

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) 140295-U

NO. 4-14-0295

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

Order filed December 29, 2015

Modified upon denial of rehearing January 29, 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARTEZ T. DUNN,)	No. 13CF1083
Defendant-Appellant.)	
)	Honorable
)	Richard P. Klaus,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant is entitled to a \$205 presentencing credit, and his challenge to the circuit court's calculation of the monthly probation fee was not preserved for review.
- ¶ 2 In July 2013, the State charged defendant, Martez T. Dunn, by information with one count of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(H) (West 2012)). Defendant entered into a negotiated plea agreement, under which he would plead guilty to the charge and receive a sentence of 24 months' probation. In September 2013, the Champaign County circuit court accepted defendant's guilty plea and set a "confirmation" sentencing hearing. Defendant failed to appear at the November 2013 sentencing hearing, and the court sentenced defendant *in absentia* to 60 days in the county jail and 24 months' probation, which included paying a \$25 monthly probation service fee. In January 2014, the State filed a petition to revoke defendant's probation. After a February 2014 hearing, the

court revoked defendant's probation. In March 2014, the court resentenced defendant to 24 months' imprisonment. Defendant filed a motion to reconsider his sentence, which the court denied in April 2014.

¶ 3 Defendant appeals, asserting (1) he is entitled to \$310 of presentencing credit and (2) the circuit clerk erred in calculating the total amount of defendant's monthly probation fee. We affirm and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 The State's July 2013 information alleged defendant committed the offense of aggravated DUI on June 7, 2013, in that he drove or was in physical control of a motor vehicle when he was under the influence of alcohol and did not possess a driver's license. In September 2013, pursuant to a negotiated guilty plea agreement, defendant pleaded guilty to the charge. On November 12, 2013, defendant failed to appear at his sentencing hearing, and the circuit court sentenced him in accordance with the plea agreement. Defendant received 24 months' probation with 60 days in the county jail. The court also ordered defendant to pay, *inter alia*, a \$25 per month probation service fee. The sentencing order noted defendant was entitled to a \$5 credit toward his fines for a day in custody. However, the record does not indicate defendant received the credit. At the sentencing hearing, the court issued a warrant for defendant's arrest.

¶ 6 On January 9, 2014, the probation department filed a report stating defendant had failed to report, in any manner, to the probation department. Two days later, defendant was taken into custody. On January 13, 2014, the State filed its petition to revoke defendant's probation, noting defendant had failed to (1) report to probation, (2) serve his 60 days in jail, and (3) obtain an evaluation for alcohol and drug abuse. That same day, the circuit court held a hearing, at which it explained the State's petition to defendant and appointed counsel for him. At

the conclusion of the proceeding, the court remanded defendant to the custody of the sheriff to serve his jail sentence.

¶ 7 On February 3, 2014, the circuit court held a hearing on the State's petition to revoke probation. After hearing the evidence and the parties' arguments, the court granted the State's petition and revoked defendant's probation. After a March 2014 hearing, the court resentenced defendant to 24 months' imprisonment. The sentencing judgment did not award any presentencing credit against defendant's fines. The court did order defendant to pay all outstanding financial obligations previously imposed and all other fines, fees, and costs as authorized by statute within 180 days. Defendant filed a motion to reconsider, asserting only that his sentence was excessive. After an April 11, 2014, hearing, the court denied defendant's motion.

¶ 8 On April 14, 2014, defendant filed a timely notice of appeal from the revocation of his probation and resentence in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Feb. 6, 2013), and thus we have jurisdiction of those matters under Illinois Supreme Court Rule 603 (eff. Feb. 6, 2013).

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant (1) requests presentencing credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14(a) (West 2012)) and (2) challenges the circuit clerk's calculation of the monthly probation fee imposed by the circuit court in the original November 2013 sentencing order. The State questions our jurisdiction of the second issue, and we note neither issue was raised in the circuit court. Our supreme court has emphasized the two most important tasks of an appellate court panel when beginning the review of a case is to ascertain whether it has jurisdiction of the appeal and to

determine if any issues have been forfeited. *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008).

