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2014 IL App (3d) 120625-U

Order filed February 11, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0625
	)	Circuit No. 11-CF-1104
WILLIAM DRUMMOND,	)	
Defendant-Appellant.	)	Honorable Michael E. Brandt, Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice O'Brien concurred in the judgment.  
Justice Wright concurred in part and dissented in part.

**ORDER**

- ¶ 1 *Held:* (1) Trial counsel was not ineffective for failing to file a motion to suppress evidence. (2) Defendant is granted a credit against his fines, and his \$200 DNA analysis fee is vacated.
- ¶ 2 Defendant, William Drummond, was convicted of unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2010)). The trial court sentenced defendant to 10 years in prison and assessed fines and fees, including a \$200 deoxyribonucleic acid (DNA)

fee. Defendant appeals, arguing: (1) trial counsel was ineffective for failing to file a motion to suppress evidence; (2) defendant is entitled to credit against his fines; and (3) the DNA analysis fee should be vacated. We grant defendant a credit and vacate his DNA analysis fee.

Defendant's conviction and sentence are otherwise affirmed.

¶ 3

### FACTS

¶ 4 On November 29, 2011, the State charged defendant with one count of unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2010)). Defendant pled not guilty to the offense, and the cause proceeded to a jury trial.

¶ 5 At trial, the State presented the testimony of police officer Anthony Rumman. Rumman testified that on the night of November 18, 2010, he was called to a residence after a neighbor had informed police that the house was vacant, yet a car was parked in the driveway, and people were inside. Upon arriving at the residence, Rumman noticed a vehicle in the driveway. He illuminated the inside of the vehicle with his flashlight and saw in plain view a clear plastic bag containing pistol ammunition sitting in the cup holder between the front two seats. After determining that no one was in the vehicle, Rumman entered the home. He discovered defendant and his girlfriend, Felisha Mays, in a state of undress. Rumman ordered the couple to put their clothes on. He then handcuffed them and separated them for interview.

¶ 6 During his investigation at the residence, Rumman asked defendant if he knew who owned the house. Defendant responded that he did not. Rumman then asked what defendant was doing at the house. Defendant responded that Mays had called him and said she was going to pick him up so the couple could have sexual intercourse. They went to the house because Mays' cousin had just moved out and she knew nobody would be there. Rumman then asked defendant whom the ammunition in the car belonged to. Defendant said, "It's mine. I take full

responsibility for it." He informed Rummans that he found the ammunition on the ground near the Harrison Homes. Rummans testified that the Harrison Homes was a high crime area located in Peoria. Rummans also testified that he discovered during his investigation that the car in which the ammunition was found belonged to Mays' mother.

¶ 7 Mays testified for the defense. She claimed that she and defendant went to the residence after they received a call from her sister asking them to help her finish moving out. Mays stated that upon arriving at the residence, she assisted defendant in removing a washer and dryer as well as some bags and boxes. As she loaded one of the boxes into the vehicle, it fell apart, and glass as well as a small bag of bullets fell out. She placed the bullets in the front passenger cup holder of the vehicle. Mays stated that she had brought along cleaning supplies, such as bleach, pine sol, a mop, and a broom. After cleaning the house, she left the supplies in the kitchen, and defendant and she began to have sexual intercourse. According to Mays, the police arrived around 10:30 p.m. while she and defendant were having intercourse.

¶ 8 In rebuttal, Rummans testified that he had searched the car and the house and did not find any cleaning supplies or broken glass. Further, he stated that Mays had not mentioned anything about her sister or the bullets the night that she was arrested. Rummans also testified that he entered the residence and found Mays and defendant in a state of undress around 7:30 p.m.

¶ 9 At the conclusion of the trial, the jury found defendant guilty of unlawful possession of firearm ammunition by a felon. The trial court sentenced defendant as a Class X offender due to his previous convictions, which included first degree murder. Defendant received a sentence of 10 years in prison. The trial court also ordered fines and fees, including \$15 in drug court fees, a \$15 state police operations assistance fee, \$30 in state police services fund fees, and a \$200 DNA analysis fee. Defendant appeals.

