PD 1671-15

IN THE COURT OF CRIMINAL APPEALS

OF TEXAS

CARLTON CHARLES PENRIGHT,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Petition for Discretionary Review from the
First Court of Appeals in No, 01-12-00647-CR
affirming the conviction in cause number 1247950
From the 174th District Court of Harris County, Texas

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

ORAL ARGUMENT NOT REQUESTED

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

JANI MASELLI WOOD
Assistant Public Defender
Harris County, Texas
TBN. 00791195
1201 Franklin Street, 13th Floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
Counsel for Appellant
February 8, 2016

IDENTITY OF PARTIES AND COUNSEL

Appellant:	Carlton Charles Penright TDCJ-ID# 01811722 Gurney Unit 1385 FM 3328 Tennessee Colony, TX 75803
Trial Prosecutor: Appellate Prosecutor	Mr. Ed McClees Ms. Jessica Akins Assistant District Attorneys Harris County, Texas 1201 Franklin, 6th Floor Houston, Texas 77002
Defense Counsel at Trial:	Steven Greenlee 4303 Whippoorwill Circle Missouri City, Texas 77459-2977
Presiding Judge:	Hon. Ruben Guerrero 174th District Court Harris County, Texas 1201 Franklin, 19th floor Houston, Texas 77002
Defense Counsel on Appeal:	Jani Maselli Wood Assistant Public Defender Harris County, Texas 1201 Franklin, 13th Floor Houston, Texas 77002

Table of Contents

INDEX OF AUTHORITIES

Cases:

Statutes, Rules, and Opinions

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

STATEMENT OF THE CASE

This is an appeal from the felony offense of sexual assault. (C.R. at 170). *See* TEX. PENAL CODE ANN. § 22.011. After a trial by jury, Mr. Penright was convicted and the jury assessed punishment at 15 years confinement in the state jail. (C.R. at 170). The judgment was dated 6/28/2012. (C.R. at 170). Timely notice of appeal was filed. (C.R. at 177).

A motion in arrest of judgment and a motion for new trial were filed on 7/25/2012. (II C.R. at 201, 273). The motions were set for a hearing to be held on 8/31/2012. (II C.R. at 356). Four subpoenas for witnesses were issued for that date. (II C.R. at 311-28). The court notified counsel they were "closed" that day and reset the hearing to 9/7/2012. (II C.R. at 371). The same witnesses were again placed under subpoena. (II C.R. at 331-49). The court had a capital jury to pick on 9/7/2012 and chose to reset the hearing to 9/21/2012, outside of the 75th day. (II C.R. at 371). The 75th day after the judgment was 9/11/2012, so no hearing was able to be held.

STATEMENT OF THE PROCEDURAL HISTORY

On October 21, 2013, the Court of Appeals abated this cause and remnaded it for a hearing on the motion for new trial. The hearing was held and the case reinstated on March 7, 2014. In an unpublished, the First Court of Appeals affirmed Mr. Penright's conviction. *Penright v. State*, 01-12-00647-CR, 2015 WL 5770006, at *1 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no pet.). A timely motion for reconsideration *en banc* was filed on October 19, 2015. The State was ordered to respond and did so on November 10, 2015. The motion was denied on December 8, 2015, with Justice Jennings dissenting. This petition, after a granted extension of time, is timely if filed on or before February 8, 2016.

GROUNDS FOR REVIEW

Ground One: The Court of Appeals' decision that the consolidated court cost was constitutional failed to explain how the comprehensive rehabilitation fee is a legitimate criminal justice purpose.

Ground Two: The Court of Appeals' determination that the cost bill is sufficient to support Sheriff's fees fails to acknowledge that in this case, admitted evidence from the Sheriff's Department states that no fee records were kept.

REASON FOR REVIEW

The First Court of Appeals has decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals. TEX. R. APP. P. 66.3(b).

STATEMENT OF FACTS RELATIVE TO GROUNDS RAISED

This is an appeal from the felony offense of sexual assault. (C.R. at 170). *See* TEX. PENAL CODE ANN. § 22.011. After a trial by jury, Mr. Penright was convicted and the jury assessed punishment at 15 years confinement in the state jail. (C.R. at 170). The judgment was dated 6/28/2012. (C.R. at 170). Timely notice of appeal was filed. (C.R. at 177).

A motion in arrest of judgment and a motion for new trial were filed on 7/25/2012. (II C.R. at 201, 273). The motions challenged the constitutionality of the consolidated court cost and the correctness of the Sheriff's fee records. After the case was abated, a hearing on the motions was held. At the hearing, the following evidence was admitted without objection:

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Major Debra Schmidt, known to me and in the capacity shown herein below, who, being by me first duly sworn, stated on her oath as follows:

"My name is Debra Schmidt. I am over eighteen (18) years of age, competent and capable to make this affidavit, and have personal knowledge of the facts stated herein which are true and correct. I am currently employed by the Harris County Sheriff's Office (HCSO) in the position of Major. For the limited purposes of this affidavit, I have been designated by Sheriff Adrian Garcia as a custodian of records for the Sheriff's Office.

