

NOTICE

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2014 IL App (4th) 120891-U

NO. 4-12-0891

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 2, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
STEVEN L. FEAGIN,)	No. 00CF2187
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part, vacated in part, and remanded with directions, concluding (1) the trial court did not abuse its discretion by denying defendant's motion for a *Franks* hearing, but (2) the circuit court clerk improperly imposed various fines.

¶ 2 In January 2012, defendant, Steven L. Feagin, filed a motion to suppress evidence, requesting the court conduct a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Defendant's motion sought to suppress the use of his deoxyribonucleic acid (DNA) sample, alleging the affidavit in support of the search warrant used to obtain his DNA swab recklessly or intentionally omitted certain facts that would have precluded a finding of probable cause. In February 2012, the trial court denied defendant's motion, finding the search warrant was appropriately issued and the matter did not need to proceed to any further stage of a *Franks* hearing.

¶ 3 Following a June 2012 trial, a jury found defendant guilty of three counts of aggravated criminal sexual assault (720 ILCS 5/12-13(a)(1), 14(a)(1) (West 1994)). In July 2012, the trial court sentenced defendant to three consecutive 30-year prison sentences. Sometime after sentencing, the circuit court clerk imposed various assessments. Defendant appeals, arguing (1) the trial court erred by denying him a *Franks* hearing, and (2) certain assessments must be vacated, as they constitute fines improperly imposed by the circuit clerk.

¶ 4 For the reasons that follow, we affirm in part, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In December 2000, the State alleged by information that James Doe, an African-American male with a certain DNA profile, committed aggravated criminal sexual assault in 1993 against S.B. (720 ILCS 5/12-13(a)(1), 14(a)(1) (West 1992)) and committed aggravated criminal sexual assault in 1995 against T.B. and M.P. (720 ILCS 5/12-13(a)(1), 14(a)(1) (West 1994)). The identity of James Doe remained unknown until approximately seven years later, when the Broward County, Florida, sheriff's office began investigating a June 2007 sexual assault that occurred in Deerfield Beach, Florida.

¶ 7 A. The Florida Affidavit and Application for Search Warrant

¶ 8 In September 2008, Florida Detective Eric Hendel applied for a search warrant to obtain oral swabs from defendant for DNA testing, asserting he had probable cause to believe the following. In June 2007, A.C. was sleeping in her home in Deerfield Beach, Florida, when she awoke, lying face down, to a person holding a wet cloth over her mouth and nose. A.C. drifted in and out of consciousness as the intruder penetrated her vagina and anus with his penis. After he ejaculated onto A.C.'s back, the intruder departed through the front door, and A.C. heard the

dead bolt on the door lock after the front door was closed. A.C. was unable to see the intruder, but officers later recovered DNA from A.C.'s sheets.

¶ 9 The investigation into A.C.'s assault initially centered on her former boyfriend, Eric Barnett. However, a comparison of the DNA found on A.C.'s sheets with Barnett's DNA excluded Barnett as a suspect. Officers then entered the DNA profile found on the sheets into the Combined DNA Index System (CODIS), a national computerized database of DNA samples, which showed the DNA matched three sexual assault cases in Champaign and Urbana, Illinois.

¶ 10 Hendel averred that upon learning of the match, he contacted Sergeant Morgan in the Urbana police department. Hendel's conversation with Morgan revealed the following. In November 1993, the Urbana police department responded to a report of a sexual assault in the 300 block of E. Michigan Street, in a large apartment complex. The victim, S.B., reported that an unknown man entered her apartment, put what she believed was a gun to her head, placed her facedown, and penetrated her vagina with his penis. S.B. did not see the intruder and could not describe him. S.B. went to the hospital, where seminal fluid containing DNA was recovered from her vagina.

¶ 11 In February 1995, the Champaign police department responded to a report of a sexual assault in the 1900 block of Melrose, a large apartment complex. The victim reported that a black male entered her apartment holding a handgun and wearing a mask over his head. He ordered her to undress, forced her to perform oral sex on him, then placed her facedown on a bed and penetrated her vagina with his penis. The victim was treated at a hospital and seminal fluid was collected from her vagina. The victim described the intruder as a black male approximately 5 feet 9 inches, weighing 160 pounds with black hair and dark eyes. The affidavit designated the

victim as "P.V." but this was apparently in error given that the details of the February 1995 sexual assault match the circumstances alleged in the indictment concerning the assault on T.B.

