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2017 IL App (3d) 140477-U

Order filed March 14, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois. |
| Plaintiff-Appellee, | ) | |
| | ) | Appeal No. 3-14-0477 |
| v. | ) | Circuit No. 08-CF-102 |
| | ) | |
| JOHN E. McCOTTRELL, | ) | Honorable David A. Brown, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright specially concurred.

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**ORDER**

¶ 1 *Held*: 1) Claims that trial counsel and appellate counsel were ineffective were positively rebutted by the record and properly dismissed at first stage of the postconviction proceedings.
2) Defendant's postconviction claim was properly dismissed where trial court did not err in failing to make an independent finding of fitness at trial.
3) Mittimus is corrected to reflect conviction for armed robbery with a dangerous weapon.
4) DNA fee, Crimestoppers fee, and public defender fee entered as part of trial court's order are voidable issues that cannot be challenged for the first time on appeal from the denial of a postconviction petition.
5) Eligible fines are offset by defendant's presentence custody credit.

¶ 2 Defendant, John E. McCottrell, filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), challenging his convictions for armed robbery with a dangerous weapon (720 ILCS 5/18-2(a)(1) (West 2008)) and aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)) and claiming he was denied effective assistance of trial and appellate counsel. He appeals, arguing that the trial court erred in denying his petition at the first stage of postconviction proceedings. Defendant also claims that the trial court and the circuit clerk improperly assessed various fines and fees against him. We affirm the summary dismissal of defendant's postconviction petition, as modified, and correct the fines and fees order to apply the $5 *per diem* presentence custody credit to defendant's eligible fines.

¶ 3 FACTS

¶ 4 Defendant was indicted on charges of armed robbery and aggravated battery based on allegations that, while armed with a claw hammer, he took money from Donna List by the use of force and that he knowingly caused harm to List by striking her in the head with the hammer.

¶ 5 Defendant waived his right to a jury trial, and the trial court admonished him regarding the consequences of a jury waiver. During the admonishments, defendant informed the court that he suffered from blackouts "every now and then" and that he had difficulty remembering things. At the next court date, defense counsel expressed that he believed there may be an issue as to defendant's sanity and was attempting to schedule a psychiatric evaluation.

¶ 6 During a subsequent status hearing, counsel informed the court that defendant had been evaluated and that a copy of the report had been provided to the State. Counsel stated that, based on the doctor's report, defendant did not suffer from insanity “to the point where it would affect his knowledge regarding criminal actions." The State agreed, specifically noting that "there was never any *bona fide* doubt as to fitness." Both parties stated that nothing in the report would

delay setting a bench trial. The court then scheduled trial for the next available date of March 12, 2009.

¶ 7 On March 2, 2009, defendant sent a letter to the trial court alleging that counsel had "tricked him" into waiving his right to a jury trial. Defendant accepted the court's offer to appoint new counsel, and the trial date was rescheduled.

¶ 8 On April 15, 2009, the court received another letter from defendant, complaining of new counsel's representation and raising several issues that were characterized by the court as "*pro se* motions." The court declined to appoint new counsel and advised defendant to discuss the issues raised in the letter with his attorney.

¶ 9 On May 8, the trial court conducted a hearing on defendant's motion to withdraw his previous jury waiver. The court upheld the voluntariness of defendant's waiver after defendant and his former counsel testified. The court then scheduled trial for June 17, 2009.

¶ 10 Three weeks later, the court received a third letter in which defendant again complained about counsel's performance. The court discussed the letter at a subsequent status hearing and rejected defendant's allegations.

¶ 11 At trial, List testified that she was a shift supervisor at CVS Pharmacy and was responsible for checking out the cash registers at the end of her shift. Around 7 p.m. on January 25, 2008, she was in the office in the back of the store counting money. She heard a noise, and when she turned to look over her shoulder, a man was standing immediately behind her. List then identified the man in court as defendant. She testified that she was looking right at his face. The man hit the top of her head with an object. She fell out of the chair and onto the floor. The man then kicked her and yelled at her and told her he was going to kill her. He continued to hit

her with the object until she stopped moving. While she was lying on the floor, she heard clicks on the cash register drawer and the "swish" of money being removed. Then the man left.

