

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
May 5, 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,

1-09-1726

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

1-09-1726

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*, No. 1-08-3092, slip op. at 25 (Ill. App. Dec. 10, 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

1-09-1726

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

1-09-1726

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

1-09-1726

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. This court, however, has determined that the DNA analysis fee may be assessed for any qualifying convictions or dispositions, which by the statute (730 ILCS 5/5-4-3(a),(j) (West 2008)), include felony offenses, regardless of whether the fee was previously assessed. *People v. Anthony*, No. 1-09-1528, slip op. at 13 (Ill. App. Mar. 31, 2011); *People v. Hubbard*, 404 Ill. App. 3d 100, 102-03 (2010); *People v. Grayer*, 403 Ill. App. 3d 797, 801-02; *People v. Marshall*, 402 Ill. App. 3d 1080, 1083 (2010), *appeal allowed*, No. 110765 (September 29, 2010); *contra People v. Rigsby*, 405 Ill. App. 3d 916 (2010).

In *Hubbard*, *Grayer*, and *Marshall*, we noted that the statute does not expressly require a fee for every felony conviction, but also does not expressly limit the taking of DNA samples or the assessment of the analysis fee to a single instance. *Hubbard*, 404 Ill. App. 3d at 102; *Grayer*, 403 Ill. App. 3d at 801; *Marshall*, 402 Ill. App. 3d at 1083. We found that the statutory language links assessment of the fee to the defendant's obligation to provide a DNA sample, but rejected the argument

that additional DNA samples would serve no purpose. *Grayer*, 403 Ill. App. 3d at 801, disagreeing with *People v. Willis*, 402 Ill. App. 3d 47, 61 (2010), and *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). This court further found no significant inconvenience in collecting a new DNA sample whenever a defendant is newly convicted of a qualifying offense. *Hubbard*, 404 Ill. App. 3d at 103; *Grayer*, 403 Ill. App. 3d at 801.

We find no reason to depart from our holdings in *Anthony*, *Hubbard*, *Grayer*, and *Marshall*, and thus find that the \$200 DNA analysis fee was properly assessed against defendant because he was convicted of a qualifying felony offense, and because the fee may be imposed regardless of whether it was previously assessed.

In the alternative, defendant contends that the DNA analysis fee is a fine subject to pre-sentencing detention credit. 725 ILCS 5/110-14(a) (West 2008). Defendant cites *People v. Long*, 398 Ill. App. 3d 1028 (4th Dist. 2010), in support of his contention. See also *People v. Folks*, No. 4-09-0579 (Ill. App. 4th Dist. Dec. 28, 2010); *People v. Mingo*, 403 Ill. App. 3d 968 (2nd Dist. 2010), and *People v. Clark*, 404 Ill. App. 3d 141 (2nd Dist. 2010) (following Long). However, this district has found that the DNA analysis fee is "compensatory and a collateral consequence of defendant's conviction," and thus a fee rather

than a fine, so that the credit stated in section 110-14 cannot be applied. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006). In following our first district opinion in *Tolliver*, we agree that the DNA analysis assessment is a fee, and thus find that it is not subject to pre-sentence incarceration credit. See also *Anthony*, No. 1-09-1528, slip op. at 15; *People v. Adair*, No. 1-09-2840, slip op. at 22-23 (Ill. App. Dec. 10, 2010); *People v. Williams*, 405 Ill. App. 3d 958, 966 (2010) (following *Tolliver*).

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.

1-09-1726

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