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).

NO. 4-10-0147 Filed 6/27/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
KATHLEEN DILLARD,	)	No. 97CF117
Defendant-Appellant.	)	
	)	Honorable
	)	James E. Souk,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

Held: (1) The trial court did not abuse its discretion in denying defendant a new trial where she was found to be willfully absent at the original proceedings.

(2) The $200 public-defender fee was improperly imposed without a hearing.

(3) The $200 DNA-analysis fee, $15 children's-advocacy-center fee, and $10 drug-court fee were all improperly imposed.

(4) The lump-sum surcharge and violent-crime-victim-assistance assessment must be recalculated.

In July 2003, the trial court convicted defendant, Kathleen Dillard, of escape (720 ILCS 5/31-6(a) (West 1996)) at a bench trial conducted *in absentia.* After the court entered a conviction, a bench warrant was issued for defendant's arrest. Defendant did not appear before the court again until 2009. In December 2009, the court denied defendant's motion for a new trial pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115-4.1(e) (West 2002)). At that same proceeding, the court

sentenced defendant to 180 days in the McLean County jail and ordered her to pay various fines and fees, including a $200 public-defender fee.

On appeal, defendant argues (1) the trial court improperly denied her request for a new trial, (2) the $200 public-defender fee must be vacated as it was imposed without a hearing, and (3) the DNA-analysis, drug-court, and children's-advocacy-center fines must be vacated and the lump-sum surcharge and violent-crime-victim-assistance (VCVA) assessment must be recalculated. We affirm in part, vacate in part, and remand with directions.

In February 1997, defendant was charged via information with escape (720 ILCS 5/31-6(a) (West 1996)). The charge alleged defendant had failed to report to a penal institution after having been convicted of aggravated battery in case No. 95-CF-1197. Because the charge defendant failed to report was a felony, the new escape charge was a Class 3 felony. *Id.* In November 1997, defendant waived her right to a jury trial, and a bench trial was scheduled for December 1997. Defendant failed to appear but contacted her appointed attorney and told him she was unable to make it to court because she was in Northern Illinois and the highway was closed due to snow. The trial judge instructed the prosecutor to contact the Illinois State Police (ISP) to verify defendant's claim. ISP informed the prosecutor no highways in the state were closed due to snow. Upon receiving this information, the trial judge issued a warrant for defendant's arrest. Defendant was not apprehended on that warrant until 2003.

In May 2003, defendant appeared in front of the trial court on the escape charge. The matter was set for trial in July 2003. At the May hearing, the court admonished defendant that if she failed to appear at her trial in July, the court could elect to proceed without her, and she could be convicted and sentenced in her absence. On the July trial date, defendant called

defense counsel and informed him that she had been a passenger in her mother's car when they were in an accident, and she was unable to make it to court. Defendant lived in Chicago, and the car she had been a passenger in was disabled in the accident. Counsel instructed her to fax a copy of the accident report to his office as soon as possible.

When the trial commenced later that day, defense counsel informed the trial court of his conversation with defendant and moved to continue. The State moved to proceed with the trial *in absentia*. The court found that defendant was willfully absent due to a lack of evidence to corroborate defendant's claims at that time. The court also cited defendant's history of failing to appear as a factor. The court went on to state, "should the defendant be able to verify that she was in a car accident while on her way to court that prevented her from getting here," the issue of a new trial could be raised then. The State proceeded with its case and introduced the testimony of two witnesses, who testified to the fact defendant had failed to report for a term of incarceration. At the close of proceedings, the court found defendant guilty of escape and set the matter for sentencing in August 2003.

Six days after the trial *in absentia*, defense counsel received a faxed copy of a police report from defendant and filed a motion for a new trial under section 115-4.1(e) of the Criminal Procedure Code. The motion claimed that defendant's absence at her trial was through no fault of her own and was due to circumstances beyond her control. Defense counsel filed another motion for judgment of acquittal or a new trial in July 2003. A hearing on the motions was set for August 2003, the same day as sentencing. When the hearing date arrived, defendant again failed to appear and a warrant was issued for her arrest. Defendant did not appear before the trial court again until 2009.

In 2009, defendant was arrested for retail theft in Cook County and was returned to McLean County on the warrant. The matter was finally set for a hearing on all posttrial motions and sentencing in December 2009. At the hearing, defense counsel made no argument and rested on the motions that had been filed with the trial court, including a copy of the accident report, which was appended to one of the motions. The State argued that any remedies due defendant had lapsed in the six years since the trial had been conducted, regardless of whether her absence was willful. Without any discussion on the record, the court denied defendant's motions and proceeded to sentencing. Defendant was then sentenced to 180 days in jail, 24 months' probation, with conditions including all "other fees that are appropriate," and ordered to pay a $1,000 fine and a $200 public-defender fee. The following fines and fees were later included by the clerk's office: $200 DNA fee, $120 VCVA penalty, $250 lump-sum surcharge, $15 children's-advocacy-center fee, and $10 drug-court fee. All fines and fees were subtracted from defendant's bond, with the balance refunded to her mother.