¶ 12 After four attempts, List was able to call 911. During the 911 call, List gave a description of a black male and tried to estimate the man's height and weight. She testified that it was difficult to make a height and weight judgment because she was in a sitting position when the man attacked her.

¶ 13 Two days after the attack, officers contacted List and asked her to view an in-person lineup at the station. Prior to viewing the lineup, List signed a form stating she understood that the suspect may not be in the lineup and that she was not required to make an identification. Out of the six men in the lineup, List identified defendant as her attacker. At trial, List testified that she was "100 percent certain" that the man she identified in the lineup was the man who attacked her and committed the robbery.

¶ 14 Officer Eric Ellis photographed the scene of the robbery on January 25, 2008, and identified the photographs as exhibits. The photographs depicted blood on the office floor, List's head wounds, cash register drawers, and the telephone List used to call 911. Ellis also identified a picture of the claw hammer that he recovered from the scene. In addition to photographing evidence, Ellis viewed a CVS surveillance video of the events that evening. He testified that in the video he noticed the robber was wearing denim pants and a tan overcoat with a plaid liner in the hood. He identified defendant in court as the man in the video.

¶ 15 Jennifer Cook, a manager at CVS, was called to the pharmacy that evening. She reviewed the surveillance tape with the officers and identified defendant in court as the person she saw on the tape attacking List and robbing the store. After the investigators left, Cook locked the store and returned the next morning to determine the amount of cash that was stolen.

She compared the register drawers in the office to what should have been there and noted a discrepancy of $1,361.43.

¶ 16 Pamela Roberson testified that she was at her friend's apartment on the night of January 25, 2008, when a man named "John" came over. The man was fidgety and had a lot of "crispy money" in both of his shoes and his shirt pocket. She identified the man as defendant.

¶ 17 Sergeant Shawn Wetzel recovered two surveillance videos from the CVS system: one from a previous incident and one from the robbery on January 25. After viewing the videos, he determined that the same person appeared in both of them. The perpetrator was wearing the same distinctive jacket with a black and red plaid liner in both videos. He printed a still-framed photograph of the individual from the surveillance video of the previous incident. The picture was printed in color and distributed to patrol officer.

¶ 18 Wetzel identified the DVD that contained video clips of the January 25 robbery from CVS video. Having previously viewed both surveillance videos, Wetzel testified that defendant was the person depicted on the DVD committing robbery and attacking List. The exhibit was then played for the trial court.

¶ 19 Officer Gerald McKean was advised of the robbery at the department roll call and given a photograph from the surveillance camera depicting the individual. He took the photo to a temporary employment service and showed it to the administrative assistant. She identified the individual as John McCottrell, a person registered with the agency. Officers subsequently detained defendant at a local bus station as he was boarding a bus to Chicago.

¶ 20 Detective Shawn Curry inventoried defendant's property after his arrest, including a tan coat with a plaid liner and $357 in cash. Curry also accompanied List when she viewed the lineup at the station. He testified that List identified defendant "without hesitation."

¶ 21 The trial court found defendant guilty of both charges and sentenced him to 30 years in prison for armed robbery with a dangerous weapon and 10 years for aggravated battery. The sentencing order imposed "a judgment against defendant for costs" in the amount of "$2,486.29." The order also imposed a DNA fee and gave defendant credit for time served in custody prior to sentencing from January 26, 2008, to August 13, 2009. The trial court did not order the assessment of any other fines or fees. The mittimus provided to the Department of Corrections indicates that defendant was convicted of armed robbery, a Class X felony, and cites section 18-2(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/18-2(a)(2) (West 2008)).

¶ 22 A payment sheet, signed by the deputy circuit clerk, also appears in the record. It lists the total assessment of fines and fees as $2486.29. Each individual assessment is listed in table format, and a corresponding charge is provided.

¶ 23 On direct appeal, counsel argued that the trial court erred in imposing a 10-year extended prison term for aggravated battery because it was not the most serious class for which he was convicted, and the State confessed error. We agreed and entered an order reducing defendant's sentence to 5 years. See *People v. McCottrell*, No. 3-09-0674 (2010) (unpublished order under Supreme Court Rule 23).

