

NOTICE

Decision filed 05/09/11. 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. 5-10-0249

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,)	Effingham County.
)	
v.)	No. 09-CF-81
)	
LARRY J. RINE,)	Honorable
)	Sherri L.E. Tungate,
Defendant-Appellant.)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

R U L E 2 3 O R D E R

Held: Where defendant failed to present an adequate record on appeal, any doubts arising from the incomplete record must be resolved against him and his contentions of error must fail. Furthermore, defendant is not entitled to monetary presentencing incarceration credit where he was neither convicted nor fined as a result of the charges for which he was incarcerated.

Defendant, Larry J. Rine, appeals from the proceedings in the circuit court which resulted in the *nolle prosequi* of charges filed against him and an order that he reimburse Effingham County for legal representation he received from the public defender. For the following reasons, we affirm.

BACKGROUND

On April 9, 2009, defendant was charged by information with one count of possession of methamphetamine in violation of section 60(a) of the Methamphetamine Control and Community Protection Act (Act) (720 ILCS 646/60(a) (West 2008)). The court appointed public defender Lupita Thompson to represent him. Defendant was then indicted on the charge on April 15, 2009. On May 14, 2009, defendant was additionally charged by

information with one count of possession of methamphetamine-manufacturing chemicals, in violation of section 30 of the Act (720 ILCS 646/30 (West 2008)), and on June 17, 2009, he was indicted on that count. Defendant was jailed on the charges in lieu of bail from the time of his arrest on April 9 until he was remanded to the custody of the Department of Corrections on unrelated charges on August 26.

Defendant waived his right to be represented by the public defender, instead choosing to proceed *pro se*. After admonishing defendant, the circuit court granted his request to proceed *pro se* but ordered that Thompson remain on the case as standby counsel. On June 4, defendant wrote a letter to the court requesting that the public defender be reappointed to represent him. The court granted his request and reappointed Thompson. On August 13, defendant filed a *pro se* motion requesting that Thompson be disqualified from his case due to a conflict of interest. On August 20, following a hearing, the circuit court denied defendant's motion. Defendant then requested in a letter to the court that he be given additional time to hire a private attorney. On September 24, 2009, defendant filed a *pro se* "petition for counsel" and a letter to the court stating that he was unable to come up with funds to hire a private attorney. In his letter, defendant stated that he was "asking the court to grant [his] motion for counsel and have an order for payment of attorney fees filed for the services." The circuit court granted defendant's motion for the appointment of counsel on October 21, again appointing Thompson.

Less than a week later, on October 27, defendant wrote another letter to the court, stating that he did not want to be represented by Thompson due to "conflicts" the two had regarding his representation and because they "could not get along." The court held a hearing on the matter and found that "no legal conflict" arose from Thompson's representation of defendant. The court further stated that while defendant had the right to representation, he did not have the right to "pick and choose" which attorney would be

appointed to represent him. On February 4, 2010, attorney John E. Longwell, whom defendant's family had hired to represent him, entered his appearance. The court directed Thompson to file a petition for reimbursement to Effingham County for services rendered by appointed counsel, which she did on March 26. Thompson appended to her petition an itemized affidavit of attorney hours averring that she had devoted 30.75 hours to her representation of defendant.

On April 14, Longwell filed a memorandum in support of a motion to suppress evidence that Thompson had previously filed on defendant's behalf, which the court then granted. Following the suppression of the evidence, the State moved to nol-pros defendant's charges, which the court granted on May 11. The same day, following a hearing at which defendant was present with Longwell, the court granted Thompson's petition for reimbursement and ordered defendant to pay \$500 for the representation that had been provided him by Thompson "for the reasons stated on the record." Defendant filed a timely *pro se* notice of appeal, wherein he stated that the nature of the order appealed from was "payment of fees for [the] public defender[']s office."

On July 14, the four court reporters who had been present at various hearings in defendant's case filed letters in the circuit court stating that they had not received requests for transcripts from the parties and would therefore not be filing transcripts as a part of the record on appeal.

CONTENTIONS ON APPEAL

We restate defendant's contentions of error as follows: (1) that the circuit court erred in ordering him to reimburse the county for the legal representation provided by the public defender because her representation of defendant was deficient and (2) that the court erred in failing to award defendant a credit of \$5 for each day that he spent in custody prior to the State moving for the *nolle prosequi* of his charges.

