

No. 1-12-0619

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 17475
	)	
JOHNNIE MELTON,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Evidence was sufficient as to location of defendant's drug transaction for purposes of proving delivery within 1,000 feet of a school. Counsel was not ineffective. Court conducted proper inquiry into *pro se* post-trial claims of ineffectiveness and did not err by not accepting a written *pro se* motion. Defendant's fines and fees are corrected.

¶ 2 Following a bench trial, defendant Johnnie Melton was convicted of delivery of a controlled substance (less than one gram of heroin) within 1,000 feet of a school and sentenced to nine years' imprisonment with fines and fees. On appeal, defendant contends that the evidence at trial was insufficient to show that the transaction occurred within 1,000 feet of a school where

the alleged address of the transaction, from which the measurement was allegedly made, does not exist. Relatedly, defendant contends that (1) trial counsel rendered ineffective assistance by not investigating the crime scene and by failing to impeach State witnesses regarding the non-existent address, and (2) the court erred by not allowing him to file a *pro se* post-trial motion raising ineffective assistance claims and by not conducting a proper inquiry into those claims. Lastly, defendant contends, and the State agrees, that his DNA analysis fee must be vacated and the order assessing fines and fees must be corrected to reflect his pre-sentencing detention credit.

¶ 3 The initial complaint alleged that defendant delivered 0.4 gram of heroin at "4107 W Westend" in Chicago on September 17, 2010. Police reports indicated that he delivered the suspected heroin at "4107 W West End Ave, Chicago, IL 60624" and was arrested at 4120 West Washington Boulevard in Chicago at 8:15 a.m. that day. He was charged by indictment with two counts of delivery of a controlled substance, both alleging that he delivered less than one gram of a substance containing heroin on or about September 17, 2010. One count alleged that he did so "within 1000 feet of any school \*\*\* to wit: George W. Tilton Elementary School."

¶ 4 During pre-trial proceedings on June 14, 2011, defense counsel told the court that defendant "refused to speak with me" after the previous court session because he wanted to proceed *pro se* and that she "attempted to discuss the case in the lockup several times" but he "refused to communicate." She also told the court that "given the investigation that [defendant] directed me to conduct, without information from him, I can't complete that investigation." Defendant told the court that he did not want to proceed *pro se* and would speak with counsel. After a recess, defendant acknowledged that he had an opportunity to speak with counsel.

¶ 5 Defendant then filed a *pro se* motion for appointment of new counsel other than a public defender, alleging that he "has had no conference or visits concerning his case with" counsel. He also alleged that he asked counsel to (1) "take photos of all four address[es] that these police

officers had tak[en] defendant in search of evidence," but "she stated that its [*sic*] not considered suspicious behavior," (2) obtain certain security video "to show defendant was subjected to illegal police exploitation," but she "precluded" this, (3) call an unnamed exculpatory witness "but she told defendant she was not going to call this witness because he may plea[d] the Fifth," and (4) make a motion to subject "the State's evidence" to independent testing, to which counsel "claim[ed] that such motions would be denied by this court." The motion was mailed on June 28, 2011, and filed by the clerk of the court on July 18.

¶ 6 On July 28, 2011, counsel informed the court that defendant had again refused to speak with her, and defendant asserted that he had "been trying to speak to my attorney." The court directed counsel to make an appointment to meet defendant and admonished defendant that "it's very important for you to talk to your attorney." The case proceeded to trial at the next session, September 1, 2011, with no ruling on the motion nor mention of the motion in open court.

¶ 7 John Capone, investigator for the State's Attorney, testified that he was assigned by a written request to measure the distance from 4107 W. West End Avenue to Tilton School, the latter being at 223 North Keeler Avenue. On July 13, 2011, he used a measuring device – which he had calibrated that day – to measure that distance at 353.6 feet, and saw that Tilton School was in operation as a school. On cross-examination, the State successfully objected on relevance grounds to counsel asking whether Investigator Capone entered Tilton School or whether it had an exterior sign indicating its name.

