

he served in the Macon County jail in Macon County case No. 11-CF-1735, (2) his probation fee must be reduced from \$1,050 to \$425, and (3) his deoxyribonucleic acid (DNA) analysis fee should be vacated. We affirm as modified and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 In December 2010, defendant was charged with domestic battery (prior offense) (720 ILCS 5/12-3.2(a)(1) (West 2010)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). He was arrested on December 5, 2010, and remained in the Macon County jail until being released on bond on December 22, 2010.

¶ 6 In January 2011, defendant pleaded guilty to unlawful possession of a weapon in exchange for the State's dismissal of the domestic battery charge and a sentence of 24 months' probation. In September 2011, defendant admitted violating his probation and the court resentenced him to 18 months' probation.

¶ 7 Defendant was arrested in Macon County case No. 11-CF-1735 on December 11, 2011, for the offense of aggravated domestic battery. On December 16, 2011, the State filed a second petition to revoke probation, which alleged he committed aggravated domestic battery as charged in Macon County case No. 11-CF-1735. In April 2012, the trial court held a hearing on the petition. Defendant remained in custody at the Macon County jail in case No. 11-CF-1735 until his sentencing in the instant case, No. 10-CF-1789, for the probation violation.

¶ 8 On June 7, 2012, the trial court held a sentencing hearing in the instant case. According to the presentence investigation report (PSI), defendant's custody dates were December 5, 2010, through December 22, 2010. Defense counsel asked whether defendant was being held pursuant to the probation violation or Macon County case No. 11-CF-1735. The court

then asked a court officer whether the sheriff's records showed defendant was being held in the instant case or No. 11-CF-1735. The court officer replied defendant was not being held in the instant case. The court revoked defendant's probation and sentenced him to three years' imprisonment. It awarded sentencing credit for the period from December 5, 2010, through December 22, 2010. On the same day, after the sentencing hearing, the State dismissed the charges in Macon County case No. 11-CF-1735.

¶ 9 In June 2012, defendant filed a motion to reconsider sentence. On July 27, 2012, defendant filed a *pro se* "Motion for Order Nunc Pro Tunc" requesting an additional 176 days' sentencing credit. The motion did not include the dates for which defendant requested credit. The trial court denied the motions.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues (1) he should receive sentencing credit for the time he served in the Macon County jail in Macon County case No. 11-CF-1735, (2) his probation fee must be reduced from \$1,050 to \$425, and (3) his DNA analysis fee must be vacated. We address defendant's arguments in turn.

¶ 13 A. Defendant's Sentencing-Credit Claim

¶ 14 Defendant argues he should receive sentencing credit pursuant to section 5-6-4(h) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-6-4(h) (West 2010)) for the time he spent in the Macon County jail in case No. 11-CF-1735. He argues, although section 5-4.5-100 of the Unified Code (730 ILCS 5/5-4.5-100 (West 2010)) does not require sentencing credit, "fundamental fairness may nevertheless require [he] receive sentencing credit based on

[s]ection 5-6-4(h)."

¶ 15

1. *Standard of Review*

¶ 16

"Generally, a trial court's sentencing decisions are entitled to great deference and will not be altered on appeal absent an abuse of discretion." *People v. Mays*, 2012 IL App (4th) 090840, ¶ 66, 980 N.E.2d 166. Accordingly, we will not upset a sentencing court's decision whether to award a defendant credit for time spent on probation absent an abuse of discretion. *People v. Sweeney*, 2012 IL App (3d) 100781, ¶ 40, 967 N.E.2d 876.

¶ 17

2. *The Applicable Statutes*

¶ 18

Section 5-4.5-100(b) of the Unified Code states an offender is entitled to sentencing credit for the days "spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010). Section 5-6-4(h) of the Unified Code states:

"The term on probation, conditional discharge or supervision shall not be credited by the court against a sentence of imprisonment or periodic imprisonment unless the court orders otherwise. The amount of credit to be applied against a sentence of imprisonment or periodic imprisonment when the defendant served a term or partial term of periodic imprisonment shall be calculated upon the basis of the actual days spent in confinement rather than the duration of the term." 730 ILCS 5/5-6-4(h) (West 2010).

¶ 19

3. *Defendant Is Not Entitled to Credit*

¶ 20

Defendant admits he was not in simultaneous custody from December 11, 2011,

to June 7, 2012, in the instant case and Macon County case No. 11-CF-1735, and is not entitled to sentencing credit pursuant to section 5-4.5-100(b) of the Unified Code. Further, he acknowledges section 5-6-4(h) of the Unified Code gives the trial court discretion in awarding sentencing credit for time spent on probation. However, he asserts it is a matter of "fundamental fairness and equity" for this court to grant him relief because he "was deprived of his liberty and spent 180 days in county jail awaiting the hearing on the State's petition to revoke and prosecution on the State's ultimately unprovable charges, without any way to receive credit for his time in custody as contemplated by the legislature."

