

2011 IL App (2d) 100027-U
No. 2—10—0027
Order filed August 11, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06—DT—1318
)	
JOSHUA A. SMITH,)	Honorable
)	Robert K. Baderstadt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

Held: (1) Defendant’s \$20 Police Vehicle Fund assessment vacated, which was a fine imposed in violation of *ex post facto* principles; (2) defendant’s assessment for DUI court appearance vacated, as there was no statutory authorization for such an assessment; (3) vacated defendant’s public defender reimbursement fee and remanded for hearing because the trial court had not provided the required notice and hearing on defendant’s ability to pay; (4) defendant awarded a \$10 credit against his fines, to reflect two days in presentencing custody.

¶ 1 Defendant, Joshua A. Smith, appeals from a judgment revoking his supervision and sentencing him to one year of conditional discharge and 180 days in jail. On appeal, defendant argues that: (1) the \$20 “Police Vehicle Fund” assessment must be vacated, because it violates the

constitutional provision against *ex post facto* laws; (2) the \$275 “DUI-Court Appear[ance]” assessment must be vacated, because it was imposed without any statutory basis; (3) the \$100 public defender fee must be vacated, because it was imposed without the required notice and hearing on defendant’s ability to pay; and (4) he is entitled to a \$10 credit against his fines for two days spent in presentencing custody. For the reasons that follow, we vacate the Police Vehicle Fund and DUI-Court Appearance assessments; vacate the \$100 public defender fee and remand for compliance with the statute; and award defendant \$10 credit against his fines.

¶ 2

I. BACKGROUND

¶ 3 On January 30, 2007, defendant entered a negotiated plea of guilty to driving under the influence (625 ILCS 5/11—501(a)(2) (West 2006)). He was sentenced to one year of court supervision and ordered to pay a \$100 public defender fee. In addition, the record indicates that defendant was assessed, *inter alia*, \$25 for the “Police Vehicle Fund” and \$275 for a “DUI Court Appear[ance].” The record further indicates that defendant spent two days in custody.

¶ 4 On October 10, 2007, the State petitioned to revoke defendant’s supervision. An amended petition was filed on January 29, 2008. On May 1, 2009, the trial court revoked defendant’s supervision, entered a judgment of conviction, and sentenced defendant to one year of conditional discharge and 180 days in the McHenry County jail.

¶ 5 Following the denial of his motion to reconsider his sentence, defendant timely appealed.

¶ 6

II. ANALYSIS

¶ 7

A. Police Vehicle Assessment

¶ 8 Defendant first argues that \$20 of the \$25 Police Vehicle Fund assessment should be vacated,¹ because the statute that provides for the assessment was enacted after defendant committed the offense at issue and thus imposition of the assessment violates *ex post facto* principles (see U.S. Const., art. I, §9; Ill. Const. 1970, art. I, §16). The State maintains that the assessment is not subject to the prohibition against *ex post facto* laws and was properly assessed. We note that defendant did not raise the issue in the trial court. However, an unauthorized sentence is void and may be challenged at any time. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *People v. Dalton*, 406 Ill. App. 3d 158, 162 (2010).

¶ 9 “The United States Constitution prohibits both the Congress (U.S. Const., art. I, §9) and the states (U.S. Const., art. I, §10) from enacting *ex post facto* laws.” *People v. Prince*, 371 Ill. App. 3d 878, 880 (2007). “The Illinois Constitution [(Ill. Const. 1970, art. I, §16)] also forbids the enactment of *ex post facto* laws.” *Id.* “[C]riminal law will run afoul of the prohibition against *ex post facto* laws if it is retroactive and disadvantageous to the defendant.” *Id.* “A law disadvantages a defendant if it criminalizes an act that was innocent when done, increases the punishment for a previously committed offense, or alters the rules of evidence by making a conviction more easy to obtain.” *Id.*

¶ 10 The prohibition against *ex post facto* laws applies only to laws that are punitive. Therefore, it does not apply to fees, which are compensatory instead of punitive. See *id.* It does, however, apply to fines, because a fine is a pecuniary punishment imposed as a part of a criminal sentence.

