

FIFTH DIVISION
August 30, 2013

No. 1-10-3577

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 986
)	
DION THOMAS,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court's finding that defendant was guilty of unlawful use of a weapon by a felon is affirmed as the State proved beyond a reasonable doubt that defendant possessed ammunition and such a finding did not violate the second amendment. Further, defendant is entitled to additional credit for time spent in custody, an offset of his \$20 VCVA fine and an order vacating defendant's \$200 DNA indexing fee.

¶ 2 Defendant Dion Thomas was convicted of unlawful possession

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of ammunition by a felon and was sentenced to four years in the Illinois Department of Corrections. Defendant appealed his conviction.

¶ 3 On appeal, defendant argues that his conviction should be reversed because (1) the State failed to prove beyond a reasonable doubt that the ammunition was found within defendant's "abode," (2) the State failed to offer evidence to corroborate defendant's admission that the ammunition belonged to him and (3) the second amendment protected defendant's right to possess the ammunition. In addition, defendant argues on appeal that he is entitled to additional credit for time spent in custody prior to sentencing and that such credit should offset defendant's \$20 Violent Crime Victim's Assistance fine. Defendant further argues that the \$200 DNA Indexing fee must be vacated as he already paid this fee for a prior felony. For the reasons that follow, we affirm the trial court's findings with respect to defendant's conviction and remand to the trial court with directions regarding defendant's credits, fine and fees.

¶ 4 BACKGROUND

¶ 5 Defendant Dion Thomas was charged by information with two counts of possession of a controlled substance with intent to deliver (counts one and two) and two counts of unlawful possession of ammunition by a felon (counts three and four).

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Defendant was tried in a bench trial. Following the People's case in chief, the trial court granted defendant's motion for a directed finding as to counts one, two and three. The trial proceeded with respect to count four.

¶ 6 Following defendant's case in chief, the trial court found defendant guilty of count four, which charged him with possession of four rounds of ammunition after having been previously convicted of a felony. The trial court sentenced defendant to four years in the Illinois Department of Corrections.

¶ 7 The evidence at trial established the following facts. On December 6, 2009 at approximately 9 o'clock p.m., several Chicago police officers went to 374 North Avers to execute a search warrant for the first floor and second-floor apartments located at that address.

¶ 8 Officer Schultz testified that upon arrival to 374 North Avers, Officer Alaniz knocked and announced at the exterior door. After receiving no response, Officer Alaniz forced entry into the building. Immediately upon entering the building, there was a staircase leading to the second-floor apartment. Officer Alaniz went up the stairs and knocked at the second-floor apartment door. After receiving no response at that door, Officer Alaniz forced entry into the second-floor apartment. Officer Alaniz, Officer Schultz, Sergeant Reckard, Officer Rasmussen and other

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officers then proceeded to enter the second-floor apartment.

¶ 9 Sergeant Reckard headed directly to the back of the apartment where he found defendant kicking in the kitchen window. He immediately detained defendant. A second civilian in the apartment was detained as well and they were both relocated to the front room. Once the area had been secured, the officers began a systematic search of the second-floor apartment.

¶ 10 During the search, Sergeant Reckard testified that he recovered blenders and a scale from the kitchen. The scale contained white residue, which he believed to be heroin. Officer Rasmussen also recovered four plastic zip-lock bags in a kitchen cupboard containing white powder, which he believed to be heroin. Outside the apartment door, Officer Schultz found a stroller with two knotted plastic bags containing white chunks of what he suspected to be cocaine.

¶ 11 Subsequently, Officers Belcik and Diblich, who were originally executing a search warrant at the first-floor apartment, entered the second-floor apartment to assist with the search. In the front bedroom of the apartment, Officer Diblich searched a dresser and found four live .38 caliber rounds of ammunition. In the rear bedroom, Officer Belcik searched another dresser where he recovered two letters addressed to "Dion Thomas" at "374 North Avers" in "Chicago, Illinois." The letters did not

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indicate a specific apartment. One of the envelopes was postmarked October 2009, while the other letter's postmark date was illegible. Officer Belcik testified that he did not find a lease for 374 North Avers with defendant's name on it, and he did not seek out the building's landlord to further inquire whether defendant lived there.

¶ 12 Upon completion of the search, Officers Diblich and Belcik went back to the 11th District to question defendant. They read defendant his *Miranda* rights, at which time defendant indicated that he wished to speak.

