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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—331
)	
JEFFREY A. WAITES,)	Honorable Fernando L. Engelsma,
)	Judge, Presiding.
Defendant-Appellant.)	

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: We vacated defendant's DNA analysis fee, as the record showed that he had given a DNA sample in connection with a prior conviction.

Following a bench trial, defendant, Jeffrey A. Waites, was convicted of three counts of aggravated criminal sexual abuse (720 ILCS 5/12—16(d) (West 2008)) and sentenced to concurrent terms of 13, 7, and 7 years' imprisonment. Following the denial of his motion for reconsideration of his sentence, defendant timely appealed. On appeal, defendant asks that we vacate the \$200 DNA analysis fee imposed by the circuit court clerk, because the record shows that defendant's DNA has already been collected and analyzed in connection with a previous conviction. For the reasons that

follow, we vacate the portion of the trial court’s order directing defendant to submit to DNA testing and pay the fee.

I. BACKGROUND

At the conclusion of defendant’s sentencing hearing, the trial court stated: “I would order DNA, but—I will order it, but it’s probably been accomplished, I think. So DNA will be ordered.” In the written order, the court ordered defendant to “submit to DNA testing and pay \$200 fee if he has not already done so.” The supplemental record includes a copy of the court’s accounts receivable concerning defendant, which indicates that defendant was assessed a \$200 DNA fee. The supplemental record also includes a letter from the Illinois State Police Division of Forensic Services DNA Indexing Laboratory, which indicates that defendant had previously been convicted of aggravated criminal sexual abuse (720 ILCS 5/12—16 (West 2000)), that a DNA sample was taken from defendant in connection with that conviction on December 19, 2000, and that the laboratory received that sample on December 22, 2000. The letter further provides that, from this DNA sample, defendant’s “Profile [was] Obtained.”

II. ANALYSIS

The statute at issue, section 5—4—3(a) of the Unified Code of Corrections (Code), provides that “[a]ny person *** convicted or found guilty of any offense classified as a felony under Illinois law *** shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with the provisions of this Section.” 730 ILCS 5/5—4—3(a) (West 2008). Section 5—4—3(j) then provides that “[a]ny person required by subsection (a) to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping, in addition

to any other disposition, penalty, or fine imposed, shall pay an analysis fee of \$200.” 730 ILCS 5/5—4—3(j) (West 2008).

The State initially confessed error and agreed that the fee should be vacated, based on *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009), where we held that once “a defendant has submitted a DNA sample, requiring additional samples would serve no purpose.” *Evangelista*, 393 Ill. App. 3d at 399. However, the State later moved to withdraw its confession of error and to file a new brief based on recently developed case law. We granted the State’s motion, and both the State and defendant filed new briefs.

In its supplemental brief, the State asks that we reconsider our ruling in *Evangelista* in light of recent appellate court decisions holding that the DNA analysis fee may be assessed upon any qualified conviction or disposition whether or not it was previously assessed. See *People v. Marshall*, 402 Ill. App. 3d 1080, 1083 (2010); *People v. Grayer*, 403 Ill. App. 3d 797, 799-802 (2010); *People v. Hubbard*, 404 Ill. App. 3d 100, 103 (2010); *People v. Bomar*, 405 Ill. App. 3d 139, 148-50 (2010).

In *Marshall*, the Third District rejected *Evangelista* and held that the trial court had statutory authority to order a defendant to submit a DNA sample and to pay a DNA analysis fee even though his DNA was already on file. *Marshall*, 402 Ill. App. 3d at 1083. The reviewing court found that “[n]owhere in the statute did the legislature provide that a convicted felon should be excused from the statute’s mandates if his DNA is already in the database.” *Marshall*, 402 Ill. App. 3d at 1083. In addition, it noted that “[t]he legislature chose the phrase ‘shall pay an analysis fee of \$200’ without consideration as to whether or not an offender’s DNA was already on file.” *Marshall*, 402 Ill. App. 3d at 1083 (quoting 730 ILCS 5/5—4—3(j) (West 2008)).

The First District, in *Grayer* and *Hubbard*, agreed with *Marshall*. The *Grayer* court further emphasized that, had the legislature intended to exempt repeat offenders, the legislature would have written such an exemption into the statute. *Grayer*, 403 Ill. App. 3d at 801. The *Grayer* court stated:

“A cursory examination of the Criminal Code reveals that our legislature is keenly aware of recidivism, with several offenses aggravated by prior convictions. Despite this awareness and willingness to manifest it in statutes, the legislature did not address the issue of successive qualifying convictions in section 5—4—3, either by expressly authorizing or expressly excepting the taking of a second DNA sample or assessment of a second analysis fee upon a second qualifying conviction.” *Grayer*, 403 Ill. App. 3d at 801.