"In connection with Cause No. 1247950, styled *State of Texas vs. Carlton Charles Penright*, currently pending before the 174th Judicial District Court of Harris County, Texas, the Harris County Sheriff's Office does not create any records that are a statement of each fee or item of cost charged as a Sheriff's fee in a criminal action."

Major Debra Schmidt

SUBSCRIBED AND SWORN TO before me this 4th day of December, 2013, to certify which witness my hand and seal of office.

Notary Public, State of Texas

VERONICA L. GORBY
Notary Public
STATE OF TEXAS
Commission Exp. JULY 25, 2017

EXHIBIT
DEFENSE
6

(MNT 2 RR at 25; MNT 1 RR at 4-6).[1]

Mr. Penright also had admitted into evidence at the hearing the statutes which support where the money for the consolidated cost is used.

ARGUMENT

Ground One: The Court of Appeals' decision that the consolidated court cost was constitutional failed to explain how the comprehensive rehabilitation fee is a legitimate criminal justice purpose.

The Court of Appeals' opinion relied upon *Peraza* to determine that the consolidated court cost statute was constitutional without any explanation of how the individual costs are legitimately related to criminal justice:

> These interconnected statutes direct the comptroller to allocate 99.99% of the proceeds collected under section 133.102(e) to uses that relate to the administration of our criminal justice system and are therefore legitimate criminal justice purposes under *Peraza*. *See Peraza*, —— S.W.3d at ——— – ———, 2015 WL 3988926, at *7–8.

Penright v. State, 01-12-00647-CR, 2015 WL 5770006, at *5 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no. pet. h.).

The Court of Appeals' panel opinion failed to offer any authority or reasoning for why the Comprehensive Rehabilitation Fee was a legitimate court cost.

Court costs must be "expended for legitimate criminal justice purposes." *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), reh'g denied (Sept. 16,

---

[1] The hearing on the motion for new trial was held December 13, 2013. The record from that hearing will be designated "MNT."

2015)(overruling *Ex parte Carson*, 159 S.W.2d (Tex. Crim. App. 1942) which held that court cost must be "necessary" or "incidental" to the "trial of a criminal case."). "A criminal justice purpose is one that relates to the administration of our criminal justice system." *Peraza*, 467 S.W.3d 508 (Tex. Crim. App. 2015), reh'g denied (Sept. 16, 2015).

The Comprehensive Rehabilitation Fee funds are spent at the direction of the Department of Assistive and Rehabilitative Services - another executive branch agency. *See* TEX. HUM. RES. CODE ANN. § 115.001. There is no mention how this in the opinion how this is a "legitimate criminal justice purpose." 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.

The Court of Appeals' decision did not consider each individual cost under the consolidated court cost statute.

As to the constitutionality of the entire statute:

> It has been consistently held that where a portion of a statute has been declared unconstitutional, and there is an absence of a saving or severability clause, the remainder of the statute must be sustained if it is complete in itself and capable of being executed in accordance with the legislative intent wholly independent of that which has been rejected.

Tussey v. State, 494 S.W.2d 866, 870 (Tex. Crim. App. 1973). There is no savings clause or severability clause in the consolidated court cost statute. Additionally, were one section to be found unconstitutional, it would undermine the entirety of the statute. As Justice Jamison explained in her dissent in *Salinas*:

> Under the circumstances presented in this case, the statute requires $133 be gathered and distributed according to specified percentages. Period. Because the statute cannot be salvaged by severing constitutionally-funded programs from those not properly funded, the statute is facially unconstitutional even if certain of the listed programs could be constitutionally funded through court costs assessed against criminal defendants.

Salinas v. State, 426 S.W.3d 318, 333 (Tex. App.—Houston [14th Dist.] 2014), *rev'd*, 464 S.W.3d 363 (Tex. Crim. App. 2015)(Jamison, J., dissenting). The Court of Appeals should have determined the severability issue one of two ways:

1. The statute is entirely unconstitutional as Justice Jamison explained in her dissent. That determination would make sense because the statute reads that:

> (a) A person convicted of an offense shall pay as a court cost, in addition to all other costs:(1) $133 on conviction of a felony;

TEX. LOC. GOV'T CODE ANN. § 133.102 (Vernon).

If this Court were to determine certain portions of the statute unconstitutional, it would not be the intent of the legislature that the constitutional portions reapportion the $133 court cost.

2. The statute's percentage can be reapportioned to be calculated to fit the percentage dictated by the statute. However, this would make (b)(1)'s $133 stated amount inaccurate. The constitutional portions of the statute funding valid court costs could be excised if this Court concluded they are wholly independent to the entirety of the statue. *See Salas v. State*, 365 S.W.2d 174, 175 (Tex. Crim. App. 1963)(explaining that "if the unconstitutional or void portion of any statute be stricken out and that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, the statute must be sustained").

The former family protection fee - partly constitutional and partly not.

