2017 IL App (1st) 150598-U

FIRST DIVISION
September 11, 2017

No. 1-15-0598

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 18106
	)	
DAJUAN THOMAS,	)	The Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Hyman concurred in the judgment.
Justice Mason concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Defendant's conviction for unlawful use of a weapon by a felon is affirmed where we do not have an adequate record to resolve his challenge to the trial court's denial of his motion to suppress, as the issue he argues on appeal was not litigated before the trial court. We, however, modify defendant's fines and fees order.

¶ 2 Following a simultaneous bench trial and hearing on a motion to quash arrest and suppress evidence, defendant Dajuan Thomas was convicted of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to 54 months' imprisonment. On

appeal, defendant contends that (1) the trial court erred when it denied his motion to quash his arrest and suppress evidence and (2) his fines and fees order must be amended. We affirm as modified.

¶ 3 Following a traffic stop on September 7, 2013, a firearm was found in defendant's vehicle. Defendant, who had a prior felony conviction, was subsequently charged with one count of unlawful use of a weapon by a felon, two counts of aggravated unlawful use of a weapon - one count based on possessing a firearm on or about his person outside his own land without having been issued a valid Firearm Owner's Identification (FOID) Card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)) - and one count of defacing the identification marks of a firearm (720 ILCS 5/24-5(b) (West 2012)). The State later nol-prossed all of the counts against defendant except for the one count of unlawful use of a weapon by a felon.

¶ 4 On December 17, 2013, defendant filed a motion to quash arrest and suppress evidence, arguing that the police did not have a valid warrant or probable cause to arrest him. Defendant's motion was heard simultaneously with his bench trial on September 23, 2014. In opening statements, defense counsel informed the trial court that he would "be concentrating [his] questions *** very much on the [traffic] stop itself that the police made" and subsequently argued that "[t]here was absolutely no basis for the stop itself." Based on the allegedly illegal stop by the police, counsel requested that the motion to suppress be granted.

¶ 5 Chicago police officer Toner testified that, at around 7:40 p.m. on September 7, 2013, he was a passenger in an unmarked police vehicle along with Officers Fagan and Sheehan. The officers were "patrolling hotspot areas in the 2nd District." While their vehicle was stopped at a red light at the intersection of East 43rd Street and South Indiana Avenue, Toner observed a

white Chevrolet approach their vehicle in the adjacent left-turn lane and "creep into the crosswalk." Toner heard the lone occupant of the vehicle, identified in court as defendant, "yelling" out of the window to individuals across the street. Those individuals "were talking back" to defendant, but Toner could not remember what they were saying. While defendant conversed with those individuals, his vehicle "was creeping forward." When the vehicle eventually stopped, it was one to three feet into the crosswalk and "obstruct[ed] pedestrian traffic," which was a traffic violation. Toner recalled that a woman pushing a stroller had to stop and go around the vehicle. The light turned green and defendant made a legal left turn onto South Indiana Avenue. The officers activated their vehicle's emergency lights, and defendant's vehicle pulled over immediately. Prior to pulling defendant over, Toner had not observed him violate any other laws.

¶ 6 As the officers exited their vehicle, it was beginning to get dark outside, but there were lit streetlights nearby. Toner additionally took out his flashlight, activated it and approached the passenger's side of defendant's vehicle. Fagan followed him while Sheehan approached on the driver's side. As Toner approached the vehicle and shined his flashlight on its interior, he observed defendant "hunched over the seat" and "making furtive movements" with his hands "[t]owards the floorboard of the driver's side of the vehicle." Toner focused his attention toward the floorboard of the vehicle and observed defendant with "a dark-colored object" in his hand. While Toner made these observations, Sheehan was ordering defendant to show his hands, but defendant initially refused as he was "attempting to conceal the object in between his feet towards the floorboard." Defendant eventually complied and showed his hands. Toner shined his flashlight "down" and noticed a handgun on the floorboard of the vehicle. Toner stated that,

without using a flashlight, he probably would not have been able to see the handgun. He acknowledged that he did not include the fact that he used a flashlight to observe the firearm in his arrest report or during his testimony at the preliminary hearing. Toner subsequently informed Sheehan and Fagan of the handgun.