¶ 24 Defendant filed a postconviction petition alleging that (1) trial counsel was ineffective for failing to object to his arrest on fourth amendment grounds and for failing to sufficiently argue reasonable doubt, (2) the trial court erred in failing to conduct a hearing regarding his fitness to stand trial, and (3) appellate counsel was ineffective for failing to raise the issues on direct appeal. The trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 25 ANALYSIS

¶ 26 I

¶ 27 Defendant first argues that he presented the gist of a constitutional violation when he alleged that trial counsel was ineffective for failing to file a motion to quash arrest and that his postconviction petition should be allowed to proceed to the second stage.

¶ 28 On appeal, a trial court's summary dismissal of a post-conviction petition is reviewed *de novo*. *People v. Coleman,* 183 Ill. 2d 366, 389 (1998). At the first stage of the post-conviction process, the defendant's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Edwards,* 197 Ill. 2d 239, 244 (2001). A *pro se* post-conviction petition may only be summarily dismissed at the first stage if the trial court determines that the petition is frivolous and patently without merit. *People v. Boclair,* 202 Ill. 2d 89, 99 (2002). A petition is frivolous and patently without merit if it has no arguable basis either in law or fact. *People v. Hodges,* 234 Ill. 2d 1, 11–12 (2009). A petition lacks an arguable basis in law or fact when it is based upon an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16.

¶ 29 A motion to quash arrest and suppress evidence filed under section 114-12 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/100-1 *et seq*. (West 2014)) must request that certain evidence in connection with the arrest be suppressed. 725 ILCS 5/114-12(a) (West 2014). The motion must clearly identify the evidence sought to be suppressed and state the facts showing wherein the fourth amendment search and seizure was unlawful. See *People v. Ramirez,* 2013 IL App (4th) 121153, ¶ 59.

¶ 30 To demonstrate ineffective assistance of trial counsel, a defendant must show that (1) counsel's performance was objectively unreasonable, and (2) absent counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984). The decision whether to

bring a motion to quash arrest and suppress evidence is considered trial strategy, and trial counsel enjoys the strong presumption that failure to challenge the validity of the defendant's arrest or move to exclude evidence was proper. *People v. Rodriguez,* 312 Ill. App. 3d 920, 925 (2000). At the first stage of a postconviction proceeding, the defendant need only show that counsel's performance was arguably defective and that it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 7. However, summary dismissal will be upheld where the record from the trial proceedings contradicts the allegations in the defendant's postconviction petition. *People v. Jefferson*, 345 Ill. App. 3d 60, 72-73 (2003).

¶ 31 In his postconviction petition, defendant alleged that he was "denied effective assistance of trial counsel [because] his trial counsel failed to object to the following: Fourth Amendment violation, petitioner arrest was unconstitutional." The basis of his argument is that trial counsel's performance was unreasonable in that counsel neglected to file a motion to quash arrest. However, motions to quash arrest, challenging only the arrest and not seeking suppression of evidence, are not recognized under the Code. See 725 ILCS 5/114-12(a) (West 2014). Defendant does not cite any evidence that should have been suppressed or that would have been suppressed if a motion to quash arrest would have been filed by counsel and granted by the trial court. Thus, defendant’s claim that his attorney was ineffective for neglecting to file a motion to quash failed to state the gist of an ineffective assistance claim.

¶ 32 Even if we interpret defendant's allegation to mean that counsel was ineffective for failing to file a motion to quash arrest and suppress the post-arrest identification, our decision would not change. Counsel's failure to file the motion was not prejudicial because the record demonstrates that the out-of-court identification was not unnecessarily suggestive.

¶ 33 On a motion to quash arrest and suppress identification, the defendant bears the burden of establishing that the pretrial identification was "unnecessarily suggestive" or "impermissibly suggestive." *People v. Curtis*, 262 Ill. App. 3d 876, 882 (1994). An out-of-court identification will be suppressed only where both the identification is unnecessarily suggestive and such suggestiveness gives rise to a substantial likelihood of misidentification. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). Factors to consider in determining the reliability of an identification under this standard include (1) the opportunity of the witness to view the criminal act, (2) the witness's degree of attention, (3) the accuracy of the prior description of the offender, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the time between the crime and the confrontation. *People v. Follins*, 196 Ill. App. 3d 680, 689 (1990).

