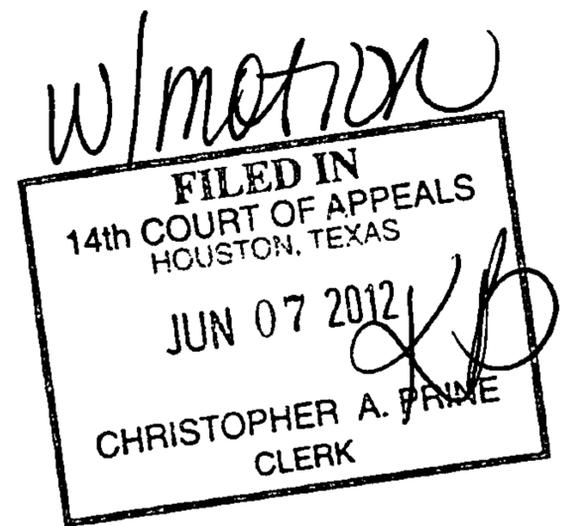


No. 14-11-00693-CR

In the
Court of Appeals
For the
Fourteenth District of Texas
At Houston



—◆—
No. 1283867
In the 230th Criminal District Court
of Harris County, Texas

—◆—
MANLEY DEWAYNE JOHNSON

Appellant

V.

THE STATE OF TEXAS

Appellee

—◆—
STATE'S APPELLATE BRIEF
—◆—

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ORAL ARGUMENT REQUESTED ONLY IF REQUESTED BY APPELLANT

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 9.4(g) and TEX. R. APP. P. 39.1, the State requests oral argument only if appellant requests oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Complainant, victim, or aggrieved party:

Shemarion Ross

Counsel for the State:

Patricia R. Lykos — District Attorney of Harris County

Bridget Holloway — Assistant District Attorney on appeal

John Lewis — Assistant District Attorney for plea

Appellant or criminal defendant:

Manley DeWayne Johnson

Counsel for Appellant:

Jani Maselli — Assistant Public Defender on appeal

Connie Williams — Counsel for plea

Trial Judge:

Honorable Belinda Hill — Presiding Judge

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Because court costs are not payable until the court produces a bill showing items of cost, because the district clerk confirmed a bill of costs is not part of the record, and because appellant failed to give the trial court an opportunity to explain the assessed costs, appellant’s sole issue presented on appeal is not ripe for review, nor is his prayer for the deletion of the court costs in its entirety the remedy. Furthermore, the court costs assessed are presumed correct.

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TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellant, Manley DeWayne Johnson, was charged by indictment with aggravated robbery with a deadly weapon. (CR at 56). Appellant entered a plea of “guilty” to the offense. (CR at 7). After a pre-sentence investigation and a hearing, appellant was sentenced to confinement for 7 years. (CR at 44, 56). A written notice of appeal was timely filed. (CR at 58).

STATEMENT OF FACTS

Appellant was indicted for aggravated robbery with a deadly weapon. (CR at 7). Appellant entered a plea of “guilty” without an agreed punishment recommendation and the case was recessed for a pre-sentence investigation (PSI). (CR at 44-45). Appellant signed a written Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession in which he agreed “I understand the above allegations and I confess that they are true and that the acts alleged above were committed on *November 1, 2010*.” (CR at 44-45) (emphasis handwritten on form). Appellant was admonished in writing. The written admonitions were initialed by appellant and signed by him and his attorney and confirm appellant understood the admonitions and was aware of the consequences of his plea. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(d) (West 2012). (CR at 46-50). Appellant was sentenced to confinement for 7 years. (CR at 56).

SUMMARY OF THE ARGUMENT

State's Reply to Appellant's Sole Issue Presented on Appeal:

Because court costs are not payable until the court produces a bill showing items of cost, because the district clerk confirmed a bill of costs is not part of the record, and because appellant failed to give the trial court an opportunity to explain the assessed costs, appellant's sole issue presented on appeal is not ripe for review, nor is his prayer for the deletion of the court costs in its entirety the remedy. Furthermore, the court costs assessed are presumed correct.



REPLY TO APPELLANT'S SOLE ISSUE PRESENTED

In his sole issue presented on appeal, appellant argues there is insufficient evidence in the record to support the \$234 court costs notated in the judgment. Appellant does not claim the court costs assessed is inaccurate, but complains that an itemized bill of costs is not in the record. As a result, appellant prays this Court delete the court costs of \$234. (CR at 19). The issue presented on appeal is not ripe for appellate review, nor is the deletion of court costs due the lack of a bill of costs in the appellate record a remedy for this Court to sanction.

