

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).

2011 IL App (4th) 090918-U

Order filed 6/7/11

NO. 4-09-0918

Modified Upon Den. of
Rhg. 9/9/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
LAUREN A. JORDEN,)	No. 08CF178
Defendant-Appellant.)	
)	Honorable
)	John C. Costigan,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* If one of the conditions of conditional discharge is that the defendant perform community service and if the office of court services monitors the community service, section 5-5-10 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-10 (West 2006)) requires the trial court to impose a fee in the maximum amount of \$50 for each month the office of court services monitors the community service, unless the court finds defendant to be unable to pay.
- ¶ 2 If a trial court orders the defendant to undergo drug testing in preparation for the presentence investigation report, section 5-6-3(g) of the Unified Code (730 ILCS 5/5-6-3(g) (West Supp. 2007)) does not authorize the court to order the defendant to pay the cost of the testing, because such testing did not occur during the term of the conditional discharge.
- ¶ 3 Under section 110-14 of the Code of Criminal Procedure of 1963 (725 I L C S 5/110-14 (West 2006)), a defendant is entitled to monetary credit against the DNA analysis assessment imposed pursuant to section 5-4-3(i) of the Unified Code (730 ILCS 5/5-4-3(i) (West 2006)).
- ¶ 4 A jury found defendant, Lauren A. Jorden, guilty of credit card fraud (720 ILCS 250/8

(West 2006)), and the trial court sentenced her to 18 months of conditional discharge. Simultaneously with the sentence that the court imposed, the circuit clerk gave defendant a written notice stating that defendant was required to pay various amounts, including a "community service fee" of \$450, a "probation testing fee" of \$28, a "DNA analysis fee" of \$190, and a "DNA Analysis Admin Fee" of \$10 (for simplicity's sake, we will group these latter two items together as a DNA analysis fee of \$200).

¶ 5 Defendant appeals, challenging the first two fees and claiming a credit against the third fee. Specifically, she argues that the "community service fee" and the "probation testing fee" were statutorily unauthorized in her case and that the "DNA analysis fee" should be reduced by \$5 for the day she spent in presentence custody.

¶ 6 Although we agree that the "probation testing fee" is statutorily unauthorized, we find statutory authority for the "community service fee"—although that fee, we notice, is \$100 too high. The State correctly concedes the \$5 credit. Therefore, we affirm the trial court's judgment as modified, and we remand the case with directions.

¶ 7 I. BACKGROUND

¶ 8 The indictment consisted of a single count, which alleged that on October 19, 2007, defendant committed credit card fraud (720 ILCS 250/8 (West 2006)) by using Terriann Haugen's credit card without her permission. At trial, the State presented evidence that a homeless man whom Haugen had taken in, William Casner, found Haugen's credit card on a street by Haugen's house (so he testified) and that he and defendant then went to Normal and used the credit card to buy toys, DVDs, and Halloween merchandise from Wal-Mart and to buy gasoline for defendant's mother's car. It appeared from a surveillance video, which was played for the jury, that defendant was the one who

swiped the card and signed the electronic pad. On August 20, 2009, the jury found her guilty.

¶ 9 When the jury returned its guilty verdict, the trial court entered an order on the finding of guilt. The order required defendant to do two things in preparation for the sentencing hearing scheduled for November 12, 2009: (1) call "CSO" (the court services office) by August 21, 2009, to schedule an appointment for an interview, which was to take place by September 4, 2009; and (2) "be screened for illegal drugs."

¶ 10 Evidently, defendant complied with this order, and on September 9, 2009, the McLean County court services department filed a "Probation Urine Assessment Fee Form." According to this form, defendant was "screened" by court services on August 28, 2009, and the fee for this service was \$28.

¶ 11 On November 12, 2009, the trial court sentenced defendant to 18 months of conditional discharge. In imposing this sentence, the court used a preprinted form entitled "Order for Probation or Conditional Discharge." Depending on which box one checks, this form can be used for either probation or conditional discharge, and there is a blank before "months," which is to be filled in. In this case, the completed form reads: "It is hereby ordered that the defendant is sentenced to a term of: Probation Conditional Discharge for a period of 18 months, upon the conditions that during said period the defendant shall:" and then the form lists a variety of preprinted conditions. Some of the conditions refer to "probation" and a "Probation Officer," and others do not. Also, some of the conditions have blanks, in which information can be filled in; again, we will indicate the filled-in blanks with underlining. The list of conditions includes the following:

"B. Pay all fines, restitution, costs, fees and mandatory

assessments, including VCVA, as set forth in the fine/cost sheet provided by the McLean County Circuit Clerk by 6/4/10 @ 10:00.