¶ 34 Here, defendant claims that his arrest was unlawful because the still photo used to facilitate his arrest depicted the perpetrator of a previous offense at CVS and not the man who attacked List on January 25. We do not believe that the photo used to identify defendant for the purpose of arrest led to an unnecessarily suggestive pretrial identification. Officer Wetzel testified that he viewed the surveillance tapes of both incidents and identified a man wearing the same coat with similar physical characteristics in both videos. Using a photograph of the man who committed the January 25 attack and robbery, defendant was then arrested. Two days after the attack, List positively identified defendant from an in-person lineup. She had an opportunity to view the offender while she was face-to-face with him and in close proximity to him, and she identified the defendant from the lineup with confidence and certainty. Under these circumstances, we find the trial court would have found that any suggestiveness in the identification process did not give rise to a substantial likelihood of misidentification. Because the record demonstrates the futility of a motion to quash arrest and suppress identification

evidence, defendant failed in his burden of demonstrating that counsel's performance was ineffective under *Strickland*.

¶ 35 II

¶ 36 Defendant argues that appellate counsel was also ineffective. He claims that on direct appeal counsel should have argued reasonable doubt because there were significant gaps in the State's evidence based on identity. Defendant argues that Wetzel's identification of defendant from the video footage is suspect because the video does not provide a clear view of the offender's face. He also argues that List's lineup identification was unreliable because she was unable to describe his height and weight immediately after the attack.

¶ 37 Claims of ineffective assistance of appellate counsel are measured against the same two-standard as claims challenging the effective assistance of trial counsel. "A petitioner must show (1) that appellate counsel's performance fell below an objective standard of reasonableness, and (2) that this substandard performance caused prejudice, *i.e.,* there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful." *People v. Golden,* 229 Ill. 2d 277, 283 (2008). Where the underlying claim lacks merit, a defendant cannot be said to have received ineffective assistance of appellate counsel due to appellate counsel's failure to raise the claim on direct appeal. *People v. Johnson,* 206 Ill. 2d 348, 378 (2002). Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetent for counsel to refrain from raising issues that are without merit. *People v. Edwards*, 195 Ill. 2d 142, 163-64 (2001). In raising reasonable doubt as an issue on appeal, the standard applied is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Williams*, 193 Ill. 2d 1, 24 (2000).

¶ 38 On direct appeal, counsel raised one meritorious issue that resulted in relief. Although he failed to raise every conceivable argument, appellate counsel was not incompetent for failing to raise a reasonable doubt issue based on unreliable identification testimony.

¶ 39 In this case, the identification evidence was overwhelming: (1) List positively identified defendant as her attacker in an in-person lineup; (2) two trial witnesses identified defendant as the man in the surveillance video who robbed the pharmacy and attacked List; and (3) List's own identification testimony was certain and convincing. Thus, the record positively rebuts defendant's allegation that a reasonable doubt challenge would had been successful had appellate counsel raised the issue on direct appeal. Because the trial record contradicts defendant's allegation that he was prejudiced by appellate counsel's ineffective representation, the postconviction court properly dismissed this claim as frivolous and patently without merit.

¶ 40 III

¶ 41 Next, defendant argues that the appointment of an expert to assess his mental state raised a *bona fide* doubt as to his fitness to stand trial and the trial court's failure to make an independent finding of fitness violated his constitutional rights.

¶ 42 Once a *bona fide* doubt as to a defendant's fitness had been raised, the trial court has a duty to hold a fitness hearing. *People v. Griffin*, 178 Ill. 2d 65, 79 (1997). In a postconviction petition, defendant bears the burden of proving that, at the time of trial, there were facts in existence which raised a real, substantial, and legitimate doubt as to his mental capacity to meaningfully participate in his defense and cooperate with counsel. *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991). Factors to consider in assessing whether a *bona fide* doubt of fitness exists include (1) a defendant's irrational behavior and demeanor at trial, (2) defense counsel's statements concerning competency, and (3) any prior medical opinions as to defendant's fitness.