The State argues that this court lacks jurisdiction over appeals from *nolle prosequi* orders and that, in any event, the circuit court's order that defendant reimburse the county was reasonable. The State also contends that we should dismiss defendant's appeal because he failed to provide a complete record on appeal and his brief contains an improper statement of facts.

DISCUSSION

Initially, we must consider the State's contention that this court lacks jurisdiction over defendant's appeal because his underlying criminal case resulted in a *nolle prosequi* order.

The State is correct in pointing out that *nolle prosequi* orders are considered to be interlocutory in nature and that "[n]o appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review" (*People v. Woolsey*, 139 Ill. 2d 157, 163, 564 N.E.2d 764, 766 (1990)). The facts before us here, though, are distinguishable from those confronted by the *Woolsey* court and relied upon by the State in arguing that we lack jurisdiction over the appeal.

In *Woolsey*, the defendant filed a motion to dismiss a pending murder charge, alleging a violation of his right to a speedy trial. Prior to the court ruling on the defendant's motion, though, the State filed a motion to nol-pros the charges, meaning they could be refiled at any time in the State's discretion. Over the defendant's objection, the court granted the State's motion without first ruling on defendant's motion to dismiss. The supreme court affirmed the appellate court's holding that it lacked jurisdiction over the *nolle prosequi* order but in doing so made clear that the *nolle prosequi* order itself was at issue rather than an ancillary issue such as the imposition of a fee. *Woolsey*, 139 Ill. 2d at 168, 564 N.E.2d at 768. In entering a supervisory order directing the circuit court to rule on defendant's motion to dismiss, the Illinois Supreme Court stressed that defendant had appealed the entry of the *nolle prosequi* due to the implications that flowed therefrom, specifically, because it had

acted to prolong the possibility that defendant might be prosecuted for murder, that it would subject him to continued anxiety and public scorn, and that it might prejudice his employment opportunities. *Woolsey*, 139 Ill. 2d at 168-69, 564 N.E.2d at 768.

Defendant here, on the other hand, is not contesting the propriety of the *nolle prosequi* order itself, but only the order that required him to pay \$500 for the legal representation he received from the public defender.

Pursuant to article 6, section 6, of the Illinois Constitution, the appellate court has jurisdiction over final judgments of the circuit court, and parties are generally entitled to appeal any final judgment as a matter of right. Ill. Const. 1970, art. VI, §6. An order's substance, and not its form, determines whether it is appealable. *People v. Salgado*, 353 Ill. App. 3d 101, 106, 817 N.E.2d 1079, 1084 (2004). A final judgment is one that determines litigation, or some definite part thereof, on the merits so that, if affirmed, the only thing remaining to be done is to proceed with the execution of the judgment. *Salgado*, 353 Ill. App. 3d at 106, 817 N.E.2d at 1084. A final judgment need not dispose of all the issues before the court, but it must dispose of the rights of the parties, at least as to some definite and separate part of the controversy. *Kellerman v. Crowe*, 119 Ill. 2d 111, 115, 518 N.E.2d 116, 118 (1987). The order to reimburse the county for the public defender's services completely disposed of the rights of the parties regarding the portion of the case related to the reimbursement of the public defender, and it is a final judgment because, if it is affirmed, all that will remain to be done is the payment of the fee by defendant.

Furthermore, it would raise serious constitutional concerns if defendant had no avenue available to pursue judicial review of an order that compelled him to pay a fee to the county. To hold that the appellate court lacks jurisdiction over this cause would in effect mean that defendant has no recourse available to challenge the imposition of the order mandating reimbursement to the county, which would deprive defendant of his right to appellate review

of an adverse final judgment and thereby violate his rights under article 6, section 6, of the constitution.

Under the State's interpretation of appellate jurisdiction over orders to reimburse the public defender in cases that result in *nolle prosequi* orders, the circuit court would be free to impose a public defender fee of any amount—even one well in excess of the statutory maximum—and the defendant would, to put it bluntly, have to live with it. In light of the constitutional right to the review of final judgments of the circuit court, this would clearly raise constitutional concerns, and we reject the State's contention that we lack jurisdiction over this appeal.