¶ 8 Police officer Ervin Ternoir testified that, on the morning in question, he went in plain-clothes and an unmarked car to the vicinity of West End and Karlov Avenues with prerecorded currency to purchase narcotics under the observation of other officers. At the northwest corner of that intersection, he saw defendant standing with another man. Officer Ternoir approached them and asked for two "sawbucks," that is, two \$10 bags of heroin. Defendant told him to park

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nearby, and Officer Ternoir testified that the location where he parked was "4107 Westend" and described it as "two or three houses" from the intersection. Officer Ternoir saw defendant go to a location "five or six houses down the block" and retrieve something from the area of an iron gate. Defendant then went to Officer Ternoir's car and handed him two plastic bags containing "suspect heroin," for which Officer Ternoir paid a prerecorded \$20 bill and then drove away. Officer Ternoir told other officers of the transaction and described defendant and his location. He was later informed that defendant had been detained at 4120 W. Washington, a block south of West End Avenue. Officer Ternoir went there and identified defendant as the man who sold him the suspected heroin. At the police station later that day, Officer Ternoir inventoried the suspected heroin, and Officer Scott Hall showed him a \$20 bill that he confirmed as a prerecorded bill. From his familiarity with the neighborhood, he knew that Tilton School was a block west of the site of the transaction, and he saw it in operation as a school on that day.

¶ 9 Officer Scott Hall testified that, when Officer Ternoir reported by radio that he had purchased suspected heroin, other officers reported that the suspect he had described "had gone mobile on foot and began walking around up and down blocks and through gangways." About a half-hour after the transaction, Officer Hall was directed by other officers to 4120 W. Washington and saw defendant, who matched the suspect's description. Officers Hall and Ronald Coleman detained defendant without incident and informed Officer Ternoir. When Officer Ternoir identified defendant as the man who sold him the suspected heroin, Officer Hall took defendant to the police station. The post-arrest search of defendant found (in relevant part) a \$20 bill; Officer Hall brought it to Officer Ternoir, who confirmed that it was one of the prerecorded bills.

¶ 10 The parties stipulated to the effect that the white substance delivered to the State Police Crime Laboratory under a particular inventory number weighed 0.4 gram and that one of the two items, weighing 0.2 gram, tested positive for heroin.

¶ 11 Defendant's motion for a directed finding was denied.

¶ 12 Defendant testified that, at about 7 a.m. on the day in question, he left his home at 213 North Karlov Avenue in Chicago after smoking "three bags of cocaine" about an hour earlier. There was a crowd of 13 or 14 people in front of his home, including "Mr. Luke \*\*\* selling narcotics." Defendant had seen Levy (or Levi) Luke in the neighborhood previously and described him as "a lot smaller" and "way younger" than himself. Defendant asked the group to leave, but they did not. He walked towards Washington Boulevard, and shortly after he started walking west on Washington, he was stopped by two officers. They searched him and then took him, in handcuffs, to the "4100 block" of West End Avenue. There, the officers arrested Luke, conducted a post-arrest search that found about \$860, and put him in the back of a police car with defendant. The officers searched that area, then went to defendant's home and searched the front and rear yards, then after a stop at a coffee shop took defendant and Luke to the police station. Defendant stated that he had "no money in his pockets" or any drugs upon arrest, and he denied having sold drugs that day to Officer Ternoir or anyone else. He admitted to a prior conviction for which he was imprisoned.

¶ 13 The State entered in rebuttal a certified copy of defendant's 2003 conviction for possession of a controlled substance with intent to deliver.

¶ 14 Following closing arguments, the court found defendant guilty as charged. After summarizing the evidence, the court found that "the eyewitness testimony of the officer corroborated with the recovery of the prerecorded funds to me is pretty substantial."

¶ 15 Trial counsel filed a general post-trial motion. Defendant asked the court if he could "file my own motion," but the court would not allow it "when you have an attorney." At another session, defendant asked to "file a motion for a new trial," but counsel noted that she had already filed such a motion, and the court directed counsel to speak with defendant. Counsel stood on her written motion at the hearing thereon and, after brief argument by the State, it was denied.

¶ 16 The case proceeded immediately to sentencing and, following arguments in aggravation and mitigation, defendant was allowed to address the court. He denied committing this offense and argued that "the person who committed this crime, I gave the information to my attorney, and she refused to address that issue with this person." He told the court that "I have filed my own motion for a new trial \*\*\* because I don't think I was represented fairly." When the court asked defendant to explain, he argued that counsel "neglected to prepare for my trial" and "just didn't do anything." In particular, she did not examine or photograph the crime scene, nor have the distance from the crime scene measured. He argued that a proper investigation would have revealed that "4107 doesn't even exist." He also challenged the stipulated forensic evidence on *Crawford*<sup>1</sup> confrontation grounds and alleged that "there was no deal as admitted into evidence to compare the serial numbers" of the prerecorded currency. The court then stated that defendant would not be able to file his own post-trial motion so long as he had counsel, but also asked counsel to respond to his claims. She stated that she wanted to evaluate defendant's *pro se* claims for inclusion in her post-trial motion but he would not allow her to see his *pro se* motion. She also said that she visited defendant "several times" before trial and "on more than one occasion he refused to speak with me" but "we did go over the facts of the case as well as the necessary information \*\*\* to prepare for trial." The court found that, having heard the trial and observed counsel's preparations for it, counsel "met the standard of a competent attorney as far as

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<sup>1</sup>*Crawford v. Washington*, 541 U.S. 36 (2004).

this type of case is concerned." Defendant mentioned his pre-trial motion for new counsel, and the court recalled that it was filed in July before stating that "I don't appoint individual attorneys \*\*\* from the public defenders to represent you."