C. Pay restitution in the following amount, as detailed in the attached restitution addendum, to the McLean County Circuit Clerk as directed by the Court or Court Services: \$490.33[.]

D. Serve a term of 30 days of imprisonment in the McLean County Jail as provided in the attached Order for Confinement. Stayed pending remission.

* * *

H. Not unlawfully consume, use, or possess: (1) cannabis; or (2) any Controlled Substances or any depressant or stimulant substances or anabolic steroid as defined in the Illinois Controlled Substances Act (720 ILCS 570). Upon the request of the Probation or Correctional Officer, the Defendant shall submit to breath, urine and/or blood tests to determine whether he has in his body the presence of any of the aforesaid prohibited substances or alcoholic beverage. The Defendant shall within 30 days pay the costs of each such test performed.

* * *

M. Complete 100 hours of Community Service by 6/4/10 @ 10:00, and shall cooperate fully with the guidelines of the Community Service Program, including payment of any applicable fee.

* * *

P. The following conditions are applicable if checked:

* * *

4. The Defendant is directed to submit to DNA testing as directed by Court Services, and shall pay a DNA collection fee of \$200.00[.]

6. The Defendant shall appear in Court for a remission hearing on 6/4/10 @ 10:00."

So, conditions of probation and conditions of conditional discharge are lumped together, A through P, in this form.

¶ 12 On November 12, 2009, the same day the trial court imposed the sentence, the circuit clerk filed and served upon defendant a document entitled "Notice to Party." This document notified defendant that a "fine and court costs" had been assessed against her, including a "community service fee" of \$450 pursuant to "720 ILCS 550/10.1," a "DNA analysis fee" of \$200 pursuant to "PA 90-130," and a "probation testing fee" of \$28 pursuant to "730 ILCS 5/5-6-3.1(g)."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. The Voidness of Unauthorized Fees in a Sentence

¶ 16 Although defendant did not challenge any of the fees in the proceedings below and although, normally, a defendant must raise a sentencing issue in a postsentencing motion in order

to preserve the issue for appellate review (*People v. Heider*, 231 Ill. 2d 1, 15 (2008)), defendant argues that the fees are nevertheless reviewable because "a sentence in conflict with a statutory guideline *** is void and may be challenged at any time" (*People v. Roberson*, 212 Ill. 2d 430, 440 (2004)). See also *People v. Rigsby*, 405 Ill. App. 3d 916, 920 (2010) ("A challenge to an alleged[ly] void order [to pay a DNA analysis fee] is not subject to forfeiture."); *People v. Albert*, 243 Ill. App. 3d 23, 28 (1993) ("[W]e agree that the \$28 'court automation fee' is void and must be vacated, as it exceeds what counties are authorized to charge.") The State does not disagree with defendant's argument that fees allegedly unauthorized by statutory law may be challenged at any time.

¶ 17

B. Community Service Fee

¶ 18 As authority for imposing the "community service fee," the notice from the circuit clerk cites section 10.1 of the Cannabis Control Act (720 ILCS 550/10.1 (West 2006)), which, in subsection (a), allows the trial court to levy a fine for a violation of the Act. Section 10.1(a) provides: "Whenever any person pleads guilty to, is found guilty of or is placed on supervision *for an offense under this Act*, a fine may be levied in addition to any other penalty imposed by the court." (Emphasis added.) 720 ILCS 550/10.1(a) (West 2006). Defendant argues that because she was not convicted of an offense under the Cannabis Control Act (720 ILCS 550/1 through 19 (West 2006)) but instead was convicted of credit card fraud (720 ILCS 250/8 (West 2006)), the "community service fee" is statutorily unauthorized in her case.

