

CAUSE NUMBER 1313253

THE STATE OF TEXAS	§	IN THE 228TH
	§	
vs	§	DISTRICT COURT
	§	
ORLANDO SALINAS	§	HARRIS COUNTY, TEXAS

MOTION IN ARREST OF JUDGMENT

Comes now, Orlando Salinas, the Defendant in the above-styled case, by and through his appointed attorney of record, Jani J. Maselli, and files this Motion in Arrest of Judgment pursuant to Rule 22 of the Texas Rules of Appellate Procedure and in support, would show this court the following:

I.

On April 18, 2012, Mr. Salinas was found guilty of injury to an elderly person and sentenced to five years imprisonment. The judgment assessed \$304 in court costs. (Appendix A). A certified bill of costs details the appropriation of those court costs. (Appendix B). This motion is filed within the thirty days of the sentencing date is timely. A hearing must commence before the 75th day after the sentence, which is July 1, 2012.

II.

A Motion in Arrest of Judgment may be based on any of the following grounds:

- (a) that the indictment or information is subject to an exception on substantive grounds;
- (b) that in relation to the indictment or information a verdict is substantively defective;
- or
- (c) that the judgment is invalid for some other reason.

Tex. R. App. Proc. 22.2. Mr. Salinas proceeds upon subsection (3), averring that the judgment

is invalid because the assessed court costs are unconstitutional as a matter of law.¹

III.

As the attached bill of costs details, Mr. Salinas was charged \$133 in consolidated court costs. (Appendix B). Local Government Code, Section 133.102 requires a person convicted of a criminal offense to pay a court cost known as the consolidated court cost. *Tex. Loc. Gov't Code Ann. § 133.102.* (Appendix C). 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).* The consolidated court cost is one of a number of costs that courts order defendants to pay upon conviction of a crime. (See Appendix D, chart of court costs from Office of Court Administration).² In the present case, Mr. Salinas was ordered to pay court costs totaling \$304 including the \$133 consolidated court cost. (Appendix B).

IV.

While Harris County is charged with collecting the \$133 consolidated court cost, 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.*

¹

“A facial challenge to the constitutional validity of a statute considers only the text of the measure itself, and not its application to the particular circumstances of an individual. A party asserting a facial challenge to a statute seeks to vindicate not only his own rights, but also those of others who may also be adversely impacted by the statute in question.” *Karenev v. State*, 281 S.W.3d 428, 435 (Tex. Crim. App. 2009)(Cochran, J., concurring), *citing* 16 C.J.S. Constitutional Law § 113, at 149 (2005).

² The chart can be found online at:
<http://www.courts.state.tx.us/oca/pdf/DC-CRfeeChart.pdf>

V.

The state comptroller allocates the consolidated court cost money to fourteen different programs on a percentage basis. *Tex. Loc. Gov't Code Ann. § 133.102(e)*. There are fourteen programs funded by court costs:

- (1) abused children's counseling;
- (2) crime stoppers assistance;
- (3) breath alcohol testing;
- (4) Bill Blackwood Law Enforcement Management Institute;
- (5) law enforcement officers standards and education;
- (6) comprehensive rehabilitation;
- (7) operator's and chauffeur's licenses;
- (8) criminal justice planning;
- (9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A & M University;
- (10) compensation to victims of crime fund;
- (11) emergency radio infrastructure account;
- (12) judicial and court personnel training fund
- (13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account
- (14) fair defense system

Only two having any direct link to the function of criminal court system operations, 12 and 14. These two programs receive only 13 percent of the consolidated court cost money directed to the state.³ The other twelve programs (to which approximately 87 percent of the consolidated court cost money is directed) are unrelated to the criminal court system. In other words, the programs provide services that are “neither necessary nor incidental to the trial of a

3

Technically, these two programs receive 12.8505 percent of the consolidated court cost money that is realized by the state. The comptroller directs 8.0143% of the consolidated court cost to fair defense and 4.8362% of the cost to judicial and court personnel training. (8.0143% + 4.8362% = 12.8505%.)

criminal cases.” Any court cost that is “neither necessary nor incidental to the trial of a criminal case” is “not a legitimate” cost of court. *Ex parte Carson*, 159 S.W.2d 126, 130 (Tex. Crim. App. 1942)(on motion for rehearing). The Court of Criminal Appeals used this language in holding that a \$1.00 assessment to support law libraries was not a legitimate criminal court cost and striking a statute as unconstitutional for imposing such a cost. *Id.* 159 S.W.2d at 127. The Court reasoned that support of a law library was too "remote" from the trial of a case to be a proper criminal court cost. *Id.* In response to the argument that a criminal court cost to establish and maintain a law library was a legitimate charge, the Court declared:

We find ourselves unable to accept that view. Such reasoning would lead into fields of expenditures which may as well include the cost of the court houses, the automobiles which officers use to apprehend criminals and even the roads upon which they ride. If something so remote as a law library may be properly charged to the litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties, it occurs to us that we might as logically tax an item of cost for the education of such attorneys and judges and even the endowments of the schools which they attend.

Id. Many of the twelve programs funded by the court cost statutes are laudable. But the worthiness of a particular government initiative is not at issue here; rather, the issue is whether the programs in question are necessary or incidental to the trial of a criminal case. *Id.*

IV.

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

The assessment of court costs is intended to be “a nonpunitive recoupment of the costs of judicial resources expended in the trial of [a] case.” *Weir v. State*, 278 S.W.3d 364, 365-66 (Tex. Crim. App. 2009). Any court cost that is "neither necessary nor incidental to the trial of a criminal case" is "not a legitimate" cost of court. *Carson*, 159 S.W.2d at 127-130. Rather, such

a court cost is, in reality, a tax.⁴ A requirement that courts assess such a cost would render the courts “tax gatherers” in violation of the separation of powers doctrine.⁵ This is because requiring courts to collect a tax (albeit one disguised as a court cost) imposes an executive branch function on the judicial branch.