¶ 7 Sheehan instructed defendant to exit the vehicle, which he did. After defendant "was secured," Toner recovered a loaded blue steel, 9-millimeter handgun from the floorboard of the vehicle, which appeared to be the same object that had been in defendant's hands earlier. After the incident, Toner learned that the vehicle was a rental and it had not been rented to defendant. Toner acknowledged that he did not have an arrest warrant or search warrant for defendant or his vehicle. Defendant was issued a traffic citation for "obstructing a crosswalk."

¶ 8 On cross-examination, Toner stated that, prior to ordering defendant out of the vehicle, Sheehan had asked defendant for his driver's license and insurance, which Toner "believe[d]" defendant had. However, Toner could not remember from where defendant obtained the items. Toner "believed" he observed the handgun before defendant displayed his driver's license. Toner acknowledged that his arrest report stated that, after he observed defendant making furtive movements toward the floorboard of the driver's seat, the officers removed defendant "[f]or officer safety" and then Toner recovered the handgun "in plain view" on the floor of the driver's seat. Toner explained that his arrest report was a summary of events, not a verbatim narrative, and further maintained that he observed the handgun before defendant exited the vehicle and recovered it after he exited.

¶ 9 Following Toner's testimony, the State offered into evidence a certified copy of conviction showing defendant had been convicted of aggravated discharge of a firearm in case number 04 CR 29746.

¶ 10 In closing arguments on the motion to suppress, defense counsel argued only that the police illegally stopped defendant. The State responded that, based on defendant's traffic violation of obstructing the crosswalk, the stop of him was lawful. Defendant did not contest the validity of Toner seizing the firearm observed on the floorboard of the vehicle.

¶ 11 On October 23, 2014, the trial court denied defendant's motion to suppress. It observed that it did not matter how "minuscule or minor" the traffic violation was, but noted that, when officers observe a violation, they have the right to stop that person's vehicle. The court therefore found that, based on Toner's observations, he and his fellow officers were justified in stopping defendant's vehicle. The court further found defendant guilty of unlawful use of a weapon by a felon.

¶ 12 On December 19, 2014, defendant filed a motion for a new trial. The motion included a renewed motion to suppress, wherein defendant again argued the validity of the traffic stop and additionally asserted that Toner's testimony of observing the firearm in plain view was incredible. After denying defendant's motions, the court sentenced him to 54 months' imprisonment and imposed $474 in fines and fees. This timely appeal followed.

¶ 13 On appeal, defendant argues that the trial court erred in denying his motion to quash arrest and suppress evidence. For the first time, he argues here that the police did not have a warrant to enter his vehicle and seize the handgun and the seizure was not otherwise justified under the plain-view exception to the warrant requirement given that, following *People v.*

Aguilar, 2013 IL 112116, observing a handgun inside of a vehicle is not automatically incriminating in nature. Defendant asserts that the recovered firearm must be suppressed as a fruit of an illegal seizure and we must therefore reverse his conviction outright. As previously discussed, defendant litigated the issue of the alleged illegality of the traffic stop in his motion to quash arrest and suppress evidence in the trial court and did not argue that under *Aguilar*, he lawfully possessed the weapon.

¶ 14 A trial court's ruling on a motion to suppress presents a mixed question of law and fact, and therefore requires a bifurcated standard of review. *People v. Grant*, 2013 IL 112734, ¶ 12. The court's findings of fact are given deference, and we will not disturb them unless they are against the manifest weight of the evidence. *Id*. However, we review *de novo* the ultimate issue of whether the law was applied correctly to the established facts. *Id.*; *People v. Fox*, 2014 IL App (2d) 130320, ¶ 11. We note that, although the trial court did not make findings of fact concerning the precise issue on appeal, we, as the reviewing court, must presume that the trial court found all contested facts in favor of the prevailing party, here, the State. *People v. Lagle*, 200 Ill. App. 3d 948, 954 (1990). Furthermore, we will presume Officer Toner testified credibly and draw all reasonable inferences from the evidence in favor of the State. *Id.*

