2017 IL App (1st) 151432-U

No. 1-15-1432

December 19, 2017

Second Division

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 16644
	)	
HERMAN DILLARD,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Justice Mason concurred and dissented.

ORDER

¶ 1 *Held*: Judgment affirmed; order assessing fines, fees, and costs corrected.

¶ 2 Following a bench trial, Herman Dillard, the defendant, was convicted of burglary (720 ILCS 5/19-1 (West 2012)) and sentenced, based on his criminal background, as a Class-X offender to six years' imprisonment. Defendant appeals, challenging certain monetary assessments imposed by the trial court and requesting that his presentence custody credit be

applied to eligible assessments. For the reasons set forth herein, we modify the fines and fees order, and affirm the judgment in all other respects.

¶ 3 Defendant was charged by information with one count of burglary. Defendant waived his right to a jury trial, and the case proceeded to a bench trial. The evidence at trial showed that, on August 18, 2013, a witness observed a man break into a car in the area of 1202 West Cabrini Street, take a large pink bag that was in the back seat, and ride away on a bicycle. Police in the area received a dispatch call about the break-in and apprehended defendant, who was riding a bicycle in the area while holding a large pink bag. The witness identified defendant as the man who had broken into the car in question. The owner of the car testified that he had not given defendant permission to enter his car.

¶ 4 The trial court found defendant guilty as charged. After a hearing, the court sentenced defendant to a mandatory Class-X term of six years' imprisonment. The court also imposed $434 of fines, fees, and costs and credited defendant with 608 days of presentence custody.

¶ 5 Defendant appeals, arguing that trial court erroneously imposed two assessments, and that a number of other assessments should be offset by his presentence custody credit.

¶ 6 Initially, defendant concedes that he did not challenge these assessments in the trial court. Generally, a sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18. However, because the State does not argue forfeiture on appeal, it has forfeited the claim that the issues raised by defendant are forfeited. *See People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the

State waives the issue of forfeiture."). Moreover, a defendant may request presentence credit for the first time on appeal. *People v. Lake*, 2015 IL App (3d) 140031, ¶ 31.

¶ 7 Defendant first contends, and the State agrees, that the trial court erroneously assessed the $5 Electronic Citation fee (705 ILCS 105/27.3e (West 2012)) and the $5 Court System fee (55 ILCS 5/5-1101(a) (West Supp. 2013)) against him. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Glass*, 2017 IL App (1st) 143551, ¶ 21. The statute authorizing the $5 Electronic Citation fee dictates that it shall be paid by a defendant "in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 720 ILCS 105/27.3e (West 2012). Because defendant was convicted of a felony offense, this fee was erroneously assessed against him. Accordingly, we vacate the $5 Electronic Citation fee. *See People v. Brown*, 2017 IL App (1st) 142877, ¶ 71 (vacating an Electronic Citation fee where defendant was convicted of a felony).

¶ 8 Similarly, the statute authorizing the $5 Court System fee states that the fee is "to be paid by the defendant 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 Supp. 2013). Because defendant was convicted of burglary, which is not a violation of the Illinois Vehicle Code, this fee was erroneously assessed against him. Accordingly, we vacate the $5 Court System fee. See *Glass*, 2017 IL App (1st) 143551, ¶ 24 (vacating a $5 Court System fee where defendant did not violate the Illinois Vehicle Code).

¶ 9 Defendant next contends that certain assessments imposed against him operate as "fines" and should therefore be offset by his presentence incarceration credit. 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 incarceration. 725 ILCS 5/110-14(a) (West 2012). "[T]he credit for presentence incarceration can only reduce fines, not fees." *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A "fee" is a charge that seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id*. The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, but 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*.

¶ 10 Initially, the parties agree that the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West Supp. 2013)), the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1011(e) (West Supp. 2013)), the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West Supp. 2013)), and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West Supp. 2013)) are offset by defendant's presentence custody credit. The order assessing fines and fees lists these assessments as "[F]ines offset by the $5 per-day pre-sentence incarceration credit." As defendant spent 608 days in presentence custody, and is entitled to $3,040 ($5 x 608) of presentence credit, these fines are completely offset by defendant's presentence credit. 725 ILCS 5/110-14(a) (West 2012).

