No. 1-09-2639

SIXTH DIVISION
January 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 2120
	)	
WILLIAM BAINER, III,	)	Honorable
	)	John J. Scotillo,
Petitioner-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

O R D E R

Held: Defendant's *pro se* section 2-1401 petition, in which he raised a *Whitfield* claim, was properly dismissed because defendant did not allege any errors of fact; as a result, section 2-1401 was not the appropriate vehicle to raise the *Whitfield* claim. Even assuming it was, defendant's claim lacked merit because he was sufficiently admonished that a term of MSR would follow his prison sentence. This court affirmed the circuit court's judgment, with modifications to the monetary penalties imposed. We vacated $80 in monetary penalties, finding them improper, and applied presentencing custody credit against $20 in fines. We, however, rejected defendant's request to apply the presentencing custody credit against the $200 DNA identification

system fee. In addition, we rejected defendant's contention that the $10 Arrestee's Medical Costs Fund fee did not apply to him.

Defendant William Bainer, III, appeals from the dismissal of his *pro se* petition for relief from judgment, filed under section 2-1401 of Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In his petition, defendant alleged that the trial court did not inform him, pursuant to *People v. Whitfield*, 217 Ill. 2d 177, 205 (2005), that he would have to serve three years of mandatory supervised release (MSR) following his 10-year sentence negotiated as part of his guilty plea to armed robbery. On appeal, defendant contends that his petition was improperly dismissed because he raised a valid *Whitfield* claim. Defendant also challenges the imposition of certain monetary penalties. We affirm, as modified.

Following a Supreme Court Rule 402 conference (eff. July 1, 1997), defendant entered a plea of guilty to the charged offense of armed robbery on April 10, 2008. The parties agreed that the sentence would be 10 years. The court asked defendant whether that was his understanding, and defendant responded, "[r]ight, yes." Defendant said he understood the charge, and the court, in relevant part, admonished him:

> "The minimum penalty is six years in the Illinois Department of Corrections. The maximum penalty is thirty years in the Illinois Department Corrections. Any

> sentence in the penitentiary is followed by a three-year period of parole which we now call mandatory supervised release."

Defendant responded "[y]es, sir," and further stated he understood the minimum and maximum penalties for the offense. He stated he was entering into the plea voluntarily.

Defendant did not file a motion to withdraw his guilty plea or a direct appeal. In March 2009, defendant, *pro se*, filed the present section 2-1401 petition alleging that the court failed to admonish him at the time of his guilty plea that a term of MSR would attach to his negotiated 10-year sentence. He argued that the addition of MSR was a breach of the terms of the plea agreement and violated his right to due process. He argued that because he did not receive the benefit of his bargain, under *Whitfield*, his sentence should be reduced by three years.

The State did not file a response. In May 2009, the court denied defendant's petition, and defendant appealed.

He now contends that both *Whitfield* and the supreme court's recent case, *People v. Morris*, 236 Ill. 2d 345 (2010), mandate relief under section 2-1401. Section 2-1401 provides a comprehensive statutory procedure for defendants to challenge final orders and judgments more than 30 days after they were entered. *People v. Haynes*, 192 Ill. 2d 437, 460 (2000). The purpose of a section 2-1401 petition for relief from judgment is

to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner or court at the time the judgment was entered, which, if known then, would have prevented the judgment's rendition. *Haynes*, 192 Ill. 2d at 461. Such a petition is not designed to provide a general review of all trial errors or to substitute for a direct appeal. *Haynes*, 192 Ill. 2d at 461.

In the defendant's case, by arguing that the circuit failed to properly admonish him of the required MSR period, the defendant alleged only a constitutional violation under *Whitfield*. Notably, defendant did not allege any errors of fact in his petition for relief from judgment. As a result, we do not believe section 2-1401 was the proper vehicle to raise the *Whitfield* claim in this case. See *People v. Harris*, 391 Ill. App. 3d 246, 249-50 (2009); see also *People v. Smith*, 188 Ill. App. 3d 387, 392 (1989) (section 2-1401 improper vehicle for raising guilty plea admonishment issue); *but see People v. Serrano*, 392 Ill. App. 3d 1011, 1016-17 (2009), *vacated in light of Morris*, 236 Ill. 2d 537 (2010) (holding the opposite).