Although a civil case, the *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex. 1986), decision by the Texas Supreme Court is especially instructive. In *LeCroy* the Court decided whether a \$40 statutory filing fee in district court where \$40 of the \$75 that was directed to the state general revenue fund violated the Texas Constitution’s open court provision. *LeCroy*, 713 S.W.2d at 336-40. The Supreme Court struck down the statute, holding that it violated the Texas Constitution and their reasoning makes clear that court fees cannot be general revenue taxes:

The major defect with the filing fee is that it is a general revenue tax on the right to litigate: the money goes to other statewide programs besides the judiciary. Nearly all state with similar open courts provisions have held that filing fees that go to fund general welfare programs, and nor court-related services, are unconstitutional.

LeCroy, 713 S.W.2d at 341.

V.

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

⁴ 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”).

⁵

See *id.* at 654 (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.").

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, § 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.⁶

VI.

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

6

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).

tax collector” and “collects taxes and fee owed to the state.”⁷ 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 which has been defined by the Texas Supreme Court as follows:

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.

Nothing in the definition of judicial power suggests that courts have the power to collect taxes.

VII. Summary

Section 133.102 of the Local Government Code requires courts to assess a consolidated court cost of \$133 against every person convicted of a felony. The revenue realized by the State from the consolidated court cost is used primarily for non-court programs. These programs provide services that are neither necessary nor incidental to the trial of a criminal case. Because the consolidated court cost is primarily used to fund non-court programs, the consolidated court cost is actually a tax. Thus, Section 133.102 effectively requires the courts to collect a tax.

7

Agency Strategic Plan 201-2015, 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>.

The assessment and collection of taxes is a function of the executive branch of government. The judicial branch has no power to assess and collect taxes. Thus, Section 133.102 imposes a function of the executive branch of state government on the state's judicial branch. This contravenes the separation of powers clause of the Texas Constitution by delegating to one branch of government a power belonging to another branch.

Section 133.102 of the Local Government Code is unconstitutional. Accordingly, the judgment ordering Mr. Salinas to pay \$304 in court costs should be reformed. Specifically, the \$304 amount should be reduced by \$133 - the amount of the consolidated court cost because the statute is unconstitutional.

WHEREFORE PREMISES CONSIDERED, Mr. Salinas prays this Honorable Court grant this motion and arrest the judgment and determine the consolidated court costs to be an unconstitutional taxing and violative of the separation of powers clause of the Texas Constitution.

Respectfully,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

Jani J. Maselli
Attorney for Orlando Salinas

CERTIFICATE OF SERVICE

A copy of this request has been filed with the Clerk of said Court and another copy hand

delivered to the Attorney for the State on this ____ day of May, 2012:

Mr. Alan Curry
Chief Appellate Division
Harris County District Attorney's Office
1201 Franklin, 6th Floor
Houston, TX 77002

Jani J. Maselli

VERIFICATION

THE STATE OF TEXAS

COUNTY OF HARRIS

Before me the undersigned authority on this day personally appeared Jani Maselli, attorney for the Defendant Orlando Salinas, who being duly sworn has deposed and stated upon her oath:

"My name is Jani Maselli. I am the attorney for Orlando Salinas in the above styled and numbered cause. I have read the above and foregoing Motion in Arrest of Judgment, and the factual allegations contained therein are true and correct to the best of my knowledge."

Jani J. Maselli

Subscribed and sworn before me, the undersigned authority, on this ____ day of May, 2012, to certify which witness my hand and official seal of office.

CAUSE NUMBER 1313253

THE STATE OF TEXAS

vs

ORLANDO SALINAS

§
§
§
§
§

IN THE 228TH

DISTRICT COURT

HARRIS COUNTY, TEXAS

PRESENTMENT

On this ___ day of May, 2011, the attached Motion In Arrest of Judgment was presented to the court.

PRESIDING JUDGE

CAUSE NUMBER 1313253

THE STATE OF TEXAS

vs

ORLANDO SALINAS

§
§
§
§
§

IN THE 228TH

DISTRICT COURT

HARRIS COUNTY, TEXAS

REQUEST FOR HEARING

The Motion in Arrest of Judgment being timely filed and presented, this request for a hearing on the Motion is hereby:

_____ Granted and set for _____.

_____ Denied, to which the defendant takes exception.

Signed this ____ day of _____, 2012.

PRESIDING JUDGE

CAUSE NUMBER 1313253

THE STATE OF TEXAS

§
§
§
§
§

IN THE 228TH

vs

DISTRICT COURT

ORLANDO SALINAS

HARRIS COUNTY, TEXAS

ORDER

The Motion in Arrest of Judgment, after consideration by this Court, is hereby

_____ Granted and the following specific provisions of *Tex. Loc. Gov't Code Ann. § 133.102* are found to be unconstitutional:

- _____ (1) abused children's counseling;
- _____ (2) crime stoppers assistance;
- _____ (3) breath alcohol testing;
- _____ (4) Bill Blackwood Law Enforcement Management Institute;
- _____ (5) law enforcement officers standards and education;
- _____ (6) comprehensive rehabilitation;
- _____ (7) operator's and chauffeur's licenses;
- _____ (8) criminal justice planning;
- _____ (9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A & M University;
- _____ (10) compensation to victims of crime fund;
- _____ (11) emergency radio infrastructure account;
- _____ (12) judicial and court personnel training fund
- _____ (13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account
- _____ (14) fair defense system

_____ Denied, to which the defendant takes exception.

Signed this ____ day of _____, 2012.

PRESIDING JUDGE