*Id*. Merely granting a defendant's motion for a fitness examination cannot, by itself, be construed as a showing that the trial court found a *bona fide* doubt as to the defendant's fitness. See *People v. Hanson*, 212 Ill. 2d 212, 222 (2004) (trial court does not implicitly conclude that a *bona fide* doubt as to defendant's fitness exists upon accepting a motion for a fitness hearing and appointing a qualified expert). Where the record rebuts allegations in a postconviction petition, summary dismissal is proper. *People v. Trujillo,* 2012 IL App (1st) 103212, ¶ 12.

¶ 43 Here, the record rebuts defendant's contention that the trial court refused a hearing on his mental health because a fitness hearing was never requested. During the underlying proceedings, defense counsel requested a psychological evaluation. Following that evaluation, the trial court did not express a *bona fide* doubt as to defendant's fitness, nor did defense counsel request a fitness hearing. The trial court's decision to schedule a mental health evaluation, does not demonstrate that a *bona fide* doubt of defendant's fitness exists.

¶ 44 The record also contradicts the allegation that the trial court "deferred to Dr. Killion's conclusion on the matter of fitness." The trial court did not rely on Dr. Killion's evaluation or his conclusion that defendant was fit to stand trial. A review of the transcript from the hearing shows that the trial court never made a finding, specifically or implicitly, that a *bona fide* doubt as to defendant's fitness had been raised. Accordingly, the postconviction court properly dismissed defendant's claim as frivolous and patently without merit.

¶ 45 IV

¶ 46 Defendant contends that the mittimus should be corrected to reflect a conviction for armed robbery with a dangerous weapon under section 5/18-2(a)(1) of Criminal Code rather than armed robbery with a firearm under section 5/18-2(a)(2). The State agrees.

¶ 47 The indictment charged defendant with armed robbery, in that "while armed with a dangerous weapon, a claw hammer" defendant took United State's currency from List by the use of force or by threatening the imminent use of force. This is, by definition, armed robbery with a dangerous weapon other than a firearm under section 5/18-2(a)(1) of the Criminal Code. 720 ILCS 5/18-2(a)(1) (West 2008). In accordance with the language of the indictment, the court found defendant guilty of armed robbery with a dangerous weapon under section 5/18-2(a)(1). The mittimus, however, incorrectly cites section 5/18-2(a)(2), which denotes a conviction for armed robbery with a firearm. We therefore modify the mittimus to read "5/18-2(a)(1)." See Ill. S. Ct. R. 615 (b)(1) (eff. Aug. 27, 1999) (appellate court may modify order from which appeal is taken).

¶ 48 V

¶ 49 For the first time on appeal from his postconviction petition, defendant maintains that various fines and fees were improperly assessed by the trial court and the circuit clerk following his conviction.

¶ 50 A. DNA Analysis Fee, Public Defender Fee and Crimestoppers Fee

¶ 51 Defendant argues that we should vacate the trial court's DNA analysis fee because he is already registered in the DNA database. He also claims that the trial court improperly imposed a $100 public defender fee because it was assessed without notice or a hearing and a $25 "Crimestoppers" fee because it can only be assessed as a condition of probation.

¶ 52 Defendant concedes that he forfeited these issues by failing to challenge the assessments in the trial court, on direct appeal, or in his postconviction petition before the trial court. However, he argues that a defendant may make a request for monetary credit at any time and at any stage of the proceedings, citing *People v. Caballero*, 228 Ill. 2d 79, 87-88 (2008). In

*Caballero*, the court concluded that the granting of sentencing credit is a "simple ministerial act" that can be executed on appeal from a postconviction proceeding in the interest of judicial economy and the orderly administration of justice. *Id.* at 88. Defendant asks us to vacate his improperly assessed fees in a similar fashion, as a simple ministerial act that can be executed at any stage of court proceedings. We decline to do so.