Ten years ago, the Attorney General considered the constitutionality of Section 51.961 of the Government Code. *See* TEX. ATT'Y GEN. OP. NO. GA-0387 (2005). This statute authorized county commissioners courts to adopt a "family protection fee" in an amount not to exceed $30. *See* Act of June 2, 2003, 78th Leg., ch. 198, 2003 Tex. Gen. Laws 711 (amended 2005 and 2007) (current version at TEX.

GOV'T CODE ANN. § 51.961 (West 2013)). The fee was to be collected upon the filing of a suit for the dissolution of marriage. *Id.* Revenue from the fee was to be directed to two different destinations. *Id.* Subsection (d) commanded that one-half of the fee be deposited in the county's family protection account. *Id.* Subsection (g) mandated that the other half of the fee go to the State's child abuse and neglect prevention trust fund account. *Id.*

The AG opined that Subsection (g)'s allocation of revenue to the State's child abuse and neglect prevention trust fund account was unconstitutional. TEX. ATT'Y GEN. OP. NO. GA-0387 (2005) at 5. According to the AG, directing revenue to the trust fund violated the open courts provision of the Texas Constitution. *Id.* But the AG reiterated a previous opinion that Subsection (d)'s allocation of revenue to the county's family protection account was constitutional. *Id.* at 6-7. The salient message here is not the reasoning for the AG's opinion that one fee destination was constitutional while the other fee destination was not. Rather, the reason for citing this AG opinion is to show that certain statutes can have both constitutional and unconstitutional aspects.

A statute that is unconstitutional in part is an unconstitutional statute.

A statute can have both constitutional and unconstitutional aspects - every time the statute is applied. When is a fee statute applied? Every time the fee is assessed.

When a statute has unconstitutional aspects, the statute itself is unconstitutional. The statute cannot continue to exist unchanged. The

unconstitutional portion of the statute must be excised from the rest of the statute. In some circumstances, the remaining portion of the statute can continue in effect. In other situations, the excision of the invalid portion of the statute makes this impossible. *See* TEX. GOV'T CODE ANN. § 311.032(C) (West 2005) ("[I]f any provision of the statute or its application to any person is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable.").

In the case of Section 51.961, the statute could not continue to stand - even with the offending provision severed out. In order to keep the constitutional portion of the statute in effect, the Legislature had to amend the statute. The Legislature did so in the very next legislative session. *See* Act of May 22, 2007, 80th Leg. R.S., ch. 637, 2007 Tex. Gen. Laws 1212, 1215. The amendment reduced the fee from $30 to $15. The amendment directed the $15 fee to the county's family protection account which the AG had found to be constitutional. Additionally, the amendment repealed Subsection (g) which had directed part of the prior $30 fee to the State's child abuse and neglect prevention trust fund.

As noted in the foregoing paragraph, when a portion of a statute is unconstitutional, the statute itself is unconstitutional. Under the original formulation of the burden the challenger to the facial constitutionality bears, a partially unconstitutional statute will always be found to be unconstitutional. But

under the altered formulation of the burden, a partially unconstitutional statute will always be found to be constitutional.

Review should be granted.

Ground Two: The Court of Appeals' determination that the cost bill is sufficient to support Sheriff's fees fails to acknowledge that in this case, admitted evidence from the Sheriff's Department states that no fee records were kept.

The Code of Criminal Procedure mandates a fee record be kept:

Fee Records

(a) Each clerk of a court, county judge, justice of the peace, **sheriff,** constable, and marshal **shall keep a fee record**. The **record must contain**:

(1) **a statement of each fee** or item of cost charged for a service rendered in a criminal action or proceeding;

(2) **the number and style of the action** or proceeding; and

(3) **the name of the officer or person who is entitled to receive the fee**.

(b) Any person may inspect a fee record described by Subsection (a).

(c) A statement of an item of cost in a fee record is prima facie evidence of the correctness of the statement.

(d) The county shall provide to officers required to keep a fee record by this article equipment and supplies necessary to keep the record.

TEX. CODE CRIM. PROC. 103.009. (Emphasis supplied). The fee record was requested and the "record" filed was actually a clerk's print out and not the type of record required by the statute. It lacked any indicia that it was prepared by the Sheriff and did not include who is entitled to receive the fee. (II C.R. at 227, 263).

The Court of Appeals' decision rejected Mr. Penright's claim that he should not be required to pay Sheriff's fees because there was no evidence the statutorily mandated fee records were being kept. *Penright v. State*, 01-12-00647-CR, 2015 WL 5770006, at *6 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no. pet. h.). But this determination fails to consider the Sheriff's requirement to keep a fee record.

When interpreting statutes, the Courts are directed to "effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Interpreting laws is a function of the judiciary. *Id.* Courts "presume the entire statute is intended to be effective, and that a just and reasonable result is intended." *Schwenke v. State*, 960 S.W.2d 227, 230 (Tex. App.—Corpus Christi 1997, pet. denied).

The Court of Appeals' decision opinion removes the Sheriff's duty to keep a fee record.

But whether there is a basis for the cost should not remove the Sheriff's duty to provide due process - notice and an opportunity to be heard. If there is no record to be inspected and none required by the court, the statute becomes *de facto* voided by this court.

