Affirmed as modified; Opinion Filed June 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00229-CR

No. 05-19-00230-CR

No. 05-19-00231-CR

No. 05-19-00232-CR

No. 05-19-00233-CR

TYRONTAE LOMON COOPER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 15th Judicial District Court
Grayson County, Texas
Trial Court Cause Nos. 069973, 069975, 069976, 069977, 069796

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Reichek
Opinion by Justice Myers

Appellant Tyrontae Lomon Cooper appeals his four convictions for burglary of a habitation (cause numbers 05-19-00229, 00230, 00231, and 00232-CR) and one conviction for unauthorized use of a motor vehicle (05-19-00233-CR). He brings four issues alleging (1) the jail time credits in cause numbers 05-19-00229-CR and 05-19-0232-CR are based on an erroneous arrest date and must be modified; (2) appellant is entitled to one additional day of jail time credits in causes 05-19-00230-

CR, 05-19-00231-CR, and 05-19-00233-CR; (3) the judgment in cause 05-19-00230-CR must be corrected to reflect the trial court's pronouncement of sentence; and (4) the imposition of court costs in causes 05-19-00230-CR, 05-19-00231-CR, 05-19-00232-CR, and 05-19-00233-CR was error. As modified, we affirm.

BACKGROUND AND PROCEDURAL HISTORY

On September 26, 2018, a Grayson County grand jury returned a two-count indictment in cause number 05-19-00233-CR for the offenses of theft of property with the value of $30,000 or more but less than $150,000 (count 1) and unauthorized use of a motor vehicle (count 2). On November 7, 2018, a Grayson County grand jury returned four more indictments against appellant in causes 05-19-00229-CR, 05-19-00230-CR, 05-19-00231-CR, and 05-19-00232-CR.

In cause number 05-19-00229-CR, the indictment alleged that appellant committed the offense of burglary of a habitation owned by Holly Burns on or about April 18, 2018, and alleged that prior to the offense, appellant was adjudicated under section 54.03 of the Texas Family Code for delinquent conduct constituting the felony offense of burglary of a habitation.

In cause number 05-19-00230-CR, the indictment alleged that appellant committed the offense of burglary of a habitation owned by Michael Denney and Amber Denney on or about April 18, 2018, and alleged the same punishment enhancement paragraph as contained in cause number 05-19-00229-CR.

In cause number 05-19-00231-CR, the indictment alleged that appellant committed the offense of burglary of a habitation owned by Elizabeth Quiroz, Zabdi Quiroz, and Jonadab Quiroz, on or about April 23, 2018, and alleged the same punishment enhancement contained in cause number 05-19-00229-CR.

In cause number 05-19-00232-CR, the three-paragraph indictment alleged that appellant committed the offense of burglary of a habitation owned by Joshua Price on or about August 7, 2018, and it contained the same punishment enhancement as cause number 05-19-00229-CR.

During a plea hearing held on December 21, 2018, the State of Texas struck count I of the indictment in cause 05-19-00233-CR, and appellant pleaded guilty to count II, unauthorized use of a motor vehicle. Appellant also pleaded guilty to the remaining indictments alleging burglary of a habitation and entered a plea of true to the enhancement paragraph contained in each indictment (causes 05-19-00229-CR, 05-19-00230-CR, 05-19-00231-CR, and 05-19-00232-CR).[1] The trial court found appellant's pleas were freely and voluntarily made and that he was mentally competent to enter those pleas. The court subsequently ordered the preparation of a presentence investigation ("PSI") report and set appellant's sentencing date.

[1] Regarding cause number 00233-CR, the trial court asked appellant whether he pleaded true or not true to the enhancement paragraph in that case, just as the court did in the other causes, even though the indictment in cause 00233 did not include an enhancement paragraph. Thus, the judgment's entry of "N/A" for the trial court's findings on the enhancement paragraph in cause 00233 is correct.