¶ 13 According to Officers Diblich and Belcik, defendant relayed to them that he had beaten cases before, that he would beat this case, and that he would bond out by Christmas because he had plenty of money. When the officers presented defendant with the bags of suspected cocaine and inquired as to the weight, defendant replied "3.5 grams." Officer Diblich further testified that the defendant appeared disgusted with himself and "said that he knew he should have moved sooner, that he stayed in one place for too long" and "that he slipped up by staying in one place for too long, that he should have moved sooner." The officers testified that when defendant was asked about the ammunition, defendant responded that the ammunition belonged to him, that he got it from a friend, and that he kept it because it was for a

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revolver.

¶ 14 Prior to the People resting, the parties stipulated that defendant had been previously convicted of a felony for possession of a controlled substance on July 11, 2001 and that the plastic bags with white substance found by Officer Rasmussen and Officer Schultz had tested positive for the presence of cocaine and heroin.

¶ 15 Following the stipulations, the State rested and defendant presented a motion for directed verdict on all counts. The trial court judge granted defendant's motion with respect to counts one, two and three. The trial continued on count four, which alleged a violation of the unlawful possession of a weapon by a felon (UUWF) statute due to defendant's possession of ammunition and prior felony conviction.

¶ 16 During defendant's case in chief, defendant testified that on December 6, 2009, he was living at 2565 West Washington with his three children and their mother. He testified that he had been living there for five years. He testified that he was familiar with 374 North Avers because his sister, Shamika Thomas, and Solomon Pierce lived on the first floor. Defendant testified that Julius Brandon, his friend of 20 years, was living in the second-floor apartment.

¶ 17 According to defendant, at about 7:45 p.m. on December 6,

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2009 he arrived at Brandon's apartment and they smoked marijuana. At approximately 9 p.m. defendant and Brandon heard someone kicking at the door. A few moments later they were able to see the police enter the first-floor apartment from the second-floor apartment window. Ten minutes later, the police entered the second-floor apartment, where defendant and Brandon were located. Defendant stated that he knew the men were police officers because of the shields they were carrying and because of this he laid on the ground. He was then relocated to the front room by the police.

¶ 18 Defendant testified that after the police searched the apartment, he was taken to the station for questioning. Defendant testified that he gave the police his name and address and denied that he ever told the police that the bullets were his, that he received the bullets from a friend or that the bullets went with a revolver. Defendant further denied telling the police that he would beat this case, like he had beaten others, and that he had money to bond out by Christmas. Defendant further stated that the police officers showed him the narcotics that were found, but that he was never asked about the weight.

¶ 19 With respect to the mail that was found in the second-floor apartment, defendant testified that it was from one of his

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children's mother, Victoria Lee, who was in a correctional center in October 2009. Defendant stated that he was not having a romantic relationship with Lee, although he acknowledged that one of the letters from Lee to him stated "I love you so much." Defendant denied ever seeing the letters before, but testified that Lee would send letters to his sister's address on the first floor because at that time he was living with another one of his children's mother at 2565 West Washington.

¶ 20 Defendant testified that he used to go to Brandon's apartment on the second floor at least three times a week and sometimes everyday. Defendant cannot recall why he was in Brandon's apartment on the date in question, but recalled that he had smoked marijuana while there. He denied ever being in the kitchen that night. Defendant stated that at the time of the search he told the police officers a number of times to look at his state ID because it said he lived at 2565 West Washington.

¶ 21 Both parties waived closing arguments and the trial court found defendant guilty of unlawful use of a weapon by a felon. Specifically, the trial court found:

"I find the defendant completely incredible. Combination of the things that he said as well as his manner when testifying. He had a huge impact in terms of my viewing of his

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testimony. And I contrast that with the State's witnesses who talk about recovering the live ammunition and the admission that the defendant gave regarding the ammunition."

¶ 22 Defendant filed a motion for a new trial, which was denied. After defendant was sentenced to four years in the Illinois Department of Corrections, he appealed the trial court's findings. Specifically, defendant argues on appeal that his conviction should be reversed because (1) the State failed to prove beyond a reasonable doubt that the ammunition was found within defendant's "abode," (2) the State failed to offer evidence to corroborate defendant's admission that the ammunition belonged to him and (3) the second amendment protected defendant's right to possess the ammunition. In addition, defendant argues on appeal that he is entitled to additional credit for time spent in custody prior to sentencing and that such credit should offset defendant's \$20 Violent Crime Victim's Assistance fine. Defendant further argues that the \$200 DNA Indexing fee must be vacated as he already paid this fee for a prior felony. For the reasons that follow, we affirm the trial court's findings with respect to defendant's conviction and remand to the trial court with directions regarding defendant's credits, fine and fees.