ANALYSIS

A trial court is statutorily authorized to order the payment of court costs. TEX. CODE CRIM. PROC. ANN. art. 42.16 (West 2012) (specifying that the judgment should adjudge the costs against the defendant); TEX. GOV'T CODE ANN. §§ 102.021-102.161 (West 2012) (ordering a person convicted of an offense to pay court costs). A certified bill of costs imposes an obligation upon a criminal defendant to pay court costs, irrespective of whether or not that bill is incorporated by reference into the written judgment. *See generally* TEX. CODE CRIM. PROC. ANN. arts. 103.001 and 103.003 (West 2012); *see also* TEX. GOV'T CODE ANN. §§ 102.001–103.033. (West 2012). The Court of Criminal Appeals held that because court costs are not punitive in nature, a trial court may charge court costs against a defendant in the court's written judgment even when the court's oral pronouncement does not include an assessment of costs. *Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009).

Upon appellant's motion to supplement the record with the bill of costs, and this Court's order to the district clerk to include it if it is part of the record, the district clerk's

office informed this Court the “official bill of costs is not part of the case file.” Where the trial record is silent as to the matter complained of on appeal, as here, it is presumed the judgment recital, including court costs, is correct. *See e.g., Ford v. State*, 848 S.W.2d 776, 777 (Tex. App. —Houston [14th Dist.] 1993, no pet.).

Furthermore, appellant’s issue presented on appeal is not ripe for review. Article 103.001 does not prohibit the assessment of court costs without an itemized bill. Rather, article 103.001 states that the costs assessed are not payable until the person charged receives an itemized bill. *See* TEX. CODE CRIM. PROC. ANN. art. 103.001 (West 2012); *see also Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011). Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction. *Patterson v. Planned Parenthood of Houston & SE Tex.*, 971 S.W.2d 439, 442 (Tex. 1998). Ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote. *Id.* Ripeness focuses on whether the case involves “uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Id.* As of the time of appellant’s appeal, the trial court had not yet “produced” the items of cost (presumably, since it could not be made a part of the appellate record). An issue is not ripe for review when its resolution depends upon contingent or hypothetical facts, or upon events that have not yet come to pass. Without the production of the bill of costs, which has not occurred, this issue is not ripe for review.

Appellant, however, is not without a remedy. Upon the production of an itemized bill of costs, should it occur, appellant can challenge any erroneous court costs under article 103.008:

On the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending or was last pending shall correct any error in the costs.

TEX. CODE CRIM. PROC. ANN. art. 103.008(a) (West 2012). Appellant prays this Court will allow him to erase all costs, without allowing the trial court an opportunity to either (1) correct any erroneous costs or (2) explain the assessment of the costs. Appellant relies upon the holding in *Armstrong v. State*, 320 S.W.3d 479, 480 (Tex. App. —Amarillo 2010), *rev'd on other grounds by* 340 S.W.3d 759 (Tex. Crim. App. 2011) to suggest the districts clerk's affidavit (and failure to file a bill of costs) denies this Court the opportunity to evaluate the court costs in this case. *Armstrong* is distinguishable because (1) the bill of costs was a part of the record on appeal (and presumably had been "produced") and (2) *Armstrong* appealed the inclusion of attorney's fees in the bill of costs, when he was indigent. When the record shows a defendant is indigent, it is presumed he is still indigent on appeal absent evidence indicating his circumstances have changed; thus, statutorily he is unable to pay court-appointed attorney's fees and the inclusion of such in a bill of costs can be fully deleted by the appellate court. *See id.* at 484 (Pirtle, J. concurring). Even indigent defendants, however, are responsible for all other statutory court costs. *See Owen v. State*, 352 S.W.3d 542 (Tex. App. —Amarillo 2011, no writ). Court costs cannot simply be deleted without ever allowing the trial court an opportunity to explain or correct. The deletion of court costs due to the lack of an itemized bill, as appellant requests, is not the remedy provided under the Code of Criminal Procedure.

The issue presented on appeal is not ripe for appellate review, nor is the deletion of court costs due the lack of a bill of costs in the appellate record a remedy for this Court to sanction. The recital of the court costs in the judgment is presumed correct. Appellant's sole issue on appeal should be overruled.

◆

CONCLUSION

It is respectfully submitted that all things are regular and that the conviction should be affirmed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to appellant's attorney at the following address on June 7, 2012:

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