¶ 11 A. Presentencing Credit

¶ 12 As to defendant's request for presentencing credit, our supreme court has held the statutory right to the credit is conferred in mandatory terms, and thus the normal rules of waiver and forfeiture do not apply. *People v. Woodard*, 175 Ill. 2d 435, 457, 677 N.E.2d 935, 945 (1997). Thus, the right to the presentencing credit "is cognizable on appeal as a matter of course subject to a defendant's application for it." *Woodard*, 175 Ill. 2d at 457, 677 N.E.2d at 946. Accordingly, we will address defendant's request for \$310 of presentencing credit (62 days). The State concedes defendant may apply for credit against his eligible fines but does not address whether defendant's calculation of the credit is correct.

¶ 13 Section 110-14(a) of the Procedure Code (725 ILCS 5/110-14(a) (West 2012)) provides the following: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." Additionally, "[a]ny portion of a day in custody constitutes a full day for purposes of section 110-14." *People v. Montoya*, 373 Ill. App. 3d 78, 86, 868 N.E.2d 389, 396 (2007).

¶ 14 In this case, defendant's presentence investigation report shows defendant was in custody at the Champaign County jail from June 7 through June 8, 2013, and again from January 11 through March 14, 2014. The June 2013 dates were before defendant's guilty plea hearing, and the State's charge was a bailable offense. Thus, defendant was in custody on a bailable offense for the first period of incarceration and is entitled to two days of credit for that period.

¶ 15 Citing *People v. Watson*, 318 Ill. App. 3d 140, 143-44, 743 N.E.2d 147, 150 (2000), defendant also asks for presentencing credit for the period of January 13, 2014, to the day before resentencing, March 13, 2014. In *Watson*, 318 Ill. App. 3d at 143-44, 743 N.E.2d at 150, the reviewing court addressed the defendant's eligibility for credit under section 110-14(a) for three different time periods. The reviewing court first found the defendant was entitled to presentencing credit for the period the defendant was in custody awaiting the hearing on her negotiated guilty plea. *Watson*, 318 Ill. App. 3d at 141, 143, 743 N.E.2d at 148, 150. Next, the court concluded the defendant was not entitled to presentencing credit for the period of time in which she was serving 90 days' periodic imprisonment because "it was served as an incident of probation rather than incarceration on a bailable offense as required by section 110-14 of the Procedure Code." *Watson*, 318 Ill. App. 3d at 143, 743 N.E.2d at 150. Finally, the *Watson* court held the defendant was entitled to presentencing credit for the time she was in custody after her failure to appear for the probation-revocation hearing and before resentencing. *Watson*, 318 Ill. App. 3d at 143-44, 743 N.E.2d at 150.

¶ 16 Here, the record shows that, on January 13, 2014, defendant was in custody serving his jail sentence imposed as part of his probation sentence. The probation sentence was in effect until February 3, 2014, when it was revoked by the circuit court. Accordingly, from January 13 to February 2, 2014, defendant was in custody solely as an incident of probation and not on a bailable offense. Thus, he is not entitled to presentencing credit for those days. See *Watson*, 318 Ill. App. 3d at 143, 743 N.E.2d at 150. After the February 3, 2014, revocation of his probation, he spent a partial day in custody awaiting the imposition of his resentence and then full days in custody until March 13, 2014. Under *Watson*, 318 Ill. App. 3d at 143-44, 743 N.E.2d at 150, defendant is entitled to credit for those days, which totals 39 days. Thus,

defendant's total days eligible for presentencing credit is 41, resulting in a total credit of \$205. Accordingly, defendant's resentencing judgment should be modified to reflect a credit of \$205 against defendant's applicable fines.

