

No. 1-09-1726

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).

FOURTH DIVISION
June 30, 2011

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 1514
)	
MELVIN RIGGS,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

O R D E R

Held: Where a bright-line rule of reversal is not needed to ensure that trial courts comply with Rule 431(b), the trial court's judgment was affirmed; where defendant was not properly assessed various fines and fees, and was entitled to pre-sentence incarceration credit to offset certain fines, his sentence was modified.

Following a jury trial, defendant Melvin Riggs was convicted of two counts of aggravated criminal sexual assault and sentenced to consecutive prison terms of 10 and 8 years. On appeal, defendant contends that he should receive a new trial because the trial court violated Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection. Defendant also maintains that the trial court improperly assessed various fines and fees against him. We affirm as modified.

Defendant's convictions arose from an incident on the evening of August 8, 2005, when he drove the victim, Joyce Jennings, to a vacant parking lot in the area of Clark Street and Webster Avenue in Chicago and sexually assaulted her. Defendant does not raise any issue regarding the evidence, but contests the propriety of the trial court's admonitions to the potential jurors during jury selection in August 2008 under Rule 431(b).

At the outset of jury selection, the trial court admonished the prospective jurors that defendant is presumed innocent of the charges before him, the State has the burden of proving defendant guilty beyond a reasonable doubt, defendant has no obligation to testify on his own behalf or call any other witnesses in his defense, and the fact that defendant does not testify must not be considered in any way in arriving at the verdict. During

individual questioning, the trial court asked each juror whether he or she agreed with the fact that defendant is presumed innocent and that the State must prove him guilty beyond a reasonable doubt. The trial court did not ask the prospective jurors whether they accepted or understood that defendant is not required to offer any evidence on his own behalf, or that his failure to testify cannot be held against him.

Rule 431(b) requires the trial court to ask potential jurors if they understand and accept the following four principles: (1) the defendant is presumed innocent of the charges against him; (2) the State must prove his guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him. See *People v. Zehr*, 103 Ill. 2d 472, 477 (1984).

On appeal, defendant challenges the completeness of the trial court's admonitions to the jury. Defendant correctly observes that the trial court omitted two of the four principles stated in Rule 431(b). Defendant also complains that although the trial court gave jurors a chance to respond to whether they disagreed with the concepts that a defendant is presumed innocent and that the State must prove him guilty beyond a reasonable

doubt, the court did not ask the jurors if they understood those two principles. Defendant admits that he forfeited this issue.

We review *de novo* a challenge to questioning potential jurors under Supreme Court Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 606 (2010). *Thompson* was decided during the pendency of this appeal and controls the case at bar.

In *Thompson*, as here, when setting out the principles of Rule 431(b), the trial court omitted the principle that the defendant did not have to offer any evidence, and the supreme court found the omission itself constituted noncompliance with Rule 431(b). *Thompson*, 238 Ill. 2d at 607. Accordingly, we must also find that the trial court here violated the rule by omitting the same principle, as well as the principle that the defendant's failure to testify cannot be held against him. See also *People v. Stewart*, 406 Ill. App. 3d 518, 534-535 (2010) (holding that the State failed to comply with Rule 431(b) when it did not question the jurors regarding the principle that defendant's failure to testify could not be held against him). This noncompliance, however, does not excuse defendant's forfeiture of the issue. *Thompson*, 238 Ill. 2d at 612.

Notwithstanding forfeiture, defendant also acknowledges that the supreme court in *Thompson* held that a violation of Rule

431(b) does not constitute structural error or plain error under the substantial rights prong. *Thompson*, 238 Ill. 2d at 611, 614-15. Defendant further recognizes that the supreme court declined to adopt a bright-line rule of reversal for a violation of the rule in order to ensure that the trial courts comply with Rule 431(b). Nevertheless, defendant argues that his case presents a factual distinction from *Thompson* as to the need for a bright-line rule.

The *Thompson* court expressly declined to adopt a bright-line rule of reversal when a trial court fails to comply with the amended version of Rule 431(b). *Thompson*, 238 Ill. 2d at 615-16. The amendment put the responsibility of articulating the rule's four principles on the trial court rather than leaving it to the discretion of counsel. The supreme court observed that the amended version of the rule had only been in effect for about two weeks before the jury was selected in *Thompson* and concluded that the drastic step of adopting a bright-line rule of reversal was not necessary. *Thompson*, 238 Ill. 2d at 616. Defendant notes that unlike the timing in *Thompson*, his jury was selected over a year after the amended version of Rule 431(b) was effective and, thus, claims that a bright-line rule of reversal is needed to ensure that trial courts comply. Contrary to defendant's

argument regarding the timing of the rule's amendment, the supreme court specifically held that it would "not impose automatic reversal for every violation of Rule 431(b) simply to send a message to our trial court to comply with the amended rule." *Thompson*, 238 Ill. 2d at 616. Thus, we will not do so here.

