

No. 2—09—1028
Order filed March 31, 2011

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Carroll County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 04—CF—15
)	
ANTONIO SALGADO,)	Honorable
)	Val Gunnarsson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: We granted defendant full credit against his DNA analysis assessment (a fine for purposes of the credit), to reflect his time in presentencing custody; we were empowered to do so even though defendant applied for the credit for the first time on appeal from the dismissal of his untimely section 2—1401 petition; the untimeliness of the petition did not divest the trial court or this court of jurisdiction.

Antonio Salgado appeals the dismissal of his petition for relief from judgment under section 2—1401 of the Code of Civil Procedure (735 ILCS 5/2—1401 (West 2008)). Salgado argues for the first time on appeal that he is entitled to a \$5 credit against his DNA analysis assessment for each day spent in presentence custody. The State concedes that the matter generally cannot be forfeited,

but argues that it cannot be raised in this particular appeal because the section 2—1401 petition was untimely. Because an application for the credit may be made for the first time on appeal and the timely filing of a petition under section 2—1401 is not jurisdictional, we modify the judgment to reflect the credit.

I. BACKGROUND

On August 9, 2004, Salgado pleaded guilty to first-degree murder (720 ILCS 5/9—1(a)(1) (West 2004)). That same day, he was sentenced to 35 years' incarceration, a \$200 assessment for DNA analysis, and a \$100 domestic violence fund fine. The court noted that Salgado was entitled to credit for 150 days served in presentence custody and that he was also entitled to a \$5-per-day credit sufficient to satisfy the domestic violence fund fine.

On December 13, 2004, Salgado moved to withdraw his plea. The motion was denied on January 7, 2005. On October 16, 2006, we affirmed. *People v. Salgado*, No. 2—04—0908 (2006) (unpublished order under Supreme Court rule 23). On August 7, 2007, Salgado filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122—1 *et seq.* (West 2008)). The petition was dismissed on August 31, 2007.

On July 31, 2009, Salgado filed his petition for relief from judgment under section 2—1401, alleging that he was unfit to plead guilty. The petition did not contend that Salgado was entitled to credit against his DNA analysis assessment for time served in presentence custody. The court dismissed the petition because it was untimely and denied Salgado's motion to reconsider. Salgado appeals.

II. ANALYSIS

Salgado's sole contention, which he raises for the first time on appeal, is that he is entitled to a \$5-per-day credit against his DNA analysis assessment for time spent in custody. The State concedes that the DNA analysis assessment is a fine that would normally be subject to offset. However, the State argues that, because Salgado's petition for relief from judgment was untimely, he cannot raise the matter in this particular proceeding.

Section 110—14(a) of the Code of Criminal Procedure of 1963 provides: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110—14(a) (West 2008). The defendant is entitled to the credit for each day or part of a day spent in jail prior to the imposition of the sentence. *People v. McCreary*, 393 Ill. App. 3d 402, 408 (2009). However, the total credit may not exceed the amount of the fine. 725 ILCS 5/110—14(a) (West 2008). The DNA analysis assessment is a fine for sentencing-credit purposes. See *People v. Long*, 398 Ill. App. 3d 1028, 1033-34 (2010).

A defendant may apply for the credit for the first time on appeal, as the normal rules of forfeiture do not apply. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997); see also *People v. Caballero*, 228 Ill. 2d 79, 88 (2008) (first time on collateral appeal). The State agrees that normally rules of forfeiture do not apply. However, section 2—1401 requires that a petition for relief from judgment be filed within two years after the entry of the judgment, unless the judgment is void. 735 ILCS 5/2—1401(c),(f) (West 2008). Thus, the State argues that we are precluded from granting the credit because the petition was untimely and the absence of the credit does not produce a void judgment that may be attacked at any time.

As noted, it is clear that a defendant is entitled to credit “upon application,” which may be made for the first time on appeal. 725 ILCS 5/110—14(a) (West 2008). Thus, if we have jurisdiction over the appeal, we may grant the credit, even if the issue was not previously raised. The State does not specifically address whether we have jurisdiction over the appeal, but its argument essentially is a jurisdictional one—the State contends that we lack authority to grant the credit based on the untimely filing.

We recently held in *People v. Glowacki*, 404 Ill. App. 3d 169, 172-73 (2010), that the two-year time limit for filing a petition under section 2—1401 is not jurisdictional. The issue is not whether the judgment being attacked is void. Even if it is not, the trial court had subject matter jurisdiction, which is derived from the constitution, not any statutory limitation provisions. *Id.* at 172 (citing *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 338-41 (2002)). Likewise, we have jurisdiction over the appeal, and we may apply the credit. Accordingly, we modify the mittimus to reflect that the \$200 DNA assessment is satisfied by the credit.

The State also requests a \$50 State’s Attorney fee under section 4—2002(a) of the Counties Code (55 ILCS 5/4—2002(a) (West 2008)). That fee is appropriate. See *Long*, 398 Ill. App. 3d at 1035 (citing *People v. Williams*, 235 Ill. 2d 286, 297 (2009)).

III. CONCLUSION

We affirm the dismissal of Salgado’s petition, but we modify the mittimus to grant Salgado full credit against his \$200 DNA analysis assessment, and we award the State a \$50 attorney fee under section 4—2002(a).

Affirmed; mittimus modified.