¹Defendant argued in his initial brief that the entire \$25 assessment should be vacated. However, in his reply brief, defendant conceded that \$5 of the amount, which was imposed pursuant to section 16—104c(b) of the Illinois Vehicle Code (625 ILCS 5/16—104c(b) (West Supp. 2007)), was properly assessed. Thus, we will address only his argument concerning the remaining \$20.

Id. The State argues that the Police Vehicle Fund charge, which was assessed under section 16—104c of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/16—104c(a), (b) (West Supp. 2007)), is a fee, because it is levied for participation in court supervision, and thus is not prohibited by *ex post facto* principles. Defendant maintains that the assessment is a fine. We agree with defendant.

¶ 11 As noted by our supreme court: “Broadly speaking, a ‘fine’ is a part of the punishment for a conviction, whereas a ‘fee’ or ‘cost’ seeks to recoup expenses incurred by the state—to ‘compensat[e]’ the state for some expenditure incurred in prosecuting the defendant.” *People v. Jones*, 223 Ill. 2d 569, 582 (2006). The “*central* characteristic which separates a fee from a fine” is whether the charge “seeks to compensate the state for any costs incurred as a result of prosecuting the defendant.” (Emphasis in original.) *Id.* at 600. “A charge is a fee if and only if it is intended to reimburse the state for some cost incurred in defendant’s prosecution.” *Id.*

¶ 12 Section 16—104c of the Vehicle Code provides, in pertinent part, as follows:

“§16—104c. Court supervision fees.

(a) Any person who, after a court appearance in the same matter, receives a disposition of court supervision for a violation of any provision of this Code or similar provision of a local ordinance shall pay an additional fee of \$20, which shall be disbursed as follows:

(1) if an officer of the Department of State Police arrested the person for the violation, the \$20 fee shall be deposited into the State Police Vehicle Fund in the State treasury; or

(2) if an officer of any law enforcement agency in the State other than the Department of State Police arrested the person for the violation, the \$20 fee shall be paid to the law enforcement agency that employed the arresting officer and shall be used for the acquisition or maintenance of police vehicles.” 625 ILCS 5/16—104c (West Supp. 2007).

¶ 13 It is clear from a reading of the statute that the \$20 assessment collected from defendant under section 16—104c(a)(2) of the Vehicle Code is not intended to reimburse the State for some cost incurred in defendant’s prosecution; rather, it is intended to “be used for the acquisition or maintenance of police vehicles.” 625 ILCS 5/16—104c(a)(2) (West Supp. 2007). Thus, the charge is a fine, not a fee. See, e.g., *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010) (although labeled a “fee,” the mental health assessment, which is designated to be placed in a general fund to finance the mental health court, is actually a fine). Because the statute authorizing the \$20 fine was not in effect when defendant committed the offense, imposition of the fine violated *ex post facto* principles. Accordingly, we vacate the fine.

¶ 14 B. DUI Court Appearance Fee

¶ 15 Defendant next argues that the \$275 assessment for a “DUI-Court Appear[ance]” was improper, because it was not authorized by statute. We again note that, although defendant did not raise the issue in the trial court, an unauthorized sentence is void and may be challenged at any time. See *Arna*, 168 Ill. 2d at 113; *Dalton*, 406 Ill. App. 3d at 162.

¶ 16 The State agrees that “there does not appear to be a specific statutory authorization” for the assessment. Nevertheless, the State is “confident that the clerk did not assess this charge without statutory authority” and asks that we remand the case for an explanation of the charge.

¶ 17 As the State has failed to provide us with any authority for this assessment, we vacate the charge outright.

¶ 18 C. Public Defender Fee

¶ 19 Next, defendant argues that the imposition of a \$100 public defender fee was improper, because it was assessed without notice and without a hearing to determine defendant's ability to pay. Defendant asks that we vacate the fee and remand for a hearing on his ability to pay. The State agrees that it was error for the trial court to impose the public defender fee without holding a hearing to determine defendant's ability to pay. Nevertheless, the State argues against vacating the fee, on the ground that this court lacks jurisdiction to consider defendant's claim, because defendant failed to appeal from the order placing him on supervision and because defendant's guilty plea resulted in waiver of any issue pertaining to his original sentence.