¶ 15 On a motion to suppress, the defendant bears the initial burden of proof. *Cregan*, 2014 IL 113600, ¶ 23. If he establishes a *prima facie* case that evidence was obtained by an illegal search or seizure, which can be done by showing the search or seizure was conducted without a warrant, the burden shifts to the State to justify the search or seizure. *Id.* ¶¶ 23, 26; *People v. Kowalski*, 2011 IL App (2d) 100237, ¶ 9.

¶ 16 Both the United States and Illinois Constitutions protect an individual's right to be free from unreasonable searches and seizures. U.S. Const., amends. IV, XIV; Ill. Const. 1970, art. I, § 6; *People v. Timmsen*, 2016 IL 118181, ¶ 9. "The touchstone of the fourth amendment is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Timmsen*, 2016 IL 118181, ¶ 9 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause." *People v. Johnson*, 237 Ill. 2d 81, 89 (2010). A warrantless search or seizure is *per se* unreasonable unless the circumstances allow for one of the few limited exceptions to the warrant requirement. *People v. LeFlore*, 2015 IL 116799, ¶ 17.

¶ 17 The fourth amendment is implicated when a police officer stops a vehicle, as "stopping a vehicle and detaining its occupants constitute a 'seizure' within the meaning of the fourth amendment, even if only for a brief period and for a limited purpose." *People v. Jones*, 215 Ill. 2d 261, 270 (2005). When an officer observes an individual commit a traffic violation, he may lawfully stop that individual's vehicle. *Id.* at 271. Due to the nature of a traffic stop, it is "more analogous to a *Terry* investigative stop than to a formal arrest." *Id.* at 270.[1]

¶ 18 In this case, Officer Toner observed defendant's vehicle proceed into the crosswalk and obstruct pedestrian traffic, thereby committing a traffic violation. See Chicago Municipal Code § 9-40-120 (amended May 26, 2004). Toner's initial stop of defendant's vehicle was supported by probable cause and therefore justified at its inception (see *Jones*, 215 Ill. 2d at 271), a point defendant does not contest on appeal. However, based solely on defendant's minor traffic violation, Toner did not have the authority to search defendant or his vehicle. *Id.* At the hearing,

[1] A *Terry* investigative stop, as the name implies, evolved from the United States Supreme Court's decision in *Terry*, 392 U.S. 1. See *Timmsen*, 2016 IL 118181, ¶ 9.

Toner acknowledged that he did not have a warrant for defendant or his vehicle. Defendant therefore established a *prima facie* case that evidence was obtained by an illegal seizure. See *Kowalski*, 2011 IL App (2d) 100237, ¶ 9.

¶ 19 However, "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). Prior to *Aguilar*, the result of this case would have been a straightforward application of the plain-view doctrine because Toner observed the firearm in plain view in defendant's vehicle.

¶ 20 During a lawful traffic stop, the police may seize an object without a warrant under the plain-view doctrine if: "(1) the officers are lawfully in a position from which they view the object; (2) the incriminating character of the object is immediately apparent; and (3) the officers have a lawful right of access to the object." *Jones*, 215 Ill. 2d at 271-72. Whether the incriminating character of an object is immediately apparent essentially turns on whether the police had probable cause to believe the object was evidence of criminal activity. See *id.* at 272, 277. To establish probable cause to permit the seizure of an object without a warrant, the State must show that, at the time of the seizure, " 'the facts available to the officer would justify a man of reasonable caution in the belief that the item may be contraband, stolen property, or evidence of a crime.' " *People v. Shinohara*, 375 Ill. App. 3d 85, 98 (2007) (quoting *People v. Blair*, 321 Ill. App. 3d 373, 377 (2001)).

