

NOTICE

Decision filed 03/21/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0490

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 08-CF-441
)	
LORENZO McCORKLE,)	Honorable
)	Milton S. Wharton,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

RULE 23 ORDER

Held: Defendant's argument that a violation of Rule 431(b) is a *per se* violation of his substantial rights fails, and his conviction is affirmed with a modification to his sentence for monetary credit against his DNA-analysis fee for time spent in presentence custody.

At a jury trial, defendant, Lorenzo McCorkle, was convicted of forgery. On appeal, he argues that the trial court violated Supreme Court Rule 431(b) (eff. May 1, 2007) and that this court should reverse his conviction and remand the cause for a new trial. Furthermore, defendant asks this court to amend the judgment to reflect a \$200 credit against his DNA-analysis "fee" for time spent in presentence custody, pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2008)).

The State argues that the defendant has forfeited his claim of a violation of Rule 431(b) and that defendant's conviction should be affirmed. However, the State confesses error regarding the issue of the monetary credit.

BACKGROUND

Defendant's jury trial was held on June 22, 2009. The court's admonishments to the jury were as follows:

"After we have selected the jury, you'll first hear from the State, who has the burden of going forward with the evidence. The State will present its evidence by way of witnesses. These witnesses will be available for cross[-]examination by the defense.

After the State has rested, the defense will have the same opportunity, if it wishes to exercise it. I want to caution you here, though, the [d]efendant is not required to prove his innocence. The State has the burden of proof[-]burden of proving the guilt of the [d]efendant beyond a reasonable doubt, and this burden stays with the State on into your deliberations and is not overcome unless you decide that the [d]efendant has been proven guilty beyond a reasonable doubt."

After the initial questioning of the jurors was complete, the court asked defendant's counsel if he would like to remind the jury that the fact that defendant would not be testifying could not be considered evidence. Defendant's counsel responded in the negative and explained that he did not think the admonishment was necessary.

The court then addressed the jurors as a whole as follows:

"Anyone believe that simply because a person is charged with a crime *** he therefore must be guilty of something? Anyone believe that proposition?"

Anyone here disagree with the proposition that I will instruct you as to the law at the end of the case and you are sworn to follow that law even though you may disagree with it?

No response. Anyone here disagree with the proposition that the [d]efendant, Mr. McCorkle, in this case is presumed to be innocent until proven guilty by the State

beyond a reasonable doubt, and the State has the burden of proving the [d]efendant guilty beyond a reasonable doubt? Anyone have any disagreement with that?"

None of the jurors responded to any of the questions presented by the court.

At the trial, defendant did not testify and there was no evidence presented on his behalf. At the end of the trial, the jury was admonished again regarding the burden of proof. The jury found defendant guilty.

Defendant was sentenced to 24 months of probation and 48 days in jail. The jail sentence was discharged because of 48 days already spent in presentence custody. Defendant was also ordered to pay a \$200 DNA-analysis fee.

ANALYSIS

On appeal, defendant first argues that the trial court failed to strictly comply with Supreme Court Rule 431(b) when it failed to ask the potential jurors whether they understood and accepted the principle that defendant was not required to offer any evidence on his own behalf. Defendant acknowledges that the issue would normally be forfeited, but he argues that the forfeiture rule should be relaxed when the objection is based on the court's conduct and that the issue should be given plain error review. Defendant asks that his conviction be reversed and the cause remanded to the trial court. Defendant also argues that he should receive a \$200 credit against his DNA-analysis fee.

In response, the State argues that error under Rule 431(b) does not constitute a *per se* denial of a substantial right and fails to meet the test for plain error review. It asserts that defendant's conviction should be affirmed. The State confesses error regarding the issue of the credit to the DNA-analysis fee. We shall address each of these contentions in turn.

First we address the court's failure to properly act under Rule 431(b). Rule 431(b) states as follows:

"The court shall ask each potential juror, individually or in a group, whether

that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The Illinois Supreme Court has recently addressed the issue of a court's violation under Rule 431(b) in *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the court did not ask any of the prospective jurors if they understood or accepted that the defendant was not required to offer any evidence. *Id.* at 602. The supreme court reversed the appellate court's judgment that the trial court committed reversible error. *Id.* at 616. The supreme court explained that there was a violation of Rule 431(b) but that a violation does not automatically render a trial unfair or a jury biased. *Id.* at 610. The court also rejected the argument that the forfeiture doctrine should be relaxed, and the court stressed that the doctrine should be enforced as uniformly as possible to deter the wasting of judicial time and resources. *Id.* at 612.

Finally, the court addressed the issue of plain error review. It stated that the plain error doctrine should be applied in the following circumstances:

"(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.'" *Thompson*, 238 Ill. 2d at 613 (quoting *People v. Piatkowski*, 225 Ill. 2d

551, 565 (2007)).

The court concluded that defendant's argument regarding the second prong of the plain error review failed to show that the violation of the rule resulted in a biased jury. *Thompson*, 238 Ill. 2d at 614. Furthermore, the court refused to adopt a bright-line reversal rule for violations of Rule 431(b). *Id.* at 615.

The arguments in *Thompson* are identical to the ones raised here on appeal. Therefore, applying the holding in *Thompson* to the instant case, we conclude that a violation of Rule 431(b) is not a *per se* violation of a substantial right, and defendant has failed to prove that any bias occurred from any violation. Therefore, we affirm defendant's conviction.

We now turn to defendant's second issue on appeal. The issue of monetary credit against a defendant's fine cannot be waived and may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997). Whether a defendant received proper credit against his fine is a question of law that we review *de novo*. *People v. Sulton*, 395 Ill. App. 3d 186, 189 (2009).

Section 110-14(a) of Code of Criminal Procedure of 1963 states as follows: "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. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2008). Generally, monetary credit under section 110-14(a) offsets only fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006).

The main issue seems to turn on whether the DNA-analysis fee is a fee or a fine for credit purposes. The Illinois Supreme Court has discussed this issue as follows: "[A] 'fine' is a part of the punishment for a conviction, whereas a 'fee' or 'cost' seeks to recoup expenses

incurred by the State—to 'compensat[e]' the State for some expenditure incurred in prosecuting the defendant." *Jones*, 223 Ill. 2d at 582. The court noted that "the label attached by the legislature is not necessarily definitive." *Id.* at 599. The court held that a fee could be offset by the \$5-per-day credit for time spent in presentence custody despite its label as a fee if its core purpose is more reflective of a fine. *Id.*

The appellate court has also held that this specific DNA-analysis fee did qualify for presentence monetary credit, in *People v. Long*, 398 Ill. App. 3d 1028, 1034 (2010). In *Long*, the court found that the money from the DNA-analysis fee mostly went to the state crime laboratory for the maintenance of a database of Illinois criminals. *Id.* Therefore, the court held that the DNA-analysis fee was "not related to defendant's prosecution and thus is a fine." *Id.*

In agreement with the *Long* court, we find that the DNA-analysis fee should be characterized as a fine for definition purposes, and we allow the crediting of presentence custody time to it. The record substantiates that defendant spent 48 days in presentence custody prior to his sentencing hearing and did not receive monetary credit for time served. The amount of \$5 for each day is applied to the 48 days and then reduced so that it does not exceed the total amount of the fines. He is, therefore, entitled to a credit of \$200 against his fines incurred in this case.

CONCLUSION

For the foregoing reasons, we affirm the circuit court's judgment of conviction and modify defendant's sentence by applying a credit of \$200 against his DNA-analysis fee.

Affirmed as modified.