¶ 17

B. Monthly Probation Fee

¶ 18

Citing *People v. Speed*, 318 Ill. App. 3d 910, 915, 743 N.E.2d 1084, 1087 (2001), the State asserts we lack jurisdiction of defendant's challenge to the circuit clerk's calculation of the monthly probation fee because defendant is challenging a fee imposed in the original sentencing judgment. The *Speed* decision noted "[a]n appeal from a sentence entered upon revocation of probation does not revive voidable errors in the guilty plea proceeding." *Speed*, 318 Ill. App. 3d at 915, 743 N.E.2d at 1087. Thus, when a defendant seeks relief from his conviction only after his or her probation is revoked, the appellate court lacks jurisdiction to review the underlying judgment unless that judgment is void. *Speed*, 318 Ill. App. 3d at 915, 743 N.E.2d at 1087. In his reply brief, defendant concedes the original conditions of his probation were proper and emphasizes he is challenging only the circuit court's calculation of the total amount of the monthly probation fee. He also notes the circuit court continued the financial obligations for his original sentence in the resentencing judgment. In this case, the circuit court did order defendant to pay all outstanding financial obligations previously imposed in the case within 180 days of the resentencing order. Thus, it appears we do have jurisdiction of the final amount of the probation fee. However, even if we have jurisdiction of the matter, defendant's challenge to the circuit clerk's calculation was not properly preserved for appeal.

¶ 19

On appeal, defendant argues that, since he never reported to probation and was later incarcerated, he was not "actively supervised" by probation and thus the monthly probation fee established by section 5-6-3(i) of the Unified Code of Corrections (730 ILCS 5/5-6-3(i))

(West 2012)) did not apply to him. Citing *People v. Wynn*, 2013 IL App (2d) 120575, 3 N.E.3d 400, defendant requests his case be remanded to the circuit court for a determination of how long he was actively supervised by probation. In *Wynn*, 2013 IL App (2d) 120575, ¶¶ 30-33, 3 N.E.3d 400, despite finding it lacked jurisdiction to address the public defender fee imposed in the underlying judgment, the reviewing court addressed the defendant's challenge to the calculation of the total amount of the monthly probation fee. The *Wynn* court recognized the fee issue was not raised in the circuit court but agreed with the parties it could review that issue and the defendant's other claims under the rule void orders may be attacked at any time. *Wynn*, 2013 IL App (2d) 120575, ¶ 8, 3 N.E.3d 400. At the time of the *Wynn* decision, the law in Illinois was "[a] sentence, or portion thereof, that is not authorized by statute is void." *People v. Donelson*, 2013 IL 113603, ¶ 15, 989 N.E.2d 1101 (citing *People v. Thompson*, 209 Ill. 2d 19, 23, 805 N.E.2d 1200, 1203 (2004)). However, our supreme court recently abolished the aforementioned void sentencing rule. See *People v. Castleberry*, 2015 IL 116916, ¶ 19. Thus, a sentencing condition that is contrary to statutory language is no longer considered void and cannot be attacked at anytime.

¶ 20 Defendant has not provided us with any explanation as to how his challenge to the circuit clerk's calculation was properly preserved for appeal, and the basis for the *Wynn* court's addressing the same issue is no longer applicable. Since defendant did not raise the issue before the circuit court, the issue is forfeited for purposes of appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010).

¶ 21 In response to our *sua sponte* finding defendant forfeited this argument for appeal, defendant argues plain error in his petition for rehearing. In denying defendant's petition for rehearing, we note our disagreement with defendant's aforementioned argument because no error

occurred. Defendant concedes the circuit court properly imposed the probation fee, and his argument the probation department was not "actively supervising" him because he refused to report to it is hairsplitting. The probation department was clearly actively supervising defendant, as evidenced by the petition to revoke his probation based, in part, on his failure to report to probation. Additionally, we note the reviewing court in *Wynn*, 2013 IL App (2d) 120575, ¶ 33, 3 N.E.3d 400, never addressed the merits of the defendant's actively supervised argument because the State agreed with the defendant's argument.

¶ 22

III. CONCLUSION

¶ 23

For the reasons stated, we affirm defendant's conviction and resentence and remand the cause to the Champaign County circuit court for an amended resentencing order reflecting the \$205 credit. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24

Affirmed; cause remanded with directions.