

**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).

2015 IL App (4th) 130529-U

No. 4-13-0529

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

June 30, 2015

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JUSTIN J. MORRIS,	)	No. 12CF727
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

---

JUSTICE KNECHT delivered the judgment of the court.

Justices Harris and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court vacated the trial court's denial of defendant's section 115-4.1(e) motion and remanded for an evidentiary hearing. The appellate court further directed the trial court to (1) issue an amended sentencing judgment reflecting a sentence credit of 29 days, (2) vacate the \$175 DNA fee, and (3) apply a \$5-per-day credit against all creditable fines.

¶ 2 In May 2012, defendant, Justin J. Morris, pleaded guilty to one count of theft of property having a value exceeding \$500 (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and was sentenced to probation. In June 2012, the trial court revoked defendant's probation. In July 2012, the court resentenced defendant *in absentia* to nine years' imprisonment, with credit for 27 days served in custody, and ordered him to pay certain assessments. In April 2013, defendant filed a *pro se* postconviction alleging his constitutional right to due process was violated when he was never given a hearing as required by section 115-4.1(e) of the Code of Criminal Procedure

of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2010)), which the court summarily dismissed. In June 2013, defendant filed a *pro se* motion for a new sentencing hearing pursuant to section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2010)), which the court denied without an evidentiary hearing. Defendant appeals, alleging the trial court erred in (1) denying his section 115-4.1(e) motion without an evidentiary hearing, (2) summarily dismissing his postconviction petition, (3) calculating credit for time served in custody, (4) imposing a \$175 deoxyribonucleic acid (DNA) fee, and (5) failing to apply a \$5-per-day credit against all creditable fines. We vacate the trial court's denial of defendant's section 115-4.1(e) motion and remand with directions.

¶ 3

## I. BACKGROUND

¶ 4

In May 2012, defendant was arrested and charged by information with two counts of burglary (counts I and II) (720 ILCS 5/19-1(a) (West 2010)) and one count of theft of property having a value exceeding \$500 (count III) (720 ILCS 5/16-1(a)(1)(A) (West 2010)). Defendant pleaded guilty to count III in exchange for dismissal of counts I and II. The trial court sentenced defendant to 24 months' probation, 15 days' incarceration, with credit for 15 days served in custody, and ordered him to pay certain assessments.

¶ 5

In June 2012, the State filed a petition to revoke defendant's probation. The trial court admonished defendant he may be tried and sentenced *in absentia* if he later failed to appear. Defendant admitted violating his probation. The court revoked defendant's probation and continued the matter for resentencing. Defendant was released on a recognizance bond.

¶ 6

In July 2012, defendant failed to appear at his resentencing hearing. The trial court resentenced defendant *in absentia* to nine years' imprisonment, with credit for 27 days

served in custody, and ordered him to pay certain assessments. The court issued a warrant for defendant's arrest.

¶ 7 In September 2012, defendant was arrested and appeared in court before a different judge and with different counsel. The trial court ordered defendant to be transported to the Illinois Department of Corrections for the commencement of his sentence.

¶ 8 In April 2013, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), alleging his constitutional right to due process was violated when he was never given a hearing as required by section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2010)). In May 2013, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. That same month, defendant filed a motion to reconsider the court's summary dismissal, which the court denied.

¶ 9 In June 2013, defendant filed a *pro se* motion for a new sentencing hearing pursuant to section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2010)). The trial court denied defendant's motion without an evidentiary hearing.

¶ 10 This appeal followed.

## ¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues, pursuant to section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2010)), this court should vacate the denial of defendant's section 115-4.1(e) motion and remand to the trial court with directions to hold a hearing on whether his absence from sentencing was without his fault and due to circumstances beyond his control. In the alternative, defendant argues, this court should remand for second-stage postconviction

proceedings as defendant's petition stated an arguable claim the trial court's failure to conduct a hearing on the reason for his absence from sentencing violated his due process rights. Defendant further asserts the trial court (1) miscalculated credit for time served in presentence custody, (2) improperly imposed a \$175 DNA fee, and (3) failed to apply a \$5-per-day credit against all applicable fines. The State, with the exception of defendant's due process allegations, concedes in all respects. We agree with defendant and accept the State's concessions.

¶ 13 Section 115-4.1(e) of the Code provides:

"When a defendant who in his absence has been either convicted or sentenced or both convicted and sentenced appears before the court, he must be granted a new trial or new sentencing hearing if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control. A hearing with notice to the State's Attorney on the defendant's request for a new trial or a new sentencing hearing must be held before any such request may be granted. At any such hearing both the defendant and the State may present evidence."

725 ILCS 5/115-4.1(e) (West 2010)).

Accordingly, a defendant who files a timely motion for a new sentencing hearing under this section must be granted an evidentiary hearing in which he or she can establish his or her or failure to appear in court was both without his or her fault and due to circumstances beyond his or her control. 725 ILCS 5/115-4.1(e) (West 2010); see *People v. Cobian*, 2012 IL App (1st) 980535, ¶ 21, 977 N.E.2d 247.

¶ 14 In the case *sub judice*, defendant filed a motion requesting a new sentencing hearing pursuant to section 115-4.1(e) of the Code. Based on the record before us, the trial court denied the motion without an evidentiary hearing. This decision was in error. We vacate the denial of defendant's motion and remand for an evidentiary hearing to determine whether his absence both was not his fault and was the result of circumstances beyond his control. (We note, the State highlights the split in the appellate districts regarding whether a request for a hearing is timely but "elects not to object to or suggest alternative procedural requirements to defendant's current request for relief." See *People v. Manikowski*, 288 Ill. App. 3d 157, 160-61, 679 N.E.2d 840, 843 (1997); *People v. Woolridge*, 292 Ill. App. 3d 788, 793, 686 N.E.2d 386, 389 (1997); *People v. Lozada*, 323 Ill. App. 3d 1015, 1021, 753 N.E.2d 383, 388 (2001); *People v. Laster*, 328 Ill. App. 3d 391, 395, 770 N.E.2d 225, 228 (2002).)

¶ 15 Accepting defendant's argument and the State's concession regarding the above error, we need not address defendant's contention of error in the dismissal of his postconviction petition.

¶ 16 Defendant further asserts, and the State concedes, (1) he is entitled to an additional two days of presentence credit for time served in custody, (2) the trial court improperly imposed a \$175 DNA fee as defendant had already provided a DNA sample pursuant to a prior felony conviction (see *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011)), and (3) the trial court failed to apply a \$5-per-day credit for time served in presentence custody (see 725 ILCS 5/110-14 (West 2010)). We agree with defendant and accept the State's concessions. We direct the trial court to (1) issue an amended sentencing judgment reflecting a

credit for time served in presentence custody of 29 days, (2) vacate the \$175 DNA fee, and (3) apply a \$5-per-day credit against all creditable fines.

¶ 17

### III. CONCLUSION

¶ 18

For the reasons stated, we vacate the trial court's denial of defendant's section 115-4.1(e) motion and remand for an evidentiary hearing to determine whether his absence both was not his fault and was the result of circumstances beyond his control. We further direct the trial court to (1) issue an amended sentencing judgment reflecting a sentence credit of 29 days, (2) vacate the \$175 DNA fee, and (3) apply a \$5-per-day credit against all creditable fines.

¶ 19

Vacated; cause remanded with directions.