¶ 17 The court sentenced defendant as a mandatory Class X offender to nine years in prison, with 405 days of credit for pre-sentencing detention. The order assessing fines and fees totaled \$2,760 and noted the 405 days of detention but did not reflect any credit. This appeal followed.

¶ 18 The record on appeal has been supplemented regarding Levi Luke. Luke was charged with delivery of a controlled substance (less than one gram of heroin) allegedly committed on or about September 17, 2010, within 1,000 feet of Mason Park, a public park, and within 1,000 feet of Tilton School. Police reports indicate that he was arrested at 4145 W. West End at 8:20 a.m. that day by Officers Hall and Coleman, having been "positively identified by U/C Smith," and had \$598 upon arrest including \$20 in prerecorded currency. Luke pled guilty on March 13, 2012, to delivery of a controlled substance – with the enhanced charges nol-prossed – and was sentenced to three years' imprisonment.

¶ 19 On appeal, defendant's primary contention is that the evidence was insufficient to convict him beyond a reasonable doubt of delivery of a controlled substance within 1,000 feet of a school because 4107 W. West End Avenue, where the transaction allegedly occurred and from which the measurement of the distance to Tilton School was allegedly commenced, does not exist.

¶ 20 A person commits the Class 2 felony of delivery of a controlled substance when he delivers less than one gram of a substance containing heroin, but commits a Class 1 offense when he does the same "in any school, or \*\*\* on the real property comprising any school or \*\*\* within 1,000 feet of the real property comprising any school." 720 ILCS 570/401(d), 407(b)(2) (West 2010). For purposes of the school enhancement, "the time of day, time of year and whether classes were currently in session at the time of the offense is irrelevant." 720 ILCS 570/407(c)

(West 2010). To prove this enhancing factor, the State is required to show that the offense occurred within 1,000 feet of a school, though not that the defendant was aware that the offense occurred within 1,000 feet of a school. *People v. Clark*, 406 Ill. App. 3d 622, 634 (2010).

¶ 21 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Id.* The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Similarly, the trier of fact is not required to disregard inferences that flow normally from the evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Id.*, ¶ 64.

¶ 22 As a threshold matter, we disagree with defendant that 4107 W. West End Avenue "does not exist." He has ably shown that there is no building, nor distinct parcel or lot, at that address. However, there is a West End Avenue in Chicago between Karlov and Keeler Avenues, which are 4100 West and 4200 West in the Chicago addressing system. Courts may take judicial notice of geographical facts such as the approximate distance between or relative location of sites, and "information acquired from mainstream Internet sites such as Map Quest and Google Maps is reliable enough to support a request for judicial notice," though we "generally will not take judicial notice of the *precise* location of a single city lot or subdivision within city lines." (Emphasis in original.) *Clark*, 406 Ill. App. 3d at 632-33. We take judicial notice that Chicago

has a logical system for the assignment of addresses, with numbers ascending as one proceeds away from the intersection of State and Madison Streets and with odd numbers on one side of a street and even numbers on the other. Therefore, there is a point on – or, more correctly, a length of – West End Avenue between Karlov and Keeler Avenues that can logically and practically said to be 4107 West even though there is no building or discrete lot at that address.

¶ 23 Defendant does not bolster his argument by pushing it nearly to a *reductio ad absurdum* when he raises the specter that "it is at best unclear whether Investigator Capone conducted any measurement at all" or "doctored the results in his report" as his testimony "is completely unbelievable because it would not have been possible for him to have measured the distance between 4107 W. West End and 223 N. Keeler since 4107 W. West End does not exist," or that "given that Officer Ternoir also gave the nonexistent address of 4107 W. West End as the location of the alleged transaction \*\*\*, the State certainly did not prove beyond a reasonable doubt that the alleged transaction occurred on the *block* where the State now alleges it took place." (Emphasis added.) The testimony of either witness is not discredited or "unequivocally undermine[d]" or "clearly untrue" merely because there is no building at 4107 W. West End.

