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No. 3-09-0678

Order filed February 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12h Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	No. 07-CF-2547
)	
SYLWESTER GAWLAK,)	Honorable
)	Daniel J. Rozak,
Defendant-Appellant.)	Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

Held: The trial court erred in imposing a \$500 sex crimes fine pursuant to 730 ILCS 5/5-4-3(j) (West 2006) because the fine was not authorized by statute. Further, the trial court failed to properly impose statutorily mandated fines and fees in this cause. Accordingly, we vacate that portion of defendant's sentencing order and judgment imposing the \$500 fine and remand the cause to the trial court for further sentencing in order to properly impose the mandatory fines and fees in this cause.

On January 10, 2008, a Will County grand jury issued a bill of indictment charging defendant with two counts of predatory criminal sexual assault and two counts of aggravated

criminal sexual abuse. The State elected to proceed to trial on both counts of predatory criminal sexual assault, but on only one count of aggravated criminal sexual abuse. Following a trial, the jury found defendant guilty of all three offenses on April 24, 2009.

On August 17, 2009, the trial court sentenced defendant to consecutive terms of six-years imprisonment on each of the offenses of predatory criminal sexual assault and three years imprisonment on the offense of aggravated criminal sexual abuse to run consecutive to the sentences imposed on predatory criminal sexual assault. In addition, the trial court ordered defendant to pay court costs and other fines and fees, including a \$200 DNA analysis fee and a \$500 sex crimes fee pursuant to the same statutory provision (730 ILCS 5/5-4-3(j) (West 2006)).

On appeal, defendant claims the trial court erred in imposing the \$500 fine because either the sex crimes fine was duplicative of the \$200 DNA analysis fee or not authorized by statute. The State agrees that the \$500 fine is not authorized by statute but further argues that the trial court failed to impose other mandatory fines and fees. We vacate that portion of defendant's sentencing order and judgment imposing the \$500 sex crimes fine and remand the cause to the trial court for further sentencing in order to impose the statutorily mandated fines and fees in this cause.

FACTS

On January 10, 2008, a Will County grand jury issued a four-count bill of indictment against defendant. Counts I and II alleged that on December 7, 2007, defendant committed the offense of predatory criminal sexual assault in violation of section 12-14.1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14.1(a)(1) (West 2006)). Counts III and IV of the indictment alleged that on December 7, 2007, defendant committed the offense of aggravated criminal

sexual abuse in violation of section 12-16(c)(1)(i) of the Criminal Code of 1961 (720 ILCS 5/12-16(c)(1)(i) (West 2006)).

Prior to trial, the State *nolle prosequed* count III of the indictment on April 20, 2009. Following a multiple day trial, the jury found defendant guilty of counts I, II and IV of the indictment on April 24, 2009.

On July 16, 2009, the trial court denied defendant's posttrial motions and proceeded to sentencing. The State asked for an unspecified sentence to the Department of Corrections but did not request the court to order any specific fees or assessments in addition to incarceration. Defendant made an unsworn statement to the court and asked to file *pro se* posttrial motions. On August 17, 2009, the trial court denied defendant's *pro se* posttrial motions, and the court pronounced sentencing.

The court sentenced defendant to six-year terms of imprisonment on counts I and II to run consecutive to one another. The court sentenced defendant to three years imprisonment on count IV to run consecutive to counts I and II. The court then stated, "[e]nter judgment for any costs that might be due."

The record contains a document entitled "4th REVISED CRIMINAL COST SHEET" filed with the court. The document listed clerk's fees of \$230. Further, section II of the cost sheet listed penalties imposed by the court which included: 1) \$20 violent crime victim assessment fee; 2) "Sex Crimes (State offender DNA database) – (730 ILCS 5/5-4-3(j)) – \$500;" and 3) "DNA database analysis fee – (730 ILCS 5/5-4-3(j)) – \$200." The cost sheet also ordered state's attorney fees of \$30 and sheriff fees of \$294. The cost sheet listed the total amount of fees and costs to be \$1,274.

