

2018 IL App (1st) 161747-U

No. 1-16-1747

Order filed August 31, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 15 CR 10180
)	
DARNELL FOSTER,)	Honorable
)	Thomas J. Hennelly,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's fines and fees order amended to vacate an improper fee and apply a \$65 credit against two assessments; claim that additional fees constitute fines entitled to monetary credit is without merit.

¶ 2 Following a bench trial, defendant Darnell Foster was convicted of two counts of delivery of a controlled substance and sentenced to seven years' imprisonment. The trial court also assessed defendant fines, fees and court costs totaling \$1779. On appeal, defendant does not challenge his convictions or term of imprisonment, but contends that his fines and fees order

reflects the incorrect total amount assessed. He also contends that two monetary charges were improperly assessed and should be vacated. In addition, defendant argues that monetary credit for the days he spent in presentencing custody should be applied against several of the assessments. We vacate one fee, correct the total amount assessed, apply a credit of \$65 against two assessments, and affirm defendant's conviction and sentence in all other respects.¹

¶ 3 Because defendant does not challenge his conviction or prison term, we need not discuss the details of the evidence presented at trial, where defendant represented himself *pro se*. The evidence established that on May 9, 2015, undercover Chicago police officer Marco Mar approached defendant near 55th and Halsted Streets and stated that he wanted to purchase \$40 each of heroin and crack cocaine. Defendant replied that he would call his "partner" and "take care of" Mar. Defendant made a phone call, then told Mar to walk with him to meet his partner. Defendant and Mar walked to the next block and met with an unknown man. Defendant told that man that Mar wanted to purchase \$40 each of heroin and crack cocaine. The man told defendant and Mar to meet him in the alley.

¶ 4 While waiting in the alley, Mar gave defendant \$20 in prerecorded funds in exchange for suspect cannabis. The unknown man arrived in the alley, and Mar handed him \$80 in prerecorded funds in exchange for two bags of suspect heroin and two bags of suspect crack cocaine. Defendant and the man both gave Mar their cell phone numbers and told Mar to call them whenever he wanted to purchase more narcotics. Defendant handed money to the other man, including the \$20 bill he had received from Mar. Mar left the area and defendant was

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

arrested by other officers. A forensic chemist tested the substances Mar received from the unknown man and found them positive for 0.1 gram of cocaine and 0.2 gram of heroin.

¶ 5 The trial court found defendant guilty of two counts of delivery of a controlled substance under a theory of accountability. Defendant was represented by counsel for posttrial motions and sentencing. The trial court sentenced defendant to seven years' imprisonment as a Class X offender and awarded him 382 days² of credit for time served in presentencing custody. The court also assessed defendant \$1779 for various fines, fees, and court costs.

¶ 6 On appeal, defendant contends that his fines and fees order must be amended. Defendant points out that the summation of his total amount assessed was improperly calculated. He also contends that two assessments must be vacated because they were erroneously assessed. In addition, defendant argues that he is entitled to apply presentence monetary credit against several assessments that are labeled as fees, but are actually fines.

¶ 7 Defendant acknowledges that he did not preserve these issues for appeal because he did not challenge the assessments in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Nevertheless, he urges this court to review his assessments under the plain error doctrine.

¶ 8 The State acknowledges the forfeiture, but asserts that the *per diem* monetary credit is a statutorily mandated benefit that cannot be waived. See *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). The State further asserts that defendant's claims may be considered under the plain error doctrine or as a claim of ineffective assistance of counsel, and addresses the merits of his claims.

² The report of proceedings and the fines and fees order both indicate that defendant received 382 days of credit for time served. The mittimus, however, indicates 387 days of credit. The trial court's oral pronouncement is the judgment of the court and controls over the mittimus. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 62.

¶ 9 Defendant's request for the *per diem* monetary credit is not merely requesting credit that is due against his fines but, rather, is raising a substantive issue regarding whether the assessments labeled as fees are fines, and therefore, is subject to forfeiture. See *People v. Brown*, 2017 IL App (1st) 150203, ¶¶ 40-41. Defendant's challenges are not reviewable under the plain error doctrine. *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017). Nor can they be reviewed as a claim of ineffective assistance of counsel. *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (failure to object to fines and fees is not an error of constitutional magnitude that will support a claim of ineffectiveness), *pet. for leave to appeal granted*, No. 123052 (Mar. 21, 2018). However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue that defendant forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, although the State acknowledges the forfeiture, it asserts that this court may reach the issues, thereby waiving the forfeiture. We therefore address the merits of defendant's claims. The propriety of the imposition of fines and fees is a question of law which we review *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 10 First, the parties agree, and we concur, that the \$5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) must be vacated as that fee only applies to traffic, misdemeanor, municipal ordinance and conservation violations, and does not apply to defendant's felony offenses. We vacate the \$5 electronic citation fee and direct the clerk of the circuit court to amend the fines, fees and costs order accordingly.

¶ 11 However, we disagree with the parties' assertion that the \$100 trauma center fine (730 ILCS 5/5-9-1.1(b) (West 2014)) was erroneously assessed. Both parties have incorrectly cited to

section 5-9-1.10 of the Unified Code of Corrections (730 ILCS 5/5-9-1.10 (West 2014)), rather than section 5-9-1.1(b). The parties are correct that section 5-9-1.10 only applies to convictions for three firearm offenses, and would not apply to defendant's drug convictions. Section 5-9-1.1(b), however, clearly states that the \$100 trauma center fine applies to convictions for delivery of a controlled substance. Therefore, the \$100 fine was properly assessed to defendant.