¶ 21 In the present case, the plain-view doctrine authorized Toner's seizure of the handgun. First, Toner was lawfully in a position from which to view the handgun, as defendant had been lawfully pulled over and Toner's observation of the firearm was made from standing on the side of the vehicle. See *Texas v. Brown*, 460 U.S. 730, 740 (1983) ("There is no legitimate

expectation of privacy [citations] shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.").

¶ 22 Second, the incriminating character of the handgun was immediately apparent, *i.e.*, Toner had probable cause to believe the firearm was evidence of criminal activity. On the date in question, it was unlawful in Illinois to possess a handgun in a vehicle, if the firearm was uncased, loaded and immediately accessible. See 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2012). Upon viewing the interior of defendant's vehicle, Toner recognized the object on the floorboard as a handgun and thus had probable cause to believe the firearm was evidence of a firearms offense. Toner therefore could lawfully seize the firearm. See *People v. James*, 163 Ill. 2d 302, 312 (1994). Toner's seizure of the handgun was lawful under the plain-view doctrine.

¶ 23 Five days after defendant's arrest, our supreme court issued its decision in *People v. Aguilar*, 2013 IL 112116. In *Aguilar*, our supreme court held that a portion of the Illinois aggravated unlawful use of a weapon statute (720 ILCS 24-1.6(a)(1), (a)(3)(A) (West 2008)), which operated as a categorical ban on an individual's right to possess a firearm for self-defense outside of the home, was facially unconstitutional under the second amendment of the United States Constitution (U.S. Const., amend. II). *Aguilar*, 2013 IL 112116, ¶¶ 19-22. When a statute has been deemed facially unconstitutional, it is void *ab initio*, as if the statute had never been passed in the first instance, and thus incapable of being enforced. *People v. Blair*, 2013 IL 114122, ¶ 28; *People v. Thomas*, 2016 IL App (1st) 141040, ¶ 18. The central premise of the *Aguilar* holding has been reaffirmed by our supreme court in multiple cases. See *e.g.*, *People v. McFadden*, 2016 IL 117424, ¶ 12; *People v. Burns*, 2015 IL 117387, ¶ 32.

¶ 24 However, despite *Aguilar* being decided three months before defendant filed his motion to suppress, he chose to contest only the validity of the traffic stop as the basis for suppressing the firearm, not Toner's seizure of the firearm. Consequently, although there was evidence adduced at the motion to suppress hearing concerning the circumstances surrounding Toner's seizure of the firearm, the evidence and arguments focused exclusively on the traffic stop. In defendant's posttrial renewed motion to suppress, he similarly focused on the traffic stop alone. In responding to the specific arguments raised by defendant, the State did not address the validity of Toner's seizure of the firearm. The implications of *Aguilar* on Toner's seizure of the firearm, if any, were not argued by the parties, and necessarily, the trial court never addressed any aspect of *Aguilar*. Now, on appeal, defendant argues for the first time that, in light of *Aguilar*, Toner did not have a legal basis for seizing the firearm. Resolving fourth amendment issues depend heavily on the factual circumstances present (see *Timmsen*, 2016 IL 118181, ¶ 9; *Grant*, 2013 IL 112734, ¶ 11), and an "appellate court ought not" resolve "factual issues anew." *People v. Hughes*, 2015 IL 117242, ¶ 46.

¶ 25 In *Hughes*, our supreme court found that, when a defendant raised arguments in support of a motion to suppress on appeal that were almost entirely distinct from the arguments he raised before the trial court, he failed to provide an adequate record for the appellate court to review his arguments under the new theories. *Id.* The defendant, who was charged with and ultimately convicted of first-degree murder, filed a motion to suppress claiming that his confession was involuntary. *Id.* ¶¶ 1-2. In support of his motion, he argued that his statements were involuntary because the police questioned him off camera and without advising him of his *Miranda* rights, and due to physical coercion from handcuffs being kept on him for an excessively long time. *Id.*

¶ 2. The trial court denied his motion and later denied his posttrial motion, in which he raised the same issue. *Id.*

