FOURTH DIVISION
February 17, 2011

No. 1-09-1526

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 25324
	)	
JOHN McGRATH,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

HELD: Where the General Assembly amended the DUI statute and repeated the language authorizing the imposition of a $1,000 subsequent DUI offense fine, *albeit* under a different section, *ex post facto* concerns are not implicated. The imposition of the fine was authorized at all relevant times, and defendant is entitled to monetary credit against it. The $5 court system fee was improperly assessed because the authorizing statute excludes the offense at bar. The $200 DNA analysis fee was properly assessed whether or not it was previously assessed, and is not subject to presentence custody credit.

Following a jury trial, defendant John McGrath was found guilty of aggravated driving while under the influence of alcohol

(DUI) and sentenced to three years in prison. He was also assessed certain fines and fees. On appeal, he contends that three of the fines and fees assessed against him should be vacated, and that he is entitled to presentence custody credit against the $200 DNA analysis assessment.

The facts underlying defendant's conviction are not in dispute. The evidence adduced at trial showed that during a traffic stop in the early morning hours of August 13, 2006, defendant failed to produce a driver's license and proof of insurance, told the Illinois State Trooper that he was at a party where he drank six beers, and failed two field sobriety tests. In addition, defendant's presentence investigation report indicated that he had a prior DUI conviction.

After the jury found defendant guilty of aggravated DUI, the trial court sentenced him to three years in prison. The court also ordered defendant to pay various fines, fees, and costs, including the subject $1,000 subsequent DUI offense, and the $5 court system and $200 DNA analysis fees, which he now claims must be vacated.

Defendant first contends that section 11-501.01(f) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501.01(f) (West 2008)), authorizing the $1,000 fine for committing a subsequent DUI offense, violates the prohibition against *ex post facto* laws because it did not become effective until June 1, 2008, almost

two years after his offense on August 13, 2006. He thus argues that the $1,000 fine is void and must be vacated.

The State counters that the fine does not violate the prohibition against *ex post facto* laws because it was authorized by section 11-501(j) of the Code (625 ILCS 5/11-501(j) (West 2006)), which was in effect at the time defendant committed the subject offense. The State reasons that the imposition of the fine pursuant to section 11-501.01(f) (625 ILCS 5/11-501.01(f) (West 2008)) did not criminalize an act that was innocent when done or increase the punishment upon conviction. We agree with the State.

The propriety of court-ordered fines and fees presents a question of statutory interpretation which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). This same standard applies to challenges to the constitutionality of statutorily imposed fines and fees. *Price*, 375 Ill. App. 3d at 697.

An *ex post facto* law is retroactive and criminalizes an act that was innocent when done, increases the punishment for a previously committed offense, or makes a conviction more easy to obtain. *People v. Morris*, 394 Ill. App. 3d 678, 680 (2009). The focus of the *ex post facto* inquiry is on whether a legislative change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Fletcher v. Williams*,

179 Ill. 2d 225, 233-34 (1997); *Toia v. People*, 333 Ill. App. 3d 523, 529 (2002).

At the time defendant committed the 2006 offense, section 11-501(j) (625 ILCS 5/11-501(j) (West 2006)) provided that "[i]f the person has been previously convicted of violating subsection (a) [DUI] or a similar provision of a local ordinance, the fine shall be $1,000." Subsequently, in Public Act 95-578 (eff. June 1, 2008) (adding 625 ILCS 5/11-501.01), the General Assembly amended the Code by deleting the language in section 11-501(j) providing for the $1,000 subsequent DUI offense fine and repeated it in section 11-501.01(f). These circumstances do not implicate *ex post facto* concerns because, at all relevant times, statutory authority existed for a $1,000 subsequent DUI offense fine. Compare 625 ILCS 5/11-501(j) (West 2006), with 625 ILCS 5/11-501.01(f) (West 2008).

Where the General Assembly amends a statute, as here, "portions of the old law which are repeated either literally or in substance, are regarded as a continuation of the existing law and not the enactment of new law upon the subject." *People v. Bullard*, 61 Ill. 2d 277, 281 (1975). In construing the amendments to the Code as constituting one law, we regard the language in section 11-501.01(f) (625 ILCS 5/11-501.01(f) (West 2008)), that "[i]f the person has been previously convicted of violating Section 11-501 [DUI] or a similar provision of a local

ordinance, the fine shall be $1,000," as a continuation of the existing law. *Bullard*, 61 Ill. 2d at 281-82. To that end, we find no support for defendant's claim that "former section 11-501(j) *** was repealed by the revisions enacted by Public Act 95-578," thereby rendering the imposition of the $1,000 fine pursuant to section 11-501.01(f) in violation of *ex post facto* principles. The $1,000 fine was properly assessed, and as such (*People v. Gordon*, 378 Ill. App. 3d 626, 641 (2007)), entitles defendant to presentence custody credit (*People v. Diaz*, 377 Ill. App. 3d 339, 351 (2007)).

Defendant next challenges the propriety of the $5 court system fee (55 ILCS 5/5-1101(a) (West 2008)) assessed by the trial court. The State concedes, and we agree, that the court system fee was improperly assessed because this provision applies only upon conviction for a violation of the Illinois Vehicle Code other than section 11-501 (625 ILCS 5/11-501 (West 2006)), at issue here. *People v. Paige*, 378 Ill. App. 3d 95, 104-05 (2007).

Finally, defendant contends that he is entitled to presentence custody credit against the $200 DNA analysis assessment because it is a fine. Alternatively, he argues that the DNA analysis assessment is void because it is a fee that cannot be assessed more than once. Our *de novo* review (*People v. Adair*, No. 1-09-2840, slip op. at 18 (Ill. App. Dec. 10, 2010)), leads us to disagree with defendant on both points.

This court has previously rejected both of these contentions. *People v. Williams*, No. 1-09-1667 (Ill. App. Dec. 2, 2010). In *Williams*, we agreed with the holding in *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006), that the $200 DNA assessment is a fee intended to compensate the State in part for the costs of obtaining DNA analysis for convicted defendants and thus the charge is not subject to presentence custody credit. *Williams*, No. 1-09-1667, slip op. at 12.

We also observed that the DNA sampling statute (730 ILCS 5/5-4-3(a),(j) (West 2008)) does not limit the taking of genetic samples or the assessment of $200 to a single occurrence, and recognized circumstances that would necessitate taking another sample from defendant. *Williams*, No. 1-09-1667, slip op. at 12, and cases cited therein. We find no reason to depart from our previous determinations, and likewise conclude that the $200 DNA analysis fee, for which presentence custody credit is not authorized, was properly assessed against defendant, whether or not it was previously assessed. *Williams*, No. 1-09-1667, slip op. at 12.

For the reasons stated, we vacate the $5 court system fee; amend the fines, fees, and costs order to reflect a monetary credit toward the $1,000 subsequent DUI offense fine for the 75 days defendant spent in presentence incarceration; and affirm the

judgment of the circuit court of Cook County in all other respects.

Affirmed as modified.