TEX. CODE CRIM. PROC. 103.009 mandates that not only a fee record be kept, but that it be available for inspection. When a fee record was requested, the County Attorney responded by stating that no fee records were kept for inspection. (CR 360). There is an affidavit that none exist for Mr. Penright. Because the statute is not being followed, the Court of Appeals' conclusion that the mere fact Mr. Penright was charged with a crime that has costs obviates the necessity for the Sheriff's Department to follow the law is erroneous.

Review should be granted.

PRAYER FOR RELIEF

For the reasons stated above, Mr. Penright prays that this Court grant his petition for discretionary review.

Respectfully submitted,
ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

Jani Maselli Wood

JANI J. MASELLI WOOD
Assistant Public Defender
Harris County, Texas
Jani.Maselli@pdo.hctx.net
TBN. 00791195
1201 Franklin Street, 13th Floor
Houston, Texas 77002
Phone: (713) 368-0016
Fax: (713) 368-9278
Attorney for Appellant
Carlton Charles Penright

CERTIFICATE OF SERVICE

Pursuant to TEX. R. APP. PROC. 9.5, this certifies that on February 8, 2016, a copy of the foregoing was emailed to Lisa McMinn, State Prosecuting Attorney, and the Harris County District Attorney's Office through texfile.com at the following address:

Jessica Akins
Assistant District Attorney
1201 Franklin Street, 6th Floor
Houston, TX 77002
Akins_Jessica@dao.hctx.net

Lisa McMinn
Lisa.McMinn@SPA.texas.gov

Jani Maselli Wood

JANI J. MASELLI WOOD

CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this petition complies with the type-volume limitations of TEX. R. APP. PROC. 9.4(I)(2)(D).

1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (I)(1), this petition contains 3407 words printed in a proportionally spaced typeface.

2. This petition is printed in a proportionally spaced, serif typeface using Garamond 14 point font in text and Garamond 14 point font in footnotes produced by Corel WordPerfect software.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in *Tex. R. App. Proc. 9.4(j)*, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

Jani Maselli Wood

_____

JANI J. MASELLI WOOD

Appendix A
Opinion *Penright v. State*

2015 WL 5770006
Only the Westlaw citation is currently available.
Court of Appeals of Texas,
Houston (1st Dist.).

Carlton Charles Penright, Appellant
v.
The State of Texas, Appellee
NO. 01–12–00647–CR

|
Opinion issued September 29, 2015

Synopsis
Background: Defendant was convicted in the 174th District Court, Harris County, Ruben Guerrero, J., of sexual assault. Defendant appealed.

Holdings: The Court of Appeals, Rebeca Huddle, J., held that:

[1] statute that authorized the assessment of a $133 court cost for defendants convicted of a felony was not unconstitutional, and

[2] evidence was sufficient to support the assessment of a Sheriff's fee in the amount of $15.

Affirmed.

West Headnotes (10)

[1] Statutes
Validity

A facial challenge is an attack on a statute itself as opposed to a particular application.

Cases that cite this headnote

[2] Constitutional Law
Burden of Proof

The party challenging the statute bears the burden of establishing the statute's unconstitutionality.

Cases that cite this headnote

[3] Statutes
Validity

To successfully mount a facial challenge to a statute, that party must establish that no set of circumstances exists under which that statute would be valid.

Cases that cite this headnote

[4] Constitutional Law
Presumptions and Construction as to Constitutionality

When reviewing a constitutional challenge, the Court of Appeals presumes that the statute is valid and that the legislature was neither unreasonable nor arbitrary in enacting it.

Cases that cite this headnote

[5] Constitutional Law
Presumptions and Construction as to Constitutionality

A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is shown.

Cases that cite this headnote

[6] Costs
Liabilities of defendant

Statute that authorized the assessment of a $133 court cost for defendants convicted of a felony was not unconstitutional; the statute had a legitimate criminal justice purpose, as the statute directed the comptroller to allocate 99.99% of the proceeds collected under the statute to specific uses that related to the administration of the criminal justice system. Tex. Loc. Gov't Code Ann. § 133.102(a)(1).

1 Cases that cite this headnote

[7] Costs
Liabilities of defendant

Evidence was sufficient to support the assessment of a Sheriff's fee in the amount of $15, when imposing sentence for sexual assault; the clerk's record included a $5.00 commitment fee, a $5.00 release fee, and a $5.00 fee for making an arrest without a warrant fee. Tex. Crim. Proc. Code Ann. art. 103.009(a).

Cases that cite this headnote

[8] Criminal Law
Particular issues in general

The Court of Appeals reviews the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost, and traditional *Jackson v. Virginia* evidentiary-sufficiency principles do not apply.

Cases that cite this headnote

[9] Criminal Law
Judgment, sentence, and punishment

The Court of Appeals reviews the sufficiency of the evidence supporting the award of costs in the light most favorable to the trial court's judgment.