¶ 26 On appeal, the defendant again argued that his confession was involuntary, but argued it should have been suppressed for different reasons than those he argued in the trial court, including his age, educational level, sleep deprivation, prior substance abuse, deceptive conduct by police and lack of experience with the criminal justice system. *Id.* ¶ 25. The State argued that the defendant had waived the issue for appeal because he did not present these reasons for suppression to the trial court. *Id.* ¶ 26. The appellate court, with one justice dissenting, concluded that the issue was not forfeited because he had raised the general issue of voluntariness in a pretrial and posttrial motion and argued "sufficiently similar theories." *Id.* ¶ 27. The appellate court ultimately held that the confession should have been suppressed, and accordingly, it reversed and remanded the matter for a new trial. *Id.*

¶ 27 Our supreme court found that the defendant's reasons for suppression in the trial and appellate courts, though "not factually hostile to one another," were "almost wholly distinct from one another." *Id.* ¶ 40. The court observed that the defendant had presented no evidence or arguments to the trial court for the claims he raised on appeal. *Id.* ¶ 41. It therefore found that, when the defendant failed to raise his claims in the trial court, he deprived the State of its opportunity to present evidence and arguments rebutting those claims, the trial court of the opportunity to decide the issue on those bases and the appellate court of an adequate record to make its determination on review. *Id.* ¶ 46. Given the lack of an adequate record to review the defendant's claims under the new theories, our supreme court found that he had not adequately

preserved his claims for appeal and the trial court did not err when it denied his motion to suppress. *Id.* ¶ 47.

¶ 28 Similar to *Hughes*, in this case, defendant has raised a claim on appeal that was not litigated before the trial court. Below, he contested the validity of the traffic stop. On appeal, defendant argues that, in light of *Aguilar*, the mere presence of the firearm in his vehicle did not justify Toner in seizing it. Given the drastic shift in factual theories, the State never had the opportunity to present evidence or arguments to rebut this new claim. Had this claim been raised below, the State would have had the opportunity to elicit further testimony to justify the seizure of the firearm. We note, for example, that pursuant to section 108-1.01 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108-1.01 (West 2012)), an officer effectuating a *Terry* stop may search a person for weapons if he reasonably suspects that he is in danger of attack and if a weapon is discovered "he may take it until the completion of the questioning, at which time he shall either return the weapon, if lawfully possessed, or arrest the person so questioned." Thus, the State did not have the opportunity to justify the seizure of the firearm, notwithstanding the ruling in *Aguilar*. It follows that the trial court was also deprived of the opportunity to rule on this fact-intensive issue.

¶ 29 Notwithstanding defendant's failure to challenge Toner's probable cause to seize the gun in his motion to quash arrest and suppress evidence filed in the trial court, our supreme court's recent decision in *People v. Holmes*, 2017 IL 120407, is dispositive of the argument defendant has raised here. Pursuant to *Holmes*, the void *ab initio* doctrine does not retroactively invalidate probable cause where probable cause was predicated on the portions of the AUUW statute invalidated in *Aguilar*. *Id.* ¶39. Thus, contrary to defendant's argument, *Aguilar* does not defeat

Toner's probable cause to seize defendant's uncased, loaded and immediately accessible weapon in this case. It follows, therefore, that defendant was not prejudiced by his lawyer's failure to raise this argument, and, consequently, his ineffective assistance argument fails as well. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 30 Defendant next contends that the trial court improperly imposed certain monetary assessments against him and failed to give him $5 per day of presentence custody credit toward other monetary assessments which, he argues, qualified as fines. Although defendant did not challenge these assessments in the trial court, a reviewing court may modify a fines and fees order without remanding the matter to the trial court under Illinois Supreme Court Rule 615(b)(1) (*People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22), and "a defendant may request presentence [custody] credit for the first time on appeal." *People v. Lake*, 2015 IL App (3d) 140031, ¶ 31. We review the propriety of the trial court's imposition of fines and fees *de novo.* *Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 31 Defendant first argues, and the State correctly concedes, that the trial court improperly imposed against him a $5 court system assessment (55 ILCS 5/5-1101(a) (West 2012)) and a $2 public defender records automation assessment (55 ILCS 5/3-4012 (West 2012)).