¶ 20 We find that we have jurisdiction to consider defendant's claim and that it is not forfeited. "An appeal from proceedings revoking probation is generally limited to issues arising out of the revocation proceedings. [Citation.] Such an appeal does not confer jurisdiction on the reviewing court to review the initial judgment of conviction unless that judgment is void." *People v. Jolliff*, 183 Ill. App. 3d 962, 967 (1989). Here, defendant argues that the imposition of the public defender fee is void because the court failed to comply with the statute authorizing the fee. We agree. Once again, a sentence that does not conform to a statutory requirement is void and may be challenged at any time. *Arna*, 168 Ill. 2d at 113. Therefore, we have jurisdiction to consider defendant's claim, and it is not forfeited. We note that the State's reliance on *People v. Hall*, 55 Ill. App. 3d 341 (1977), is misplaced, because there the court found that the underlying order the defendant sought to challenge was voidable rather than void. See *Hall*, 55 Ill. App. 3d at 343 ("[P]rosecution of a

juvenile in adult criminal proceedings without regard to the transfer provisions set forth in the [Juvenile Court Act] renders the disposition voidable rather than void.”).

¶21 Here, the public defender fee was assessed under section 113—3.1(a) of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/113—3.1(a) (West 2006)), which provides:

“Whenever under either Section 113—3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113—3 of this Code and any other information pertaining to the defendant’s financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court’s own motion or on motion of the State’s Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level.” 725 ILCS 5/113—3.1(a) (West 2006).

¶22 Section 113—3.1(a) requires the trial court to conduct a hearing into the defendant’s financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel. *People v. Love*, 177 Ill. 2d 550, 563 (1997). The hearing is required even where a cash bail bond has been posted, because the existence of a bond is not conclusive evidence of an ability to pay. *Id.* at 560-63. “The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided.” *Id.* at 563.

¶23 “The hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his

ability to pay and other relevant circumstances.” *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (1999). “Notice” includes informing the defendant of the court’s intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard. *Id.* at 704. “Such a hearing is necessary to assure that an order entered under section 113—3.1 complies with due process.” *Id.*

¶ 24 In *Love*, our supreme court determined that principles of forfeiture do not apply when the trial court wholly ignores the statutory procedures under section 113—3.1(a) and orders *sua sponte* that the fee be paid from the defendant’s bail bond without warning to the defendant. *Love*, 177 Ill. 2d at 564. The court reasoned that the hearing required by section 113—3.1(a) is a safeguard to ensure that an order entered under that section meets constitutional standards related to the right to counsel. *Id.* Thus, the issue is not forfeited when a defendant does not raise the matter in the trial court.

¶ 25 Under *Love*, because the fee was entered when the court had not provided notice to defendant and a hearing on his ability to pay, entry of the fee was improper. Thus, we vacate the fee and remand for the required notice and hearing on the fee. See *id.* at 565.

¶ 26 We reject defendant’s argument that, because the State did not request a remand, we should vacate the fee outright. In *Dalton*, the case upon which defendant relies, the State specifically requested that the fee be vacated outright. *Dalton*, 406 Ill. App. 3d at 160. We have no similar request by the State here. Therefore, we grant defendant his original request to remand for a hearing.

¶ 27 D. Credit for Time Spent in Presentencing Custody

¶ 28 Last, defendant argues that he is entitled to a \$10 credit against his fines for two days spent in presentencing custody. The State agrees, as do we. Under section 110—14(a) of the Criminal Code (725 ILCS 5/110—14(a) (West 2006)), most defendants are entitled to credits of \$5 per day

for time spent in presentencing custody against their “fines” (unless the law specifically excludes application of the credit to a particular fine). We note that defendant did not apply for the credit in the trial court; however, the credit is mandatory and must be allowed even when a defendant applies for it for the first time in the appellate court. *People v. Woodard*, 175 Ill. 2d 435, 457-58 (1997). Defendant served two days in presentencing custody. Accordingly, he is entitled to \$10 in credit against his fines.

¶ 29

III. CONCLUSION

¶ 30 Based on the foregoing, we vacate the \$20 Police Vehicle Fund and \$275 DUI-Court Appearance assessments; we vacate the \$100 public defender fee and remand for compliance with the statute; and we award defendant a \$10 credit against his fines.

¶ 31 Affirmed in part and vacated in part; cause remanded.