¶ 53 In *Caballero,* 228 Ill. 2d 79, 88 (2008), our supreme court explained, in the context of a monetary presentence credit, that the defendant's claim was a statutory claim and thus not cognizable under the Post-Conviction Hearing Act. Nevertheless, it held that such a claim may be considered at any time, including on appeal in postconviction proceedings, based on its acknowledgment that the presentence credit statute explicitly permits the award of *per diem* credit "upon application of the defendant." *Id.* at 88 (citing 725 ILCS 5/110-14 (West 2014)). The court concluded that where "the basis for granting the application of the defendant is clear and available from the record, the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Id.* Contrary to defendant's argument, the *Caballero* court did not hold that we may reach any sentencing issue raised in collateral proceedings. Here, the issues presented in defendant's postconviction appeal involve the assessment of a successive DNA analysis fee (730 ILCS 5/5-4-3 (West 2014)), a public defender fee (725 ILCS 5/113-3.1 (West 2014)), and a Crimestoppers fee (730 ILCS 5/5-6-3(b)(13) (West 2014)). None of the statutes authorizing these assessments gives a defendant the ability to attack the fine at any time or at any stage of court proceedings. Thus, we cannot apply the analysis in *Caballero* to address defendant's claims on collateral appeal. See *People v. Buffkin*, 2016 IL App (2d) 140792, ¶¶ 7-10.

¶ 54 B. Circuit Clerk's Fines and Fees

¶ 55 Defendant also challenges several fines and fees listed on the clerk's payment sheet, including the assessment of sheriff's fees and State's attorney fees. He maintains that the assessments were improperly imposed by the clerk and asks us to offset them by his $5 *per diem* presentence credit.

¶ 56 Here, unlike other cases we have been asked to review, the sentencing order signed by the trial court instructed defendant to pay "costs" in the amount of "$2,486.29," the full amount of fines and fees calculated by the circuit clerk on the payment sheet. Although the circuit clerk clearly made the calculations, the trial court ordered defendant to pay the total amount as part of the sentencing order. Accordingly, under *People v. Castleberry*, 2015 IL 116916, the fines and fees are not void, they are merely voidable, and cannot be challenged in a collateral proceeding. See *Id*. ¶¶ 11-18 (holding that a sentencing order that does not comply with statutory guidelines is only void if the court lacked personal or subject-matter jurisdiction); *People v. Price*, 2016 IL 118613, ¶¶ 26-32 (applying *Castleberry* retroactively in a collateral proceeding).

¶ 57 However, defendant has also made an application to this court requesting that his presentence custody credit of $2825 be used to offset the Crimestoppers fee, the court usage fee, the drug court fund and circuit clerk operation/administrative fund assessments, the drug court operation fund assessment, and the medical costs fund assessment. These assessments are considered fines that are all eligible for sentencing credit under section 110-14 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/110-14 (West 2014)), except the medical costs assessment fine. See *People v. Dowding*, 388 Ill. App. 3d 936, 948 (2009) ($25 Crimestoppers fee is a fine); *People v. Wynn,* 2013 IL App (2d) 120575, ¶¶ 17-18 ($50 court usage fee is a fine); *People v. Unander,* 404 Ill. App. 3d 884, 886 (2010)) ($4.75 drug court assessment and related $0.25 circuit clerk operation/administration assessment are fines); *People v. Sulton,* 395 Ill. App.

3d 186, 188-91 (2009)) ($10 drug court operation fee is a fine); see also 730 ILCS 125/17 (West 2014) ($10 medical costs assessment is a fine that is expressly excluded from presentence custody credit by statute). The State concedes that defendant is entitled to receive presentence custody credit against ~~these~~ the eligible fines.

¶ 58 As noted in *Buffkin*, 2016 IL App (2d) 140792, ¶ 4, there is no impediment in granting defendant the credit he requests. Section 110-14 of the Code permits the award of a $5 per day credit for time spent in custody prior to sentencing "upon application of the defendant." 725 ILCS 5/110-14 (West 2014). A defendant can apply for the credit at any time, "even on appeal in a postconviction proceeding," and the credit can be used to offset certain fines assessed by the trial court. *Caballero*, 228 Ill. 2d at 88. Therefore, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $25 Crimestoppers fee, the $50 court usage fee, the $4.75 drug court fund and related $0.25 circuit clerk operation/administration fund assessments, and the $10 drug court operation fee be offset by defendant's presentence custody credit.