¶ 12 Next, the parties agree that the fines and fees order incorrectly indicates that defendant's total amount assessed is \$1784. We concur with defendant that the correct summation of the total amount assessed by the trial court should have been \$1779. We direct the clerk of the circuit court to amend the fines and fees order to reflect that defendant's total assessment, after vacating the \$5 electronic citation fee, but before applying any credit, should be \$1774.

¶ 13 Defendant also contends that he is due monetary credit against several of his assessments. Pursuant to section 110-14 of the Code of Criminal Procedure (Code) (725 ILCS 5/110-14 (West 2014)), a defendant is entitled to have a credit applied against his fines of \$5 for each day he spent in presentence custody. Here, defendant spent 382 days in presentence custody, and is therefore entitled to a maximum credit of \$1910.

¶ 14 The credit under section 110-14 can only be applied to offset fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). To determine whether an assessment is a fine or a fee, we consider the nature of the assessment rather than its statutory label. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Our supreme court has defined a "fine" as "punitive in nature" and "a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense." (Internal quotation marks omitted.) *Id.* (quoting *Jones*, 223 Ill. 2d at 581). A "fee," on the other hand, is "a

charge that ‘seeks to recoup expenses incurred by the state,’ or to compensate the state for some expenditure incurred in prosecuting the defendant.” *Id.* (quoting *Jones*, 223 Ill. 2d at 582).

¶ 15 Defendant contends, the State agrees, and we concur, that defendant is due full credit for the \$15 state police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)) and the \$50 court system fee (55 ILCS 5/5-1101(c) (West 2014)). The parties agree that, although these two charges are labeled as fees, this court previously held that they are fines because they do not compensate the State for expenses incurred in the prosecution of defendant, and thus, they are subject to offset by the monetary sentencing credit. *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 13, 17. We direct the clerk of the circuit court to amend the fines, fees and costs order to reflect a \$15 credit for the state police operations fee and a \$50 credit for the court system fee.

¶ 16 Defendant next contends that he is entitled to credit against the \$190 felony complaint filed fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), the \$15 automation fee (705 ILCS 105/27.3a(1) (West 2014)), and the \$15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)). Defendant argues that these assessments are fines rather than fees because they do not reimburse the State for the costs incurred in prosecuting a defendant, but instead, finance a component of the court system for the general costs of litigation.³

¶ 17 This court has already considered challenges to these assessments and has determined that they are fees, not fines, and therefore, not subject to presentence incarceration credit. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41–42 (relying on *Tolliver* and finding the \$190 felony complaint filed fee to be a

³ Whether the felony complaint filed, automation, document storage, Public Defender records automation, and State’s Attorney records automation assessments are fees or fines is currently pending before the Illinois Supreme Court in *People v. Clark*, 2017 IL App (1st) 150740-U, *pet. for leave to appeal granted*, No. 122495 (Sept. 27, 2017).

fee), *pet. for leave to appeal granted*, No. 122008 (May 24, 2017); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81 (finding that the document storage fee and automation fee are fees not subject to offset by presentence incarceration credit). See also *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (citing *Tolliver* and finding the automation and document storage fees are fees rather than fines). We adhere to the reasoning in our prior decisions and find that these assessments are fees that compensate the clerk's office for expenses incurred in the prosecution of a defendant. As such, defendant is not entitled to offset these fees with his presentence custody credit.

¶ 18 Finally, defendant contends that he is entitled to credit against the \$2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) and the \$2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)). Defendant points out that these assessments apply to all defendants who are found guilty of an offense, and that the purpose of the assessments is to discharge the expenses associated with establishing and maintaining automated record keeping systems. He argues that the assessments therefore do not compensate the State for prosecuting a particular defendant, and thus, they constitute fines rather than fees.

¶ 19 This court has repeatedly found that the \$2 State's Attorney records automation fee and the \$2 Public Defender records automation fee are compensatory in nature because they reimburse the State for its expenses related to maintaining its automated record-keeping systems. *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; *People v. Green*, 2016 IL App (1st) 134011, ¶ 46 (Public Defender assessment is a fee, not a fine); *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30 (State's Attorney assessment is a fee, not a fine). In *Reed*, we explained that the State's Attorney's Office would

have utilized its automated record-keeping systems in prosecuting the defendant when it filed charges with the clerk's office and made copies of discovery that were tendered to the defense. *Reed*, 2016 IL App (1st) 140498, ¶ 16. We further explained that, because the defendant was represented by a public defender, counsel would have used the Public Defender's Office record systems in representing the defendant. *Id.* ¶ 17. Consequently, we concluded that the assessments were fees, not fines, and thus not subject to offset by the *per diem* credit. *Id.* ¶¶ 16-17; *Green*, 2016 IL App (1st) 134011, ¶ 46; *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; *Rogers*, 2014 IL App (4th) 121088, ¶ 30; *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56 (finding the assessments are fines because they do not compensate the State for the costs associated with prosecuting a particular defendant).

¶ 20 We agree with the holdings in *Reed*, *Green*, *Bowen*, and *Rogers*, and similarly conclude that the State's Attorney records automation fee and the Public Defender records automation fee are fees, not fines. Accordingly, defendant is not entitled to offset these fees with his presentence custody credit.

¶ 21 For these reasons, we vacate the \$5 electronic citation fee from the fines, fees and costs order. We direct the clerk of the circuit court to amend that order to reflect that defendant's total assessment, after vacating the \$5 electronic citation fee, but before applying any credit, should be \$1774. We further direct the clerk to apply a credit of \$65 to offset the \$15 state police operations fee and the \$50 court system fee, in addition to any other credit defendant is due against his eligible fines. We affirm defendant's convictions and sentence in all other respects.

¶ 22 Affirmed in part; vacated in part; fines and fees order corrected.