

**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) 130561-U

NO. 4-13-0561

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

February 19, 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
BOBBY TATUM,	)	No. 07CF968
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Pope and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the dismissal of defendant's petition for relief from judgment, vacated the filing fee imposed on defendant, and remanded with directions.

¶ 2 In August 2007, a jury found defendant, Bobby Tatum, guilty of aggravated battery of a child. In December 2007, the trial court sentenced him to 24 years in prison. In March 2013, defendant filed a petition for relief from judgment, and the State filed a motion to dismiss. In June 2013, the trial court dismissed the petition and ordered defendant to pay, and the Department of Corrections (DOC) to withhold from his account, \$40 for filing fees and court costs.

¶ 3 On appeal, defendant argues the \$40 fee imposed by the trial court should be vacated and the amount refunded to his prisoner trust account. We affirm in part, vacate in part, and remand with directions.

¶ 4

## I. BACKGROUND

¶ 5 In August 2007, a jury found defendant guilty of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)). In December 2007, the trial court sentenced him to 24 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Tatum*, No. 4-08-0078 (Aug. 20, 2009) (unpublished order under Supreme Court Rule 23).

¶ 6 In April 2010, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)), setting forth claims of ineffective assistance of trial and appellate counsel. In June 2010, the trial court summarily dismissed the petition, finding it frivolous and patently without merit.

¶ 7 On appeal, defendant did not challenge the trial court's dismissal. Instead, defendant argued the court erred in ordering him to submit a duplicate sample of his deoxyribonucleic acid (DNA) and pay the \$200 DNA assessment when his DNA was already registered with the Illinois State Police. This court affirmed the dismissal of defendant's postconviction petition but vacated the \$200 DNA fee. *People v. Tatum*, 2011 IL App (4th) 100562-U, ¶ 12.

¶ 8 In March 2013, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)). Defendant argued his three-year term of mandatory supervised release must be vacated because it was never expressly imposed by the trial court. Defendant also filed motions for leave to proceed *in forma pauperis* and for the appointment of counsel. The State filed a motion to dismiss.

¶ 9 In June 2013, the trial court dismissed the petition, finding it frivolous and

patently without merit. In doing so, the court refused to waive the filing fees and ordered defendant to pay \$40 for the filing fees and court costs, citing section 27.2(a) of the Clerks of Courts Act (Courts Act) (705 ILCS 105/27.2(a) (West 2012)) and section 22-105(a) of the Procedure Code (735 ILCS 5/22-105(a) (West 2012)). The court also directed DOC to withhold and collect the \$40 from defendant's account pursuant to section 27.9 of the Courts Act (705 ILCS 105/27.9 (West 2012)) and section 22-105 of the Procedure Code. This appeal followed.

¶ 10

## II. ANALYSIS

¶ 11 On appeal, defendant argues the trial court erred in imposing the \$40 fee for filing his section 2-1401 petition and asks this court to vacate the fee and order it be refunded to his prisoner trust account. We agree.

¶ 12 Section 22-105(a) of the Procedure Code (735 ILCS 5/22-105(a) (West 2012)) provides, in part, as follows:

"If a prisoner confined in [a DOC] facility files a pleading, motion, or other filing which purports to be a legal document in a case seeking post-conviction relief under Article 122 of the Code of Criminal Procedure of 1963, pursuant to Section 116-3 of the Code of Criminal Procedure of 1963, in a habeas corpus action under Article X of this Code, in a claim under the Court of Claims Act, or a second or subsequent petition for relief from judgment under Section 2-1401 of this Code or in another action against the State, the [DOC], or the Prisoner Review Board, or against any of their officers or employees and the Court makes a specific finding that the pleading, motion, or other filing which purports to be a legal

document filed by the prisoner is frivolous, the prisoner is responsible for the full payment of filing fees and actual court costs.

On filing the action or proceeding the court shall assess and, when funds exist, collect as a partial payment of any court costs required by law a first time payment of 50% of the average monthly balance of the prisoner's trust fund account for the past 6 months. Thereafter 50% of all deposits into the prisoner's individual account under Sections 3-4-3 and 3-12-5 of the Unified Code of Corrections administered by the [DOC] shall be withheld until the actual court costs are collected in full."

¶ 13 Section 27.9(a) of the Courts Act (705 ILCS 105/27.9(a) (West 2012) provides as follows:

"The fees of the clerks of the circuit court shall not be waived for a petitioner who is a prisoner in [a DOC] facility who files a pleading, motion, or other filing which purports to be a legal document in a lawsuit seeking post-conviction relief under Article 122 of the Code of Criminal Procedure of 1963, pursuant to Section 116-3 of the Code of Criminal Procedure of 1963, or in a habeas corpus action under Article X of the [Procedure Code] and the defendant is the State, [DOC], or the Prisoner Review Board or any of their officers or employees, and the court makes a specific finding that the pleading, motion, or other filing which purports to

be a legal document is frivolous."

¶ 14 In the case *sub judice*, the record indicates the section 2-1401 petition for relief from judgment defendant filed in March 2013 was the first one he filed under that section. The trial court found the petition frivolous and patently without merit. In light of the alleged frivolous filing, the court found the filing fees were not waived and ordered defendant to pay \$40 for the filing fees and court costs, citing section 27.2(a) of the Courts Act and section 22-105(a) of the Procedure Code. Also, the court directed DOC to withhold and collect money from defendant's account, citing section 27.9 of the Courts Act and section 22-105 of the Procedure Code.

¶ 15 Here, since the petition at issue was defendant's first filed under section 2-1401, the trial court did not have the authority to assess filing fees and order the withholding of funds by DOC under section 22-105(a) of the Procedure Code. The State concedes the withholding order directed to DOC is void and must be vacated.

¶ 16 Despite the concession, the State argues the Courts Act authorized up to a maximum \$40 filing fee in criminal cases for motions to vacate or amend final orders. See 705 ILCS 105/27.1a(w)(1)(G) (West 2012). Here, however, the trial court did not impose filing fees and court costs for the simple filing of a petition for relief from judgment and did not rely on section 27.1a(w)(1)(G) in assessing the \$40 amount. Instead, the \$40 fee was based on the court's finding that defendant's petition was frivolous, as it specifically cited section 27.2(a) and section 22-105. The court plainly intended to impose this fee as a response to a filing it deemed frivolous, which it had no authority to do under section 22-105 of the Procedure Code.

¶ 17 As stated, the trial court's withholding order directed to DOC is void and must be vacated. Pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we remand to the

trial court for a determination as to whether DOC has deducted the \$40 filing fee from defendant's prisoner account and, if so, to order that the \$40 be refunded to him.

¶ 18

### III. CONCLUSION

¶ 19 For the reasons stated, we affirm the dismissal of defendant's petition for relief from judgment, vacate that portion of the trial court's order directing DOC to withhold \$40 from defendant's prisoner account, and remand with directions for the trial court to determine whether DOC has deducted the \$40 filing fee from defendant's prisoner account and, if so, to enter an order that the \$40 be refunded to him.

¶ 20

Affirmed in part and vacated in part; caused remanded with directions.