The *Grayer* court went on to reject the defendant’s argument (and our finding in *Evangelista*) that the collection of additional samples would serve no purpose, stating:

“We find no significant inconvenience, much less absurdity or injustice, in the State Police collecting a new DNA sample whenever a defendant is convicted of a felony or other qualifying offense. We readily envision at least two reasonable bases for doing so: a need or desire to have fresh samples, and an ability to subject new samples to new methods of ‘collection, analysis, and categorization’ that result from ‘continuing research and development of new techniques for analysis and genetic marker categorization.’ ” *Grayer*, 403 Ill. App. 3d at 801-02 (quoting 730 ILCS 5/5—4—3(d—5), (k)(3)(D) (West 2008)).

On December 3, 2010, after the State filed its supplemental brief in the present appeal, the First District issued *People v. Rigsby*, 405 Ill. App. 3d 916 (2010), which rejected the reasoning of *Marshall* and *Grayer*. Turning to the tenets of statutory interpretation, the *Rigsby* court found that, because section 5—4—3 of the Code was silent about requiring offenders to provide additional DNA

samples upon every qualifying conviction or requiring payment of additional DNA analysis fees from an offender who had already complied with the statutory requirements, it could look beyond the statutory language to resolve the ambiguity. *Rigsby*, 405 Ill. App. 3d at 917-18. The *Rigsby* court then turned to section 1285.30 of Title 20 of the Administrative Code, which is the implementing regulation for section 5—4—3 of the Code and which discusses the duty of a designated agency, *i.e.*, the county sheriff, Department of Corrections, Department of Juvenile Justice, Department of Human Services, or probation office, to collect the defendant’s DNA sample when he is in or transferred to a facility under that agency’s control, if a sample has not been collected from the defendant previously. See 20 Ill. Adm. Code § 1285.30(c), amended at 31 Ill. Reg. 9249 (eff. June 12, 2007). The court relied on language stating, “ ‘[i]f the qualifying offender has not previously had a sample taken,’ ” to support its conclusion that the agencies charged with administering section 5—4—3 of the Code would not interpret it to require submission of multiple DNA samples. (Emphasis omitted.) *Rigsby*, 405 Ill. App. 3d at 918-19 (quoting 20 Ill. Adm. Code § 1285.30(c), amended at 31 Ill. Reg. 9249 (eff. June 12, 2007)). The court held that “[a] one-time submission into the police DNA database is sufficient to satisfy the purpose of the statute in creating a database of the genetic identities of recidivist criminal offenders, because once an offender’s DNA data is stored in the database, it remains there unless and until the offender’s conviction is reversed based on a finding of actual innocence or he is pardoned based on a finding of actual innocence.” *Rigsby*, 405 Ill. App. 3d at 919 (citing 730 ILCS 5/5—4—3(f—1) (West 2008)).

In the meantime, the Illinois Supreme Court granted leave to appeal in *Marshall*. See *People v. Marshall*, 237 Ill. 2d 577 (2010). On January 27, 2011, at the parties’ request, we entered an order holding the present appeal in abeyance pending the supreme court’s decision in *Marshall*.

On May 19, 2011, the supreme court issued its decision in *Marshall. People v. Marshall*, No. 110765 (Ill. May 19, 2011). The supreme court, agreeing with the *Rigsby* court’s application of “the tenets of statutory interpretation” and “ ‘well-reasoned’ ” analysis, held that section 5—4—3 of the Code 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 where that defendant is not currently registered in the DNA database. *Marshall*, slip op. at 7-15. The supreme court agreed with the *Rigsby* court that the regulations implementing section 5—4—3 of the Code “show an intent to require a single specimen of DNA be taken from each qualified person to create a profile for entry into the DNA database maintained by the Illinois Department of State Police, rather than an intent to require submission of multiple and duplicative DNA samples from an offender who has already submitted samples pursuant to a prior conviction.” *Marshall*, slip op. at 9-10. In addition, the court “reject[ed] the notion mentioned in *Grayer* [citation] that the desire to have fresh samples of DNA justifies requiring the submission of multiple and duplicative samples from an offender who has already satisfied the statute by submitting DNA samples pursuant to a prior conviction. ‘Samples of DNA can remain viable for thousands of years if maintained under appropriate conditions. [Citation.]’” *Marshall*, slip op. at 14.

III. CONCLUSION

Based on the foregoing, we vacate the portion of the trial court’s order directing defendant to submit to DNA testing and pay the fee. We affirm defendant’s conviction and sentence in all other respects.

Affirmed in part and vacated in part.