April 16, 2014

PROBATION REVOCATION
ABILITY TO PAY
COURT COSTS ETC.

Gipson v. State, No. PD-0377-13, publish, Keller, On appellant's plea of true, the TCT revoked appellant's community supervision for failing to pay his fine and various court-assessed fees. TEX. CODE CRIM. PROC.42.12 21 (c)[1] does not apply to fines. Fines are not specifically mentioned and could have been also. Fines are imposed as a punishment—like incarceration. By contrast, fees and costs serve a remedial function by compensating the State for costs of the criminal justice system. Not absurd for the legislature to distinguish between punitive and remedial monetary sanctions for the purpose of determining whether the State has the burden to show the defendants ability to pay. Therefore the State does not have the burden to show ability to pay before revoking probation for non-payment of fines. Beautiful Alcala concurrence (joined by Cochran) the Federal Constitutional issue was not preserved and would most likely be outcome determinative if it had been: Although appellant presented no objections that he was unable to pay his fine and fees, his sufficiency-of-the-evidence challenge under the ability-to-pay statute may be addressed on appeal, but his complaint under the federal Constitution may not. No evidence in this record shows that the sentencing court inquired into the reasons for appellant's failure to pay, and therefore, had appellant's complaint under the federal Constitution[2] been preserved, it would appear that relief should be granted to him and his conviction be reversed. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).The federal Constitution places the burden on the trial judge to inquire into the reasons for failure to pay and permits incarceration when alternate measures are not adequate to meet the State's interests in punishment and deterrence. The federal Constitution may ultimately provide greater relief because it requires a judge to consider alternatives to imprisonment if he finds that a defendant is unable to pay. "IT WOULD BE PRUDENT FOR A DEFENDANT WHO IS FACING REVOCATION-SOLELY FOR MONETARY OBLIGATIONS . . .TO ASSERT AN OBJECTION UNDER THE FEDERAL CONSTITUTION . . "

SUFFICIENCY OF EVIDENCE VALUE LADDER
(or the TCCA loves to reverse the 8th Court)

Campbell v. State, Hervey, publish, 4/16/14, Sufficiency of evidence to support the value on a criminal mischief conviction with pecuniary loss over $200K. Also an arson conviction which was not challenged. Arby's employee burned the restaurant to the ground.[3] The owner testified that the insurance company valued the loss at 400K, cost to rebuild one mil. An owners testimony estimating the value of the property is generally sufficient. An insurance adjuster's

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[1] *" . . .In a community supervision revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge .*

[2] *U.S. Const. amend. XIV.*

[3] *He got tired of the horsey sauce.*

testimony about payment to the owner is sufficient to prove the cost of repair. An unsupported lay opinion as to the value of damage is insufficient to prove the cost of repair, but the State need not present expert testimony to prove the cost of repairing the property. We presume that an owner's testimony estimating the value of his property is either estimating the purchase price of the property or the cost to replace the property in terms of the fair market value, even though the owner may not use the specific terms, "market value", "replacement value", or "purchase price." Held, owners testimony to place damage over 200K not unsupported lay opinion because based on insurance pay out. See *Holz v. State,* 320 S. W. 3d 344, 345, 349 (Tex. Crim. App. 2010), *Elomary v. State*, 796 S. W. 2d 191 (Tex. Crim. App. 1990); *English v. State*, 171 S. W. 3d 625, 629 (Tex. App. –Houston [14th Dist} 2005, no pet). Evidence found to be sufficient, 8th Court's holding to the contrary flipped and conviction re-instated. Janet's thoughts: nothing remarkable about this, this is the law but I am loving that footnote wherein the State is spanked for citing unpublished opinions which they are want to do.

MNT

Exculpatory evidence

State v. Thomas, NO. PD-0211-13, Keller, unanimous, publish. A MNT grant can only be supported by exculpatory evidence by way of an IAC claim or a claim that the evidence is newly discovered but unavailable at trial. Recites all the law that we know that a TCT should be affirmed if the defendant articulated a valid legal ground in the MNT, produced evidence to support same and showed prejudice. *State v. Herndon,* 215 S. W. 3d 901, 906 (Tex. Crim. App. 2007).

THE EVER POPULAR REMAND LIST

This section involves issues that the TCCA is ordering remanded to the habeas court to see if a record can be developed to flip a conviction

- *Whether, when the TCT signs the motion to adjudicate and directs the district clerk to issue capias within the period of community supervision, but the motion is file-stamped by the clerk and the pre-revocation warrant issued after the expiration of the period of community supervision, the TCT retains jurisdiction to proceed to adjudication under TCCP 42.12 section 5 (h).*
- *The following are all IAC claims:*
  - *Failure to investigate mental health history*
  - *Allowing client to testify without investigating clients mental health history/criminal record and failing to advise properly of advantages/disadvantages of taking the stand*
  - *Failed to investigate medical/psychological history*
  - *Coerced GP*
  - *Failed to investigate CW recantation*
  - *Appellate counsel coerced him into waiving direct appeal and waiving right to habeas*
  - *Whether it was clear from federal case law that applicant's conviction was an "aggravated felony" for deportation purposes*