2017 IL App (3d) 140839-U

Order filed July 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0839
v.	)	Circuit No. 11-CF-53
	)	
RICHARD D. GARSKE,	)	Honorable
	)	Kim L. Kelley,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The defendant is allowed leave to file his late notice of appeal; (2) the trial court did not err in denying the defendant's motion to suppress; and (3) the trial court improperly imposed a public defender fee, the defendant is entitled to the statutory $5-*per-diem* credit, and the circuit clerk erroneously charged the defendant with a DNA analysis fee.

¶ 2 The defendant, Richard D. Garske, appeals his conviction and sentence. The defendant argues that this court should allow his motion for leave to file a late notice of appeal. In addition,

the defendant argues the trial court erred in denying his motion to suppress. The defendant also challenges several assessments imposed against him.

¶ 3 FACTS

¶ 4 The State charged the defendant with aggravated driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(E) (West 2010)). The State alleged that on November 20, 2010, the defendant operated a motor vehicle while under the influence of alcohol (after having at least five prior DUI's).

¶ 5 Prior to trial, the defendant filed a motion to suppress statements he made at the scene of the accident and later at the hospital. The defendant argued that he was not given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1996), prior to making the statements and the statements were coerced and involuntary.

¶ 6 At the hearing on the motion to suppress, Deputy John Huston testified that on the night of November 20, 2010, he was dispatched to the scene of a single motor vehicle accident. Huston arrived at the scene and observed a truck off the side of the road. The truck was lying on the driver's side. Huston approached the vehicle and saw debris including beer cans. Some of the cans were open. Huston looked inside the vehicle and saw the defendant lying with his back against the ground sitting on the driver's seat.

¶ 7 According to Huston, the defendant was not awake. Huston began yelling at the defendant to get his attention. Huston was unable to remove the defendant based on the position of the vehicle. Huston waited for the fire department to arrive. The fire department cut off the roof of the truck, and removed the defendant. The fire department put the defendant on a backboard and placed the defendant in an ambulance.

¶ 8 While the defendant was being placed in the ambulance, Huston spoke with the defendant. Huston noticed a strong smell of an alcoholic beverage coming from the defendant's mouth. The defendant's speech was slow and slurred. The defendant did not know who he was, what had happened, or where he was. The defendant told Huston that nobody else was in his vehicle. Huston asked the defendant if he had been drinking. The defendant said yes. Huston then asked how many drinks the defendant had consumed, and the defendant stated "100."

¶ 9 The defendant was then transported to a hospital for treatment. Huston went to the hospital, and was greeted by nurse Julie Barron. Barron asked Huston, "Let me guess. You're here for the really drunk guy that wrecked his car." In the defendant's hospital room, Huston could still smell the odor of an alcoholic beverage coming from the defendant, and the defendant's speech was still slurred. The defendant's right eye was swollen and his left eye was bloodshot, watery, and glassy. The defendant told Huston that he had no idea how many beers he had drunk, but did not think that the amount would have impaired his ability to drive. Huston then placed the defendant under arrest for DUI. Huston did not administer any field sobriety tests, and he never provided the defendant *Miranda* warnings.

¶ 10 Ultimately, the trial court denied the motion to suppress as to the statements the defendant made both at the scene of the accident and at the hospital. The cause then proceeded to a jury trial.

¶ 11 Ryan Deemie testified that on November 20, 2010, he was driving home from work and noticed a vehicle flipped on its side on the side of the road. Deemie approached the vehicle and noticed the defendant sitting in the driver's seat with his seatbelt on. The defendant was bleeding and Deemie noticed several beers cans (some open and some unopened) and could smell a strong

odor of alcoholic beverages. Deemie tried asking the defendant questions, but the defendant was incoherent. Deemie did not notice any other individuals at the scene. Deemie called 911.

¶ 12 Lieutenant Jon Quast testified that he responded to the scene of the accident. Quast observed a large number of beer cans, some open and some unopened. The cans were found both in and around the truck. The defendant was lying on the ground where the driver's side window would have been, but Quast could not recall whether the defendant was on his back or his side.

