

COURT OF CRIMINAL APPEALS OF TEXAS

Tucker v. State

No. PD-1059-24 · No. PD-1059-24 · Decided February 12, 2026

SUMMARY

The Texas Court of Criminal Appeals reversed the Third Court of Appeals and remanded the case to the trial court to modify the judgment to include Texas Penal Code sections 22.021(a)(2)(B) and (f)(1) in the statute-for-offense field. The court relied on the parties' agreement and did not decide whether subsection (f)(1), concerning victims under six years old, was required to appear in that specific judgment field. Judge Newell concurred, while Judge Yeary dissented from both the decision to avoid the legal issue and the remand to the trial court.

OPINION

CONCURRING OPINION.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS NO. PD-1059-24 MICHAEL TUCKER, APPELLANT v. THE STATE OF TEXAS ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TRAVIS COUNTY NEWELL, J., filed a concurring opinion. There is nothing wrong with the judgment in this case. Article 42.01 of the Texas Code of Criminal Procedure sets out the requisites for judgments in a criminal case.¹ The judgment in this case complies with that statute.

Specific to 1 Tex. Code Crim. Proc. Ann. art. 42.01. Tucker Concurring — 2 the ground for review, the judgment recites the offense for which Appellant was convicted, and that the victim of the offense was under six years old.

The judgment even uses the felony judgment form promulgated by the Office of Court Administration (OCA).² As near as I can tell, there is no legal requirement that the "Statute for Offense" box on the felony judgment form require more information than the trial court entered. Neither is there any legal requirement that the "Offense for Which Defendant Convicted" box on the felony judgment specify the age of the victim of the offense.

While it may be good practice to include this information in those particular boxes, I remain skeptical that the trial court was required to do so. I acknowledge that OCA has promulgated "published guidance" entitled "TIPS FOR AVOIDING MOST COMMON MISTAKES". This guidance is certainly not controlling. So I do not see how there was any "error" legal or clerical in the way the trial court filled out the judgment form.

The absence of this information does not render the conviction void or alter the applicable punishment 2 Tex. Code Crim. Proc. Ann., art. 42.01, sec. 4 (“The Office of Court Administration of the Texas Judicial System shall promulgate a standardized felony judgment form that conforms to the requirements of Section 1 of this article. A court entering a felony judgment shall use the form promulgated under this section.”).

Tucker Concurring — 3 range or even affect parole eligibility. “It doesn’t look right” isn’t a legal basis for a new judgment. And if it is, what’s next? Fonts? This is why I think there is only a “legal” rather than a “clerical” issue; a court would first have to decide whether there is a legal requirement that the information be placed in the particular box before it could be said to be clerical.

A judgment nunc pro tunc is an appropriate avenue to make a correction when the trial court’s records do not mirror the judgment that was rendered.³ But the judgment rendered in this case does mirror the judgment pronounced. There is no credible argument that the notations the State requests are necessary to make the judgment in this case match the judgment that was pronounced.

⁴ Everyone assumes that these additional notations are legally required but they simply are not. That’s why I believe we should leave policing style issues regarding judgments to the trial courts. As a legal error, this falls into the category of “unassigned error.” As we have explained previously, reviewing courts cannot consider “unassigned error” that is not preserved in the trial court.

⁵ Arguably we ³ See, e.g., *Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007). ⁴ *Blanton v. State*, 369 S.W.3d 894, 897-98 (Tex. Crim. App. 2012) (“The purpose of a nunc pro tunc judgment is to provide a method for trial courts to correct the record when there is a discrepancy between the judgment as pronounced in court and the judgment reflected in the record.”).

⁵ See *Pena v. State*, 191 S.W.3d 133, 136 (Tex. Crim. App. 2006) (reaffirming that appellate courts are free to review “unassigned error” - a claim that was preserved in the trial below but was not Tucker Concurring — 4 should hold that the State failed to preserve error regarding the notations in the judgment.