¶ 10

## ANALYSIS

¶ 11

### I.

¶ 12 Defendant contends that he was subject to arrest upon being handcuffed. Defendant argues that trial counsel was therefore ineffective for failing to move to suppress his postarrest statements which were elicited without proper *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring a defendant receive certain rights prior to any in-custody interrogation). To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 13 Generally, the question of whether to file a motion to suppress evidence is considered a matter of trial strategy. *People v. Brannon*, 2013 IL App (2d) 111084. However, a defendant can succeed on an ineffective assistance claim if he can show a reasonable probability that the motion would have been granted and that the trial outcome would have been different. *Id.* Therefore, it follows that a defendant's appeal rises and falls with the merits of the motion to suppress. *Id.*

¶ 14 Here, after our review of the record and the arguments on appeal, we conclude that defendant has not demonstrated a reasonable probability that the trial court would have granted his motion to suppress.

¶ 15 First, it appears that *Miranda* warnings may not have been necessary prior to Rummans' questions regarding the ammunition. *Miranda* required that certain warnings be given prior to custodial interrogation. *Miranda*, 384 U.S. 436. Following *Miranda*, courts have interpreted interrogation to mean any words or actions on the part of the police that they should know are

reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291 (1980). In this case, defendant and Mays were suspected of a crime based on their presence in the residence. Therefore, any questions relating to such a crime would be meant to elicit an incriminating response. However, because they were not suspected of a crime regarding the ammunition, and because the simple presence of bullets in a vehicle is not a crime, the officer's questions regarding the ammunition were not likely to elicit an incriminating response. As to the ammunition, the officer did not even know a crime had been committed when he asked about it. See *People v. Wilson*, 164 Ill. 2d 436 (1994) (where a defendant is not regarded as a suspect until he admitted to a crime, the officers had no reason to suspect that their questioning would elicit incriminating responses). Therefore, even if defendant's comments regarding his presence in the residence could have been suppressed, it would have been reasonable for the trial court to deny a request to suppress his comments regarding the ammunition.

¶ 16 *Miranda* warnings may not have been required for a second reason. *Miranda* warnings are only required where the person being questioned is induced to speak where he would not otherwise do so freely. *Miranda*, 384 U.S. 436. Based on this reasoning, *Miranda* warnings are not required for every individual subject to a custodial interrogation. See *Berkemer v. McCarty*, 468 U.S. 420 (1984) (*Miranda* warnings were not necessary during a traffic stop even though defendant was subject to a custodial interrogation). The *Berkemer* court reasoned that *Miranda* warnings were not necessary because the custodial interrogation: (1) took place during a presumptively temporary and brief detention; and (2) was not a situation where the suspect would feel completely at the mercy of the police. *Id.* In reaching its conclusion on the second point, the court noted that the stop was: (1) public, and therefore diminished the motorist's fears if he did not cooperate; (2) conducted by only one or two police officers; and (3) not in a police-

dominated setting, like the police station. *Id.* Here, as in *Berkemer*, the stop took place in a location away from the police station, was conducted by only one police officer, and was not in a police-dominated setting. Further, it was presumptively temporary and brief. Therefore, the trial court could have reasonably followed *Berkemer* and concluded that *Miranda* warnings were not necessary.

¶ 17 Lastly, even if *Miranda* warnings were necessary prior to Rummans' questions about the ammunition, the record does not establish that Rummans failed to *Mirandize* defendant. While it may be true that the trial record contains no indication that Rummans did read defendant his *Miranda* rights, the record is also devoid of any indication that Rummans did not read defendant his *Miranda* rights. Without evidence relating to the giving or not giving of *Miranda* rights, it is impossible to conclude with any certainty that the trial court would have suppressed defendant's statements.

¶ 18 Therefore, based on the above reasoning, we find that defendant has not met his burden of establishing that the motion to suppress would have been granted. Because of this conclusion, we cannot find that trial counsel was ineffective. See *Brannon*, 2013 IL App (2d) 111084.

¶ 19 II.

¶ 20 Defendant next contends that he should be granted a credit against his fees for drug court, state police operations assistance, and state police services. Section 110-14 of the Code of Criminal Procedure of 1963 provides that a defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14(a) (West 2010). That credit can be applied to fines; however, it cannot be applied to fees. *People v. Jones*, 223 Ill. 2d 569 (2006). A charge is a fine, even if the

legislature labels it a fee, if it is part of the punishment for a conviction, and not established to recoup expenses incurred by the State in prosecuting the defendant. *Id.*

¶ 21 In this case, defendant spent 190 days in pretrial custody. Therefore, he is entitled to a credit of up to \$950 against his fines. We find that credit can be applied to defendant's \$15 drug court fees (see *People v. Unander*, 404 Ill. App 3d 884 (2010)), \$15 state police operations assistance fee (see *People v. Millsap*, 2012 IL App (4th) 110668), and \$30 state police services fund fees (see *People v. Williams*, 2013 IL App (4th) 120313). After applying the credit, defendant's fines and fees are reduced by \$60.