¶ 23 ANALYSIS

¶ 24 I. Unlawful Possession of a Weapon by a Felon

¶ 25 Defendant claims that his conviction pursuant to the unlawful use or possession of a weapon by a felon (UUWF) statute should be reversed because the State failed to prove beyond a reasonable doubt that the ammunition recovered was found within his "abode." When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004); *People v. Ornelas*, 295 Ill. App. 3d 1037, 1049 (1998). It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is justified. *People v. Moore*, 171 Ill. 2d 74, 84 (1996).

¶ 26 Simply put, proving that the ammunition was found in defendant's "abode" is not a necessary element under the UUWF

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statute. Pursuant to section 5/24-1.1(a) of the Code of Criminal Procedure, the unlawful possession of a firearm by a felon statute that defendant was convicted under, it is not a mandatory requirement that the State prove that defendant's ammunition was found in his "abode." See 720 ILCS 5/24-1.1(a) (West 2008).

Section 5/24-1.1(a) states:

"It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2008).

Furthermore, our supreme court has made it clear that the elements that must be shown in order to prove unlawful possession of a weapon by a felon are: "(1) the knowing possession or use of a firearm [or firearm ammunition] and (2) a prior felony conviction." *People v. Gonzalez*, 151 Ill. 2d 79, 87 (1992). Accordingly, the State did not have to prove the ammunition was found within defendant's "abode" in order to convict him of unlawful possession of a weapon by a felon.

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¶ 27 Defendant's charging instruction states that defendant:

"knowingly possessed in his own abode any
firearm ammunition, to wit: 4 rounds of .38
caliber ammunition, after having been
previously convicted of the felony offense of
possession of a controlled substance under
case number 01-CR-8349***"

Although we recognize this charging instrument states that defendant: "knowingly possessed in his own abode any firearm ammunition[] ***, " the use of the word "abode" in the charging instruction is surplusage. The term "abode" is surplusage because even if the term were omitted from the charging instruction, the charge still would have been sufficient. "Where an indictment charges the elements essential to an offense under the statute, other matters unnecessarily appearing in the indictment may be rejected as surplusage." *People v. Adams*, 46 Ill. 2d 200, 204 (1970); *People v. Figgers*, 23 Ill. 2d 516, 519 (1962).

¶ 28 Here, defendant's charging instruction clearly includes the two elements of a UUWF claim: that defendant knowingly possessed firearm ammunition and had been previously been convicted of a felony. Thus, any reference to defendant's "abode" in the charging instruction was clearly surplusage.

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¶ 29 However, even if the State was required to prove that the ammunition was found within defendant's "abode," we believe that the State has proven this fact beyond a reasonable doubt. In *People v. Price*, the court defined "abode" as "a place of residence where an individual maintains substantial and long-lasting contacts." *People v. Price*, 375 Ill. App. 3d 684, 695 (2007). Under that definition, it is possible that "an individual may have more than one abode[] ***." *Id.*

¶ 30 Here, the State established that at the time of the search, defendant was in the second-floor apartment at 374 North Avers. The State was also able to show that defendant not only received letters from his child's mother at 374 North Avers, but that he kept those letters in a bedroom drawer in the second-floor apartment. Officer Belcik testified that after reading defendant his *Miranda* rights, defendant stated that he had "slipped up by staying in one place for too long, that he should have moved sooner." The State further established that one of the other people living in the second-floor apartment was defendant's friend of 20 years, and defendant even admitted that he was in the second-floor apartment at least three times a week and sometimes everyday.

¶ 31 As stated above, when reviewing the evidence presented before the trial court, we view all evidence in the light most

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favorable to the prosecution and ask whether any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Cunningham*, 212 Ill. 2d at 278; *Ornelas*, 295 Ill. App. 3d at 1049. It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *Williams*, 193 Ill. 2d at 338. A criminal conviction will not be reversed unless the evidence is so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is justified. *People v. Moore*, 171 Ill. 2d 74, 84 (1996).

¶ 32 Here, given that defendant was found in the second-floor apartment, received mail at that apartment, kept mail at that apartment, implied that he had been staying at that apartment for "too long," kept ammunition at that apartment and even admitted to being at that apartment everyday, we find that all of this evidence, especially when viewing it in the light most favorable to the State, sufficiently proves that defendant's ammunition was found within his "abode." Further, based on the above facts, we find that the State was able to prove beyond a reasonable doubt that defendant was in possession of ammunition and was a felon. As such, the trial court properly convicted defendant under the UUWF statute.