On that same date, the trial court entered an order certifying defendant as a child sex offender and ordering disease testing. Further, the trial court ordered defendant to submit blood and saliva specimens to the Illinois State Police and to pay the \$200 DNA analysis fee. The trial court entered a sentencing order setting forth the terms of imprisonment. In the sentencing order, the trial court ordered defendant to pay costs of the prosecution but did not specify any amount. The trial court entered a memorandum of judgment against defendant in the amount of \$1,274 as set forth in the cost sheet filed with the court.

On August 20, 2009, the clerk of the court filed a notice of appeal on defendant's behalf.

ANALYSIS

On appeal, defendant claims that the trial court erred in imposing a \$500 fine pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2006)) because either the fine was duplicative of the \$200 DNA analysis fee ordered by the court or was not authorized by the statute. Alternatively, defendant argues that the \$500 fine cannot be considered as a sex offender fine pursuant to section 5-9-1.15 of the Unified Code of Corrections (730 ILCS 5/5-9-1.15 (West 2008)) because that provision became effective after defendant committed the offenses in question.

In response, the State concedes that the trial court's order imposing a \$500 fine in this case pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2006)) cannot stand in light of the fact the trial court imposed a \$200 DNA analysis fee pursuant to the same statutory provision. However, the State also argues that the trial court failed to impose other statutorily mandated fees and asks this court to remand the cause to the trial court for a proper determination of fines, fees and assessments.

The parties agree that the issue raised on appeal involves a question of law. Further, the parties agree that the appropriate standard of review is *de novo*. *People v. McCarty*, 223 Ill. 2d 109, 124 (2006).

When arguing sentencing alternatives to the court, the prosecutor did not recite the mandatory financial penalties required by statute for the court to impose in this case. Similarly, the trial court did not articulate any particular fines, fees or assessments when announcing the sentence, but stated that judgment would be entered “for any costs that might be due.”

According to minute entry of August 17, 2009, the court assessed fines and costs against defendant, and the sentencing order required defendant to pay costs for the prosecution of the case. Another written order signed and entered by the court specified that defendant pay a \$200 DNA analysis fee, and a separate document entitled memorandum of judgment, signed by the trial court, entered judgment against defendant for the non-itemized amount of \$1,274.

The only itemization as to costs, fees and fines contained in the record on appeal is set forth in the document entitled “4th REVISED CRIMINAL COST SHEET” filed with the court, but not signed or approved by the judge. The document listed clerk’s fees of \$230. Further, section II of the cost sheet listed penalties imposed by the court which included: 1) \$20 violent crime victim assessment fee; 2) “Sex Crimes (State offender DNA database) – (730 ILCS 5/5-4-3(j)) – \$500;” and 3) “DNA database analysis fee – (730 ILCS 5/5-4-3(j)) – \$200.” Taking into account state’s attorney fees and sheriff fees, the cost sheet listed the total amount of fees and costs to be \$1,274.

Section 5-4-3(j) of the Unified Code of Corrections provides in pertinent part:

“Any 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 2006).

The language of the statute is clear. The fee relates to the cost of the DNA analysis and is limited to \$200. The statute does not allow for the imposition of additional fees unless otherwise authorized, such as court costs or cost of prosecution. *People v. Alexander*, 369 Ill. App. 3d 955, 958 (2007).

The record reveals that the court first signed an order imposing the statutorily required \$200 DNA analysis fee and then entered a memorandum of judgment against defendant which included a \$500 fine pursuant to the same statutory section supporting the \$200 DNA analysis fee, specifically “730 ILCS 5/5-4-3(j),” despite the fact that this statutory section does not authorize the imposition of a \$500 fine. Presumably, as defendant points out in his brief, the \$500 sex crimes fine was intended to be a sex offender fine pursuant to section 5-9-1.15 of the Unified Code of Corrections which provides that there “shall be added to every penalty imposed in sentencing for a sex offense *** an additional fine in the amount of \$500.” 730 ILCS 5/5-9-1.15 (West 2008). However, that statutory section did not become effective until June 1, 2008, and therefore, was not in effect at the time defendant committed these offenses on December 7, 2007.