Assuming, *arguendo*, that section 2-1401 was the proper vehicle to raise the present *Whitfield* claim, for the following reasons defendant still cannot be granted the relief he seeks.

In *Whitfield*, the trial court made no mention of MSR to the defendant when he entered into a negotiated guilty plea for a

specific sentence. The supreme court held that in such a case, there was no substantial compliance with the admonishment specifications of Rule 402 and due process was violated because the sentence imposed was more onerous than the one defendant agreed to at the time of the plea hearing. To approximate the bargain struck by the parties, the *Whitfield* court held that the defendant was entitled to receive a three-year reduction of his prison sentence.

Recently, in *Morris*, our supreme court acknowledged that *Whitfield* had "created some confusion" and that questions remained as to what information a trial court was required to convey to a defendant regarding MSR to ensure that the guilty plea admonishments complied with Rule 402 and due process. *Morris*, however, did not explicitly resolve this issue, holding instead that *Whitfield* did not apply retroactively to its defendants.

Morris, nevertheless, did provide guidance for courts to follow when giving guilty plea admonishments. *Morris*, 236 Ill. 2d at 355, 366-68; *People v. Thomas*, 402 Ill. App. 3d 1129, 1135 (2010). *Morris* instructed that a Rule 402 admonishment is sufficient if an ordinary person in the accused's circumstances would understand it to convey "that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged." *Morris*, 236 Ill. 2d at 366-67; see also

Thomas, 402 Ill. App. 3d at 1134-35. In addition, the *Morris* court suggested that ideally, a Rule 402 admonishment expressly linking MSR to the agreed-upon sentence would be (1) given when the trial court reviewed the plea agreement's provisions, (2) reiterated at sentencing, and (3) included in the written judgment.

Here, defendant stated that he understood his sentence on the charge would be 10 years. The court then admonished him of the minimum and maximum penalties and stated, "[a]ny sentence in the penitentiary is followed by a three-year period of parole which we now call mandatory supervised release." Defendant stated, "[y]es, sir," in response.

Defendant argues that the admonishment was insufficient under *Whitfield* and *Morris*, because the court only mentioned MSR once when discussing minimum and maximum penalties, but did not link MSR to the ultimate pronouncement of defendant's sentence or include MSR in the written sentencing order. We disagree. We believe the language used by the trial court made it reasonably clear that a term of MSR would follow defendant's prison sentence. See *Morris*, 236 Ill. 2d at 366-67; *People v. Davis*, No. 1-08-3498, slip op. at 10-12 (August 9, 2010); *People v. Marshall*, 381 Ill. App. 3d 724, 735 (2008); *but see People v. Smith*, 386 Ill. App. 3d 473, 483-84 (2008) (mere mention of MSR during plea hearing insufficient under *Whitfield*). We find the

admonishment sufficient to meet the statutory requirement, and defendant thereby received the benefit of his bargain. *People v. Holt*, 372 Ill. App. 3d 650, 653 (2007); *People v. Borst*, 372 Ill. App. 3d 331, 334 (2007).

Because we find no error, we find it unnecessary to address defendant's argument that the allegedly insufficient admonishment rendered his sentence void.

Defendant next challenges the imposition of certain fines and fees. Although he did not raise a claim for monetary relief in his section 2-1401 petition, we nevertheless address it as an "application of defendant" under the relevant statutes; such a claim may be raised at any time and in any stage of proceedings. See *People v. Caballero*, 228 Ill. 2d 79, 88 (2008).