¶ 11 Defendant next contends, the State concedes, and we agree, that the $15 State Police Operations assessment (705 ILCS 105/27.3a (West Supp. 2013)) and the $50 Court System assessment (55 ILCS 5/5-1101(c) (West Supp. 2013)) levied against him operate as fines, and are subject to offset by his presentence custody credit. The statute authorizing the $15 State Police Operations assessment mandates that the funds collected be deposited in the State Police

Operations Assistance Fund, which can be used by the Illinois Department of State Police to "finance any of its lawful purposes or functions," including homeland security initiatives. 705 ILCS 105/27.3a (5), (6) (West Supp. 2013); 30 ILCS 105/6z-82 (West 2012); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. This court has found that this assessment "does not reimburse the State for costs incurred in defendant's prosecution," and is therefore a fine, which is subject to offset by defendant's presentence credit. *Millsap*, 2012 IL App (4th) 110668, ¶ 31. Similarly, we have found that the $50 Court System assessment is a fine, as it "is essentially punitive, particularly because its amount varies depending on the degree of a defendant's offense." *Reed*, 2016 IL App (1st) 140498, ¶ 15 (citing *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21). Accordingly, the $15 State Police Operations assessment and the $50 Court System assessment are completely offset by defendant's presentence credit.

¶ 12 Defendant next contends that the $2 Public Defender Records Automation assessment (55 ILCS 5/3-4012 (West 2012)) and the $2 State's Attorney Record Automation assessment (55 ILCS 5/4-2002.1(c) (West 2012)) levied against him operate as fines, and should be offset by his presentence credit. This court has found that the $2 Public Defender Records Automation assessment and the $2 State's Attorney Records Automation assessment are fines, because they do not compensate the State for the costs associated with prosecuting a particular defendant. *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56. In *Camacho*, we explained that the costs associated with developing and maintaining automated record keeping systems for the public defender's and State's Attorney's offices were not related to the prosecution of a specific defendant. *Id.* ¶ 50. In addition, the public defender assessment may be imposed against any guilty defendant, regardless of whether or not he was represented by the public defender. *Id.*

¶ 51. Consequently, we concluded that the assessments are fines, and thus, entitled to be offset by the *per diem* credit. Id. ¶ 56. Contra *Reed*, 2016 IL App (1st) 140498, ¶¶ 16–17 (finding the assessments are fees because they compensate the State for the costs associated with prosecuting a particular defendant). In line with *Camacho*, we find that $2 Public Defender Records Automation assessment and the $2 State's Attorney Record Automation assessment operate as fines, and are completely offset by defendant's presentence credit.

¶ 13 In sum, we vacate the $5 Electronic Citation fee and the $5 Court System fee assessed against defendant. We find that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine, the $30 Children's Advocacy Center fine, the $15 State Police Operations assessment, the $50 Court System assessment, the $2 Public Defender Records Automation assessment, and the $2 State's Attorney Record Automation assessment are completely offset by defendant's presentence credit. Accordingly, we order the clerk of circuit court, pursuant to Illinois Supreme Court Rule 615(b)(1), to modify the fines, fees, and costs order to indicate that defendant has a total of $305 in outstanding assessments.

¶ 14 Affirmed as modified.

¶ 15 JUSTICE MASON, concurring in part and dissenting in part.

¶ 16 Dillard's notice of appeal was filed on April 17, 2015. In his opening brief filed two years later, he raises only issues relating to $129 out of a total of $434 in monetary assessments. The State agrees that of the $129 Dillard challenges, two $5 fees were improperly included and that the total should have been $119. The State further agrees that Dillard is entitled to the *per diem* credit against $115 of the $119 total. The only area of disagreement—after 26 pages of briefs—is two $2 assessments for, respectively, the State's Attorney Records Automation fee and the Public

Defender Records Automation fee. These particular assessments have been the subject of numerous, conflicting decisions. I have previously expressed my view that both assessments are fees, not fines (*People v. Murphy*, 2017 IL App (1st) 142092, ¶¶ 18-20; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 12; *People v. Thomas*, 2017 IL App (1st) 150598-U, ¶ 49 (Mason, J., dissenting)) and so I respectfully dissent from the majority's contrary determination.

¶ 17 This is a manifestly wasteful expenditure of scarce attorney and judicial time. Because our supreme court has determined that a defendant can seek the *per diem* credit at any time *(People v. Caballero*, 228 Ill. 2d 79, 88 (2008)), nothing has prevented Dillard from filing a petition in the trial court to ascertain his *per diem* credit. He does not need this court to perform that function for him. For that matter, nothing prevented the State's Attorney and the Public Defender from (i) reviewing the judgment order prior to its entry to determine whether the assessments were appropriate (how many times do we need to note that traffic citation fees do not apply in non-traffic offense cases?) and (ii) calculating the amount of credit against those assessments Dillard was entitled to. And certainly nothing has prevented the State's Attorney and State Appellate Defender from communicating with each other during the pendency of this appeal to ascertain the areas of their agreement; they do not need judicial imprimatur to accomplish this task by agreement.