Cases that cite this headnote

[10] Criminal Law
Mootness

The issue of whether the trial court abused its discretion in refusing to conduct a hearing on defendant's motion for new trial and motion in arrest of judgment was rendered moot, where defendant's appeal was abated and the trial court conducted a hearing on the motion for a new trial.

Cases that cite this headnote

On Appeal from the 174th District Court, Harris County, Texas, Trial Court Cause No. 1247950. Ruben Guerrero, Judge.

Attorneys and Law Firms

Jani Maselli, Assistant Public Defender, Houston, TX, for Appellant.

Devon Anderson, District Attorney, Jessica Akins, Assistant District Attorney, Houston, TX, for State.

Panel consists of Chief Justice Radack and Justices Massengale and Huddle.

OPINION

Rebeca Huddle, Justice

*1 The State indicted Carlton Charles Penright on the charge of aggravated sexual assault, and a jury found him guilty of the lesser offense of sexual assault. The jury sentenced Penright

to 15 years in prison, and the trial court's judgment assessed court costs in the amount of $534. The trial court later entered a judgment nunc pro tunc reducing the amount of costs assessed to $484, which includes a $133 consolidated court cost authorized by Local Government Code section 133.102 and a $15 Sheriffs fee. In three issues, Penright contends that (1) the provision of the Local Government Code that authorizes the assessment of the $133 consolidated court cost is unconstitutional, (2) there is insufficient evidence to support the assessment of the $15 Sheriff's fee, and (3) the trial court abused its discretion by setting but then failing to hold a hearing on Penright's motion for new trial and motion in arrest of judgment. We affirm.

Constitutionality of Local Government Code Section 133.102

According to Penright, the $133 consolidated court cost authorized by Local Government Code section 133.102 violates the separation of powers clause of the Texas Constitution because it is a "tax" collected by the judiciary to benefit accounts that are neither necessary nor incidental to the trial of a criminal case. *See* Tex. Loc. Gov't Code Ann. § 133.102 (West Supp.2014).

A. Standard of Review

[1] [2] [3]"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel,* ——U.S. ——, 135 S.Ct. 2443, 2449, 192 L.Ed.2d 435 (2015). The party challenging the statute bears the burden of establishing the statute's unconstitutionality. *State v. Rosseau,* 396 S.W.3d 550, 557 (Tex.Crim.App.2013). To successfully mount a facial challenge to a statute, that party must establish that no set of circumstances exists under which that statute would be valid. *Peraza v. State,* Nos. PD–0100–15 & PD–0101–15, ——S.W.3d ——, ——, 2015 WL 3988926, at *4 (Tex.Crim.App. July 1, 2015); *see Santikos v. State,* 836 S.W.2d 631, 633 (Tex.Crim.App.1992) ("A facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid.").

[4] [5]When reviewing a constitutional challenge, we presume that the statute is valid and that the legislature was "neither unreasonable nor arbitrary in enacting it." *Curry v. State,* 186 S.W.3d 39, 42 (Tex.App.–Houston [1st Dist.] 2005, no pet.); *see Rosseau,* 396 S.W.3d at 557; *see also State ex. rel. Lykos v. Fine,* 330 S.W.3d 904, 908–9 (Tex.Crim.App.2011) (same). A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is shown. *Ex parte Granviel,* 561 S.W.2d 503, 511 (Tex.Crim.App.1978).

B. Applicable Law

Section 133.102(a)(1) of the Texas Local Government Code mandates that "[a] person convicted of an offense shall pay as a court cost, in addition to all other costs: $133 on conviction of a felony." Tex. Loc. Gov't Code Ann. § 133.102(a)(1). The Local Government Code requires the comptroller to allocate the proceeds collected among the following fourteen accounts and funds:

*2 (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) law enforcement and custodial officer supplemental retirement fund;[1]

(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; and

(14) fair defense account.

See Tex. Local Gov't Code Ann. § 133.102(e).

C. Analysis

[6]Penright urges us to declare section 133.102(a)(1) facially unconstitutional because, Penright argues, it requires the judicial branch to collect a tax, which is a power that the separation of powers clause reserves solely to the executive branch. Penright contends that the allocation of proceeds collected under section 133.102(a)(1) to twelve of the fourteen enumerated programs is contrary to *Ex parte Carson,* 143 Tex.Crim. 498,159 S.W.2d 126 (Tex.Crim.App.1942), because these 12 programs are "neither necessary nor incidental to the trial of a criminal case."[2]

In *Ex parte Carson,* Carson challenged the constitutionality of a statute authorizing the assessment of a $1 fee to fund law libraries. The fee was assessed in civil and criminal cases, but only in counties having more than a certain number of district and county courts. *Id.* at 127. The Court of Criminal Appeals concluded that "the tax imposed by the bill is not and cannot be logically considered a proper item of cost in litigation, particularly in criminal cases." *Id.* at 127. It held that (1) the $1 cost was "neither necessary nor incidental to the trial of a criminal case [and thus was] not a legitimate item to be so taxed" against a criminal defendant; (2) the statute was a local or special law, which the state legislature was not authorized to enact; and (3) collection of this cost only in certain counties was discriminatory. *Id.* at 127–30.