¶ 13 Deputy Huston testified consistently with his testimony at the motion to suppress hearing. Huston found the defendant at the scene of the accident lying with his back against the driver's side window and not wearing a seatbelt. There was blood on the driver's side visor. Huston did not observe anybody else at the scene and he did not find any footprints around the truck. Huston stated that the defendant never told him that anyone else was driving the vehicle. Huston arrested the defendant at the hospital, but did not conduct any field sobriety tests due to the defendant's injuries. Huston provided the defendant with the warning to motorists and requested a biological sample, but the defendant declined.

¶ 14 Nurse Julie Matson testified that she treated the defendant at the hospital. The defendant told Matson that he remembered the accident, but told the doctor that he did not. The defendant had lacerations around his waist which were indicative of an injury caused by a seatbelt in a motor vehicle accident. Matson could not recall, and did not make note in the defendant's chart of any other seatbelt markings, such as across the defendant's chest. The defendant had a head injury, and smelled strongly of alcoholic beverages.

¶ 15 Huston spoke with Daniel Neltner at the hospital. Neltner was with the defendant earlier on the night of the accident. Neltner appeared intoxicated to Huston. Huston also spoke with Matson at the hospital. Huston asked Matson if the defendant had any seatbelt markings on his

body, but Matson said he did not. Matson told Huston that the defendant had said that he was not wearing a seatbelt.

¶ 16 The State rested and Dr. John Lomax testified for the defense. Lomax treated the defendant's injuries to the bone around the defendant's eye. Lomax opined that the defendant's injury would not likely be caused by a visor or an airbag. Lomax opined that the defendant's injury was more consistent with hitting the steering wheel, dashboard, or one of the pillars in the interior of the truck. Lomax, however, stated that he could not tell whether the defendant was sitting in the passenger seat based on his injuries.

¶ 17 Next, the defendant testified on his own behalf. On the night of the accident, the defendant had been at a party with Neltner. The defendant had too much to drink and allowed Neltner to drive the defendant's truck when they left the party. The defendant got in the passenger seat but did not put on a seatbelt. The defendant remembered hitting the dashboard with his face, but did not remember most of the questions he was asked at the scene. He did remember speaking to an officer at the hospital. The defendant did not remember being placed under arrest or refusing to give a sample to the officer.

¶ 18 March 19, 2014, the jury found the defendant guilty of aggravated DUI. On June 25, 2014, the trial court held a sentencing hearing. The court sentenced the defendant to 12 years' imprisonment, imposed assessments, and refused to assess any other fines. The trial court granted the defendant the $5-*per-diem* credit for 666 days of presentence custody to be applied to any applicable fines.

¶ 19 On July 2, 2014, defense counsel filed a motion to reconsider sentence and a motion for new trial. The motion for a new trial renewed the defendant's pretrial arguments on the motion to

suppress and alleged counsel's own ineffectiveness. The trial court denied the motion to reconsider sentence.

¶ 20 The court then considered the motion for new trial. The trial court denied the motion in part, but allowed defense counsel leave to withdraw so the defendant could pursue the claim that counsel was ineffective. The court continued the motion to conduct an inquiry into the claim of ineffective assistance of trial counsel. Following a hearing, the trial court denied the defendant's claims motion.

¶ 21 A cost sheet created by the circuit clerk appears in the record. The cost sheet does not bear a judicial signature but is certified by the circuit clerk. The individual costs were broken down into specific assessments. Each assessment is named and includes the amount owed.

¶ 22 On October 19, 2014, the defendant filed a notice of appeal. The Office of the State Appellate Defender was appointed to represent the defendant. On February 11, 2015, the defendant filed a motion for leave to file a late notice of appeal. On March 12, 2015, this court entered an order announcing that the motion would be taken with the case.

¶ 23 ANALYSIS

¶ 24 I. Jurisdiction

¶ 25 Initially, we must address the defendant's request that we grant him leave to file a late notice of appeal. A notice of appeal confers jurisdiction on the appellate court, and it must be filed within 30 days after the entry of the final judgment or a timely motion to reconsider that judgment. Ill. S. Ct. R. 606(a) (eff. Dec. 11, 2014). In this case, the defendant's notice of appeal was filed after the 30-day period had expired. However, Illinois Supreme Court Rule 606(c) (eff. Dec. 11, 2014) provides for late notices of appeal:

> "On motion supported by a showing of reasonable excuse for failing to file a notice of appeal on time filed in the reviewing court within 30 days of the expiration of the time for filing the notice of appeal, or on motion supported by a showing by affidavit that there is merit to the appeal and that the failure to file a notice of appeal on time was not due to appellant's culpable negligence, filed in the reviewing court within six months of the expiration of the time for filing the notice of appeal, in either case accompanied by the proposed notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing."