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¶ 33 Defendant further claims that the State failed to corroborate his admission that the ammunition belonged to him-or in other words failed to comply with the *corpus delicti* rule-and produced witnesses whose testimony was incredible and contrary to human experience. As a result, defendant argues that his conviction should be reversed.

¶ 34 It is well established that a confession alone is not sufficient to sustain a conviction. See e.g., *People v. Willingham*, 89 Ill. 2d 352, 358 (1982). To sustain a conviction the State must prove: first, that a crime occurred, i.e., the *corpus delicti*, and second, that the crime was committed by the person charged. *People v. Cloutier*, 156 Ill. 2d 483, 503 (1993). Where the defendant's confession is part of the proof of the *corpus delicti*, the State must also adduce corroborating evidence independent of the defendant's own admission. *Id.* The independent, corroborating evidence need not rise to the level of proof beyond a reasonable doubt but must tend to confirm the defendant's own statement. *Id.*

¶ 35 Here, both Officers Belcik and Diblich testified regarding defendant's admission that the ammunition belonged to him. Further, the ammunition was found in an apartment where defendant received mail, kept mail and where he admitted to being everyday. Based on those facts alone, we find that the defendant's

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admission that the ammunition belonged to him was sufficiently corroborated.

¶ 36 Moreover, the trial court was very clear in that it found the State's witnesses to be very credible and defendant's testimony to be "completely incredible." It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence, *Williams*, 193 Ill. 2d at 338, and we will not overturn a criminal conviction unless the evidence is so improbable or unsatisfactory that a reasonable doubt of defendant's guilt is justified. *Moore*, 171 Ill. 2d at 84. Further, a reviewing court must not retry the defendant or substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). As such, we find that based on the evidence presented at trial, not only was defendant's admission sufficiently corroborated, but the State presented sufficient evidence to convict defendant of unlawful possession of a weapon by a felon.

¶ 37 II. Second Amendment

¶ 38 Next, defendant argues that the UUWF statute is unconstitutional on its face because it violates the second amendment and, as such, his conviction should be reversed.

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Although defendant did not raise this issue in the trial court, we recognize that a constitutional challenge to a statute may be raised at any time. *People v. Bryant*, 128 Ill. 2d 448, 454 (1989). When reviewing the constitutionality of a statute, our review is *de novo*. *People v. Johnson*, 225 Ill. 2d 573, 584 (2007).

¶ 39 The second amendment states:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const., amend. II.

¶ 40 The UUWF statute, in relevant part, provides:

(a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the

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Department of State Police under Section 10
of the Firearm Owners Identification Card
Act.[]" 720 ILCS 5/24-1.1(a) (West 2008).

¶ 41 Preliminarily, we note that every statute is presumed to be constitutional and it is the party challenging the constitutionality of the statute that has the burden of rebutting that presumption. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2009). The legislature has a wide latitude in prescribing criminal penalties under its police power and has an obligation to protect its citizens from known criminals. *People v. Ross*, 407 Ill. App. 3d 931, 939 (2011).

¶ 42 Further, while we acknowledge that the Supreme Court has held that the "right to possess a handgun in the home for the purpose of self defense is protected by the second amendment as a fundamental right," and this right applies to the states, *MacDonald*, 130 S. Ct. 3020, 3050 (2010), defendant's status as a convicted felon allows the state to place limitations on that right. "Our United States Supreme Court has never indicated that a felon can possess a firearm in a home or outside of a home." *Ross*, 407 Ill. App. 3d at 939. In fact, in *District of Columbia v. Heller*, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws

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forbidding the carrying of firearms in sensitive places such as schools and governmental buildings, or laws imposing conditions on the commercial sale of arms." *Heller*, 554 U.S. 570, 626-27 (2008). Further, in *McDonald v. City of Chicago*, the Supreme Court reinforced the assurances made in *Heller*, stating:

"We made in clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here." (Internal citations omitted.) *McDonald v. City of Chicago*, 130 S. Ct. at 3047.

Accordingly, the second amendment has never been interpreted to encompass an unlimited right to bear arms.

¶ 43 More importantly, though, our courts have addressed the constitutionality of the UUWF statute and specifically held that it is constitutional and in line with the precedent set by the Supreme Court. In *People v. Davis*, the Illinois appellate court

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held that the UUWF and the armed habitual criminal statute were constitutional on their face and did not violate the second amendment. *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011).

In coming to this conclusion, the court stated:

"The UUWF statute serves to protect the public from the danger posed when convicted felons possess firearms. *** The State has a legitimate interest in protecting the public from the dangers posed by felons in possession of firearms. The statutes at issue in this case forbid possession of firearms only by persons proven to have committed felonies. *** Thus, the restrictions fit proportionally with the interests the statutes serve." (Internal citations omitted.) *Id.* at 750.