*3 The Court of Criminal Appeals recently rejected a *Carson*-based facial constitutional challenge in an analogous case. *See Peraza v. State,* Nos. PD–0100–15 & PD–0101–15, —— S.W.3d ——, —— – ——, 2015 WL 3988926, at *6–7 (Tex.Crim.App. July 1, 2015). *Peraza* involved a facial constitutional challenge to Article 102.020 of the Texas Code of Criminal Procedure, which required trial courts to assess a $250 DNA record fee on conviction of specified offenses. *Id.* at —— – ——, 2015 WL 3988926 at *6–7. The *Peraza* Court expressly rejected *Carson* 's holding that court costs must be "necessary" or "incidental" to the trial of a criminal case in order to pass constitutional muster:

> if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause.

Id. at ——, 2015 WL 3988926 at *7. The *Peraza* court explained that a legitimate criminal justice purpose is one that "relates to the administration of our criminal justice system."*Id.* It added that the question of whether a criminal justice purpose is legitimate must be considered on a "statute-by-statute/case-by-case basis." *Id.* Thus, after *Peraza,* the question we consider is not whether the funds enumerated in section 133.102(e) are necessary or incidental to the trial of a criminal case, but, rather, whether those funds relate to the administration of our criminal justice system. *Id.*

In determining whether Peraza met his burden to demonstrate that section 102.020 could not operate constitutionally under any circumstance, the *Peraza* court considered the uses to which funds collected under the statute would be put. *Id.* (considering "statutorily provided for" applications and noting that it would be improper to evaluate constitutionality by "theorizing where the funds collected ... might be spent"). For example, with respect to the 65% of the DNA record fee deposited to the credit of the criminal justice planning account, the *Peraza* court concluded that the statute passed constitutional muster because the criminal justice planning account is statutorily required to reimburse monies spent collecting DNA specimens from offenders charged with certain offenses, including aggravated sexual assault of a child under 14, the offense for which Peraza was convicted. *Id.* at —— – ——, 2015 WL 3988926 at *7–8. Thus, the Court concluded that the DNA fee was constitutional because the funds collected are allocated by statute to a purpose that is related to the administration of our criminal justice system. *Id.* at ——, 2015 WL 3988926 at *8.

Applying the analysis set forth in *Peraza* to the statute Penright challenges here leads us to conclude that the consolidated court cost authorized by section 133.102(e) is likewise constitutional. Several interconnected Texas statutes dictate the manner in which the vast majority of the proceeds collected under section 133.012(a) are to be expended:

• Section 133.102(e)(2) directs the comptroller to allocate .2581% of the proceeds received to "crime stoppers assistance." Tex. Loc. Gov't Code Ann. § 133.102(e)(2). These proceeds are appropriated to the Criminal Justice Division of the Governor's Office, which distributes 90% of the proceeds to crime stoppers organizations and may use up to 10% of the funds for the operation of the toll-free telephone service in areas of Texas not served by a crime stoppers organization for reporting to the council information about criminal acts. *See* Tex. Code Crim. Proc. Ann. art. 102.013(a) (West 2006); Tex. Gov't Code Ann. § 414.012 (West 2012).

*4 • Section 133.102(e)(3) directs the comptroller to allocate .5507% of the proceeds received to "breath alcohol testing." Tex. Loc. Gov't Code Ann. § 133.102(e)(3). These proceeds may be used by counties that maintain a certified breath alcohol testing program but do not use the services of a certified technical supervisor employed by the Department of Public Safety to defray the costs of maintaining and supporting a certified breath alcohol testing program, and it may be used by the Department in the implementation, administration, and maintenance of the statewide certified breath alcohol testing program. *See* Tex. Code Crim. Proc. Ann. art. 102.016 (West Supp.2014).

• Section 133.102(e)(4) directs the comptroller to allocate 2.1683% of the proceeds received to the "Bill Blackwood Law Enforcement Management Institute." Tex. Loc. Gov't Code Ann. § 133.102(e)(4). These proceeds are used to pay for the cost of Texas residents' participation in the Institute's law enforcement management training programs.Tex. Educ. Code Ann. § 96.64(a), (c) (West 2002).

• Section 133.102(e)(5) directs the comptroller to allocate 5.0034% of the proceeds received to "law enforcement officers standards and education." Tex. Loc. Gov't Code Ann. § 133.102(e)(5). Two-thirds of these proceeds may be used "only to pay expenses related to continuing education" for law enforcement officers licensed under Chapter 1701 of the Occupations Code, and the remaining third may be used only to pay related administrative expenses. Tex. Local Gov't Code Ann. § 133.102(f).

• Section 133.102(e)(6) directs the comptroller to allocate 9.8218% of the proceeds received to "comprehensive rehabilitation." Tex. Loc. Gov't Code Ann. § 133.102(e)(6). These proceeds may be used only to provide rehabilitation services directly or through public resources to individuals determined by the department to be eligible for the services under a vocational rehabilitation program or other program established to provide rehabilitation services, as described in Human Resources Code section 111.052. Tex. Hum. Res. Code Ann. §§ 111.052, 111.060 (West 2013).