¶ 22 III.

¶ 23 Finally, defendant argues that his \$200 DNA analysis fee should be vacated. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2008). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, defendant has provided a record from the Illinois State Police Forensic Services which states that, pursuant to a prior conviction, defendant's DNA was received on July 31, 2003, and a profile was obtained for the DNA database. We take judicial notice of that record. See *People v. Jimerson*, 404 Ill. App. 3d 621 (2010). Because defendant's DNA was previously registered, we vacate the DNA analysis fee assessed against him at sentencing.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Peoria County is affirmed in part, modified in part, and vacated in part.

¶ 26 Affirmed in part, modified in part, and vacated in part.

¶ 27 JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 28 I concur with the majority's conclusion that defense counsel was not ineffective. I also agree defendant is entitled to receive a credit of up to \$950 against his fines at the rate of \$5 per day for every day defendant spent in pretrial detention.

¶ 29 I respectfully disagree that this court should continue the practice of modifying the circuit clerk's calculations, challenged for the first time on appeal, unless defendant contends the various financial charges resulted in a void sentence. Since the financial errors raised by defendant in this appeal were not presented in the trial court as part of a motion to reconsider defendant's sentence, I submit this court should refuse to recalculate the financial charges *de novo* and remand these issues to the trial court for consideration.

¶ 30 I acknowledge that often, without guidance from the attorneys of record, a trial judge must devise a court order that includes all of the mandatory, statutory, financial penalties required by statute depending on the nature of the charge and circumstances of the offense. Thus, trial courts often generically describe the financial consequences to be imposed following a conviction and, by necessity, rely on the court clerk to identify, calculate, assess, and then collect, the statutorily mandated financial penalties. Often, a trial judge does not indicate the clerk's calculations have been reviewed by the parties or approved by the court before imposition by court order. Such is the case at bar.

¶ 31 Here, the trial judge simply ordered "statutory costs and fees" but did not identify any fines to be imposed for the clerk to include in the monetary calculations. The record does not demonstrate that the court reviewed, approved, or incorporated the clerk's calculations, which included statutory fees viewed as mandatory fines, as part of the judgment order.

¶ 32 This court has historically held that the clerk of a circuit court is a nonjudicial member of the court with purely ministerial duties and, as such, has no power to impose sentences or levy mandatory fines. *People v. Tarbill*, 142 Ill. App. 3d 1060, 1061 (1986); see also *People v. Rexroad*, 2013 IL App (4th) 110981, ¶¶ 52-54. Similarly, I conclude any fees that are deemed fines by existing case law cannot be incorporated by a clerk acting on good intentions as part of a defendant's sentence.

¶ 33 In addition, once again, I note the trial court's written order *did not* mark the box showing the court required defendant to pay a \$200 DNA fee, but the clerk assessed this \$200 charge. See *People v. Williams*, 2014 IL App (3d) 120240. Since the clerk's cost sheet includes this obvious inconsistency, contrary to the court's written order, I cannot assume the trial court approved the clerk's calculations. Nor am I confident the trial court intended to incorporate all charges reflected in the circuit clerk's cost sheet as part of the judgment order.

¶ 34 In my view, any disputed financial charges reflected in the clerk's cost sheet are best addressed in the trial court, with both parties and the circuit clerk present. As a result, I would remand this case with directions for the trial court to vacate the DNA fee and other fines and fees incorrectly imposed by the clerk. It would be prudent for the trial court to enter a written order, perhaps even an agreed order, clarifying the correct amounts for fines, fees, costs, and other assessments levied against this defendant by the court. Once the trial court orders defendant to pay specific mandatory, statutory fines, then the court should direct the clerk to allow defendant a \$5 per day credit up to the amount of any mandatory, statutory, financial charges deemed to constitute fines by existing case law or applicable statute for purposes of the \$5 per day credit. See *Hunter*, 2014 IL App (3d) 120552.