The remaining issues concern the monetary assessments against defendant which totaled \$1,380. We modify the amount for the reasons that follow.

First, defendant and the State correctly agree that the \$25 traffic court supervision fee must be vacated because this fee can only be assessed on a person who "receives a disposition of court supervision for any violation of this [Illinois Vehicle] Code." 625 ILCS 5/16-104c (West 2006). Here, defendant was convicted of aggravated criminal sexual assault and, therefore, we vacate this \$25 fee.

Second, defendant and the State correctly agree that two assessments (a \$30 children's advocacy fee and a \$500 sex offense fine) constitute fines and must be vacated because they were not in effect until 2008, *i.e.*, after the subject crimes were committed in 2005. The *ex post facto* clauses in the United States and Illinois Constitutions forbid retroactive application

of a law that inflicts greater punishment than did the law that was in effect at the time the offense was committed. *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004). The prohibition against *ex post facto* laws applies only to laws that are punitive in nature, such as fines, but does not apply to costs, which are compensatory. *People v. Bishop*, 354 Ill. App. 3d 549, 561-62 (2004). The \$30 children's advocacy fee constitutes a fine (*People v. McNeal*, 405 Ill. App. 3d 647, 680-81 (2010)), and was not effective until January 1, 2008 (55 ILCS 5/5-1101(f-5) (West 2008)). The \$500 sex offender fine constitutes a fine by the plain language of the statute and was not effective until June 1, 2008. 730 ILCS 5/5-9-1.14 (West 2008), now codified at 730 ILCS 5/5-9-1.15 (West 2008) (the renumbering to 1.15 occurred in August 2008 because this provision originally was mistakenly given the same number (1.14) as the pre-existing child pornography fine). Accordingly, we vacate both the fines.

Likewise, we vacate the \$5 drug court assessment that was imposed pursuant to section 5-1101(f) of the Counties Code (55 ILCS 5/5-1101(f) (West 2006)). In this appeal, defendant seeks to have this \$5 charge offset as a part of pre-sentencing custody credit and the State makes no mention of this charge in its brief. However, like the two above-vacated charges, this \$5 drug

court assessment is a fine (see *People v. Graves*, 235 Ill. 2d 244, 253-54 (2009)); *People v. Sulton*, 395 Ill. App. 3d 186, 193 (2009)) and was not effective until 2006, which is after the 2005 crimes at issue. Accordingly, the imposition of this \$5 drug court charge violates the prohibition against *ex post facto* laws and is vacated.

Next, defendant contests the \$200 DNA analysis fee, arguing that it cannot be imposed because he was assessed the fee upon a prior conviction. Defendant points to the investigative report generated by the circuit court adult probation department which shows that he was convicted of a felony in 2002. Defendant argues the fee now imposed is duplicative.

The supreme court in *People v. Marshall*, No. 110765, slip op. at 15 (May 19, 2011), recently held that section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)), authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee, only once where that defendant is not currently registered in the DNA database. Here, the records, of which we may take judicial notice (*People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010)), reflect that defendant is already registered in the DNA database. See *People v. Leach*, No. 1-09-0339, slip op.

at 14-15 (May 31, 2011) (holding that to vacate a DNA charge under *Marshall*, a defendant need only show that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998). We therefore agree with defendant that the \$200 DNA analysis fee is duplicative and must be vacated. See *Marshall*, No. 110765, slip op. at 15.

Defendant finally contends, and the State agrees, that he spent time in custody before sentencing and, therefore, is entitled to a \$5 per-day custody credit to offset fines imposed by the trial court pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/110-14(a) (West 2008). Here, the fines imposed against defendant included a \$10 mental health court assessment, and a \$5 youth diversion assessment. 55 ILCS 5/5-1101(d-5), (e) (West 2008); *Graves*, 235 Ill. 2d at 253-54. Because fines are subject to reduction (*People v. Jones*, 223 Ill. 2d 569, 587-99 (2006)), defendant is entitled to a pre-sentence incarceration credit to offset them. The mittimus states, and the parties agree, that defendant served 1,269 days in pre-sentencing custody.

For the foregoing reasons, we vacate the \$25 traffic court supervision fee, the \$30 children's advocacy assessment, the \$500 sex offense fine, the \$5 drug court assessment, and the \$200 DNA

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analysis fee; find that defendant is entitled to a \$5 per-day custody credit to offset the \$10 mental health court assessment and the \$5 youth diversion assessment; and affirm the judgment in all other respects.

Affirmed as modified.