No. 2—09—0899
Order filed June 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	No. 08—CF—4420
v.	)	
MARQUISE D. CALDWELL,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: The defendant's submission of a sample of his deoxyribonucleic acid (DNA) for forensic analysis and indexing and his payment of a $200 DNA analysis fee (see 730 ILCS 5/5—4—3 (West 2008)) in a prior case barred the trial court from ordering him to submit a second DNA sample and pay the $200 DNA analysis fee.

A jury found defendant, Marquise D. Caldwell, guilty of unlawful possession of a weapon by a felon (see 720 ILCS 5/24—1.1(a) (West 2008)), and the trial court imposed an eight-year prison term. The court also ordered defendant to pay $500 in fines and court costs, a $100 lab fee, and a $200 DNA testing fee. The trial court specified that the DNA testing fee should be assessed only if defendant had not previously submitted to DNA testing and paid the fee. The record shows that

defendant was assessed the $200 DNA testing fee in this case even though he had submitted to the testing and paid the fee following a conviction of residential burglary (720 ILCS 5/19—3 (West 2010)) in 2007.

The issue presented on appeal is whether, under a prior version of section 5—4—3 of the Unified Code of Corrections (Code) (730 ILCS 5/5—4—3 (West 2008)), a trial court has the authority to order a defendant to pay a $200 DNA analysis fee where that defendant has already submitted a DNA sample pursuant to a prior conviction and has paid the corresponding analysis fee.[1] We agree with defendant that, because a $200 analysis fee already was imposed in his previous conviction, the portion of the judgment ordering him to submit to DNA testing and pay the $200 DNA analysis fee must be vacated. The judgment is affirmed in part and vacated in part.

FACTS

Defendant does not challenge the facts supporting the conviction. On November 2, 2008, defendant was a passenger in a car that had been pulled over for various traffic offenses. Officer Jesse Washington testified that defendant hesitated when ordered to show his hands. Defendant raised his hands and Washington caught a glimpse of a shiny object in defendant's hand. Because defendant acted suspiciously, Washington checked the area outside the car's passenger door to see if defendant had dropped anything. On the ground about one foot from the car door, Washington

[1]In Public Act 96—426, effective August 13, 2009, the legislature amended section 5—4—3(a) to limit its application to an offender "who has not yet submitted a sample of blood, saliva, or tissue." Pub. Act 96—426, §5, eff. August 13, 2009 (amending 730 ILCS 5/5—4—3(a) (West 2008)).

found a silver .22 caliber handgun with one round in the chamber and several rounds in the magazine. The parties stipulated that, on January 12, 2007, defendant had been convicted of residential burglary, which is a class 1 felony. See 720 ILCS 5/19—3(b) (West 2010)).

The jury found defendant guilty of unlawful possession of a weapon by a felon. See 720 ILCS 5/24—1.1(a) (West 2008). The trial court imposed an 8-year prison term and ordered defendant to pay $500 in fines and court costs, a $100 lab fee, and a $200 DNA testing fee.

The trial court specified that the DNA testing fee should be assessed only if defendant had not previously submitted to DNA testing and paid the fee. On appeal, defendant has supplemented the record with a printout prepared by the clerk of the circuit court that shows that defendant was assessed the $200 DNA testing fee in this case. Defendant has further supplemented the record with evidence that he had submitted to DNA testing and paid the fee following a conviction of residential burglary (see 720 ILCS 5/19—3 (West 2010)) in 2007.

ANALYSIS

As a preliminary matter, we must determine the appropriate standard of review for the portion of the judgment ordering defendant to submit to DNA testing and pay the $200 DNA analysis fee. The parties correctly assert that the facts are undisputed and that the order presents a question of statutory authorization. Questions of statutory interpretation when no facts are in dispute are subject to *de novo* review. *People v. Martinez,* 184 Ill. 2d 547, 550 (1998).

The relevant version of section 5—4—3 of the Code provides that a person convicted of a felony or certain juvenile offenses must submit a DNA sample and pay an analysis fee of $200. 730 ILCS 5/5—4—3(a), (j) (West 2008). The samples are categorized into genetic marker grouping and kept in a central repository database by the Illinois State Police. 730 ILCS 5/5—4—3 (d), (e) (West

2008). The primary purpose of section 5—4—3 is the creation of a criminal DNA database of the genetic identities of recidivist offenders. *People v. Marshall,* No. 110765, slip op. at 4-5 (Ill. May 19, 2011). Prior to his conviction herein for unlawful possession of a weapon by a felon, defendant had been convicted of a felony that required him to provide a DNA sample and to pay the corresponding analysis fee. The record reveals that, at the time of his sentencing in this case, his DNA was registered in the database. Defendant argues that the trial court was not authorized to order him to submit another DNA sample and pay an additional $200 DNA analysis fee in connection with his present conviction. Defendant contends that the DNA analysis order must be vacated as void.