Thus, the appellate court can allow a defendant to file a late notice of appeal within 30 days of the expiration of the appeal period, if the defendant shows a reasonable excuse, or within six months of the expiration of the appeal period, if the defendant shows a meritorious issue and a lack of culpable negligence.

¶ 26 In the present case, both parties agree that the defendant's motion to file a late notice of appeal was timely as it was filed within the six-month period. The State, however, argues that the defendant's proposed notice of appeal limits this court's jurisdiction to consideration of the issues raised in the denial of the defendant's motion to reconsider sentence and the denial of the defendant's posttrial claim of ineffective assistance of counsel. Stated another way, the State argues that this court lacks jurisdiction to consider the defendant's argument regarding his motion to suppress and the assessments he now contests.

¶ 27 The purpose of the notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision. *People v. Smith*, 228 Ill. 2d 95, 104-05 (2008). The notice must identify the nature of the order appealed if the appeal is not from a conviction. Ill. S.

Ct. R. 606(d) (eff. Dec. 11, 2014). A notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts of judgments specified in the notice. *Smith*, 228 Ill. 2d at 104. The notice is sufficient to confer jurisdiction if, considered as a whole and construed liberally, it fairly and adequately identifies the complained-of judgment. *Id.* at 104-05. The failure to comply strictly with the form of the notice is not fatal if the deficiency is nonsubstantive and the appellee is not prejudiced. *Id.* at 105.

¶ 28 In the present case, the defendant's proposed notice of appeal lists the conviction and sentence. The proposed notice also lists both the denial of the defendant's motion to reconsider sentence and the "denial of counsel-related motion." Although the defendant refers to a "counsel-related motion," the referenced motion was indeed a motion for new trial. The motion for new trial identified in the notice of appeal renewed the defendant's pretrial motions and alleged ineffective assistance of counsel. The State cannot say that it was without notice of the defendant's intention to challenge the entire proceedings when the proposed notice of appeal referenced both the final order and subsequent disposition of his motion for new trial. Accordingly, we allow the defendant's motion to file a late notice of appeal.

¶ 29 II. Motion to Suppress

¶ 30 As to the merits of the defendant's appeal, he argues that the trial court erred in denying his motion to suppress statements made to Deputy Huston at the scene of the accident and while being treated in the hospital after the crash. Specifically, the defendant argues that his statements to Huston should have been suppressed as involuntary in light of the fact he was not advised of his *Miranda* rights.

¶ 31 When reviewing a trial court's ruling on a motion to suppress, findings of fact and credibility determinations are accorded great deference and will not be reversed unless they are

against the manifest weight of the evidence. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003). The ultimate question posed by the legal challenge to the trial court's ruling is reviewed *de novo*, however. *People v. Nicholas*, 218 Ill. 2d 104, 116 (2005).

¶ 32 In *Miranda*, 384 U.S. at 444, the United States Supreme Court held that prior to the start of an interrogation, a person being questioned by law enforcement officers must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," as long as that person "has been taken into custody or otherwise deprived of his freedom of action in any significant way." "The finding of custody is essential, as the preinterrogation warnings required by *Miranda* are intended to assure that any inculpatory statement made by a defendant is not simply the product of ' "the compulsion inherent in custodial surroundings." ' " *People v. Slater*, 228 Ill. 2d 137, 149-50 (2008) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004), quoting *Miranda*, 384 U.S. at 458).

¶ 33 An individual is in custody "if, under the circumstances of the questioning, 'a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.' " *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 17 (quoting *Braggs*, 209 Ill. 2d at 506). To determine whether a statement was made in a custodial setting, the following factors are relevant:

> "(1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of

questioning; and (6) the age, intelligence, and mental makeup of the accused." *Slater*, 228 Ill. 2d at 150.