¶ 19

The State responds that the circuit clerk merely cited the wrong statute. Instead of section 10.1 of the Cannabis Control Act, the applicable statute, according to the State, is section 5-5-10 of the Unified Code (730 ILCS 5/5-5-10 (West 2006)), which requires the trial court to impose a community service fee if (1) the offender is not otherwise assessed a fee for probation services and

(2) the offender is actively supervised by the probation and court services department. Section 5-5-10 provides as follows:

"When an offender or defendant is ordered by the court to perform community service and the offender is not otherwise assessed a fee for probation services, the court shall impose a fee of \$50 for each month the community service ordered by the court is supervised by a probation and court services department, unless after determining the inability of the person sentenced to community service to pay the fee, the court assesses a lesser fee. *** The fee shall be imposed only on an offender who is actively supervised by the probation and court services department." 730 ILCS 5/5-5-10 (West 2006).

The State notes that, apparently, defendant's \$450 community service fee was assessed at \$25 per month for the 18 months of conditional discharge (\$25 x 18=\$450).

¶ 20 In her reply brief, defendant contends that the State has forfeited any reliance on section 5-5-10 of the Unified Code because that statutory provision never was mentioned in the proceedings below. Alternatively, defendant argues that section 5-5-10 is inapplicable because the trial court never made a finding that she was "actively supervised by the probation and court services department."

¶ 21 Before addressing defendant's alternative argument, we note that defendant is the appellant and that the State is the appellee and that although, as a rule, the appellant cannot make new arguments for reversal (see *People v. Smith*, 44 Ill. 2d 82, 87 (1969)), the appellee can make

new arguments for affirmance (*People ex rel. Skinner v. Graham*, 170 Ill. App. 3d 417, 440 (1988)). Besides, by citing the wrong statute, the circuit clerk cannot cause us to forfeit our power to affirm the judgment for any reason the record supports. See *Shaw v. Lorenz*, 42 Ill. 2d 246, 248 (1969); *In re Marriage of Holtorf*, 397 Ill. App. 3d 805, 811 (2010); *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 665 (2004); *Redd v. Woodford County Swine Breeders, Inc.*, 54 Ill. App. 3d 562, 565 (1977).

¶ 22 So, finding no forfeiture on the State's part, we move on to defendant's alternative argument. Defendant argues that the record affords no factual support for a conclusion that she was "actively supervised by the probation and court services department." 730 ILCS 5/5-5-10 (West 2006). On the contrary, the trial court ordered defendant to perform 100 hours of community service as one of the conditions of her conditional discharge, and according to the website of McLean County court services, of which we may take judicial notice (see *People v. McKinney*, 399 Ill. App. 3d 77, 79 (2010); *Ashley v. Pierson*, 339 Ill. App. 3d 733, 739-40 (2003)), the court services office has a public service officer, whose duty it is to "seek and maintain worksites throughout McLean County and to monitor the probationers while they are performing public service employment." http://www.mcleancountyil.gov/courtservices/Adult_Court_Services.htm (visited May 3, 2011) (website of McLean County court services). Defendant is not a probationer, but presumably the public service officer monitored her, too, while she performed the community service. "Monitoring" suggests not merely theoretical supervision, or not merely the authority to supervise, but active supervision.

¶ 23 In her petition for rehearing, defendant objects that we are at least impliedly taking judicial notice of a fact that cannot be ascertained from the website of McLean County court services, namely, that in the years 2009 and 2010, a public services officer monitored individuals

sentenced to community service—or that McLean County court services even had a public service officer during those years. Defendant reminds us that we last visited the website on May 3, 2011, not in 2009 or 2010, and that consequently the website is not a source of indisputable accuracy as to the state of affairs that existed in 2009 and 2010. See Ill. R. Evid. 201(b) (eff. Jan. 11, 2011) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). True, and we might add that the record is silent on this factual question. Judging from the record and from the website of McLean County court services, we are confronted with two possibilities: (1) in 2009 and 2010, court services had a public services officer who supervised community service, or (2) court services had no such officer during those years. Which possibility should we choose? We should choose the first possibility, the one that supports the trial court's judgment. See *People v. Harrell*, 104 Ill. App. 3d 138, 143 (1982); *People v. Hamilton*, 64 Ill. App. 3d 276, 278 (1978); *People v. Callahan*, 16 Ill. App. 3d 1006, 1008 (1974). "The well-established rule is that an appellant must demonstrate the existence of error in the record, and failure to do so creates a presumption of regularity that attaches to all trial court proceedings." *People v. Majer*, 131 Ill. App. 3d 80, 83 (1985). "Because a court of review cannot presume the existence of an error that the record does not demonstrate affirmatively, it must resolve silence in the record against the defendant." *Id.*