¶ 12 In July 1995, Urbana police officers responded to a sexual assault at 802 West Illinois, a large house converted into individual apartments. The victim, M.P., reported that while she was loading her car, a black male asked about another man supposedly living somewhere in the building. When M.P. returned to her apartment later, the same black male was inside. He pointed what she believed to be a handgun at her, forced her to undress, placed her facedown on the bed, and penetrated her vagina with his penis. Seminal fluids containing DNA were recovered from M.P.'s vagina. M.P. described the suspect as a black male with black hair, approximately 5 feet 9 inches to 5 feet 11 inches, weighing about 160 to 170 pounds.

¶ 13 The DNA collected in S.B., T.B., and M.P.'s cases matched, but the suspect in the three cases remained unidentified. After learning that the suspect had reappeared in Florida, Urbana police officers consulted the University of Illinois student directories to find students with a connection to Florida. Of the 37,665 students listed in the 1994-95 student-staff directory, 73 students were from Florida. After eliminating female and Asian students from the list, 54 names remained. Those 54 students were numbered and the authorities attempted to discern whether they were African-American. Student number 13 was defendant, whose home address was listed as Deerfield Beach, Florida, the same city in which A.C.'s sexual assault occurred.

¶ 14 The Urbana authorities determined that defendant was a student at the University of Illinois in Champaign-Urbana from 1991 through 1995 and, after graduating, remained in the area as a graduate assistant with the University's football team. The 1993 assault took place at 306 E. Michigan, apartment No. 10. At the time, defendant lived in the same building, in apartment No. seven. The February 1995 assault occurred in the Colony West Apartments,

where defendant was also living, and the building in which the assault took place was "within sight" of defendant's building. The 2007 Florida assault occurred two houses away from defendant's home.

¶ 15 According to the affidavit, all four victims were Caucasian females with blonde hair and blue or green eyes. Defendant's wife, Jennifer Feagin, also had blonde hair and blue eyes. The affidavit further averred that a composite sketch of the suspect, created with M.P.'s assistance, demonstrated an "obvious similarity" to a 1991 photograph of defendant. In addition, in 1995, defendant had contact with a Champaign police officer and the officer's report described defendant as 5 feet 11 inches and weighing 198 pounds.

¶ 16 Based on this information, the Florida trial court granted a search warrant permitting police to obtain oral swabs from defendant for the purpose of obtaining a DNA sample. Defendant's DNA profile was later identified as matching the DNA profile found on A.C.'s bed sheets.

¶ 17 **B. Defendant's Illinois Case**

¶ 18 In October 2008, the State filed amended informations alleging defendant committed the aggravated sexual assaults against T.B., M.P., and S.B. In December 2008, a grand jury indicted defendant with six counts of aggravated criminal sexual assault, alleging (1) defendant sexually assaulted S.B. in November 1993 (count I); (2) defendant sexually assaulted T.B. in February 1995 (counts II and III); and (3) defendant sexually assaulted M.P. in July 1995 (counts IV, V, and VI). In November 2011, the trial court ordered defendant to supply a sample for DNA testing. In December 2011, defendant's standards were taken and transferred to the Illinois State Police crime lab for analysis.

¶ 19 In January 2012, defendant filed a motion to suppress evidence, requesting the court conduct a hearing pursuant to *Franks*. Defendant's motion alleged the State had indicated it planned to use the Florida swab, the results of a DNA analysis performed on the Florida swab, and the comparison of the results of the DNA analysis of the Florida swab with the DNA collected in the Illinois case. Defendant asserted that Detective Hendel's affidavit in support of the Florida search warrant contained material omissions as to facts which, had they been disclosed, would have led the judge to deny the application for the search warrant. Specifically, defendant asserted the affidavit failed to disclose A.C. firmly identified her ex-boyfriend, Barnett, a white male, as the suspected perpetrator of her assault. Barnett was the only person beside A.C. and A.C.'s daughter to have been given a key to A.C.'s home, and A.C. had indicated her attacker left through the front door and locked the door from the outside after he left. Hendel's affidavit also omitted that law enforcement had been investigating Barnett for theft-related crimes he perpetrated against A.C., and when Barnett found out A.C. was assisting law enforcement with those investigations, he threatened her with physical harm. Defendant requested the trial court conduct a *Franks* hearing and, if the outcome of that hearing was favorable, defendant asked that the Florida warrant be quashed and that the State be precluded from using against defendant "any evidence seized under the purported authority of the warrant."