However, Appellant’s concession that the judgment needs to be fixed waives any possible complaint about this Court’s correction of the judgment despite a lack of preservation. Given that concession, I join the Court’s correction of the judgment in this case. At some point a court will have to decide the legal issue of whether these notations are legally required.

As mentioned above, I believe we should let that happen in the trial courts. Otherwise, we are signing this Court and the courts of appeals up to answer OCA’s judgment tipline. With these thoughts, I concur. Filed: February 12, 2026 Do Not Publish raised on appeal); see also *Ford v.*

State, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009) (noting that a court of appeals should review preservation of error on its own motion, but if it does not do so expressly, the court of criminal appeals can and should do so when confronted with a preservation issue).

PER CURIAM.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS NO. PD-1059-24 MICHAEL TUCKER, Appellant v. THE STATE OF TEXAS ON STATE’S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TRAVIS COUNTY SCHENCK, P.J., delivered the opinion of the Court in which RICHARDSON, NEWELL, KEEL, and MCCLURE, JJ., joined. NEWELL, J., filed a concurring opinion. FINLEY and PARKER, JJ., concurred.

YEARY, J., filed a dissenting opinion. Walker, J., dissented. OPINION TUCKER–2 Appellant, Michael Tucker, was convicted under a predecessor statute of super-aggravated sexual assault of a child, among other offenses.

The minimum term of confinement was twenty-five years, and Appellant was ineligible for parole because the victim was under six years old at the time of the offense. 1 Appellant challenged the sufficiency of the evidence of one of his other convictions. *Tucker v. State*, 706 S.W.3d 379, 387 (Tex. App.—Austin 2024) (op. on reh’g) (en banc). While the case was pending at the court of appeals, the State requested a judgment nunc pro tunc to reflect Appellant’s victim was under six years old at the time of the offense by adding (f)(1) as a subsection in the “Statute for Offense” box.

2 Id. at 390. The court of appeals held there was no error in the judgment to modify because Section 22.021(f)(1) is not an element of the offense but a punishment issue. 3 Id. 1 See TEX. PENAL CODE § 22.021(a)(2)(B), (f)(1) (2017); TEX. GOV’T CODE § 508.145(a)(4) (2017).

In 2025, the legislature amended Section 22.021(f)(1) and changed the age from under six years old to under ten years old. Act of May 27, 2025, 89th Leg., R.S., ch. 557, § 21, sec. 22.021(f)(1), 2025 TEX. SESS. LAW SERV. 1313, 1323 (codified at TEX. PENAL CODE § 22.021(f)(1)). 2 The trial court did not have jurisdiction to enter a nunc pro tunc judgment because the case was on appeal.

See TEX. R. APP. P. 25.2(g) (“Once the record has been filed in the appellate court, all further proceedings in the trial court – except as provided otherwise by law or by these rules – will be suspended until the trial court receives the appellate-court mandate.”). 3 The judgment includes a reference to the victim being under six years old at the time of the offense, but it is in the sex-offender registration part of the judgment.

TUCKER–3 The State filed a petition for discretionary review challenging the denial of its request for a judgment nunc pro tunc, which we granted. After the court of appeals decided this case and

after we granted review, this Court held the under- six-years-old provision is an element of the offense. See *Gutierrez v. State*, 710 S.W.3d 804, 809 (Tex. Crim. App.

2025). The parties now agree the State is entitled to relief. Given Appellant’s concession, we need not decide whether subsection (f)(1) must be included in the judgment’s “Statute for Offense” box. We reverse the court of appeals’s judgment, remand the cause to the trial court, and order the trial court to modify the judgment of conviction for Count I in appellate cause number 03-22-00697-CR (trial court cause number D-1-DC-21- 904045) to show “PC 22.021(a)(2)(B), (f)(1)” in the “Statute for Offense” box.

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DISSENTING OPINION.

In the Court of Criminal Appeals of Texas ===== No. PD-1059-24
===== MICHAEL TUCKER, Appellant v. THE STATE OF TEXAS
===== On State’s Petition for
Discretionary Review From the Third Court of Appeals Travis County
===== YEARY, J., filed a
dissenting opinion. I have two problems with the Court’s opinion that prevent me from joining it.