During the sentencing hearing held on February 7, 2018, after reviewing the PSI and hearing testimony, the trial court found appellant guilty in cause number 05-19-00233-CR and sentenced him "to two years state jail plus court costs with restitution to be determined." In cause number 05-19-00229-CR, the trial court found appellant guilty, found the enhancement true, and sentenced him to 40 years of imprisonment "plus court costs with restitution to be determined." In cause number 05-19-00230-CR, the trial court found appellant guilty, found the enhancement true, and sentenced him to 40 years of imprisonment "plus court costs, and restitution to be determined." For the last two cases, 05-19-00231-CR and 05-19-00232-CR, the trial court found him guilty, found the enhancements true, and sentenced appellant to 40 years of imprisonment "plus court costs and restitution to be determined." The trial court ordered all sentences to run concurrently and ordered that appellant "receive credit for time served."

Costs of court were imposed, and a bill of costs was issued, in each of the five cases. In causes 05-19-00229-CR, 05-19-00230-CR, 05-19-00231-CR, and 05-19-00232-CR, appellant was assessed identical court costs of $226.00. In cause 05-19-00233-CR, he was assessed court costs of $246.00—the difference based on a "Subpoena Service Fee" of $20.00 assessed in that case.

Appellant timely filed notices of appeal. His original counsel filed a motion to withdraw because, as stated in the motion, he had made a complete review of the

record and found no legal or factual issues that could be raised. Counsel also cited the longstanding principle that "it is not appropriate for appointed appellate counsel to file an *Anders* brief in a case in which counsel also served as trial counsel." *Chandler v. State*, 988 S.W.2d 827, 828 (Tex. App.—Dallas 1999, no pet.). We granted the motion to withdraw and ordered the trial court to appoint new counsel, who filed the appellate brief raising the above four issues.

DISCUSSION

Issue 1: Jail Time Credits

In his first issue, appellant argues that the jail time credits ordered in causes 05-19-00229-CR and 05-19-00232-CR are based on an erroneous arrest date and must be modified. Appellant's argument is that he is entitled to 176 days of jail time credit in 05-19-00229-CR and 05-19-00232-CR, rather than the 79 days credited by the trial court in the two judgments. The State responds that the trial court did not err in its assessment of credit for time served.

A trial court must give a criminal defendant credit on his sentence for time spent in jail in the cause, other than served as a condition of community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.03, § 2(a); *Taylor v. State*, 126 S.W.3d 201, 204 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *see Ex parte Bynum*, 772 S.W.2d 113, 114 (Tex. Crim. App. 1989) ("It is settled that an individual is entitled to all time spent in jail 'on said cause.'"). "The trial court is required to grant the

[defendant] pre-sentence jail time credit when [the] sentence is pronounced." *Ex parte Ybarra*, 149 S.W.3d 147, 148 (Tex. Crim. App. 2004). An appellant is not required to object at trial to raise the issue of jail time credit on appeal. *McGregor v. State*, 145 S.W.3d 820, 822 n.1 (Tex. App.—Dallas 2004, no pet.).

The relevant portion of article 42.03 provides:

> Sec. 2. (a) In all criminal cases the judge of the court in which the defendant is convicted shall give the defendant credit on the defendant's sentence for the time that the defendant has spent:
>
> (1) *in jail for the case*, including confinement served as described by Article 46B.009[2] and excluding confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court;
>
> (2) in a substance abuse treatment facility operated by the Texas Department of Criminal Justice under Section 493.009, Government Code, or another court-ordered residential program or facility as a condition of deferred adjudication community supervision granted in the case if the defendant successfully completes the treatment program at that facility; or
>
> (3) confined in a mental health facility or residential care facility as described by Article 46B.009.

TEX. CODE CRIM. PROC. ANN. art. 42.03, § 2(a) (emphasis added).

Article 42.03 entitles a defendant to credit for the time the defendant is incarcerated as to the case in which he is ultimately tried and convicted. *See Collins v. State*, 318 S.W.3d 471, 473 (Tex. App.—Amarillo 2010, pet. denied) ("[T]he plain wording of the provision mandates that the defendant receive credit for the time spent jailed before his conviction. But, of import is the phrase 'for the case'

[2] Article 46B.009 concerns credit for confinement resulting from proceedings to determine competency to stand trial and is not applicable to this matter. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.009.