¶ 32 The $5 court system assessment applies only to defendants "on a judgment of guilty or a grant of supervision for violation of the Illinois Vehicle Code other than Section 11-501 or violations of similar provisions contained in county or municipal ordinances committed in the county." 55 ILCS 5/5-1101(a) (West 2012). Here, defendant was convicted of unlawful use of a weapon by a felon, a felony. See 720 ILCS 5/24-1.1(a), (e) (West 2012). Therefore, the trial court improperly imposed this assessment, and we vacate it.

¶ 33 Although defendant initially argues that he should receive presentence custody credit toward his $2 public defender records automation assessment, the State notes that defendant was represented by private counsel, not the public defender, and thus the assessment is inapplicable to his situation. We agree that the assessment does not apply to defendant. See *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 30 (finding that, where the defendant "was represented by private counsel during trial," the public defender records automation assessment was "inapplicable"). Therefore, the trial court improperly imposed this assessment, and we vacate it.

¶ 34 Defendant next argues, and the State correctly concedes, that he is entitled to $5 per day of presentence custody credit toward a $50 court system assessment (55 ILCS 5/5-1101(c)(1) (West 2012)) and a $15 state police operations assessment (705 ILCS 105/27.3a(1.5) (West 2012)).

¶ 35 A defendant is entitled to a $5 credit for each day incarcerated toward the fines levied against him. 725 ILCS 5/110-14(a) (West 2012). Fines and fees are distinguished based on their purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee is an assessment intended to " 'recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *Id.* (quoting *People v. Jones*, 223 Ill. 2d 569, 582 (2006)). An assessment "is a fee if and only if it is intended to reimburse the state for some cost incurred in defendant's prosecution." *Jones*, 223 Ill. 2d at 600. In contrast, a fine is punitive, " 'a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense.' " *Graves*, 235 Ill. 2d at 250 (quoting *Jones*, 223 Ill. 2d at 581). Although an assessment may be statutorily labeled as a "fee," it nevertheless may still be a "fine," despite the language used by

our legislature. *Id.* Here, defendant accumulated 102 days of presentence custody credit, and thus, he is entitled to a maximum $510 credit toward his eligible fines.

¶ 36 The court system assessment and state police operations assessment are fines subject to presentence custody credit. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 (court system assessment is a fine); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (state police operations assessment is a fine). Therefore, defendant must receive presentence custody credit toward these fines.

¶ 37 Defendant lastly argues that he must also receive presentence custody credit toward a $2 state's attorney records automation assessment. 55 ILCS 5/4-2002.1(c) (West 2012). Defendant asserts this assessment is a fine because it does not seek to reimburse the state for the costs of prosecuting a particular defendant. The State disagrees, arguing it is a fee because it is compensatory in nature and intended to reimburse the state for expenses related to automated record-keeping systems.

¶ 38 We agree with defendant that this assessment is a fine and not a fee. See *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56; but see *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65 (finding the assessment to be a fee); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 16 (same). Therefore, defendant must receive presentence custody credit toward this fine.

¶ 39 In sum, we order the clerk of the circuit court to (1) vacate defendant's $5 court system assessment and $2 public defender records automation assessment, and (2) award defendant presentence custody credit toward his $50 court system fine, $15 state police operations fine and $2 state's attorney records automation fine, resulting in a total credit in the amount of $67.

¶ 40 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 41 Affirmed as modified.

¶ 42 JUSTICE MASON, concurring in part and dissenting in part:

¶ 43 I concur in the majority's decision to affirm the circuit court's judgment. I further agree that, consistent with *People v. Caballero,* 228 Ill. 2d 79 (2008), we may consider Thomas's claim for presentence credit against his fines.

