

No. 1-14-2098

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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.)	No. 14 CR 3300
)	
DESEAN THOMAS,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

O R D E R

- ¶ 1 *Held:* (1) Public defender reimbursement fee assessed after an inadequate hearing is vacated, and (2) fines and fees order is corrected.
- ¶ 2 Following a bench trial, defendant Desean Thomas was convicted of possession of a stolen motor vehicle and sentenced to 40 months' imprisonment. On appeal, defendant challenges a \$300 public defender reimbursement fee imposed by the trial court, and seeks presentence custody credit toward five additional assessments. For the following reasons, we

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vacate the public defender reimbursement fee, correct defendant's fines and fees order, and affirm in all other respects the judgment of the trial court.

¶ 3 Defendant was charged with one count of possession of a stolen motor vehicle. The trial court appointed the public defender to represent defendant at arraignment on March 5, 2014. The State indicated, in the presence of defendant and defense counsel, that it had filed a motion for reimbursement of public defender fees. The record does not indicate whether defendant submitted a financial affidavit.

¶ 4 The case proceeded to trial, where the evidence established that at approximately 11 p.m. on January 10, 2014, the victim called the police to report her car missing from the street in front of her house in Chicago. Shortly after midnight, an officer observed the victim's car being driven without headlights. The car slid out of control and all three occupants, including defendant, who had been driving, fled. Police detained defendant soon afterwards. The court found defendant guilty of possession of a stolen motor vehicle.

¶ 5 The presentence investigation report (PSI) indicated that defendant was unemployed and that his father provided "monthly expenses and financial obligations." The court sentenced defendant to 40 months' imprisonment, imposed fines and fees totaling \$499, and credited defendant for 146 days spent in presentence custody. After sentencing, the court stated that "[w]e are going to have a hearing on attorney's fees." The following colloquy then occurred:

"THE COURT: *** [Assistant Public Defender (APD)], how many times have you appeared on this?

APD: Five.

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THE COURT: All right. And you went to trial; is that correct?

APD: Yes, Your Honor.

THE COURT: The appropriate attorney fees would be \$300."

Defendant did not challenge the attorney's fees or the fines and fees order in the trial court.

¶ 6 Defendant raises two issues on appeal.

¶ 7 Defendant first contends that the trial court improperly imposed the \$300 public defender reimbursement fee where the court did not provide adequate notice of a hearing, did not properly establish the amount of attorney's fees or the time the attorney spent on the case, and did not determine defendant's ability to pay. Therefore, defendant argues that no hearing on the public defender fee occurred, and the fee order should be reversed without remand for a new hearing. The State concedes, correctly, that the trial court did not comply with the requirements for a hearing on the public defender fee, but argues that the appropriate remedy is to remand for a new hearing on defendant's ability to pay.

¶ 8 Although defendant failed to raise this claim of error in the trial court, both parties agree, correctly, that forfeiture does not apply if the appropriate procedures for imposing the public defender reimbursement fee are not followed. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 31. For the following reasons, the appropriate procedures were not followed in this case.

¶ 9 Under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code), when the trial court appoints counsel for the defendant, "the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation." 725 ILCS 5/113-3.1(a) (West 2014). Section 113-3.1(a) further directs the trial

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court to conduct a hearing to determine the amount of payment. *Id.* The hearing, which is mandatory (*People v. Love*, 177 Ill. 2d 550, 559-60 (1997)), must occur within 90 days after the entry of the trial court's final order. 725 ILCS 5/113-3.1(a) (West 2014). It "must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *People v. Somers*, 2013 IL 114054, ¶ 14. Additionally, the trial court must consider the defendant's financial affidavit. *Id.* Whether the trial court properly conducted the hearing presents a question of law, which we review *de novo*. *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 10 In this case, the postsentencing colloquy between the court and defense counsel was not a proper hearing on the public defender reimbursement fee. The record does not show that the court considered the cost of representation, defendant's financial circumstances, or his ability to pay. Additionally, the court did not indicate whether defendant submitted a financial affidavit or whether the court had considered defendant's finances as described in the PSI. Consequently, the appropriate procedures for imposing the public defender reimbursement fee were not followed, and the \$300 fee must be vacated. See *Moore*, 2015 IL App (1st) 141451, ¶ 32 (vacating public defender fee that trial court had imposed "without holding a sufficient hearing").