¶ 59 In reaching our decision, we are mindful that the trial court's sentencing order unlawfully imposed significant fines and fees against defendant that cannot be corrected on appeal. This case presents an example of *Castleberry*'s unanticipated implications. In *Castleberry*, the supreme court's refusal to allow the State's request for an increase in a sentence that was unlawfully low resulted in a change in course that abolished a rule of law used to correct statutorily unauthorized sentences. See *Castleberry*, 2015 IL 116916, ¶¶ 17-19. Here, the State argues, and we reluctantly agree, that *Castleberry* also applies in cases where a defendant's sentence is unlawfully high. The only remedy left is a writ of *mandamus*, a remedy that imposes disproportionate burdens on the defendant. In future cases, our interpretation of *Castleberry*

must include the availability of correcting serious sentencing errors. Fines that are imposed in gross excess of the statute may raise due process concerns. See generally *People v. Graves*, 235 Ill. 2d 244, 255-56 (2009). Moreover, forfeiture of a fines and fees issue leads to the inevitable argument that counsel was ineffective for failing to raise the issue at trial or on direct appeal or in a postconviction petition. Admittedly, these are additional remedies that a defendant may use to correct his sentence.

¶ 60 In this case, the record clearly demonstrates that the fines and fees are excessive and were ordered in violation of the law, sentencing defendant to an illegal sentence under the statute. Unfortunately, few options remain to correct the errors on appeal from the denial of his postconviction petition.

¶ 61 CONCLUSION

¶ 62 We affirm the judgment of the circuit court of Peoria County, dismissing defendant's postconviction petition, and modify the mittimus to accurately reflect defendant's conviction of armed robbery with a dangerous weapon. We further order the clerk of the circuit court to correct defendant's fines and fees order to reflect a $90 presentence custody credit in satisfaction of the Crimestoppers fine, the court usage fine, the drug court fund and circuit clerk operation/administrative fund assessments, and the drug court operation fine.

¶ 63 Affirmed as modified; fines and fees order corrected.

¶ 64 JUSTICE SCHMIDT, specially concurring.

¶ 65 I concur, but do not join in paragraphs 59 and 60 of the Order.

¶ 66 JUSTICE WRIGHT, specially concurring.

¶ 67 I strongly agree with the majority's conclusion that the clerical errors became judicial errors with the stroke of a pen held by a judge with unquestioned jurisdictional authority.

However, I specially concur because I do not share the same concerns about the natural consequences arising out of the *Castleberry* decision.

¶ 68 For the reasons discussed below, it appears the *Castleberry* door swings both ways and results in the forfeiture of sentencing errors that operate to the detriment of both sides. This is the beauty of *Castleberry*.

¶ 69 For example, in this case there are multiple unintentional judicial errors regarding fines that do not culminate in any unfair harm to this defendant. I agree the trial court unlawfully imposed the $25 Crimestopper's fine and recognize *Castleberry* prevents this court from correcting the error raised for the first time on appeal. Yet, the applicable statutes required this judge to impose a VCV fine and criminal surcharge fine for *each* felony conviction, but the total monetary charges did not include these fines. See 725 ILCS 240/10(b); and 730 ILCS 5/5-9-1(c). Thus, I submit the court order undercharged this defendant at least $40 in criminal surcharges, plus the additional amount omitted for a VCV fine arising out of the second felony conviction. In the end, the fines ordered are not excessive.

¶ 70 Prior to *Castleberry*, we would have remanded the matter to the trial court to correct the sentencing errors by adjusting the fines accordingly and allowing the *per diem* credit to offset the fines correctly imposed on remand. After *Castleberry*, we simply remind both sides that forfeiture is easily avoided by bringing the sentencing errors, if any, to the attention of the trial court before filing the first notice of appeal. I celebrate the decision in *Castleberry* for this reason and specially concur on this basis.