As the State correctly notes, defendant's appellant's brief is defective due to an improper statement of facts that contains argumentative, conclusory, and unsupported allegations. Although it is within this court's discretion to strike defendant's brief and dismiss his appeal on this ground (see *Niewold v. Fry*, 306 Ill. App. 3d 735, 737, 714 N.E.2d 1082, 2084 (1999)), we decline to do so and will now consider his appeal on its merits.

Initially, we note that appellants have the duty to present a complete record on appeal, and we will not consider matters that are not contained in the record. *People v. Leeper*, 317 Ill. App. 3d 475, 482, 740 N.E.2d 32, 39 (2000). Any doubts arising from the incompleteness of the record are properly resolved against the appellant. *Leeper*, 317 Ill. App. 3d at 482, 740 N.E.2d at 39. Absent an affirmative showing of error in the record, the circuit court is presumed to know the law and to have applied it properly. *People v. Henderson*, 336 Ill. App. 3d 915, 922, 789 N.E.2d 774, 779 (2003). In the absence of a transcript or a proper substitute therefor, we must assume that the trial court's decision was correct and based on a proper consideration of the evidence and arguments before it. *People ex rel. Director of Corrections v. Edwards*, 349 Ill. App. 3d 383, 389, 812 N.E.2d 355, 361 (2004).

Here, defendant has failed to provide this court with an adequate record on appeal. Significantly, we have before us no transcripts of the proceedings that gave rise to defendant's contentions of error. Defendant in effect argues that the court reporters are responsible for ensuring that transcripts are made a part of the record, and he contends that he is not to blame for the court reporters' failure to provide transcripts to this court. This argument is without merit. Defendant's attempt to shift the blame for the incomplete record to the court reporters is unpersuasive, and we will, as discussed above, resolve any doubts arising from the lack of transcripts against him.

Based on the incomplete record before us, we cannot agree with defendant that the circuit court erred in ordering him to reimburse the county for the services he received from Thompson because her representation was ineffective.

In order to establish that counsel's performance was deficient, defendants must meet both prongs of the two-part test established by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984), and subsequently adopted by the Illinois Supreme Court. Under Illinois law, in order for a defendant to establish the ineffective assistance of counsel, he must show "that counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial, a trial whose result is reliable.'" *People v. Albanese*, 104 Ill. 2d 504, 525, 473 N.E.2d 1246, 1255 (1984) (quoting *Strickland*, 466 U.S. at 687). An attorney's performance is deficient under the first prong where the level of representation is "unreasonable under prevailing professional norms." *People v. Colon*, 225 Ill. 2d 125, 135, 866 N.E.2d 207, 213 (2007). The deficient representation afforded a defendant is prejudicial under the second prong where there is a reasonable probability that, but for the deficient representation, the outcome would have been different. "A reasonable probability *** is [one] sufficient to undermine our confidence in the outcome of the proceeding." *Colon*, 225

Ill. 2d at 135, 866 N.E.2d at 213. In order to prevail on a claim of ineffective assistance of counsel, defendant must satisfy both prongs. *Colon*, 225 Ill. 2d at 135, 866 N.E.2d at 213.

Defendant is unable to satisfy either prong. From the information available in the record before us, it is apparent that Thompson filed a number of motions and made several court appearances on behalf of defendant, and defendant points to nothing that would tend to show that her performance was below that which a reasonably competent attorney would provide. Indeed, it was the motion to suppress evidence filed by Thompson that was ultimately granted and that led to the State's decision to nol-pros defendant's charges. Defendant repeatedly attempted to have Thompson replaced with different appointed counsel, but he points to nothing that would indicate that her performance was deficient, instead contending that he and Thompson "could not get along." Indigent criminal defendants have the constitutional right to appointed counsel, but this right does not permit an indigent defendant to pick which attorney will be appointed to represent him. *People v. Adams*, 195 Ill. App. 3d 870, 872, 553 N.E.2d 3, 4 (1990). Seeking to prevent an attorney from being appointed is just as much an attempt to control who will be appointed as is seeking a particular attorney. *People v. Ogurek*, 356 Ill. App. 3d 429, 437, 826 N.E.2d 605, 612 (2005). The fact that appointed counsel and her client bicker or otherwise do not get along does not justify the appointment of a new attorney. *People v. Sylvester*, 71 Ill. App. 3d 130, 132, 389 N.E.2d 601, 602-03 (1979).

