways:(1) when one branch of government assumes or is delegated a power “more properly attached” to another branch, or(2) when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.

Ex parte Gill, 413 S.W.3d 425, 431–32 (Tex. Crim. App.2013); *see also Armadillo Bail Bonds*, 802 S.W.2d at 239.

Ex parte Lo, 424 S.W.3d 10 (Tex. Crim. App. 2013), reh'g denied (Mar. 19, 2014).

The collection of costs for programs that are not related back to the courts is a violation of the separation of powers clause.

A Court Cost used to fund Non-Court Programs is actually a Tax

Rather, such a court cost is, in reality, a tax.² A requirement that courts assess such a cost would render the courts “tax gatherers” in violation of the separation of powers doctrine.³ Requiring courts to collect a tax (albeit one disguised as a court cost) imposes an executive branch function on the judicial branch. The Attorney General has explained in an opinion that “court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant interferes with access to the courts in violation of the constitution.” *Tex. Atty. Gen. Op.*, No. JC-0158 (1999).

²

The fact that an assessment is labeled as a court cost is of no consequence. *See State v. Lanclos*, 980 So.2d 643, 653 (La. 2008) (if the primary purpose of a criminal court cost is to raise revenue, the court cost is a “tax”); *People v. Barber*, 165 N.W.2d 608, 613 (Mich. 1968) (“legislature cannot circumvent the explicit provision of the Constitution by placing the label ‘costs’ on what by no construction of the term can be considered costs”).

³

See id. at 614 (tax funded through the judiciary violates separation of powers); *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994)(court cost not reasonably related to costs of administering criminal justice system renders courts “tax gatherers in violation of separation of powers”); *People v. Barber*, 165 N.W.2d 608, 614 (Mich. 1968) (“[c]ourts are not tax gatherers.”).

Separation of Powers Clause Forbids the Imposition of Executive Branch Functions on the Judicial Branch

The separation of powers provision of the Texas Constitution is found in Article II, Section 1 and reads as follows:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. ART. II, SEC. 1. This provision is violated when one branch of government is delegated a power that is more appropriately attached to another branch. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). Thus, a statute imposing upon the judicial branch a power of government belonging to the executive branch would violate the doctrine of separation of powers.⁴

The Power to Collect Taxes is an Executive Branch Function

The Comptroller of Public Accounts is one of six officers constituting the executive department of the State of Texas. TEX. CONST., ART. IV, SEC. 1. The Comptroller is to perform such duties as may be required by law. TEX. CONST., ART. IV, SEC. 23. As stated in the Comptroller's "Agency Strategic Plan" for 2011-2015, the Comptroller serves as "Texas' chief tax collector" and "collects taxes and fee

⁴

See *Forbes v. Texas Dep't of Public Safety*, 335 S.W.2d 439, 442-43 (Tex. Civ. App. – Waco 1960, no writ) (separation of powers provision applies to statutes involving exercise by the courts of non-judicial powers); *Accord Buback v. Romney*, 156 N.W.2d 549, 558 (Mich. 1968) (Michigan Supreme Court struck down statute imposing executive branch functions on the judicial branch).

owed to the state.”⁵ Chapter 403 of the Government Code sets out many of the Comptroller's duties in this regard. Because the Comptroller is an executive branch officer, the power to collect taxes resides in the executive branch of state government.

Unlike the executive branch, the judicial branch is not empowered to collect taxes. Rather, the judicial branch is charged with exercising the “judicial power” of the state:

Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision.

TEX. CONST. ART. V SEC. 1; *Morrow v. Corbin*, 62 S.W.2d 641 (Tex. 1933).

Nothing in the definition of judicial power suggests that courts have the power to collect taxes. This Court should find that comprehensive rehabilitation cost unconstitutional.

⁵ Agency Strategic Plan 2011-2015, Susan Combs Texas Comptroller of Public Accounts, page 7. The strategic plan can be accessed online at: <http://www.cpa.state.tx.us/taxbud/strategic/96-361-10.pdf>.

PRAYER

Mr. Guerrero prays that this Court find the comprehensive rehabilitation fee of the consolidated court cost unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on December 18, 2014, a copy of the foregoing was emailed to counsel for the state (through texfile.com) at the following address:

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CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of *Tex. R. App. Proc. 9.4(e)(i)*.

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/s/ Jani J Maselli Wood

JANI J. MASELLI WOOD