Further, in a case where the defendant was convicted under the UUWF statute for possession of ammunition alone and challenged the conviction by claiming the UUWF statute was unconstitutional, the court upheld the statute's constitutionality once again as a "valid exercise of Illinois' right to protect the health, safety, and general welfare of its citizens from the potential danger posed by convicted felons in possession of firearms or firearm

ammunition." *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 42 (2013). The *Garvin* court emphasized that the Supreme Court recognized the second amendment as guaranteeing "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at ¶ 2. Ultimately, the *Garvin* court stated that "[k]eeping bullets out of the hands of those who also may not possess a firearm is well within the law under the constitution." *Id.* at ¶ 43.

¶ 44 Thus, as our courts have already held that the UUWF statute is constitutional on its face, and this finding comports with the precedent laid out by the Supreme Court, we affirm the trial court's conviction and find defendant's claim that the UUWF statute violated his second amendment right to bear arms to be without merit.

¶ 45 III. Credits, Fine and Fees

¶ 46 Defendant argues that he is entitled to additional credit for time spent in custody prior to sentencing and that the \$20 Violent Crime Victim's Assistance fine imposed upon him should be offset by defendants' presentence custody credit. See 725 ILCS 240/10(c)(2) (West 2008). Because the question of the amount of credit due is a legal question and does not require any credibility assessment or act of discretion, our review is *de novo*. *People v. McCreary*, 393 Ill. App. 3d 402, 408 (2000). For

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the reasons that follow, we agree with defendant.

¶ 47 A defendant is to receive credit "for time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7(b) (West 2008). Illinois law affords defendants "credit towards his sentence" for "any portion of a day prior to sentencing" that the defendant spends in custody. *People v. Dominguez*, 255 Ill. App. 3d 995, 1005 (1994).

¶ 48 Here, defendant was arrested on December 6, 2009 and was sentenced on November 9, 2010. The trial court awarded defendant credit for 335 days of presentence incarceration. Nonetheless, after calculating the amount of time spent in presentence incarceration, we agree that defendant is entitled to 338 days.

¶ 49 Next, Defendant argues that he should not have to pay the \$20 fee that was imposed upon him pursuant to the Violent Crime Victim's Assistance Fund Act due to the credits he had already accumulated. See 725 ILCS 240/10 (West 2008). A defendant who is "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). As defendant pointed out, the aforementioned credit is also available to defendants whom

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receive jail time credit against their prison term. *People v. Hare*, 119 Ill. 2d 441, 452 (1988). Because none of the exceptions listed in section 110-4 prevent a person charged with unlawful possession of ammunition by a felon from receiving bail, defendant is eligible for the \$5-per-day credit. 725 ILCS 5/110-4 (West 2008).

¶ 50 Because we previously found defendant was entitled to 338 days of sentencing credit, defendant is qualified for up to \$1690 credit against any fines. Accordingly, we find that defendant is entitled to 338 days of presentence credit and an offset of the \$20 Violent Crime Victim's Assistance fine.

¶ 51 IV. DNA Indexing Fee

¶ 52 Lastly, defendant contends that the trial court judge erred by ordering a \$200 assessment for the collection of DNA samples pursuant to section 5/5-4-3(j) of the Code of Criminal Procedure, and asks this court to remand the cause with directions that the \$200 DNA assessment be vacated. See 730 ILCS 5/5-4-3(j) (West 2008). The State agrees with this request. We also agree with this request.

¶ 53 Section 5-4-3, "authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not

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currently registered in the DNA database." *People v. Marshall*, 242 Ill. 2d 285, 303 (2011); see also 730 ILCS 5/5-4-3 (West 2008). As such, the \$200 DNA fee can only be levied once pursuant to section 5-4-3. See *id.*

¶ 54 Here, a report from the Illinois State Police Division of Forensic Services shows that his DNA profile was already on file and that he was already assessed a \$200 fee. Because defendant is able to show that he is currently registered in the DNA database and, therefore, was already assessed this fee, the current \$200 DNA Indexing fee must be vacated.

¶ 55 For the above reasons, we affirm the trial court's conviction of defendant for unlawful possession of ammunition by a felon; we vacate the \$200 DNA fee and order the clerk of the circuit court to modify the mittimus to reflect defendant's pre-sentence credits and offset the \$20 Violent Crime Victim's Assistance fine in accordance with this order.

¶ 56 Conviction affirmed; remanded with directions.