¶ 11 Next, we consider the proper remedy for the improper imposition of the fee. The State submits that the cause should be remanded to the trial court for a new hearing on the fee, but defendant argues that the fee must be vacated without remand because no hearing occurred within the statutory timeframe.

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¶ 12 This inquiry is guided by our supreme court's decision in *Somers*. In *Somers*, after the defendant pled guilty and the court imposed sentence, the court asked the defendant whether he thought he could get a job when he was released from jail, whether he planned on using his future income to pay his fines and costs, and whether there was any physical reason why he could not work. *Somers*, 2013 IL 114054, ¶¶ 3-4. After the defendant answered, the court imposed a public defender reimbursement fee. *Id.* ¶ 4. On review, our supreme court found that the trial court conducted "some sort of a hearing within the statutory time period" when it posed the foregoing questions to the defendant and heard his answers, but "the hearing that the court did hold was insufficient to comply with the statute." *Id.* ¶ 15. Consequently, the defendant's case was remanded for a new sentencing hearing. *Id.* ¶ 20.

¶ 13 In *Moore*, we considered whether, under *Somers*, a postsentencing colloquy between the court and defense counsel constituted a hearing on a public defender reimbursement fee. In *Moore*, the court asked the public defender how many times he appeared in the case, and counsel indicated that he and another attorney made a total of nine appearances. *Moore*, 2015 IL App (1st) 141451, ¶ 30. In response, the court imposed a \$150 public defender reimbursement fee, stating that amount "should be appropriate." *Id.* On review, we found that no hearing occurred because "there was no discussion of the amount of fees to be imposed or defendant's ability to pay them." *Id.* ¶¶ 38, 41. Unlike in *Somers*, the trial court in *Moore* did not address defendant and made no inquiry regarding his financial status, his employment, his ability to work, or his ability to pay. *Id.* ¶ 39. Moreover, the record contained no indication whether the trial court had consulted the PSI or any financial affidavit the defendant may have completed after requesting to

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be represented by the public defender. *Id.* As there was "no inquiry, however slight" into the defendant's financial circumstances and his ability to pay the public defender fee, the trial court's questioning of the public defender "was not a hearing as articulated in *Somers*." *Id.* ¶ 41. Because no hearing occurred, we vacated the public defender reimbursement fee without remand. *Id.* ¶¶ 41, 44.

¶ 14 Turning to the present case, we find that the trial court did not conduct a hearing regarding defendant's ability to pay the public defender reimbursement fee. As in *Moore*, the court asked the public defender how many times he had appeared in the case, and then imposed a fee without inquiring about defendant's finances, employment, ability to work, or ability to pay. Moreover, the record does not indicate whether the court considered defendant's statements in the PSI, or whether defendant submitted a financial affidavit. Because the court's colloquy with defense counsel did not constitute a hearing (*id.* ¶ 39), no hearing into defendant's ability to pay the public defender reimbursement fee occurred within the statutory period. 725 ILCS 5/113-3.1(a) (West 2014). Consequently, we vacate defendant's public defender reimbursement fee without remand for a new hearing.

¶ 15 Next, defendant contends that five assessments imposed against him are fines that should be offset by presentence custody credit. Although defendant did not challenge these assessments in the trial court, "a defendant may raise the issue of credit on appeal even if not raised in the trial court." *People v. Vasquez*, 368 Ill. App. 3d 241, 261 (2006) (citing *People v. Woodard*, 175 Ill. 2d 435, 457-58 (1997)).

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¶ 16 A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of \$5 for each day of presentence custody. 725 ILCS 5/110-14(a) (West 2014). A "fine" is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee, in contrast, seeks to recoup expenses incurred by the state, or to compensate the state for expenditures incurred in prosecuting the defendant. *Id.* The presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006).

¶ 17 The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, and other relevant factors include whether the charge is only imposed after conviction and to whom the payment is made. *Graves*, 235 Ill. 2d at 250-51. However, the "most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant." *Id.* at 250. We review the trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 18 Defendant contends, and the State correctly concedes, that the \$50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) and \$15 state police operations fee (705 ILCS 105/27.3a(1.5) (West Supp. 2013)) imposed by the trial court are fines subject to offset by presentence custody credit. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 ("the \$50 Court System fee *** is a fine"); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("the State Police operations assistance fee is also a fine"). Accordingly, both charges should be offset by defendant's presentence custody credit.

