

No. 14-24-00175-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

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DEBORAH M. YOUNG
Clerk of The Court

MARCO ANTONIO LEIJA
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1776682
From the 177th District Court of Harris County, Texas

BRIEF FOR APPELLANT

Oral Argument Requested

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Judge	Judge Robert Johnson 177th District Court Harris County, Texas Houston, Texas 77002
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STATEMENT OF THE CASE

- Nature of the Case:** This is an appeal of a conviction for the offense of theft between \$2,500 and \$30,000. [C.R. 56]. The State of Texas charged the defendant, Marco Antonio Leija with theft of eight pool cues and one pool case belonging to Quoc Trieu. [C.R. 41].
- Trial Court:** The 177th Judicial District Court, Harris County, Texas.
- Trial Court's Disposition:** Mr. Leija entered into a plea bargain agreement and received 6 months in the Harris County Jail. [CR 44-56]. A hearing was held on the record regarding Mr. Leija's ability to pay costs and fees. [1 RR]. After the hearing on the record was complete, the trial court denied the request to waive costs or fees. [1 RR 6].
- Jurisdiction:** The trial court granted Mr. Leija the right to appeal , stating on the record: "You can appeal whatever you want to." [1 RR 7]. The trial court then appointed an appellate attorney. [CR 64, 67]. Mr. Leija timely filed his notice of appeal. [C.R. 64]. *See* TEX. R. APP. P. 26.2 (1)(A).

ISSUE PRESENTED

Issue One: The trial court is required to conduct an ability-to-pay hearing and consider the ability of a defendant at that time to immediately pay costs and fees. Mr. Leija had been in jail 79 days, had no income, and expressed he would be unable to pay any costs. Despite that evidence, the trial court ordered costs to be paid. Did the trial court abuse its discretion in ordering court costs to be paid by an indigent defendant?

STATEMENT OF FACTS

Mr. Leija pleaded guilty to the offense of theft. [CR 44-53]. The indictment alleged he had stolen eight pool cues and one pool cue case. [CR 41]. The guilty plea was not on the record. The paperwork indicates Mr. Leija was admonished and agreed to six months in jail. [CR 44-49]. In the plea paperwork there is a notation that Mr. Leija waived his right to appeal. [CR 43].

On February 2, 2024, there was a hearing on the record regarding Mr. Leija's ability to pay court costs and fees pursuant to Tex. Code Crim. Proc. 42.15 (a-1). [1 RR]. At the hearing was the court, the defense attorney, and state prosecutor Blair Duroy. [CR 94]. Before the hearing, defense counsel explained that Mr. Leija was homeless prior to going into custody and had been in custody for 79 days. [1 RR 4]. The defense requested the trial court conduct the hearing, but the trial court refused: "I don't have to do an inquiry on anything. That's your client, Defense counsel. So you may proceed with your inquiry." [1 RR 4]. The court requested that the defense lawyer proceed with the inquiry. [1 RR 4].

Upon questioning by the defense, Mr. Leija explained he had been in custody since November 16, 2023. [1 RR 5]. While in jail he had been unable to earn income. [1 RR 5]. He stated that at the time of the hearing, he had no ability to pay any costs. [1 RR 5].

The trial court asked the prosecutor if she had any questions; she did not. [1 RR 5]. The defense argued to the court that the costs were excessive because he had

no ability at that time to pay anything.¹ [1 RR 5-6]. The trial court denied the request. [1 RR 6]. The trial court did however grant the right to appeal “whatever you want to.” [1 RR 7].

SUMMARY OF THE ARGUMENT

Mr. Leija was in jail and had no money to pay his court costs. Despite this record evidence, with no rebuttal from the State, the trial court refused to waive the court costs or offer any other statutory means of paying the costs under Tex. Code Crim. Proc. 42.15(a-1). The trial court’s determination that he was not indigent was an abuse of discretion.

¹

The cost bill is dated 3/5/24, over a month from the hearing and judgment. [CR 60]. The cost bill reflects that the money was paid. [CR 60]. Whether or not Mr. Leija was able to pay the costs on a date *after* the hearing is immaterial to this appeal and the statute.

ARGUMENT

Issue One: The trial court is required to conduct an ability-to-pay hearing and consider the ability of a defendant at that time to immediately pay costs and fees. Mr. Leija had been in jail 79 days, had no income, and expressed he would be unable to pay any costs. Despite that evidence, the trial court ordered costs to be paid. Did the trial court abuse its discretion in ordering court costs to be paid by an indigent defendant?

The trial court conducted an ability-to-pay inquiry on the record, which is laudable. But the trial court abused its discretion by ordering costs be paid. The statute provides:

(a-1) Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:

- (1) subject to Subsection (c), required to be paid at some later date or in a specified portion at designated intervals;
- (2) discharged by performing community service under, as applicable, Article 43.09(f), 45A.254, 45A.459, or 45A.460 ;
- (3) waived in full or in part under Article 43.091 or 45A.257 ; or
- (4) satisfied through any combination of methods under Subdivisions (1)-(3).

Tex. Code Crim. Pro. Ann. art. 42.15 (a-1).

The hearing was conducted and the trial court’s inquiry rests on “whether the defendant has sufficient resources or income to **immediately** pay all or part of the fine and costs.” *Id.* (Emphasis supplied).

The indigency status of Mr. Leija was to be considered immediately at the time of the hearing.

A review of the relevant ability-to-pay inquiry mandates that the only funds that can be considered are those that he could “immediately” pay. “When there is no definition or technical meaning provided for a word or phrase, the terms are typically given their plain and ordinary meaning.” *See Edwards v. State*, 666 S.W.3d 571, 575 (Tex. Crim. App. 2023) *citing* Tex. Gov’t Code § 311.011(a). Immediately means “without interval of time: straightway.” Merriam-Webster's Collegiate Dictionary (11th ed. 2020). In this context, immediately means at the time the hearing just concluded. There would be no interval of time between the time the court heard the evidence and made its ruling.