Defendant contends, and the State correctly concedes, that the following monetary penalties were improperly assessed because they are not related to his conviction of armed robbery: a $5 court system fee for individuals who violate the Illinois Vehicle Code or a similar local provision (55 ILCS 5/5-1101(a) (West 2008)); a $25 court supervision fee for individuals who violate the Illinois Vehicle Code or a similar local provision (625 ILCS 5/16-104c (West 2008)); and a $20 serious traffic violation fee (625 ILCS 5/16-104d (West 2008)). Accordingly, we vacate these monetary penalties.

Defendant further challenges the $30 Children's Advocacy Center fee (55 ILCS 5/5-1101(f-5) (West 2008)). He argues that the fee is really a fine and, as such, violates the prohibition against *ex post facto* laws because the statute imposing the fine was not in effect at the time of defendant's 2007 offense. See Pub. Act 95-103, eff. January 1, 2008 (adding 55 ILCS 5/5-1101(f-5)); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009); *People v. Bishop*, 354 Ill. App. 3d 549, 561 (2004). The State concedes that application of the "fee" would be improper. We agree with defendant and the State, and vacate that monetary penalty.

Defendant next contends that the $10 Arrestee's Medical Costs Fund fee ("Fund fee") does not apply to him because there is no evidence that he was injured, or that the county incurred medical expenses for him, while he was in the custody of the county (730 ILCS 125/17 (West 2006)). The State concedes this issue. However, we reject that concession.

The statute provides, in relevant part:

> "The county shall be entitled to a $10 fee for each conviction or order of supervision for a criminal violation, other than a petty offense or business offense. The fee shall be taxed as costs to be collected from the defendant, if possible, upon conviction or entry of an order of supervision. ***

> All such fees collected shall be deposited by the county in a fund to be established and known as the Arrestee's Medical Costs Fund. Moneys in the Fund shall be used solely for reimbursement of costs for medical expenses relating to the arrestee while he or she is in the custody of the sheriff and administration of the Fund.
>
> *** For the purposes of this Section, 'medical expenses relating to the arrestee' means only those expenses incurred for medical care or treatment provided to an arrestee on account of an injury suffered by the arrestee during the course of his or her arrest ***." 730 ILCS 125/17 (West 2006); but see 730 ILCS 125/17 (West 2008) (deleting the language, "medical care or treatment provided to an arrestee on account of an injury suffered by the arrestee during the course of his or her arrest").

In *Jones*, this court recently considered a similar challenge to the Fund fee statute. *Jones*, 397 Ill. App. 3d at 661-63. The *Jones* court affirmed the assessment of the Fund fee, rejecting both the defendant's contention that there was no evidence of his

injury or medical expenses related to his custody, and the State's concession of error. The court noted the unconditional language of the statute that the county is entitled to the Fund fee for each conviction other than petty or business offenses. The *Jones* court found the legislature, by creating this latter exception, showed that it was capable of creating other exceptions to the county's entitlement to the Fund fee. Because the statute expressly provided that money in the Fund may be used for the arrestee's medical expenses or the administration of the Fund, the Fund functioned as a medical insurance policy for the defendant while in custody and thereby benefitted him even when he required no medical services. Where a defendant incurred no medical expenses while in custody, the county could comply with the statute by using his Fund fee to pay for Fund administration. *Jones*, 397 Ill. App. 3d at 662; see also *People v. Evangelista*, 393 Ill. App. 3d 395, 399-400 (2009).

In light of *Jones*, we conclude that the trial court did not err in assessing the $10 Fund fee in this case. The Fund fee was properly applied to defendant even though he was not injured or treated in custody.

Finally, defendant contends that he was entitled to $5-per-day credit for time spent in presentencing custody. See 725 ILCS 5/110-14 (West 2008). He requests that the credit be applied against the $200 DNA identification system fee (730 ILCS 5/5-4-

3(j) (West 2008)), $10 mental health court fine, $5 youth diversion/peer court fine, $5 drug court fine (55 ILCS 5/5-1101(d-5),(e),(f) (West 2008)). Because defendant has accumulated 154 days worth of presentencing credit, defendant may apply up to $770 of credit against his fines. This credit applies only against a "fine," not a fee. 725 ILCS 5/110-14(a) (West 2008).