¶ 20 In February 2012, the parties appeared before the trial court. Following arguments, the court found the search warrant was appropriately issued and nothing in the record indicated the matter needed to proceed to any further stage of a *Franks* hearing. Specifically, the court reasoned as follows:

"In looking at the search warrant that was drafted, in looking at the defendant's motion, the issue is the ex-boyfriend down in

Florida, Eric Barnett, a white male with whom she had a previous physical and sexual relationship, the DNA that was found in Florida matched the DNA from three victims in Champaign County. The victims in Champaign County I believe identified their attacker as an African-American male.

So what we have is the same individual being involved in four separate attacks. Mr. Barnett is a Caucasian male. He was developed as a suspect. That was in the search warrant. That was in the information provided. And the fact that the victim believed it was her boyfriend or ex-boyfriend, given the circumstances, that is understandable. But the magistrate had that information, had all of the other information involving the attacks in Champaign County[.]"

Accordingly, the court denied defendant's motion.

¶ 21 C. Defendant's Jury Trial and Sentence

¶ 22 A jury trial commenced in June 2012 on counts IV, V, and VI, which alleged defendant committed aggravated criminal sexual assault against M.P. in that, while displaying an object that appeared to be a handgun, he (1) placed his penis in M.P.'s vagina, (2) made contact between his mouth and M.P.'s sex organ, and (3) made contact between an object and M.P.'s sex organ. Sergeant Daniel Morgan testified he obtained a buccal swab from defendant, pursuant to court order, and Jennifer Aper, a forensic biologist with the Illinois State Police crime lab, testified she compared defendant's DNA with the DNA profile generated from the vaginal swab of M.P. According to Aper, the profiles matched. M.P. could not identify anyone as her

assailant from a photo lineup that Morgan showed her in 2008. M.P. also did not make an in-court identification of defendant. The jury found defendant guilty of all three counts of aggravated criminal sexual assault.

¶ 23 In July 2012, defendant filed a motion for acquittal or, in the alternative, a new trial. In his motion, defendant asserted, among other claims, the trial court erred by denying his motion to suppress evidence under *Franks*. At a hearing later that month, the court denied defendant's motion and proceeded to the sentencing portion of the hearing. The court sentenced defendant to 30 years' imprisonment on each count, ordering the sentences to run consecutively. The court also ordered defendant to "pay costs of prosecution herein." A circuit clerk printout reveals defendant was charged various assessments, including (1) a \$50 court system finance fee (55 ILCS 5/5-1101(c)(1) (West 2012)); (2) a \$10 State Police Operations Assistance Fund fine (705 ILCS 105/27.3a(1.5)(5) (West 2012)); (3) a \$10 arrestee's medical fee (730 ILCS 125/17 (West 2012)); (4) a \$10 State Police Services Fund fine (730 ILCS 5/5-9-1.1 (West 2012)); (5) a \$10 traffic/criminal conviction surcharge (730 ILCS 5/5-9-1(c) (West 2012)); and (6) a \$4 Violent Crime Victims Assistance Fund fine (725 ILCS 240/10 (West 2012)).

¶ 24 In August 2012, defendant filed a motion to reconsider sentence, arguing his sentence was excessive. Following a September 2012 hearing, the trial court denied defendant's motion.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant argues (1) the trial court erred by denying him a *Franks* hearing, and (2) the fines imposed against defendant by the circuit clerk must be vacated. We address defendant's arguments in turn.

¶ 28 A. The Trial Court's Denial of Defendant's Request For a *Franks* Hearing

¶ 29 Defendant first asserts the trial court erred by denying him a *Franks* hearing.

Specifically, defendant argues he made a substantial preliminary showing that (1) material information was deliberately or recklessly omitted from Hendel's affidavit and (2) the Florida judge would not have found probable cause to support the issuance of the warrant if the missing information had been included.