• Section 133.102(e)(7) directs the comptroller to allocate 11.1426% of the proceeds received to the "law enforcement and custodial officer supplemental retirement fund." Tex. Loc. Gov't Code Ann. § 133.102(e)(7). These funds may be used only to pay supplemental retirement and death benefits to law enforcement and custodial officers and to pay for administration of the fund. Tex. Gov't Code Ann. § 815.317(b) (West Supp.2014).[3]

• Section 133.102(e)(8) directs the comptroller to allocate 12.5537% of the proceeds received to "criminal justice planning." Tex. Loc. Gov't Code Ann. § 133.102(e)(8). These funds are to be used for state and local criminal justice projects which aim to reduce crime and improve the criminal and juvenile justice systems, and for other court-related purposes. Tex. Code of Criminal Proc. 102.056(a), (b) (West Supp.2014).

• Section 133.102(e)(9) directs the comptroller to allocate 1.2090% of the proceeds received to "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."

Tex. Loc. Gov't Code Ann. § 133.102(e)(9). The center may conduct and evaluate research relating to juvenile justice crime and delinquency and provide a setting for educational programs relating to juvenile crime and delinquency, including educational training for criminal justice and social service professionals. Tex. Educ. Code Ann. § 87.105(d) (West 2002).

*5 • Section 133.102(e)(10) directs the comptroller to allocate 37.6338% of the proceeds received to the "compensation to victims of crime fund." Tex. Loc. Gov't Code Ann. § 133.102(e)(10). These funds may be used for the payment of compensation to claimants or victims, to reimburse a law enforcement agency for the reasonable costs of a sexual assault medical examination, to administer the associate judge program for child protection cases, and for victim-related services or assistance. Tex. Code Crim. Proc. Ann. arts. 56.54 (West Supp.2014), 56.542 (West 2006).

• Section 133.102(e)(11) directs the comptroller to allocate 5.5904% of the proceeds received to the "emergency radio infrastructure account." These funds may only (1) be used for planning, development, provision, enhancement or ongoing maintenance of interoperable statewide emergency radio infrastructure, (2) be used in accordance with the statewide integrated public safety radio communications plan, (3) be used for the development of a regional or state interoperable radio communication system, (4) be distributed as grants by the department to regional governments that have entered into interlocal agreements and state agencies requiring emergency radio infrastructure, or (5) be used for other public safety purposes.Tex. Gov't Code Ann. § 411.402 (West 2012).

• Section 133.102(e)(13) directs the comptroller to allocate 1.2090% of the proceeds received to "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." These funds are used for the training of criminal justice professionals. Tex. Educ. Code Ann. § 96.645(b) (West Supp. 2014).

These interconnected statutes direct the comptroller to allocate 99.99% of the proceeds collected under section 133.102(e) to uses that relate to the administration of our criminal justice system and are therefore legitimate criminal justice purposes under Peraza. *See Peraza*, —— S.W.3d at ——– – ——, 2015 WL 3988926, at *7–8. Although no current statute mandates how the .0088% of the proceeds allocated to abused children's counseling under section 133.102(e)(1) may be spent, abused children's counseling on its face relates to the administration of our criminal justice system by providing resources for victimized children. Thus, Penright has failed to establish that it is not possible for section 133.102(e) to operate constitutionally in any circumstance. *Id.* (appellant failed to meet burden to establish that it was not possible for court cost provision to operate constitutionally in any circumstance where interconnected statutory provisions provided for funds to be expended for legitimate criminal justice purposes); *see also Luquis v. State*, 72 S.W.3d 355, 365 n. 26 (Tex.Crim.App.2002) (we favor constitutional reading over unconstitutional reading when construing statutes.).

*6 In sum, the interconnected statutory provisions providing for the allocation of the funds collected as court costs pursuant to section 133.120 allow and require that the vast majority of the proceeds collected be expended for legitimate criminal justice purposes. *See Peraza*, —— S.W.3d at ——, 2015 WL 3988926, at *8. We therefore hold that Penright has not met his burden to establish that it is not possible for section 133.102 to operate constitutionally under any circumstance. Accordingly, the trial court did not err in denying Penright's motions in arrest of judgment and for new trial.

We overrule Penright's first issue.

Sufficient evidence supports the Sheriff's fee

[7]In his second issue, Penright contends that the evidence is insufficient to support the assessment of the Sheriff's fee in the amount of $15 because the record contains no Sheriff's fee record.