Another factor to consider is whether the suspect "had reason to believe that he or she was the focus of a criminal investigation." *People v. Vasquez*, 393 Ill. App. 3d 185, 190 (2009).

¶ 34 We find the circumstances surrounding the defendant's questioning supported the trial court's factual finding that the defendant was not "in custody" for *Miranda* purposes. Huston testified that the questions he asked the defendant were minimal (both at the scene and the hospital). No other officer questioned the defendant. The defendant was never handcuffed, fingerprinted, or told he was under arrest. See *Slater*, 228 Ill. 2d at 156. In addition, Huston did not perform any field sobriety tests. The defendant left the scene of the accident by ambulance, and arrived at the hospital by ambulance, he was not taken to the police station nor was he in a police car. The defendant was never told that he was not free to terminate the questioning. Although the defendant was placed on a backboard and could not physically leave the area, we note that he was placed in that position by medical personnel to facilitate his treatment. *People v. Botsis*, 388 Ill. App. 3d 422, 433-34 (2009). In other words, the defendant was not placed on the backboard by Huston. Other than being intoxicated, and having suffered a head injury, there was no evidence that the defendant's intelligence was diminished. In sum, the balance of the factors all support the trial court's factual finding that the defendant was not in custody for *Miranda* purposes. Accordingly, the trial court did not err in denying the defendant's motion to suppress. See *Slater*, 228 Ill. 2d at 149 (*Miranda* warnings are required only when an individual is in custody).

¶ 35 III. Fines and Fees

¶ 36 Next, the defendant challenges several monetary assessments imposed against him. We discuss each argument in turn.

¶ 37 First, the defendant argues that this court should vacate the $100 public defender fee imposed by the trial court. The State concedes this issue. Because the trial court made a finding that the defendant could not pay the fee, but imposed the fee anyway, we accept the State's concession and instruct the circuit clerk to vacate the $100 public defender fee on remand. See *People v. Love*, 177 Ill. 2d 550, 563 (1997).

¶ 38 Next, the defendant requests this court to apply the $5-*per-diem* credit to offset his $1000 DUI fine. The State concedes this issue. Because the defendant was credited with 666 days of presentence custody, we find that the defendant's DUI fine should be reduced to zero. *People v. Caballero*, 228 Ill. 2d 79, 89 (2008) (noting that an application for the $5-*per-diem* credit may be made at any time and at any stage of court proceedings); see also *People v. Diaz*, 377 Ill. App. 3d 339, 351 (2007) ($5-*per-diem* credit applies toward the defendant's DUI fine).[1] On remand, the circuit clerk is directed to apply this credit to offset the DUI fine.

¶ 39 Turning to the nonconceded fines, the defendant argues they should be vacated because they were improperly assessed against him by the circuit clerk. "Because the imposition of a fine is a judicial act, and the circuit clerk has no authority to levy fines, any fines imposed by the circuit clerk are void from their inception." *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56. Upon review, we find that the following fines were imposed by the circuit clerk and are therefore void:

[1] We note that the trial court ordered a $1000 DUI fine and the parties refer to this fine as amounting to $1000. However, the circuit clerk's cost sheet appears to show that defendant was only charged $800 for this fine.

(1) $35 serious traffic violation fee (broken down into $15 “Fire Prevention Fund” and $15 “Fire Truck Loan Fund,” and $5 “Circuit Clerk Oper/Adm Fund”) (*People v. Higgins*, 2014 IL App (2d) 120888, ¶ 32);

(2) $50 “Roadside Memorial Fund” (*People v. O’Laughlin*, 2012 IL App (4th) 110018, ¶ 15);

(3) $5 spinal cord fee (broken down into $4.88 “Spinal Cord Fee” and $.12 “Circuit Clerk Oper/Adm Fund”) (*People v. Jones*, 223 Ill. 2d 569, 599 (2006));

(4) $15 “State Police Operation Assistance Fund” (*People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31);

(5) $30 juvenile records expungement fine (broken down into $10 “State Police Services Fund,” $10 “State’s Attorney Juvenile Expenses” fee, and $10 “Clerk Oper/Adm Fine”) (*People v. Carter*, 2016 IL App (3d) 140196, ¶ 54);

