

No. 1-13-1795

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 11 CR 5354
)	11 CR 7798
)	
FRANCISCO ARRIAGA,)	Honorable
)	Larry G. Axelrood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order imposing a fee for a frivolous filing is vacated where such a fee is not permitted on initial section 2-1401 petitions. The cause is remanded for the circuit court to conduct a hearing to determine the amount of money deducted from defendant's trust fund account for the erroneously imposed fee and to issue an order restoring the full amount of those funds to defendant's account immediately.

¶ 2 Defendant Francisco Arriaga appeals from the *sua sponte* dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that the trial court lacked statutory authorization to

impose a frivolous filing fee on what was his first section 2-1401 petition. For the reasons that follow, we vacate the trial court's order imposing the frivolous filing fee and remand for further proceedings.

¶ 3 On August 10, 2012, defendant pleaded guilty in case No. 11 CR 7798 to possession of a controlled substance with intent to deliver and was sentenced to 10 years in prison. On that same date, defendant separately pleaded guilty in case No. 11 CR 5354 to aggravated driving under the influence and was sentenced to one year in prison. Defendant's two sentences were ordered to run consecutively. Fines and fees were imposed on both cases.

¶ 4 On January 29, 2013, defendant filed a *pro se* section 2-1401 petition, challenging the terms of mandatory supervised release imposed on his cases as void. The caption on the petition referenced both case No. 11 CR 7798 and case No. 11 CR 5354. On May 10, 2013, the trial court *sua sponte* denied the petition. In a separate order, the caption of which only referenced case No. 11 CR 7798, the trial court ordered defendant to pay a \$90 fee for filing a frivolous section 2-1401 petition and a \$15 fee for mailing, for a total fee of \$105, pursuant to section 22-105 of the Code of Civil Procedure. 735 ILCS 5/22-105(a) (West 2012).

¶ 5 On May 13, 2013, defendant filed a *pro se* notice of appeal on case No. 11 CR 7798. On September 24, 2014, this court allowed defendant to amend his notice of appeal to reflect both of his cases, No. 11 CR 7798 and No. 11 CR 5354.

¶ 6 A trust account report included in the record on appeal reflects that on June 20, 2013, the Illinois Department of Corrections (IDOC) began deducting money to satisfy court ordered fees in the amount of \$105, under an identifying "F/R#" of 7104. A total of \$105 was deducted for F/R# 7104. The report also reflects that on July 23, 2013, the IDOC began deducting money

under a separate identifying "F/R#" of 7126 to satisfy court ordered fees in the amount of \$105. At least \$99.97, but possibly \$105, was deducted for F/R# 7126; the final line item of \$5.03 is described in the report as "Closed Out" rather than "Payment." Also included in the record on appeal are printouts from the circuit court clerk's computer, indicating that starting in July 2013, the circuit court received a series of payments totaling \$105 in case No. 11 CR 7789 and \$94.14 in case No. 11 CR 5354.

¶ 7 On appeal, defendant challenges the imposition of the \$90 frivolous filing fee and \$15 mailing fee. Defendant did not challenge these fees in the trial court. Nevertheless, citing *People v. Marshall*, 242 Ill. 2d 285, 302 (2011), which in turn cites *People v. Arna*, 168 Ill. 2d 107, 113 (1995), defendant argues that the fines are void and therefore may be challenged at any time. In light of our supreme court's recent decision in *People v. Castleberry*, 2015 IL 116916, ¶ 19, the "void sentence" rule no longer applies. In general, a defendant forfeits any sentencing issue that he or she fails to preserve through both a contemporaneous objection and a written postsentencing motion. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. However, forfeiture and waiver rules of waiver also apply to the State, and where the State fails to timely argue that a defendant has forfeited an issue, it waives the issue of forfeiture. *Id.* Here, the State has not argued that defendant forfeited his challenge to the frivolous filing fees. Accordingly, we address the merits of defendant's claim. We review the propriety of court-ordered fines and fees *de novo*. *Id.*

¶ 8 Defendant argues, and the State agrees, that the trial court lacked statutory authorization to impose a \$90 frivolous filing fee and \$15 mailing fee on what was defendant's first section 2-1401 petition. Section 22-105(a) of the Code of Civil Procedure permits a court to order a

petitioner responsible for the full payment of filing fees and actual court costs of a frivolous "second or subsequent" section 2-1401 petition. 735 ILCS 5/22-105(a) (West 2012). Here, the petition at issue was the *first* section 2-1401 petition filed by defendant. Accordingly, section 22-105(a) does not apply. We accept the State's concession and, pursuant to our authority under Supreme Court Rule 615 (eff. Aug. 27, 1999), vacate the \$90 and \$15 fees.

¶ 9 While the parties agree that the \$90 and \$15 fees must be vacated, they disagree on the issue of reimbursement. Defendant asserts that the IDOC and the clerk's office collected frivolous filing fees on both his trial court case numbers, creating, in essence, two \$105 fees. Based on the above-cited paperwork included in the record on appeal, defendant argues that "there is no question that at least \$204.97 has been deducted from [his] account and at least \$199.14 has been paid to the circuit court pursuant to the unauthorized frivolous filing fee order." He asks this court to order the circuit court to refund him the \$204.97 that was deducted from his trust account, or in the alternative, at least refund him the \$199.14 that the record shows the circuit court received from him in satisfaction of the unauthorized fees.

¶ 10 The State maintains that other than conjecture, there is no concrete evidence in the record that the trial court imposed a second improper \$105 fee. While acknowledging that the "pages from the Clerk's computer" show that the circuit court clerk did receive payments in case No. 11 CR 5354, the State maintains that there is no indication in that paperwork as to what those payments were for. The State suggests that if money was improperly taken from defendant's account on case No. 11 CR 5354, he could pursue a remedy through internal IDOC channels by filing a grievance or bringing an action through claims court, or alternatively, he could file a *mandamus* action in the circuit court.

¶ 11 In his reply brief, defendant responds that while the circuit court clerk's computer records do not directly show what the payments it received were for, the IDOC's records show that the deductions that correlate to those payments were for "Court Ordered Fees." Because the clerk's records for case No. 11 CR 5354 do not show any other \$105 fee being assessed, defendant maintains that the \$105 charge was an improper frivolous filing fee. He argues that there "is no other reasonable inference that this record allows."

¶ 12 We agree with defendant that the logical conclusion to be taken from the paperwork in the record is that he was assessed frivolous filing fees twice. As such, he should be reimbursed all the money that was deducted from his trust account to satisfy those fees. However, because a discrepancy exists between the trust account ledger and the circuit court clerk's computer records as to how much money was deducted from the account and paid to the court, the circuit court is directed to conduct a hearing to determine the amount deducted from defendant's trust fund account for the erroneously imposed fees and to issue an order restoring the full amount of those funds to defendant's account immediately.

¶ 13 For the reasons explained above, we vacate the order imposing fees for a frivolous filing and remand for further proceedings.

¶ 14 Judgment vacated; remanded.