

¶ 5 In October 2008, the grand jury indicted defendant on one count of unlawful possession of cannabis with intent to deliver (count I) (720 ILCS 550/5(c) (West 2008)) and one count of unlawful possession of cannabis (subsequent offense) (count II) (720 ILCS 550/4(c) (West 2008)).

¶ 6 In September 2009, defendant entered an open guilty plea to count I. Defendant also pleaded guilty to driving with a revoked license. In exchange for the plea, the State agreed to dismiss count II as well as several other cases. Following the State's factual basis, the trial court accepted defendant's plea.

¶ 7 In December 2009, the trial court sentenced defendant to serve an extended term of six years in prison. The court also assessed, *inter alia*, a \$1,000 fine, a \$500 contribution to the Child Protection Network, a \$200 DNA-analysis fee, a \$28 probation testing fee, and a \$200 fee to reimburse the public defender. A receipt voucher indicated defendant was required to pay two probation fees totaling \$38, \$10 DNA-analysis administrative fee, a \$190 DNA-analysis fee, and the \$200 reimbursement for the public defender. On appeal, this court remanded the cause with directions that defendant be properly admonished under Illinois Supreme Court Rule 605(b) (210 Ill. 2d R. 605(b)) and be allowed an opportunity to file a postplea motion in compliance with Rule 604(d) (210 Ill. 2d R. 604(d)). *People v. Jones*, No. 4-09-0980 (June 16, 2010) (unpublished order under Supreme Court Rule 23).

¶ 8 In September 2010, the trial court admonished defendant as to his right to appeal. In October 2010, defendant filed a motion to reconsider sentence, alleging the court did not consider the excessive hardship the sentence would cause defendant's family. He also alleged the sentence was excessive and the Child Protection Network fee was not authorized. The court

found the sentence was appropriate but vacated the Child Protection Network fee because it was not authorized by statute. This appeal followed.

¶ 9

II. ANALYSIS

Defendant argues the fees imposed for probation testing, DNA analysis, and to reimburse the public defender must be vacated. The State concedes.

¶ 10

Initially, we note defendant did not raise the issue that these three assessments were improperly imposed in his motion to reconsider sentence. While this would normally result in forfeiture of the issues on appeal, "[a] sentence provision imposed without statutory authority is void and can be attacked at any time." *People v. Valle*, 405 Ill. App. 3d 46, 61, 939 N.E.2d 10, 22 (2010). Moreover, a challenge to the improper imposition of the public-defender fee cannot be forfeited and may be raised at any time. *People v. Dalton*, 406 Ill. App. 3d 158, 161, 941 N.E.2d 428, 432 (2010). Thus, we will consider the issues.

¶ 11

A. Probation-Testing Fee

¶ 12

Section 5-6-3(g) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-6-3(g) (West 2008)) provides, in part, as follows:

"An offender sentenced to probation or to conditional discharge and who during the term of either undergoes mandatory drug or alcohol testing, or both, or is assigned to be placed on an approved electronic monitoring device, shall be ordered to pay all costs incidental to such mandatory drug or alcohol testing, or both, and all costs incidental to such approved electronic monitoring in accordance with the defendant's ability to pay those costs."

¶ 13 In this case, the trial court sentenced defendant to prison. However, the court also imposed \$38 in fees for probation testing. Since defendant was not subject to the imposition of the probation-testing fee, it must be vacated.

¶ 14 B. DNA-Analysis Fee

¶ 15 Section 5-4-3(a) of the Unified Code (730 ILCS 5/5-4-3(a) (West 2008)) requires anyone convicted of a felony to submit blood, saliva, or tissue specimens to the Illinois State Police. If a defendant must submit a specimen under section 5-4-3(a), the trial court must impose "an analysis fee" of \$200. 730 ILCS 5/5-4-3(j) (West 2008). In *People v. Marshall*, 242 Ill. 2d 285, 950 N.E.2d 668 (2011), the supreme court considered whether a defendant who, because of a prior conviction, had previously submitted a DNA sample for testing and paid the DNA fee could be required, on a subsequent conviction, to submit another DNA sample and pay another DNA fee. *Marshall*, 242 Ill. 2d at 287-88, 950 N.E.2d at 670. The court found the defendant was not subject to an additional DNA fee. *Marshall*, 242 Ill. 2d at 303, 950 N.E.2d at 679.

¶ 16 Here, the trial court imposed a \$10 DNA-analysis administrative fee and a \$190 DNA-analysis fee. The presentence investigation indicates DNA testing was previously performed on defendant in June 2005. As defendant's DNA has already been collected and indexed, the \$200 in DNA fees must be vacated.

¶ 17 C. Public-Defender Fee

¶ 18 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) provides, in part, as follows:

"Whenever *** the court appoints counsel to represent a defen-

dant, 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 [s]ection 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1(a) (West 2008).

Section 113-3.1 requires the trial court to conduct a hearing into a defendant's financial circumstances and find an ability to pay before ordering him to pay reimbursement for his appointed counsel. *People v. Love*, 177 Ill. 2d 550, 555-56, 687 N.E.2d 32, 35 (1997). "[T]he defendant must (1) have notice that the trial court is considering imposing a payment order under section 113-3.1 of the Code and (2) be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Barbosa*, 365 Ill. App. 3d 297, 301, 849 N.E.2d 152, 154 (2006).

¶ 19 In the case *sub judice*, the trial court appointed the public defender to represent defendant in December 2008. In July 2009, private counsel entered his appearance on behalf of defendant. Defendant pleaded guilty in September 2009. In December 2009, the court sentenced defendant to prison and imposed a \$200 public-defender assessment. After this court remanded for further proceedings, the trial court appointed the public defender. In ruling on the matter, the court partially denied defendant's motion to reconsider sentence and the \$200 fee to reimburse the public defender remained.

¶ 20 Here, the trial court did not hold a hearing or mention the public-defender fee prior to adding the fee to the written order. The record fails to show defendant was given notice that the court was considering imposing the reimbursement payment and he was not given an opportunity to present evidence or be heard regarding the imposition of the fee. The court's failure to follow the procedures required by section 113-3.1 requires us to vacate the reimbursement portion of the sentencing order and remand for a hearing on the matter. See *Barbosa*, 365 Ill. App. 3d at 301-02, 849 N.E.2d at 155.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we vacate that part of the trial court's sentencing order imposing \$38 in probation-testing fees, \$200 in DNA-analysis fees, and the \$200 fee to reimburse the public defender. We otherwise affirm. The cause is remanded for a hearing pursuant to section 113-3.1.

¶ 23 Affirmed in part and vacated in part; cause remanded with directions.