¶ 44 But I respectfully dissent from the majority's decision to review Thomas's challenge to the propriety of $7 of his assessments. The parties' briefs on the assessments issues consume roughly 10 pages and boil down to the issue of whether Thomas is entitled to the *per diem* credit against the $2 States Attorney Records Automation Fee. In particular, Thomas's opening brief devotes three pages to his argument that a $5 fee applicable only in traffic violation cases was erroneously assessed (the State agrees) and he is entitled to *per diem* credit with respect to remaining $69 of assessments (the State agrees that, with one exception, he's entitled to credit). For its part, the State spends six pages conceding every argument made by Thomas (with the exception of the $2 States Attorney fee) and also volunteers that Thomas should not have been assessed the $2 Public Defender Records Automation Fee because he was represented by private counsel in the trial court, an argument Thomas never advanced. And we get another couple of pages about the $2 State's Attorney fee in Thomas's reply.

¶ 45 I commend the State's Attorneys Office for not quibbling over these issues, but suggest both to the State's Attorney and the State Appellate Defender that such issues are more quickly and efficiently resolved by a simple phone call and an agreed order entered in the trial court. We

have been repeatedly advised, in countless motions for extensions of time to file briefs, that both offices are understaffed and overworked. Why lawyers who are tasked with the preparation of appellate briefs in serious criminal matters would bypass the opportunity to resolve any issue by agreement is dumbfounding.

¶ 46 The issues Thomas asks us to resolve are unpreserved, having never been raised in the trial court. In one sentence, Thomas invokes plain error as a means of review, citing *People v. Lewis*, 234 Ill. 2d 32 (2009). But the fine challenged in *Lewis* required an evidentiary basis and the trial court failed to conduct an evidentiary hearing. Thus, our supreme court found that "[p]lain error review is appropriate because imposing the fine without any evidentiary support in contravention of the statute implicates the right to a fair sentencing hearing." *Id.* at 48. Importantly, *Lewis* distinguished the trial court's failure to conduct the required hearing from a case involving "a simple mistake in setting the fine," (*Id.*), which is precisely the nature of Thomas's argument here regarding the $5 traffic violation fee. And his argument regarding the $2 State's Attorney fee doesn't fall into the "mistake" category either; he claims that despite its label, it's really a fine.

¶ 47 Illinois Supreme Court Rule 615(b) (eff. Jan. 25, 2966), which delineates what actions a reviewing court *may* take in any matter before it, cannot override the mandate of Rule 615(a) (eff. Jan. 25, 1966), which provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights *shall be disregarded*." See *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 14 (Rule 615(b) "does not purport to override the forfeiture rule set forth in Rule 615(a)"). Although the State has not argued against Thomas's invocation of plain error to review these unpreserved issues, that does not mean this "narrow and limited exception" to forfeiture

(*People v. Herron*, 215 Ill. 2d 167, 177 (2005)), warrants our consideration of those claims. Because the $5 and $2 assessments challenged by Thomas on appeal cannot be said to affect substantial rights, we should, consistent with Rule 615(a), disregard these claimed errors. See *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 11 (consistent with narrow and limited scope of plain error review, it is questionable whether reviewing courts should continue to address contentions of error regarding fines and fees never raised in the trial court); *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 29.

¶ 48 Such a course of action does not leave Thomas without a remedy. If the State, as it obviously does, agrees that certain assessments were improperly imposed, the parties can proceed by way of an agreed order in the trial court, which retains jurisdiction to correct ministerial errors in its judgment. *Griffin*, 2017 IL App (1st) 143800, ¶ 12.

¶ 49 I have also previously concluded that the $2 States Attorney Record Automation Fee is not a fine and I adhere to that determination. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 19. See also, *People v. Warren*, 2016 IL App (4th) 120721-B; *People v. Bowen*, 2015 IL App (1st) 130698, ¶ 115. Therefore, I further respectfully dissent from the majority's conclusion that this assessment is a fine against which Thomas is entitled to *per diem* credit.