Even if defendant were able to satisfy the first prong of the test, though, he is unable to satisfy the second prong because his case did not result in a conviction, meaning that there is no reasonable probability that the result would have been more favorable to defendant had Thompson represented him differently. It therefore cannot be said that defendant suffered any prejudice due to Thompson's representation, and we reject defendant's claim that the assistance of counsel he received was so deficient that it made the order that he reimburse

the county improper.

Pursuant to section 113-3.1 of the Code of Criminal Procedure of 1963 (Code), courts may order a defendant to reimburse the county "a reasonable sum" for the representation he received from appointed counsel. 725 ILCS 5/113-3.1(a) (West 2008). Defendants must be afforded a hearing prior to the entry of any reimbursement order. 725 ILCS 5/113-3.1(a) (West 2008). The maximum reimbursement that a defendant charged with a felony may be ordered to pay is \$5,000. 725 ILCS 5/113-3.1(b) (West 2008). In determining what is reasonable, courts must consider the financial circumstances of the defendant, the time spent on representation, the nature of the services provided, the expenses incurred, and any statutory limitations. *People v. Terry*, 170 Ill. App. 3d 484, 488-89, 524 N.E.2d 685, 688 (1988).

Here, defendant was afforded a hearing on the reimbursement issue. Defendant was present at the hearing with private counsel, and the court ordered him to reimburse the county \$500 "for the reasons stated on the record." As discussed above, the absence of a complete record means we must assume that the circuit court's order for defendant to pay public defender fees was correct.

Based on the foregoing, we reject defendant's claim that the circuit court erred in ordering him to reimburse the county. We note, however, that even had defendant provided this court with a complete transcript of the hearing, it is unlikely that we would reverse the determination of the circuit court. According to the affidavit of hours Thompson filed in the circuit court, she devoted 30.75 hours to her representation of defendant. The court's award of \$500 thus means defendant was ordered to pay slightly more than \$16 an hour for the legal representation he received. We cannot say that this was unreasonable, particularly in light of the fact that the relevant statute permitted the court to order defendant to pay up to \$5,000 because he faced felony charges. See *People v. Nunez*, 197 Ill. App. 3d 332, 337,

553 N.E.2d 1123, 1126 (1990) (the court's order that the defendant reimburse the county \$75 per hour for the services of the public defender was reasonable). Defendant raises vague allegations that Thompson perjured herself in the affidavit, but these allegations are utterly unsupported by the record, and we will not consider them.

Finally, defendant's claim that he is entitled to a monetary credit for the time he spent in custody prior to the entry of the *nolle prosequi* order is likewise unpersuasive. Section 110-14(a) of the Code provides 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 (West 2008). Presentencing incarceration credits apply only to fines that are imposed pursuant to a conviction, and not to any other court costs or fees. *People v. Littlejohn*, 338 Ill. App. 3d 281, 283, 788 N.E.2d 339, 341 (2003). The supreme court has held that the "central characteristic which separates a fee from a fine" (emphasis omitted) is that a fee "seek[s] to compensate the state for any costs incurred as the result of prosecuting the defendant." *People v. Jones*, 223 Ill. 2d 569, 600, 861 N.E.2d 967, 986 (2006). Elaborating further, the *Jones* court stressed that a "charge is a fee if and only if it is intended to reimburse the state for some cost incurred in defendant's prosecution." *Jones*, 223 Ill. 2d at 600, 861 N.E.2d at 986.

As the plain language of section 110-14(a) makes clear, only defendants who are convicted and against whom a fine is imposed are eligible for presentencing incarceration credits. Here, the circuit court did not—and could not—impose a fine on defendant because he was not convicted of the charges against him. The reimbursement that defendant was ordered to pay clearly was intended to compensate the county for costs incurred as a result of prosecuting defendant. The reimbursement order was thus in the nature of a fee, not a

fine, and defendant's claim to the contrary fails.

CONCLUSION

Based on the foregoing, the circuit court committed no error and its judgment is hereby affirmed.

Affirmed.