The State concedes, and we agree, that defendant is entitled to $20 credit for the mental health court, youth diversion/peer court, and drug court fines. See *Jones*, 397 Ill. App. 3d at 663-64; see also *People v. Paige*, 378 Ill. App. 3d 95, 102 (2007) (mental health court and the youth diversion/peer charges are characterized as fines).

The State, however, contests the application of the credit against the $200 DNA identification system fee. The State argues that, contrary to the holding in *People v. Long*, 398 Ill. App. 3d 1028 (4th Dist. 2010), the monetary penalty is a fee, not a fine. *See also People v. Mingo*, No. 2-08-1013 (September 29, 2010), and *People v. Clark*, No. 2-08-0993 (September 16, 2010) (following *Long*).

We agree. This district has found that the DNA analysis fee is "compensatory and a collateral consequence of defendant's conviction," and thus a fee rather than a fine, so that "the credit stated in section 110-14 *** cannot be applied." *People*

v. Tolliver, 363 Ill. App. 3d 94, 97 (2006).

Long is distinguishable. Unlike here, in *Long*, the State was arguing that the DNA analysis fee is a fine and conceded that it was subject to the credit (*Long*, 398 Ill. App. 3d at 1033-34). Moreover, *Long* preceded our decisions in *People v. Hubbard*, No. 1-09-0346 (September 17, 2010) and *People v. Grayer*, No. 1-09-0021 (August 24, 2010), in which we found that there are rational bases for the State to collect DNA samples and assess the DNA analysis fee after doing so upon an earlier conviction. That finding supports our conclusion that the DNA analysis fee is compensatory rather than punitive, which is the key factor in determining whether a charge is a fine or a fee. *People v. Graves*, 235 Ill. 2d 244, 250-51 (2009); *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006).

Finally, *Long* noted the *Jones* court's statement that a fee or cost is intended to reimburse the State for some cost incurred *in* a defendant's prosecution and found that "any costs incurred by the State in relation to defendant's DNA specimen were incurred after his prosecution, conviction, and sentence." *Long*, 398 Ill. App. 3d at 1034, citing *Jones*, 223 Ill. 2d at 600. However, our supreme court has since clarified that "the most important factor is whether the charge seeks to compensate the [S]tate for any costs incurred *as the result of* prosecuting the defendant." (Emphasis added.) *Graves*, 235 Ill. 2d at 250.

In *Graves* and *Jones*, our supreme court has distinguished fines on one hand from fees and costs on the other. A "fine" is a pecuniary punishment for a criminal conviction, payable to the public treasury, while a "fee" or "cost" seeks to recoup expenses incurred by the State or to compensate the State for some expenditure incurred as the result of prosecuting a defendant. *Graves*, 235 Ill. 2d at 250; *Jones*, 223 Ill. 2d at 581-82.

The DNA analysis fee does not go into the general fund of the State treasury but exclusively to the State Police laboratory, except for a $10 portion of each fee for the clerk of the circuit court to offset her costs in implementing the DNA analysis statute. 730 ILCS 5/5-4-3(j), (k) (West 2008). The DNA analysis fee reimburses the State for the expense of operating a system under which this defendant's DNA profile was required to be processed and analyzed as a result and collateral consequence of this prosecution and conviction. We therefore find that the DNA analysis fee is indeed a fee not subject to presentencing detention credit.

Based on the foregoing, we vacate the $5 court system fee, $25 court supervision fee, $20 serious traffic violation fee, and $30 Children's Advocacy Center fine, and apply presentencing custody credit against the $10 mental health court fine, $5 youth diversion/peer court fine, and the $5 drug court fine. We order the clerk of the circuit court to correct the mittimus

accordingly, to reflect a total owed of $590. See *Jones*, 397 Ill. App. 3d at 664. We affirm the judgment in all other respects.

Affirmed, as modified.