appearing in the statute. From its location in the edict, the credit at issue relates not just to any time the defendant spent incarcerated before conviction. Rather, it is the time one is incarcerated for the case in which he is ultimately tried and convicted."); *see also Benefield v. State*, No. 02-14-00099-CR, 2015 WL 4606273, at *8 (Tex. App.—Fort Worth July 30, 2015, no pet.) (mem. op., not designated for publication) (opinion on reh'g) (in a conviction for a charge of continuous violence against the family, the defendant was not entitled to credit for prior incarceration under a charge of injury to a child); *Blackerby v. State*, No. 03-11-00272-CR, 2012 WL 6097306, at **4–5 (Tex. App.—Austin Dec. 5, 2012, no pet.) (mem. op., not designated for publication) (appellant not entitled to jail-time credit on intoxication manslaughter conviction for time spent in jail after arrest for felony DWI when not indicted for intoxication manslaughter until later date: "Because the State is not barred by double jeopardy from bringing the two charges independently even though they arose from the same facts, the time appellant spent in jail on the DWI charge was not for the same 'case' as the later-filed intoxication manslaughter charge."); *Martinez v. State*, No. 13-04-00085-CR, 2005 WL 1805500, at *3 (Tex. App.—Corpus Christi July 28, 2005, no pet.) (mem. op., not designated for publication) ("A trial court must award credit for time served for the same offense and not time incarcerated pre-trial for independent offenses.") (citing *Ex parte Crossley*, 586 S.W.2d 545, 546 (Tex. Crim. App. 1979)).

> Whenever a defendant can show indisputably that he has been denied jail-time credit for a period of pre-trial incarceration for the identical 'case' for which he was convicted and sentenced, he is entitled to relief from the convicting court in the form of a judgment *nunc pro tunc* and, failing that, by writ of mandamus in the court of appeals.

In re Brown, 343 S.W.3d 803, 805 (Tex. Crim. App. 2011) (orig. proceeding) (per curiam). However, the Court of Criminal Appeals has held that article 42.03 requires that the trial court credit a defendant's sentence only for time spent in jail between arrest and confinement and subsequent sentence *on a particular charge*. *See Ex parte Crossley*, 586 S.W.2d at 546 ("On the face of it, the applicant was not confined in the same cause for which he was sentenced."); *see also Collins*, 318 S.W.3d at 473; *Blackerby*, 2012 WL 6097306, at *4.

In this case, the two clerk's records reflect that appellant was arrested on August 16, 2018 in causes 05-19-00230-CR and 05-19-00231-CR, according to the docket sheets in both cases, the officer's return on the arrest warrant, and the "Credit for Time Served" documents prepared by the Grayson County Sheriff's Office. The clerk's record in 05-18-00233-CR shows appellant was arrested on May 1, 2018. He bonded on May 11, 2018 and was back in custody pursuant to an article 17.16 surrender of the bond by the bondsman[3] on August 16, 2018, according to the bond

[3] "Under the Texas Code of Criminal Procedure, the surety can end its financial liability on the bond by physically surrendering the principal back into the custody of the authorities, or appropriately notifying the authorities where the principal is otherwise incarcerated, or filing an affidavit stating the cause of surrender with information sufficient to allow for an arrest warrant to be issued." *Seneca Ins. Co. v. Ross*, 507 S.W.3d 798, 802 (Tex. App.—El Paso 2015, no pet.) (citing TEX. CODE CRIM. PROC. ANN. arts. 17.16(a)(1), (2) and 17.19(a)).

paperwork and the article 17.16 affidavit. The docket sheets and "Credit for Time Served" documents in 05-19-00229-CR and 05-19-00232-CR show an arrest date of November 20, 2018 in both cases, but there is no record in either case of an arrest warrant having been issued.

Appellant argues he is entitled to credit for the same time served in all five cases despite the absence of an arrest warrant in 05-19-00229-CR and 05-19-00232-CR. Appellant cites to general principles of statutory construction, arguing that, according to its plain meaning, article 42.03 does not require a warrant for purposes of establishing whether a defendant has been arrested for a case. He also argues that because a formal warrant is not a perquisite, his jail time credits in 05-19-00229-CR and 05-19-00232-CR should be modified to show a total of 176 days of jail time credit instead of the 79 days ordered by the court—based on continuous incarceration from his arrest on August 15, 2018 to the date of sentencing in all five cases. Appellant bases that arrest date on the PSI report, which references an August 15, 2018 date of arrest.