Criminal provisions which are disadvantageous to a defendant cannot be applied retroactively. *People v. Prince*, 371 Ill. App. 3d 878, 880 (2007) (citing *People v. Malchaw*, 193 Ill. 2d 413, 418 (2000)). Such prohibition applies to the imposition of fines. *People v. Prince*,

371 Ill. App. 3d at 880 (citing *People v. Bishop*, 354 Ill. App. 3d 549, 562 (2004)). Accordingly, there was not any basis for the court to impose an additional \$500 sex crimes fine in this case. Therefore, we agree with the parties that the trial court improperly imposed a \$500 fine in this case and that portion of defendant's sentencing orders and judgment must be vacated.

Next, we turn to the State's assertion that this cause should be remanded to the trial court because the trial court failed to impose other statutorily mandated fines and fees. The State argues that given defendant was convicted of the offense of predatory criminal sexual assault, the trial court was obligated to impose a sexual assault fine of \$200 pursuant to section 5-9-1.7 of the Unified Code of Corrections (730 ILCS 5/5-9-1.7 (West 2006)) and a domestic violence fine of \$200 pursuant to section 5-9-1.5 of the Unified Code of Corrections (730 ILCS 5/5-9-1.5 (West 2006)). Defendant did not file a reply brief in this cause and did not respond to the State's assertion on appeal that the matter should be remanded for the imposition of additional financial penalties as required by statute, but overlooked by the court.

A sentence or a portion of a sentence which does not conform to a statutory requirement, including the imposition of a statutory fine or fee, is void. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *People v. Montiel*, 365 Ill. App. 3d 601, 606 (2006). Further, "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void." *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). However, we note that on appeal, defendant does not challenge his sentence to the Illinois Department of Corrections as void, but only challenges the trial court's imposition of the \$500 sex crimes fine. Accordingly, we vacate only that portion of the court's sentencing order and memorandum of judgment ordering defendant to pay \$1,274.

After reviewing the record, it is clear that the trial court failed to impose certain

mandatory fines and fees in this cause, including the \$200 sexual assault fine and the \$200 domestic violence fine, as pointed out by the State on appeal. See 730 ILCS 5/5-9-1.7(a)(1), (b)(1) (West 2006); 730 ILCS 5/5-9-1.5 (West 2006). The responsibility to stay abreast of ever changing required fees, costs, assessment, and fines is shared by *both* the court and counsel, even though in many cases the court is charged with the duty of specifically ordering the fines and fees before the clerk may collect those fines and fees and then distribute them into the specific funds as identified by the legislature. Here, the prosecutor neither acknowledged that any mandatory financial penalties were required for the court to impose nor recommended that the court should impose those financial penalties enacted by our lawmakers in addition to the incarceration requested. These statutory fees and assessments have been enacted by our legislature and should not be overlooked by the prosecution during the sentencing hearing.

Consequently, we vacate that portion of the sentence regarding the financial obligations imposed on defendant, direct the court not to re-impose a \$500 sex crimes fee in addition to the \$200 DNA analysis fee, and remand the matter to the trial court for the purpose of the entry of an order that clearly delineates the nature and specific amounts of any mandatory fees, costs, and assessments which must be imposed in this case, along with any appropriate credit toward those fees and assessments to which defendant is entitled to receive.

CONCLUSION

The judgment and sentence of the circuit court of Will County ordering defendant to pay financial penalties including a \$500 fine, listed as a sex crimes fee, is vacated, and the cause is remanded to the trial court for further proceedings consistent with this order.

Vacated in part and remanded with directions.