According to Penright, article 103.009 of the Texas Code of Criminal Procedure requires the Harris County Sheriff's Department to keep a fee record and, therefore, the appellate record must contain the Sheriff's fee record. *See* Tex. Code Crim. Proc. Ann. art. 103.009(a) ("Each clerk of court, county judge, justice of the peace, sheriff, constable, and marshal shall keep a fee record."). But we have previously rejected this argument—the record need not contain a Sheriff's fee record. *See Cardenas v. State,* 403 S.W.3d 377, 386 n. 10 (Tex.App.–Houston [1st Dist.] 2013) (rejecting same argument and noting appellant presented no authority that article 103.009 fee record must be filed with trial court to support inclusion of sheriff's fees among costs chargeable to appellant and presented no argument that costs where not legally authorized), *aff'd,* 423 S.W.3d 396 (Tex.Crim.App.2014).

Here, the clerk's record includes a "J.I.M.S. Cost Bill Assessment," which includes a $5.00 commitment fee, a $5.00 release fee, and a $5.00 fee for making an arrest without a warrant fee—amounting to the $15 Sheriffs fee in the judgment. Penright contends that the J.I.M.S cost bill assessment is not a proper bill of costs because it is a "print out and not the type of record required by the statute." The Court of Criminal Appeals has rejected this argument. *See Johnson v. State,* 423 S.W.3d 385, 391–94 (Tex.Crim.App.2014).

[8] [9]"[W]e review the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost, and traditional *Jackson* evidentiary-sufficiency principles do not apply." *Johnson,* 423 S.W.3d at 390. We review the sufficiency of the evidence supporting the award of costs in the light most favorable to the trial court's judgment. *See Mayer v. State,* 309 S.W.3d 552, 557 (Tex.Crim.App.2010); *Cardenas,* 403 S.W.3d at 385.

A defendant convicted of a felony offense must pay certain statutorily mandated costs and fees. *See Johnson,* 423 S.W.3d at 389. The record shows that Penright was convicted of a felony in district court, supporting each of the following court costs constituting a Sheriff's fee:

(1) $5.00 for making an arrest without a warrant;[4]

(2) $5.00 as a commitment fee;[5]

(3) $5.00 as a release fee;[6]

These fees total $15.00, the same amount of costs assessed as a Sheriff's fee in this case:

$ 5.00 (making arrest without a warrant)

$ 5.00 (release fee)

$ 5.00 (commitment fee)

$ 15.00

*7 Accordingly, we hold that the evidence was sufficient to support the Sheriff's fee in the amount of $15 assessed in the trial court's judgment. *See Johnson,* 423 S.W.3d at 389, 396.

We overrule Penright's second issue.

The trial court held a hearing on Penright's motion for new trial

[10]In his third issue, Penright asserts that the trial court abused its discretion in refusing to conduct a hearing on his motion for new trial and motion in arrest of judgment. The record reflects that the trial court had scheduled a hearing on the motion for new trial but was unable to conduct the hearing as anticipated due to scheduling conflicts. As a result, Penrighf s motion for new trial was overruled by operation of law.

We abated this appeal and ordered the trial court to hold a hearing on the motion for new trial. The trial court held a hearing, and we have considered the record from that hearing on appeal. Therefore Penrighf s third issue is moot. *See Highfill v. State,*

No. 03–00–00126–CR, 2001 WL 520978, at *10 (Tex.App.–Austin May 17, 2001, no pet.) (not designated for publication) (holding appellant's issue was rendered moot because appellant was given the opportunity to make a record in support of his motion for new trial and appellate court considered that record in disposing of only issue raised in the motion for new trial).

We overrule Penrighf s third issue.

Conclusion

We affirm the judgment of the trial court. All pending motions are dismissed as moot.

All Citations

--- S.W.3d ----, 2015 WL 5770006

Footnotes

1 Effective September 1, 2013, subsection (7) was amended from "operator's and chauffeur's license" to "law enforcement and custodial officer supplemental retirement fund." *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1249, § 13(b), 2011 Tex. Gen. Laws 3349, 3353. Although Penright's court costs were imposed on June 28, 2012, because he did not pay them before September 1, 2013, the distribution will be governed by now-effective section 133.102(e)(7).

2 Penright does not challenge the constitutionality of two of the programs enumerated in section 133.102: judicial and court personnel training fund and fair defense system.*See* Tex. Local Gov't Code Ann. § 133.102(e)(12), (14). Because Penright concedes their constitutionality, we do not address them further.

3 Before September 1, 2013, this 11.1426% was directed to the Operators and Chauffeurs License Fund which was administered by the Department of Public Safety. *See* Act of May 29, 2011, 82nd Leg., R.S., ch. 1249, § 13(b), 2011 Tex. Gen. Laws 3349, 3353. Undedicated and unobligated monies in this fund could be appropriated "only to the criminal justice division for the purpose of awarding grants" under the Prosecution of Border Crime Grant Program. *See* Act of May 23, 2011, 82nd Leg., R.S., ch. 1106, § 1, 2011 Tex. Gen. Laws 2854, 2855 (enacting now-repealed Tex. Gov't Code Ann. § 772.0071(d)).

4 Tex. Code Crim. Proc. Ann. art. 102.011(a)(1) (West Supp.2014) ("$5 for ... making an arrest without a warrant").

5 *Id.*.001(a)(6) (West Supp.2014) ("A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by a peace officer ... $5 for commitment or release").

6 *Id.*