The Code of Criminal Procedure provides that the consideration for payment is the “present ability to pay.”

The Code of Criminal Procedure provides:

Except as otherwise specifically provided, in determining a defendant’s ability to pay for any purpose, the court shall consider only the defendant’s present ability to pay.” Tex. Code Crim. Proc. Art. 1.053.

In the statute, present is used as an adjective, defined as “now existing.” Merriam-Webster's Collegiate Dictionary (11th ed. 2020). On February 2, 2024, Mr.

Leija offered evidence that he presently had no money and had been incarcerated. [1 RR 5].

There is no record evidence that Mr. Leija could immediately pay the court costs.

Mr. Leija was incarcerated at the time of the plea. [1 RR 5]. [1 RR 5]. While in jail he had been unable to earn income. [1 RR 5]. He stated that at the time of the hearing, he had no ability to pay any costs. [1 RR 5].

When offered the opportunity, the State chose to waive any questions regarding Mr. Leija's indigency. [1 RR 5]. Mr. Leija had a public defender representing him in the trial court. [1 RR 2]. Mr. Leija was appointed an appellate attorney. [CR 68]. The record is replete with information that Mr. Leija had no money to pay costs.

The trial court failed to follow the statute in denying the request to waive costs.

Despite the knowledge that Mr. Leija had been incarcerated and had no money at all, the trial court denied the request to waive the costs. [1 RR 6]. This denial is in direct contravention of the statute - which explicitly provides four options to payment when the defendant is indigent:

If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:

- (1) subject to Subsection (c), required to be paid at some later date or in a specified portion at designated intervals;
- (2) discharged by performing community service under, as applicable, Article 43.09(f), 45A.254, 45A.459, or 45A.460 ;

(3) waived in full or in part under Article 43.091 or 45A.257 ; or

(4) satisfied through any combination of methods under Subdivisions (1)-(3).

Tex. Code Crim. Pro. Ann. art. 42.15 (a-1)(1-4).

The trial court could have ordered payment at a later date, community service, a waiver of fees, or a combination of the three. The trial court did not apply any of the statutory options.

The trial court abused its discretion in denying the request that costs be waived.

“Determination of a defendant's indigency status rests squarely within the discretion of the trial court and is reviewable only for a clear abuse of that discretion.”

Atwood v. State, 120 S.W.3d 892, 896 (Tex. App.—Texarkana 2003, no pet.), *citing* *Newman v. State*, 937 S.W.2d 1, 3 (Tex. Crim. App.1996); *Rosales v. State*, 748 S.W.2d 451, 455 (Tex. Crim. App.1987). This Court has held:

The trial court's determination, therefore, will be disturbed on appeal only if the court acted arbitrarily and unreasonably, without reference to any guiding rules or principles, or is so clearly wrong as to lie outside the zone within which reasonable persons might disagree.

Heidelberg v. State, 36 S.W.3d 668, 675 (Tex.App.-Houston [14th Dist.] 2001, no pet.).

The trial court's ruling was clearly wrong. Mr. Leija was in jail. He was not working. He stated that he did not have the money to pay the costs. [1 RR 5]. The trial court had previously found him indigent to appoint trial counsel and then later

appellate counsel. [CR 29, 68]. It is axiomatic that “[a] defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs.” Tex. Code Crim. Pro. Ann. art. 26.04 (p). There was no evidence of a material change.

The burden was upon the State to rebut the evidence of indigence.

The Court of Criminal Appeals has established a two-part test for determining indigency for a free appellate record. *McFatridge v. State*, 309 S.W.3d 1, 6 (Tex. Crim. App. 2010). Although this case is slightly different, the test is persuasive and instructive in this matter. In making its indigence determination for a free record, the trial court should employ a two-step process. First, the defendant must make a prima facie showing of indigence. *McFatridge*, 309 S.W.3d at 6. If the defendant makes a prima facie showing of indigence, the burden then shifts to the State to show the defendant is not indigent. *McFatridge*, 309 S.W.3d at 6.

Mr. Leija made a prima facie showing of indigence. At the hearing, the State chose to ask nothing, and stated “No questions at this time.” [1 RR 5]. Under this test, Mr. Leija has established he is indigent.

Gone (hopefully) are the days of punishing the poor for being poor.

In *Tate v. Short*, a case from Houston, Texas, the Supreme Court determined that this nation does not punish people for being poor because there are other options:

There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines. We repeat our observation in *Williams* in that regard, 399 U.S., at 244-245, 90 S.Ct., at 2024 (footnotes omitted):

“The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

Tate v. Short, 401 U.S. 395, 399, 91 S. Ct. 668, 671, 28 L. Ed. 2d 130 (1971).

The Texas legislature has mandated ability-to-pay hearings to be on the record. Tex. Code Crim. Proc. 42.15(a-1). The legislature has provided four options to assist the indigent defendant in payment of costs. Tex. Code Crim. Proc. 42.15(a-1)(1-4).

Because the trial court abused its discretion, Mr. Leija asks that this Court find him indigent at the time of the plea and sentencing and order the costs waived and the judgment amended to reflect \$0 costs.

PRAYER

Mr. Leija prays that this Court determine the trial court abused its discretion, find him indigent, and order the costs waived and the judgment amended to reflect \$0 costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on April 24, 2024, 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).

1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 2,994 words printed in a proportionally spaced typeface.
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/s/ Jani J Maselli Wood

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