(6) $227.85 “Surcharge-Lump Sum” (*People v. Warren*, 2014 IL App (4th) 120721, ¶ 124);

(7) $100 trauma DUI (broken down into $97.50 “Trauma DUI” and $2.50 “Circuit Clerk Oper/Adm Fund”) (*People v. Lee*, 379 Ill. App. 3d 533, 541 (2008));

(8) $100 “Violent Crime Victims Assistance Fund” (*Warren*, 2014 IL App (4th) 120721, ¶ 135);

(9) $50 “Court Usage” (*People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30);

(10) $30 "Criminal Child Advocacy Center" (*People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009));

(11) $5 drug court fund (broken down into $4.75 "Drug Court Fund" and $.25 "Circuit Clerk Oper/Adm Fund") (*People v. Graves*, 235 Ill. 2d 244, 255 (2009));

(12) $10 "Drug Court Operation" (*id.*);

(13) $10 "Medical Costs Fund" (*Warren*, 2014 IL App (4th) 120721, ¶ 112).

Because we find that the above assessments imposed by the circuit clerk were fines and therefore void, said fines should be vacated on remand.

¶ 40 In reaching this conclusion, we reject the State's argument that this court lacks jurisdiction to consider the defendant's challenge to the fines improperly assessed by the circuit clerk. Specifically, the State argues that the defendant's notice of appeal was insufficient to confer jurisdiction of this issue because the defendant's notice of appeal does not list the assessment of any fines or fees. As noted above (*supra* ¶ 27), because the defendant's notice of appeal properly brought up his entire conviction for review, this court has jurisdiction to act on void acts of the circuit clerk. See *People v. Gutierrez*, 2012 IL 111590, ¶ 14.

¶ 41 Next, the defendant argues that the $240 DNA analysis fee imposed by the circuit clerk was improper because he previously provided a DNA sample as a result of a prior conviction.[2] "[S]ection 5-4-3 [of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2010))] authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA,

[2] We note the defendant states that the DNA analysis fee was $250. However, the circuit clerk cost sheet included in the appendix of the defendant's brief shows that the defendant was assessed $240 for the DNA analysis fee.

and the payment of the analysis fee only where that the defendant is not currently registered in the DNA database." *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). At the defendant's request, we take judicial notice of a document from the Illinois State Police division of forensic services showing that he had previously submitted a DNA specimen, which the defendant included in the appendix to his appellate brief. See *Carter*, 2016 IL App (3d) 140196, ¶ 59 (taking judicial notice of a defendant's previously submitted DNA specimen). Accordingly, we instruct the circuit clerk to vacate the $240 DNA analysis fee on remand, as the defendant has already submitted a DNA specimen. See *Marshall*, 242 Ill. 2d at 303.

¶ 42 Finally, the defendant argues that the circuit clerk improperly imposed a $200 sheriff fee. We disagree. In instances where the sheriff serves an arrest warrant or picks up an offender outside the State of Illinois pursuant to his extradition or his waiver of extradition, a defendant may be assessed the reasonable costs incurred by the sheriff. 725 ILCS 5/124A-5 (West 2010). This assessment is a fee and therefore may be imposed by the circuit clerk. See *People v. Jernigan*, 2014 IL App (4th) 130524, ¶ 36. In this case, the record establishes that the defendant was brought from Indiana to Illinois to face the instant charges.

¶ 43 In sum, we instruct the circuit clerk to vacate the public defender fee, apply the $5-*per-diem* credit to satisfy the DUI fine, vacate the fines improperly imposed by the circuit clerk (*supra* ¶ 38), vacate the DNA analysis fee, and uphold the remaining assessments listed on the cost sheet. For purposes of clarity we note that the trial court will not reimpose said fines on remand. See *People v. Wade*, 2016 IL App (3d) 150417, ¶ 13; *Carter*, 2016 IL App (3d) 140196, ¶ 48.

¶ 44 CONCLUSION

¶ 45 The judgment of the trial court of Peoria County is affirmed and remanded with directions for the circuit clerk of Peoria County to amend the cost sheet to reflect the corrections set forth in this order.

¶ 46 Affirmed and remanded with directions.