The appellate court has been split on the issue of whether taking a DNA sample and assessing the analysis fee in a prior case bars the taking of a new sample and assessing the attendant fee in a subsequent case. In *People v. Evangelista*, 393 Ill. App. 3d 395 (2009), this court determined that a DNA analysis fee may not be assessed more than once because the purpose of the statute is to collect DNA to be stored in a database and that once a defendant has submitted a DNA sample, requiring additional samples would serve no purpose. *Evangelista*, 393 Ill. App 3d at 399.

In *People v. Marshall*, 402 Ill. App. 3d 1080 (2010), *rev'd*, No. 110765 (Ill. May 19, 2011), the Third District determined that, by using the mandatory language of "shall" in the subsection authorizing the DNA analysis fee, the General Assembly indicated that no qualifying offender is exempt from the fee assessment. *Marshall*, 402 Ill. App. 3d at 1083. The court noted that the subsection authorizing the expungement of collected DNA from the database in instances of the reversal of a conviction or pardon could be problematic. *Marshall,* 402 Ill. App. 3d at 1083. The court envisioned a scenario in which (1) a defendant is convicted of a qualifying offense and a DNA

sample is collected; (2) the defendant is then convicted of a second qualifying offense but no DNA is collected or fee assessed, as the DNA is already on file; and (3) the defendant's first conviction is reversed and the DNA sample is expunged, leaving the DNA database without the defendant's DNA, even though he has a valid conviction for a qualifying offense. *Marshall*, 402 Ill. App. 3d at 1083; see also *People v. Grayer*, 403 Ill. App.3d 797, 801 (2010) (the DNA analysis fee may be assessed more than once because "nothing in the statutory language limits the taking of DNA samples or the assessment of the analysis fee to a single instance").

The Illinois Supreme Court resolved this split of authority in *People v. Marshall,* No. 110765 (Ill. May 19, 2011), after the parties in this case had submitted their briefs. The supreme court determined that the implementation of the relevant version of section 5—4—3 shows an intent to require a single specimen of DNA be taken from each qualified person to create a profile for entry into the DNA database maintained by the Illinois Department of State Police, rather than an intent to require submission of multiple and duplicative DNA samples from an offender who has already submitted samples pursuant to a prior conviction. *Marshall,* slip op. at 12-14.

Further, the supreme court rejected the argument that a one time DNA sample and analysis fee would result in a "loophole" if a defendant's first qualifying offense was expunged. *Marshall,* slip op. at 11. The court interpreted the relevant version of section 5—4—3 as requiring that a single DNA sample remain in the database for each person convicted of a qualifying offense. *Marshall,* slip op. at 14. If an offender's previous sample was expunged, a subsequent conviction naturally would require a new sample be taken, which would be sufficient for maintenance of the DNA database. *Marshall,* slip op. at 12.

In this case, defendant previously was convicted of a qualifying offense, his DNA was collected, and a $200 DNA analysis fee was paid. Consistent with the supreme court's decision in *Marshall*, we vacate the additional $200 DNA analysis fee imposed at sentencing.

Finally, we reject the State's argument that defendant forfeited this issue by failing to raise it in a postsentencing motion. Defendant's contention on appeal is that the trial court exceeded its statutory authority in ordering him to pay the DNA analysis fee, and therefore the order is void. In *Marshall*, the supreme court concluded that a trial court's order to pay an additional DNA analysis fee did not conform to the statutory requirement, and thus was a void order and not subject to forfeiture. *Marshall,* slip op. at 14.

We order that the mittimus be corrected to reflect that defendant need not submit to DNA testing or pay the $200 DNA analysis fee. Because we vacate the DNA analysis fee, we need not address defendant's further argument that he may apply the $5-per-day sentence credit (see 725 ILCS 5/110—14(a) (West 2008)) to the fee.

For the preceding reasons, the judgment of the circuit court of Winnebago County is affirmed in part and vacated in part.

Affirmed in part and vacated in part.