However, the clerk's records in 05-19-00229-CR and 05-19-00232-CR show a November 20, 2018 date of arrest—not August 15, 2018. There is no corroboration in the records in those cases of the August 15, 2018 arrest date referenced in the PSI, nor has appellant cited any other authority to support that contention. We have noted before that arrest date information in PSI reports may not be altogether reliable. *See*

Soria v. State, No. 05-03-01198-CR, 2004 WL 1376129, at *2 (Tex. App.—Dallas June 21, 2004, no pet.) (not designated for publication) (judgments in prosecution for aggravated sexual assault of a child would not be reformed to give defendant additional credit for time served based on earlier arrest date in PSI; the defendant provided the information in the PSI and there was no official record of the arrest date available for court's review). Moreover, appellant has cited no authority that would require a trial court to grant credit for time served before a defendant is in custody "for the case." *See* TEX. CODE CRIM. PROC. ANN. art. 42.03, § 2(a). As other courts have explained, the plain meaning of the phrase "for the case" in article 42.03 requires that the time credit relate not just to *any* time a defendant spent incarcerated before conviction, but time he spent incarcerated for the case in which he was ultimately tried and convicted. *See Ex parte Crossley*, 586 S.W.2d at 546; *Collins*, 318 S.W.3d at 473. Based on the records before us, appellant is not entitled to additional jail time credit in causes 05-19-00229-CR and 05-19-00232-CR. Accordingly, we overrule appellant's first issue.

Issue 2: Jail Time Credits

In his second issue, appellant contends he is entitled to an additional day of jail time credit in causes 05-19-00230-CR, 05-19-00231-CR, and 05-18-00233-CR.

The judgments in each case state that sentence was imposed February 7, 2019. In his brief, appellant argues he is entitled to 176 days of jail time credit in causes

05-19-00230-CR and 05-19-00231-CR, rather than the 175 days ordered by the trial court, and 187 days of credit in 05-18-00233-CR instead of the 186 days ordered by the court, because he was arrested on August 15, 2018. Appellant again bases his contention on the August 15, 2018 arrest date referenced in the PSI report.

The clerk's records, however, as we noted before, reflect that appellant was arrested on August 16, 2018 in causes 05-19-00230-CR and 05-19-00231-CR—according to the respective docket sheets, the officer's return on the arrest warrant, and the "Credit for Time Served" documents. The records also show appellant remained in custody until he pleaded guilty on February 7, 2019. In 05-18-00233-CR, he was arrested on May 1, 2018, bonded on May 11, 2018, and (as we noted before) surrendered back into custody by his bondsman on August 16, 2018. There is no corroboration in the records in 05-19-00230-CR, 05-19-00231-CR, or 05-18-00233-CR of the August 15, 2018 arrest date referenced in the PSI report, nor has appellant cited any other support for his contention that he is entitled to an extra day of jail time credit in 05-19-00230-CR, 05-19-00231-CR, or 05-18-00233-CR. We overrule the second issue.

Issue 3: Trial Court's Pronouncement of Sentence

In his third issue, appellant cites to the original reporter's record filed in this case to argue the judgment in cause 05-18-00230-CR should be corrected to reflect the trial court's pronouncement of sentence.

The reporter's record originally indicated that in cause 05-18-00230-CR, appellant was sentenced to four years in prison, not the forty years reflected in the judgment and sentence and the court's docket sheet. But the court reporter submitted a corrected record showing the sentence in 05-18-00230-CR was forty years, just as it is in the other burglary cases. The trial court, based on an order from this Court, made findings of fact that the corrected volume 5, page 87, line 7 of the reporter's record accurately reflected the proceedings in the trial court sentencing the appellant to forty years in prison in cause 05-18-00230-CR. There is no conflict between the oral pronouncement of sentence and the written judgment and sentence; therefore, there is no error in the judgment for us to reform. We overrule appellant's third issue.

Issue 4: Duplicative Court Costs

In his fourth issue, appellant correctly points out that the judgments in all five cases charge court costs, and that four of the judgments should be reformed pursuant to article 102.073 of the Texas Code of Criminal Procedure to eliminate duplicative court costs. The State agrees.