This appeal followed.

On appeal, defendant first claims that she was improperly denied a new trial under section 115-4.1(e) of the Criminal Procedure Code. We disagree.

Trials *in absentia* are not favored by our legal system as defendants have a right to face their accusers. *People v. Smith*, 188 Ill. 2d 335, 340, 721 N.E.2d 553, 557 (1999). "However, it is well established that it is not only defendant's right to be present, but it is also [defendant's] duty." (Internal quotation marks omitted.) *Id.* When voluntarily absent at trial, he or she waives his or her right to be present before his or her accusers. *Smith*, 188 Ill. 2d at 341, 721 N.E.2d at 557. "A trial court's decision to proceed with a trial *in absentia* will not be

reversed unless the trial court abused its discretion." *Id*. The same standard applies to a court's decision to deny a defendant a new trial under section 115-4.1(e) of the Criminal Procedure Code. *People v. Reyna*, 289 Ill. App. 3d 835, 838, 682 N.E.2d 1191, 1193-94 (1997).

Section 115-4.1(e) of the Criminal Procedure Code states that a defendant convicted *in absentia* "must be granted a new trial *** if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control." 725 ILCS 5/115-4.1(e) (West 2002). Under this language, the burden is on the defendant to establish that her absence at trial was not willful, after the State establishes a *prima facie* case that the defendant's absence was willful. *Smith*, 188 Ill. 2d at 347, 721 N.E.2d at 560; *People v. Williams*, 274 Ill. App. 3d 793, 803, 655 N.E.2d 470, 478 (1995). "To establish a *prima facie* case of willful absence, the State must demonstrate that the defendant: (1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia*; and (3) did not appear for trial when the case was called." *Smith*, 188 Ill. 2d at 343, 721 N.E.2d at 558. If the defendant introduces some evidence showing the absence was not willful, the court can require more of the State in proving willful absence. *Id*.

In this case, defendant was informed on the record of the time, date, and place of hearing as well as the fact that the trial court would proceed in her absence if she failed to appear. The record further shows that defendant failed to appear and, though defense counsel offered an excuse for her absence, no corroborating evidence was offered at that time. Thus, the State met its burden of making a *prima facie* case of willful absence, and the trial court properly found defendant willfully absent on the record. Upon filing the section 115-4.1(e) motion for a new trial, the burden was on defendant to show that she was not willfully absent.

At the December 2009 hearing on the section 115-4.1(e) motion for a new trial, counsel for defendant rested solely on the motion and the attached accident report. No argument was made and neither defendant nor her mother, who was driving the car at the time of the purported accident and was present at the hearing, testified as to why defendant had failed to appear at the July 2003 trial. The State then argued, erroneously, that any remedy due defendant had lapsed. See *People v. Manikowski*, 288 Ill. App. 3d 157, 161, 679 N.E.2d 840, 843 (1997) ("The potential relief [section 115-4.1(e)] provides is not limited by the passage of time."). At the conclusion of the parties' arguments, the trial court denied defendant's motion without comment. Defendant now claims the court relied on the State's erroneous argument in denying a new trial, thus that decision should be vacated. We disagree.

First, the record does not reflect that the trial court relied on the State's argument in reaching its decision. Second, defendant had the burden to show that she missed court through no fault of her own and due to circumstances beyond her control. Though the court did not elaborate on the record, it clearly did not believe defendant had carried her burden. In searching the record, we find no abuse of discretion in the court denying defendant's motion.

Defense counsel rested on its motion and the attached police report. Accordingly, the police report is all the evidence the defense offered. However, the police report provides very little information about the purported accident, does not reference defendant at all, and is not signed by a police officer. The only "evidence" linking defendant to the purported accident is a notation, apparently made by defendant herself, on the fax cover sheet, that a passenger was in the car. The State, in its brief, erroneously links this notation to the officer that wrote the report; however, it was made on a fax cover sheet sent from a currency exchange in Chicago, not on any

official police cover sheet. Given the nature of the evidence presented and defendant's history of failing to appear when ordered to do so, the trial court was reasonably entitled to conclude defendant failed to show her absence was not willful and therefore deny her motion for a new trial.

Defendant next claims the $200 public-defender fee imposed by the trial court should be vacated because the court did not conduct a hearing on the matter. The State contends because defendant was absent at her trial, the court did not need to conduct a hearing before assessing the public-defender fee.