First, I disagree that we can avoid deciding “whether the TUCKER – 2 notation [of the complete statute the defendant has been convicted of violating, including every applicable subsection] must be included [on the line provided for that information by the Office of Court Administration’s form for] the judgment of conviction[.]” Majority Opinion at 3.

The trial court’s judgment in this case reflects, in the field provided for what it calls “Statute for Offense[.]” that Appellant committed an offense under Section 22.021(a)(2)(B), but no reference is made there to Subsection (f)(1), at least not on that line. Subsection (f)(1), at the time this offense was committed, provided that the minimum term of confinement for an offense committed under Section 22.021 would be increased to “25 years if” the victim was “under six years of age at the time the offense [was] committed[.]” See former TEX. PENAL CODE § 22.021(f)(1) (amended by Acts 2025, 89th Leg., ch. 557 (H.B.

1422), § 21, eff. Sept. 1, 2025). And, indeed, the third page of the trial court’s judgment in this case affirmatively reflected, underneath a heading described as “Execution of Sentence[.]” that the trial court made a special finding that, at the time of the offense, the child victim was under six years old. So, it is not as though the judgment in this cause wholly failed to reflect a finding on the age of the victim.

Our recent decision in *Gutierrez v. State*, 710 S.W.3d 804 (Tex. Crim. App. 2025), complicates matters somewhat because, there, this Court decided that Subsection (f)(1) “operates more as an

element of a TUCKER – 3 super aggravated offense, rather than a [mere] punishment issue.” 710 S.W.3d at 809. 1 And Article 42.01, Sec. 1(13) demands that a judgment “shall reflect”... “[t]he offense for which the defendant was convicted[.]” TEX. CODE CRIM.

PROC. art. 42.01, §1(13). So, at least arguably, because this Court has said that Subsection (f)(1) “operates more as an element of a super aggravated offense,” it should have been included on the line of the judgment announcing the “Statute for Offense[.]” But the Court now seems to say we can simply avoid resolving that issue because “[t]he parties now agree” how that issue should be resolved, at least in this case.

Majority Opinion at 3. But that is, in my view, manifestly not so. Decisions made by courts are an exercise of the judicial power. Judges exercise the judicial power; the parties to litigation do not. This Court has said before that we “must still independently examine [an] error confessed because our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.” *Estrada v. State*, 313 S.W.3d 274, 286 (Tex.

Crim. App. 2010) (internal quotation marks and citation to authority omitted). Second, I cannot join the Court’s ultimate disposition of the case. I do not understand the point of remanding this cause to the trial court 1 I joined most of the Court’s opinion in *Gutierrez*, but I did not join that part of the Court’s opinion that contained this quote. TUCKER – 4 to modify the judgment of conviction.

It seems to me this is the least preferable of three alternative dispositions. First, in light of this Court’s opinion in *Gutierrez v. State*, 710 S.W.3d 804 (Tex. Crim. App. 2025), we could, after pointing out that the part of the court of appeals’ opinion that suggests that Subsection 22.021(f) (1) is not an element of the offense but a punishment issue, simply summarily remand the cause to the court of appeals for further consideration of the issue the Court itself avoids today.

That would be my preferred disposition. Alternatively, since this Court seems to regard the parties’ agreement as dispositive, the Court could simply modify the judgment on its own, under Rule 78.1(b) of the Texas Rules of Appellate Procedure. See TEX. R. APP. P. 78.1(b) (“The Court of Criminal Appeals may... modify the lower court’s judgment and affirm it as modified[.]”).

But the Court does not choose that option. Instead, the Court chooses what to my mind is the least desirable alternative by remanding the cause to the trial court to make a modification that we could make ourselves. I am concerned that this third option runs an unacceptable risk of potentially reigniting the appeal itself.

For these reasons, I respectfully dissent. FILED: February 12, 2026 PUBLISH