"In a single criminal action in which the defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant." TEX. CODE CRIM. PROC. ANN. art. 102.073(a). For purposes of this rule, a person convicted of more than one offense

in the same trial is convicted of those offenses in a "single criminal action." *Hurlburt v. State*, 506 S.W.3d 199, 201–04 (Tex. App.—Waco 2016, no pet.); *see also Burton v. State*, No. 05-18-00608-CR, 2019 WL 3543580, at *3 (Tex. App.—Dallas Aug. 5, 2019) (mem. op., not designated for publication). When two or more convictions arise from a single criminal action, "each court cost or fee the amount of which is determined according to the category of offense must be assessed using the highest category of offense that is possible based on the defendant's convictions." TEX. CODE CRIM. PROC. ANN. art. 102.073(b). A claim challenging the bases of assessed court costs can be raised for the first time on appeal. *Johnson v. State*, 423 S.W.3d 385, 390–91 (Tex. Crim. App. 2014); *Burton*, 2019 WL 3543580, at *3. Moreover, when the convictions are for the same category of offense and the costs are the same, court costs should be based on the lowest trial court cause number. *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dism'd, improvidently granted*, No. PD-0947-16, 2017 WL 1493488 (Tex. Crim. App. Apr. 26, 2017) (not designated for publication); *Duchesneau v. State*, Nos. 02-18-00321-CR, 02-18-00322-CR, 2019 WL 2455619, at *7 (Tex. App.—Fort Worth June 13, 2019, pet. ref'd) (mem. op., not designated for publication).

The record shows all five indictments were tried in a single proceeding, and thus fall within a single criminal action. *See Burton*, 2019 WL 3543580, at *3 (citing *Hurlburt*, 506 S.W.3d at 201–04). Also, the costs of court are identical ($226) in

four of the five cases (05-19-00229-CR, 05-19-00230-CR, 05-19-00231-CR, and 05-19-00232-CR), and appellant's convictions in all of the cases except 05-19-00233-CR (unauthorized use of a motor vehicle) are for burglary of a habitation—a second-degree felony enhanced to a first-degree felony. Furthermore, court costs cannot be assessed in 05-19-00233-CR because it is a state jail felony and thus falls under a lower offense category of offense.

This Court has the power to modify an incorrect judgment to make the record speak the truth when we have the necessary information before us to do so. *See* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). This includes modifying a judgment to eliminate duplicative court costs. *See Burton*, 2019 WL 3543580, at *3; *Rubio v. State*, No. 05–17–00621–CR, 2018 WL 3424362, at *3 (Tex. App.—Dallas July 16, 2018, pet. ref'd) (mem. op, not designated for publication). Therefore, the judgments in causes 05-19-00230-CR, 05-19-00231-CR, 05-19-00232-CR, and 05-19-00233-CR will be modified to remove the duplicative court costs.

As modified, we affirm the trial court's judgments.

/Lana Myers/
LANA MYERS
JUSTICE

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TEX. R. APP. P. 47.2(b)
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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TYRONTAE LOMON COOPER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00229-CR V.	Trial Court Cause No. 069973. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TYRONTAE LOMON COOPER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00230-CR V.	Trial Court Cause No. 069975. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

***** The part of the judgment that reads "Court Costs" should be changed from "$226" to "N/A."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TYRONTAE LOMON COOPER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00231-CR V.	Trial Court Cause No. 069976. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

***** The part of the judgment that reads "Court Costs" should be changed from "$226" to "N/A."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TYRONTAE LOMON COOPER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00232-CR V.	Trial Court Cause No. 069977. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

> * The part of the judgment that reads "Court Costs" should be changed from "$226" to "N/A."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TYRONTAE LOMON COOPER, Appellant	On Appeal from the 15th Judicial District Court, Grayson County, Texas
No. 05-19-00233-CR V.	Trial Court Cause No. 069796. Opinion delivered by Justice Myers.
THE STATE OF TEXAS, Appellee	Justices Partida-Kipness and Reichek participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

***** The part of the judgment that reads "Court Costs" should be changed from "$246" to "N/A."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 29th day of June, 2020.