¶ 30 In *Franks*, the United States Supreme Court held that an affidavit supporting a search warrant is generally presumed valid. *Franks*, 438 U.S. at 171. However, a defendant can overcome that presumption, thereby entitling the defendant to an evidentiary hearing, if "the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and the false statement was "necessary to the finding of probable cause." *Id.* at 155-56. A defendant makes a "substantial preliminary showing" where the defendant provides proof "that is 'somewhere between mere denials on the one hand and proof by a preponderance on the other.'" *People v. Petrenko*, 237 Ill. 2d 490, 500, 931 N.E.2d 1198, 1204 (2010) (quoting *People v. Lucente*, 116 Ill. 2d 133, 152, 506 N.E.2d 1269, 1277 (1987)). Once granted an evidentiary hearing, the defendant must demonstrate, by a preponderance of the evidence, the knowing, intentional or reckless use of a false statement necessary to the finding of probable cause. *Franks*, 438 U.S. at 156. Upon meeting this burden, defendant is entitled to exclusion of all fruits of the search. *Id.*

¶ 31 The principles outlined in *Franks* also apply where an affiant intentionally or recklessly omits information from an affidavit that is necessary to a probable cause determination. *Petrenko*, 237 Ill. 2d at 500, 931 N.E.2d at 1205. A defendant must show the

omitted information " 'was material to the determination of probable cause and that it was omitted for the purpose of misleading the magistrate.' " *Id.* at 500, 931 N.E.2d at 1205 (quoting *People v. Stewart*, 105 Ill. 2d 22, 44, 473 N.E.2d 840, 851 (1984)). "Material" information is information that would have defeated probable cause if it had been included in the affidavit. *Id.* We will not overturn a trial court's determination as to whether a defendant made the necessary showing to entitle him to a *Franks* hearing absent an abuse of discretion. *People v. Caro*, 381 Ill. App. 3d 1056, 1062, 890 N.E.2d 526, 531 (2008).

¶ 32 Initially, we note the State challenges defendant's failure to attach to his motion an offer of proof to support his allegations. However, as defendant points out, the State did not raise such an argument at the trial court, where defendant may have been given the opportunity to correct the alleged deficiency. Accordingly, we will consider the merits of defendant's claim. See *People v. Cruz*, 2013 IL 113399, ¶ 20, 985 N.E.2d 1014 ("Generally, an issue not raised in the trial court is forfeited on appeal.").

¶ 33 Here, defendant argues he made a substantial preliminary showing entitling him to an evidentiary hearing. Specifically, defendant points out that Hendel omitted the following information from his affidavit: (1) the Florida victim, A.C., explicitly identified her ex-boyfriend, Barnett, as her assailant based on her previous sexual encounters with Barnett; (2) police were investigating Barnett for a number of thefts, and Barnett had threatened to harm A.C. after discovering that she was cooperating with police; (3) A.C. said the attacker entered her home through the front door without force and locked the door from the outside when he left, and A.C. said Barnett was the only other person beside herself and her daughter who had a key; and (4) Barnett is Caucasian, while defendant is African-American.

¶ 34 We disagree with defendant that if the aforementioned omissions were included in Hendel's affidavit, the judge would not have found probable cause to issue the warrant to obtain defendant's DNA. Arguably, the omissions may have defeated probable cause if police had not ruled Barnett out as a suspect. However, as noted in Hendel's affidavit, Barnett voluntarily provided a DNA sample, and that sample did not match the DNA sample from A.C.'s sheet. Thus, although A.C. believed that Barnett was her assailant based on her prior relationship with him and the fact that he possessed a key to her home, the DNA recovered from A.C.'s sheet did not support A.C.'s belief. Moreover, A.C. did not see her perpetrator, stating she was forced to lay down and she drifted in and out of consciousness during the assault. Accordingly, as detailed in the affidavit, Hendel redirected his efforts, entering the DNA sample recovered from A.C.'s sheet into the national database and, after discovering the DNA matched the DNA in three Illinois cases, working with Urbana police to identify possible suspects based on connections between Florida and Illinois. Thus, defendant failed to make a substantial showing that the omission of the details concerning A.C.'s identification of Barnett as her assailant was material. Based on the foregoing, the trial court did not abuse its discretion in denying defendant's motion for a *Franks* hearing.