¶ 24 Consequently, in our *de novo* interpretation of section 5-5-10 (see *People v. Caballero*, 228 Ill. 2d 79, 82 (2008)), we conclude that defendant owed a community service fee to McLean County, and accordingly we deny the petition for rehearing. But we see a problem in the amount of the fee, \$450. The amount is too high, given the period of community service. According

to the order of conditional discharge, entered on November 12, 2009, defendant was required to complete the 100 hours of community service by June 4, 2010. That is a period of 6 months and 24 days. According to section 5-5-10, "the court shall impose a fee of \$50 for each month the community service ordered by the court is supervised by a probation and court services department." 730 ILCS 5/5-5-10 (West 2006). Therefore, the total community service fee for seven months can be no greater than \$350 (7 x \$50=\$350).

¶ 25

C. Probation Testing Fee

¶ 26

As authority for imposing the \$28 probation testing fee, the notice from the circuit clerk cites section 5-6-3.1(g) of the Unified Code (730 ILCS 5/5-6-3.1(g) (West Supp. 2007)). Section 5-6-3.1(g) provides as follows:

"A defendant *placed on supervision* and who during the period of supervision undergoes mandatory drug or alcohol testing, or both, *** shall be ordered to pay the costs incidental to such mandatory drug or alcohol testing, or both *** in accordance with the defendant's ability to pay those costs. The county board with the concurrence of the Chief Judge of the judicial circuit in which the county is located shall establish reasonable fees for the cost of maintenance, testing, and incidental expenses related to the mandatory drug or alcohol testing, or both, *** of all defendants *placed on supervision*. *** The fees shall be collected by the clerk of the circuit court." (Emphases added.) 730 ILCS 5/5-6-3.1(g) (West Supp. 2007).

Defendant argues that because the trial court sentenced her to conditional discharge instead of placing her on supervision, section 5-6-3.1(g) is inapplicable and the probation testing fee is statutorily unauthorized in her case.

¶ 27 The State responds that this is simply another instance of the circuit clerk's citing the wrong statute. The applicable statute, according to the State, is section 5-6-3(g) of the Unified Code (730 ILCS 5/5-6-3(g) (West Supp. 2007)), which provides 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, *** shall be ordered to pay all costs incidental to such mandatory drug or alcohol testing, or both, *** in accordance with the defendant's ability to pay those costs. *** The fees shall be collected by the clerk of the circuit court." (Emphasis added.) 730 ILCS 5/5-6-3(g) (West Supp. 2007).

Defendant, however, did not undergo mandatory drug and alcohol testing during the term of her conditional discharge. Rather, she underwent this testing before she was sentenced. Therefore, section 5-6-3(g), by its terms, is inapplicable.

¶ 28 Neither party has provided this court any applicable authority for the imposition of the probation testing fee. We should not have to comb the statutes for such authority. See Ill. S. Ct. Rs. 341(h)(7), (i) (eff. July 1, 2008).

¶ 29 D. Monetary Credit Against the DNA Assessment

¶ 30 It appears from the record sheet that defendant was arrested on March 4, 2009, and that after she posted \$300 bond, she was released that same day. Defendant argues that she is

entitled to a credit of \$5 against the DNA analysis assessment of \$200 for the day (or portion of a day) that she spent in custody. See 725 ILCS 5/110-14(a) (West 2006); *People v. Stahr*, 255 Ill. App. 3d 624, 627 (1994) ("[A]ny portion of a day in custody constitutes a full day for purposes of section 110-14."); *People v. Long*, 398 Ill. App. 3d 1028, 1034 (2010) (holding that the DNA analysis assessment is a fine, which should be offset with monetary credit for presentence custody). The State concedes this point, and we accept the State's concession.

¶ 31

III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the trial court's judgment as modified, and we remand this case with directions that the court amend its sentencing order so as to reduce the community service fee to \$350, rescind the probation testing fee, and allow defendant a \$5 credit against the DNA analysis assessment. We award the State \$50 in costs.

¶ 33

Affirmed as modified and remanded with directions.