¶ 21 Defendant relies on *People v. Townsend*, 209 Ill. App. 3d 987, 990, 568 N.E.2d 946, 948 (1991), in which the Third District modified the defendant's sentencing judgment to include 17 days' additional credit. In *Townsend*, the defendant was found guilty of unlawful possession of a controlled substance in December 1989. *Id.* at 988, 568 N.E.2d at 947. Then, while Townsend was released on bond and awaiting sentencing, the State filed a petition to revoke the defendant's probation in an unrelated retail theft conviction. *Id.* Townsend was held in custody pursuant to that petition from January 1990 until her sentencing in the unlawful possession case. *Id.* at 989, 568 N.E.2d at 947. The State ultimately dismissed the petition to revoke. *Id.* The Third District concluded, "[b]ased on the particular facts of this case and the legislative intent of section 5-8-7 [of the Unified Code]," the defendant was entitled to credit for the 17 days she spent in custody on the petition to revoke. *Id.* at 989, 568 N.E.2d at 948. The court reasoned, "[t]he State is splitting hairs in arguing that the defendant was in jail for the theft conviction but not for the possession conviction. She was in jail because of both convictions. If anything, the possession conviction was the stronger factor. Had it not been for that conviction,

she would have remained free on probation and bail pending sentencing." *Id.* at 990, 568 N.E.2d at 948. The instant case is distinguishable. Here, defendant, as he concedes, was in jail because of the conduct in Macon County case No. 11-CF-1735, not the instant case. Further, *Townsend* is of limited precedential value where the Third District expressly restricted its holding to the case's facts.

¶ 22 As defendant concedes, section 5-6-4(h) of the Unified Code leaves the decision whether to grant defendant credit for time spent on probation to the trial court. In *People v. Whitfield*, 228 Ill. 2d 502, 520, 888 N.E.2d 1166, 1176 (2007), our supreme court addressed a similar argument and held a defendant sentenced to probation and then sentenced to imprisonment for the same offense "is not entitled to credit for time spent on probation." Accordingly, defendant cannot show he was statutorily or constitutionally entitled to sentencing credit for time spent while on probation.

¶ 23 Defendant's assertion this court can upset a trial court's exercise of its discretion based on "fundamental fairness" is problematic. While Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999) gives the appellate court "significant powers when reviewing criminal cases," the appellate court does not have the supervisory authority to issue an order to a circuit court solely in an effort to reach a fair result. *Whitfield*, 228 Ill. 2d at 520-21, 888 N.E.2d at 1177. As our supreme court long ago recognized, the limits of appellate review can have harsh results but courts do not make laws, and the appropriate remedy may lie with the legislature. *People v. Judd*, 396 Ill. 211, 212-13, 71 N.E.2d 29, 30 (1947).

¶ 24 As part of his argument, defendant asserts we should consider the merits of his claim because of trial counsel's failure to argue defendant should receive credit for the time spent

in custody in No. 11-CF-1735. Because we have considered the merits of defendant's argument, we need not consider this ineffective-assistance-of-counsel claim.

¶ 25 B. Defendant's Assessment Claims

¶ 26 1. *Standard of Review*

¶ 27 Whether assessments are properly imposed raises a question of statutory interpretation, and is reviewed *de novo*. *People v. Adair*, 406 Ill. App. 3d 133, 142-43, 940 N.E.2d 292, 301 (2010); *People v. Price*, 375 Ill. App. 3d 684, 697, 873 N.E.2d 453, 465 (2007).

¶ 28 2. *Probation Fees*

¶ 29 Defendant argues pursuant to section 5-6-3(i) of the Unified Code (730 ILCS 5/5-6-3(i) (West 2010)) he is only accountable for the probation service fee from January 2011 until June 7, 2012. In other words, he is only accountable for the fee for 17 months, rather than the 42 months the trial court ordered, and his fee must be reduced from \$1,050 to \$425. The State concedes defendant is only responsible for \$425 in probation service fees. We accept the State's concession and remand to the trial court with directions to amend the sentencing judgment accordingly.

¶ 30 3. *DNA Analysis Fee*

¶ 31 In his brief, defendant argued he was not required to pay the DNA analysis fee because his DNA was previously obtained. See *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011) (DNA analysis fee cannot be assessed twice against the same defendant). In his reply brief, defendant withdraws his argument on the basis of Illinois State Police records showing his DNA sample was collected as a result of the instant case.

¶ 32 The State notes the trial court improperly credited \$85 against the \$200 DNA

analysis fee. The \$200 DNA analysis fee is not subject to offset by the \$5 *per diem* credit. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 99, 963 N.E.2d 430. Defendant concedes he improperly received an \$85 credit against the DNA analysis fee. We remand with directions the trial court vacate the \$85 credit against the DNA analysis fee.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm as modified and remand with directions. We direct the trial court to (1) amend the sentencing judgment to reduce defendant's probation service fees from \$1,050 to \$425; and (2) vacate the \$85 credit against the DNA analysis fee. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 35

Affirmed as modified and remanded with directions.