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¶ 19 Contrary to defendant's argument, however, neither the \$2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) nor the \$2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)) constitutes a fine. *Bowen*, 2015 IL App (1st) 132046, ¶¶ 63-65 ("both charges constitute fees"). Accordingly, neither records automation fee is offset by defendant's presentence custody credit.

¶ 20 Finally, defendant argues that the \$190 charge for the filing of a felony complaint constitutes a fine that should be offset by presentence custody credit. According to defendant, the felony complaint charge recoups the clerk's expenses rather than reimburses the State for the cost of the prosecution. Even if the clerk could incur expenses in a prosecution, defendant submits that the "flat" \$190 charge is an arbitrary amount that finances the clerk's activities "as a whole" instead of reimbursing costs "specifically incurred" in a particular prosecution. Defendant also observes that the felony complaint charge appears in a schedule of assessments that correlates the amount charged to the severity of the offense, and is only imposed following a conviction.

¶ 21 The State responds that, even if the felony complaint charge is not "specifically attributable" to the office prosecuting defendant's case, it nonetheless reimburses the state for some of the cost of prosecution incurred by the clerk or court system and, therefore, is a fee. The State reasons that the "flat" \$190 charge is neither arbitrary nor unrelated to the cost of prosecution as the actual expense of court proceedings is higher and, ultimately, the fee funds the court system in which defendant's prosecution occurred. Additionally, the State argues that the fact this charge is assessed after conviction is not determinative of whether it is fee or fine, as "all fees and costs" in criminal cases are assessed after a finding of guilty.

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¶ 22 In relevant part, the Clerks of Courts Act (Act) provides that "[t]he clerk shall be entitled to costs in all criminal and quasi-criminal cases from each person convicted or sentenced to supervision," including "a minimum of \$125 and a maximum of \$190" for "[f]elony complaints." 705 ILCS 105/27.2a(w)(1)(A) (West 2014). The Act also entitles the clerk to lesser costs for, *inter alia*, convictions on misdemeanor complaints, business offense complaints, petty offense complaints, and minor traffic or ordinance violations, as well as costs for appearances and a variety of motions. 705 ILCS 105/27.2a(w)(1)(B)-(K) (West 2014).

¶ 23 We find that the felony complaint assessment is a fee rather than a fine, and therefore, is not offset by presentence custody credit. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) (felony complaint charge is a fee); see also *People v. Despenza*, 318 Ill. App. 3d 1155, 1157 (2001) (filing fees represented "court costs" and "were not imposed upon the defendant as a pecuniary punishment"). Defendant argues that *Tolliver* predates our supreme court's decision in *Graves* and fails to acknowledge that, for an assessment to be a fee, it must be intended to reimburse the state for some cost from defendant's prosecution. *Graves*, 235 Ill. 2d at 250. This argument lacks merit. As we held in *Tolliver*, the charge for filing a felony complaint is a fee because it is "compensatory" and a "collateral consequence of defendant's conviction." *Tolliver*, 363 Ill. App. 3d at 97. Thus, although *Tolliver* was decided before *Graves*, it nonetheless considered whether the felony complaint charge was intended as reimbursement for defendant's prosecution, which *Graves* termed "the most important factor" in determining whether an assessment is a fee. *Graves*, 235 Ill. 2d at 250.

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¶ 24 Defendant likens the felony complaint fee to a \$50 court-finance assessment (55 ILCS 5/5-1101(c) (West 2014)), which a panel of the Second Division of this court determined was a fine in *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21. As *Tolliver* squarely addresses the felony complaint fee, we cannot say that *Smith's* analysis of a separate assessment created by a different statute controls our analysis here. We note, however, that *Smith* cites *Tolliver* for the proposition that for an assessment to be a fee, it should relate to "the actual charges involved in prosecuting the defendant, *e.g.*, the charges, the preliminary hearing, or various court services." *Id.* (citing *Tolliver*, 363 Ill. App. 3d at 97). Consequently, *Smith* does not change our conclusion that the felony complaint assessment is a fee not offset by presentence custody credit.

¶ 25 For the foregoing reasons, we vacate defendant's public defender reimbursement fee and find that the \$50 court system fee and \$15 state police operations fee are offset by presentence custody credit. We affirm the \$2 State's Attorney records automation fee and the \$2 Public Defender records automation fee. Additionally, we find that the felony complaint fee is not offset by presentence custody credit. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly.

¶ 26 Affirmed as modified.