¶ 24 That said, defendant's argument is colorable. Because the first building on West End west of Karlov is at 4113 West, there was no readily-apparent means for Officer Ternoir to determine that the location where he parked and defendant delivered the heroin was at 4107 West rather than any of the other odd-numbered address between 4101 and 4111. While he also described that location as "two or three houses" from the intersection of West End and Karlov, this is equally if not more imprecise because of the lack of houses or other buildings between the intersection and 4113 West. Similarly, though we reject the characterization that Investigator Capone measured from a site that does not exist, or did not measure at all, it is apparent for the same reasons that he measured from an imprecise site.

¶ 25 However, because 4107 West is an address in the area at issue, and because on review we make all reasonable inferences in favor of the State, we proceed on the basis that Officer Ternoir and Investigator Capone formed opinions – estimates, based on work and life experience, of the sort reasonable persons make every day – on where 4107 W. West End is. We consider it decisive that defendant did not challenge at trial the foundation or basis for those opinions. A defendant's objection regarding a test, even one underlying an element of the offense, concerns the foundation for its admission rather than its sufficiency and is forfeited on appeal when the defendant made no such objection at trial, because a timely objection gives the State the opportunity to correct any deficiency in the proof. *People v. Korzenewski*, 2012 IL App (4th) 101026, ¶ 7; *People v. Rigsby*, 383 Ill. App. 3d 818, 822-23 (2008). Though defendant's contention is framed as an insufficiency claim, a challenge to the basis for Investigator Capone's measurement of the distance to Tilton School concerns the foundation for his opinion (and that of Officer Ternoir) as to where to begin that measurement. Absent a cogent challenge to the basis for the opinions of Officer Ternoir and Investigator Capone, a reasonable finder of fact could conclude that their opinions were reasonable and accept them at face value. Thus, taking the trial evidence in the light most favorable to the State as we must, a reasonable finder of fact could conclude that defendant delivered heroin within 1,000 feet of Tilton School as charged.

¶ 26 Defendant also contends that trial counsel rendered ineffective assistance by not investigating the crime scene and by failing to impeach State witnesses regarding the non-existent address to which they testified.

¶ 27 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that the deficient performance prejudiced him; that is, by showing a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *People*

*v. Domagala*, 2013 IL 113688, ¶ 36. Counsel has a professional duty to conduct reasonable investigations, or to make a reasonable decision that a particular investigation is unnecessary, and an allegation of failure to investigate is judged for reasonableness under the circumstances with considerable deference to counsel's judgment. *Id.*, ¶ 38. A defendant raising an ineffectiveness claim must overcome a strong presumption that the challenged action or inaction of counsel, including whether to call a particular witness at trial, may be the result of sound trial strategy. *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. A defendant may overcome that presumption if counsel's decision seems so irrational and unreasonable that no reasonably-effective defense attorney facing similar circumstances would pursue such a strategy. *Id.*

¶ 28 Here, as stated above, counsel did not cross-examine Officer Ternoir or Investigator Capone on how each concluded that he was at 4107 W. West End when, respectively, purchasing the heroin or beginning the measurement to Tilton School. For the reasons stated in defendant's briefs, we agree that an investigation of the crime scene would show what his investigation shows: the first building on West End west of Karlov is at 4113 West, and the first discrete parcel or lot is at 4111 West. However, counsel could have concluded as a matter of reasonable trial strategy that the challenge proposed by defendant would not have been successful because their opinions were apparently reasonable and it was unlikely that the court would conclude otherwise. Stated another way, counsel could reasonably conclude that, while he could challenge their estimates or opinions regarding 4107 W. West End, the challenge would not be persuasive. Firstly, the location of the transaction described by Officer Ternoir was near Karlov Avenue, as is 4107 West, so that his estimate is plausible. Moreover, the measured distance from what Investigator Capone concluded was 4107 West to Tilton School was under half of the statutory 1,000 feet, so that any error or uncertainty in the estimates is well within any reasonable margin of error. Under such circumstances, counsel did not render ineffective assistance.

¶ 29 Defendant also contends that the court erred by not allowing him to file a written *pro se* post-trial motion raising ineffective-assistance claims and by not conducting a proper inquiry into his claims.

¶ 30 A defendant who makes a *pro se* post-trial motion alleging ineffective assistance of counsel is not automatically entitled to the appointment of counsel to assist with the motion. *People v. Fields*, 2013 IL App (2d) 120945, ¶ 38, citing *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The court should examine the basis of the claims and, if it determines that the claims lack merit or pertain only to trial strategy, it may deny the motion without appointing counsel. *Id.* Conversely, if the court determines from its inquiry that the claims demonstrate possible neglect of the defendant's case by trial counsel, new counsel should be appointed for the hearing on the *pro se* motion, before which new counsel may independently evaluate the defendant's claims. *Id.* In conducting its inquiry into the defendant's claims, the trial court will likely need to discuss the allegations with the defendant or with trial counsel. *Fields*, ¶ 39. "Accordingly, to evaluate whether the claims indicate possible neglect, the trial court may consider any facial insufficiency of the defendant's allegations and may (1) ask the defendant's trial counsel questions; (2) briefly discuss the allegations with the defendant; or (3) rely upon its own knowledge of counsel's performance." *Id.*, citing *Moore*, 207 Ill. 2d at 78–79. Our review of how the trial court conducted this inquiry is *de novo*. *Id.*, citing *Moore*, 207 Ill. 2d at 75.