¶ 35 B. The Circuit Clerk's Assessments

¶ 36 Defendant next posits six assessments imposed by the circuit clerk must be vacated, as they constitute fines the circuit clerk lacked authority to impose. Defendant further argues some of the fees violated *ex post facto* principles, as they were not in effect in July 1995, the month in which defendant's last identified crime occurred. The State concedes that these assessments are fines and that some of the assessments also violate *ex post facto* principles. We accept the State's concession and agree.

¶ 37 The imposition of a fine is a judicial act, and the circuit clerk has no authority to levy fines; thus, any fines imposed by the circuit clerk are void from their inception. *People v. Williams*, 2013 IL App (4th) 120313, ¶ 16, 991 N.E.2d 914. In addition, the imposition of a fine that did not become effective until after the defendant committed an offense violates *ex post facto* principles. *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624.

¶ 38 Here, the clerk's printout lists the following assessments: (1) a \$50 court finance fee; (2) a \$10 state police operations fine; (3) a \$10 arrestee's medical fee; (4) a \$10 state police services fine; (5) a \$10 traffic/criminal conviction surcharge; and (6) a \$4 violent crime victims assistance (VCVA) fine.

¶ 39 The court finance fee, imposed pursuant to section 5-1101(c)(1) of the Counties Code (55 ILCS 5/5-1101(c)(1) (West 1994)), provides that a defendant found guilty of a felony shall pay a \$50 fee. Despite its label, the court finance fee is a fine. *People v. Graves*, 235 Ill. 2d 244, 253, 919 N.E.2d 906, 911 (2009).

¶ 40 The \$10 state police operations fine is also a fine. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030. In addition, Public Act 96-1029, which authorized the police operations fine, did not become effective until July 13, 2010. Pub. Act 96-1029, § 6 (eff. July 13, 2010). Accordingly, defendant cannot be assessed a police operations fine based on *ex post facto* principles.

¶ 41 Defendant also challenges the imposition of the arrestee's medical costs fee. The current version of section 17 of the County Jail Act (730 ILCS 125/17 (West 2012)), entitles the county to \$10 for each conviction, regardless of whether a defendant actually incurs any injury. *People v. Unander*, 404 Ill. App. 3d 884, 890, 936 N.E.2d 795, 800 (2010). Thus, the arrestee's medical costs fee is a fine. See *People v. Jake*, 2011 IL App (4th) 090779, ¶ 29, 960 N.E.2d 45

(An assessment is a fee only if it is intended to reimburse the State for a cost incurred in the defendant's prosecution.). As it existed in 1995, section 17 of the County Jail Act did not provide for a \$10 medical costs fine. See 730 ILCS 125/17 (West 1994). Accordingly, the imposition of the \$10 fine violates the prohibition against *ex post facto* laws. Likewise, the \$10 state police services fund is a fine that did not go into effect until after the date of defendant's offense. See Pub. Act 96-402 (eff. Jan. 1, 2010). Accordingly, the \$10 police services fund fine must be vacated.

¶ 42 Finally, the \$10 traffic-criminal assessment (730 ILCS 5/5-9-1(c) (West 1994)) and the \$4 victims fund fine (725 ILCS 240/10(b) (West 1994)) must also be vacated and recalculated. See *People v. O'Laughlin*, 2012 IL App (4th) 110018, ¶ 24, 979 N.E.2d 1023 (directing the trial court, on remand, to first calculate the "lump sum surcharge" (730 ILCS 5/5-9-1(c) (West 1994)) based on the amount of gross applicable fines, and then to calculate and impose the VCVA fine (725 ILCS 240/10(b) (West 1994))).

¶ 43 The State also asserts that because defendant was convicted of aggravated criminal sexual assault, the trial court was obligated to impose a \$100 sexual assault fine and a \$100 domestic violence fine under the statutes in effect in July 1995. See 730 ILCS 5/5-9-1.5, 1.7(b)(1) (West 1994). We agree.

¶ 44 Based on the foregoing, we vacate the circuit clerk's assessment of fines. We remand with directions to the trial court to (1) impose mandatory fines in effect at the time of defendant's last known offense, July 1995, and (2) direct credit applied to creditable fines as specified in section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 1994)) as it existed at the time of defendant's offense.

¶ 45

III. CONCLUSION

¶ 46 We vacate the circuit clerk's assessments and remand to the trial court with directions; we otherwise affirm. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 47 Affirmed in part and vacated in part; cause remanded with directions.