¶ 31 Defendant does not cite any case requiring, nor does anything in *People v. Krankel*, 102 Ill. 2d 181 (1984), or its progeny provide, that a court errs by not accepting a written *pro se* post-trial motion, but only that a court errs in failing or refusing to consider *pro se* ineffectiveness claims. The court here conducted exactly the steps set forth in *Moore*: allowing defendant to explain his claims, giving trial counsel an opportunity to respond, and considering the court's own knowledge of counsel's performance. We also disagree with defendant that the court's

finding that counsel "met the standard of a competent attorney as far as this type of case is concerned" indicated that it was "grading counsel on a curve based on the court's erroneous view that this was a simple controlled-purchase case." Almost every case falls into some "type" or category, from multiple-victim shootings punishable by life imprisonment to probationable disorderly conduct. As defendant's prior convictions render him a mandatory Class X offender upon conviction for delivery of a controlled substance even without the school enhancement, it is as likely that the court meant a case of this gravity as that it meant a simple case.

¶ 32 Defendant argues that two matters in his post-trial claims of ineffective assistance merit further investigation: counsel's failure to investigate "that 4107 W. West End does not exist" and "her failure to investigate Luke, who [defendant] identified as the actual culprit during his testimony." For the reasons stated above, in ¶ 28, we conclude that the absence of nonexistent-address questions and argument at trial does not indicate counsel's possible neglect of the case. As to Luke, per defendant's *pro se* pre-trial motion for new counsel, trial counsel explained that she did not call Luke because he could invoke his right against self-incrimination. As Luke faced felony charges for events of the same day and in the same neighborhood as defendant's offense and arrest, which had not come to trial or other disposition by the time of defendant's trial, the supplemented record corroborates that explanation. As to defendant's argument that counsel should have cross-examined the State's witnesses regarding Luke, we do not see how this was likely to have affected the outcome of the trial so that counsel may have neglected the case by not doing so. Luke's arrest for a similar offense as defendant in the same area at essentially the same time, by the same arresting officers but upon the identification of different undercover officers (Officer Ternoir for defendant, and Officer Smith for Luke) and with defendant admitting that Luke does not resemble him in size or age, does not contradict any of the State's evidence. As stated above, the trial court is not obligated to elevate every possible explanation consistent with

innocence to reasonable doubt, and there is nothing unreasonable in either counsel or the trial court concluding that officers conducted undercover narcotics purchases from multiple offenders in the neighborhood so that Luke's arrest and subsequent guilty plea do not imply defendant's innocence or materially support an acquittal. We find that nothing introduced in the trial court or the supplemental record calls for a conclusion that counsel may have neglected defendant's case, and thus the court did not err in its consideration of defendant's *pro se* post-trial claims.

¶ 33 Lastly, defendant contends, and the State agrees, that his DNA analysis fee must be vacated and that the order assessing fines and fees must be corrected to properly reflect his pre-sentencing detention credit. We agree. Defendant was assessed a \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)) though he had prior felony convictions subject to the DNA analysis fee. Our supreme court has determined that the DNA analysis fee may not be assessed under such circumstances. *People v. Marshall*, 242 Ill. 2d 285 (2011). His \$2,000 controlled substance assessment (720 ILCS 570/411.2(a) (West 2010)), \$30 children's advocacy center fee, and \$5 drug court fee (55 ILCS 5/5-1101(f), (f-5) (West 2010)), are all fines subject to a \$5 credit for each day of pre-sentencing detention. 725 ILCS 5/110-14(a) (West 2010); *People v. Jones*, 223 Ill. 2d 569, 587-92 (2006); *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 53; *People v. Butler*, 2013 IL App (5th) 110282, ¶ 4. Therefore, defendant's credit of \$2,025 for 405 days must be applied to his \$2,035 in fines.

¶ 34 Accordingly, we vacate defendant's DNA analysis fee. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the order assessing fines and fees to reflect (1) the vacatur, and (2) \$2,025 pre-sentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 35 Affirmed in part, vacated in part, and order corrected.