Though this issue was not raised in posttrial proceedings, it is not subject to forfeiture and may be reviewed by this court. *People v. Roberson*, 335 Ill. App. 3d 798, 804, 780 N.E.2d 1144, 1149 (2002). Section 113-3.1(a) of the Criminal Procedure Code requires courts to hold a hearing on the defendant's financial circumstances and ability to pay prior to ordering any reimbursement for the appointment of a public defender. 725 ILCS 5/113-3.1(a) (West 2008); *People v. Love*, 177 Ill. 2d 550, 559, 687 N.E.2d 32, 36 (1997). The hearing, or at least the opportunity for a hearing, is required even when cash bond is available to apply to the fee. *People v. Maxon*, 318 Ill. App. 3d 1209, 1214, 744 N.E.2d 339, 342-43 (2001). However, Section 115-4.1(a) of the Criminal Procedure Code allows the court to allocate bond money posted by a defendant to a public-defender fee in cases where the trial was conducted *in absentia*. 725 ILCS 5/115-4.1(a) (West 2008); see also *People v. Kelly*, 361 Ill. App. 3d 515, 525, 838 N.E.2d 236, 245-46 (2005). The State applies this provision of the Criminal Procedure Code and the decision in *Kelly* to the instant case and argues that since the trial of defendant was held *in absentia*, she was not entitled to a hearing on her ability to pay the public-defender fee. We find

Kelly distinguishable from the case at hand.

First and foremost, *Kelly* dealt with a defendant who was absent at sentencing as well as trial, and was therefore unavailable for a hearing when the fee was assessed. *Kelly*, 361 Ill. App. 3d at 524, 838 N.E.2d at 245. Defendant in this case was present at the sentencing. Further, the defendant in *Kelly,* 361 Ill. App. 3d at 524-25, 838 N.E.2d at 245-46, had forfeited the bond that was subsequently applied to the public-defender fee and thus had no interest in it, so his ability to pay was irrelevant and a hearing was not required. In the instant case, the bond in question had been posted after the trial *in absentia* was conducted and had not been forfeited, thus any leftover amount was to be refunded; therefore, defendant or whoever posted bond for her still had an interest in the bond money. Finally, *Kelly*, 361 Ill. App. 3d at 524, 838 N.E.2d at 245, dealt with section 115-4.1(a), which is inapplicable here.

The record clearly shows that no hearing was held prior to the assessment of the public-defender fee. We vacate the $200 fee assessed by the trial court and remand for the court to hold a hearing in compliance with section 113-3.1(a).

Defendant next contends that the DNA-analysis, children's-advocacy-center, and drug-court fees were improperly imposed by the trial court in violation of the prohibition against *ex post facto* laws. We agree and vacate those fines.

Although defendant failed to object to the imposition of the fines prior to her appeal, this court will relax the rules of forfeiture when the improperly raised objection involves a claim regarding the prohibition against *ex post facto* laws. *People v. Bosley*, 197 Ill. App. 3d 215, 220, 553 N.E.2d 1187, 1191 (1990). The State concedes that (1) the drug-court and children's-advocacy-center fees are fines (see *People v. Sulton*, 395 Ill. App. 3d 186, 193, 916

N.E.2d 642, 647-48 (2009) (drug-court fee is a fine); *People v. Williams*, 405 Ill. App. 3d 958, 965-66, 940 N.E.2d 95, 101 (2000) (children's-advocacy-center fee is a fine)), and (2) the fines were not in place when defendant was charged with the underlying crime, and they therefore violate the prohibition against *ex post facto* laws and should be vacated (see *People v. Ramsey*, 192 Ill. 2d 154, 157, 735 N.E.2d 533, 535 (2000) (New definition of insanity defense could not be applied to the defendant's case retroactively as that would violate prohibition against *ex post facto* laws)). The State also admits (1) the DNA fee is a fine *(*see *People v. Long*, 398 Ill. App. 3d 1028, 1034, 924 N.E.2d 511, 516 (2010)), and (2) the DNA fee was not in place at the time the underlying crime was charged. However, the State contends that because the language of the statute shows that the legislature intended the DNA fee to apply to anyone convicted of a felony after August 22, 2002 (730 ILCS 5/5-4-3(a)(3.5) (West 2008)), it does not violate the prohibition against *ex post facto* laws. We disagree.

This court has found that a fine is punitive in nature while a fee merely seeks to recoup costs involved in the prosecution of a defendant. *Long*, 398 Ill. App. 3d at 1032, 924 N.E.2d at 515. Further, a "law is *ex post facto* *** if it increases the punishment for a previously committed offense." (Internal quotation marks omitted.) *Ramsey*, 192 Ill. 2d at 157, 735 N.E.2d at 535. The DNA analysis is clearly a fine and therefore punitive, and as it was put into place after the underlying offense was committed, it cannot be imposed on defendant in this case. We therefore vacate the $200 DNA-analysis fee, along with the $10 drug-court fee and the $15 children's-advocacy-center fee.

Finally, defendant contends that the lump-sum surcharge and the VCVA assessment must be recalculated. The State concedes the lump-sum surcharge was erroneously

calculated using the standard in place at the time of sentencing rather than the standard in place when the underlying crime was committed. In addition, because the VCVA assessment was based in part on the DNA fee being valid, the VCVA must be recalculated as well. We therefore vacate the fees and remand with directions.

The current lump-sum surcharge is calculated at the rate of $10 for every $40 of fine imposed. 730 ILCS 5/5-9-1(c) (West 2008). However, the lump-sum surcharge in place when defendant was charged was calculated at the rate of $4 for every $40 of fine imposed. 730 ILCS 5/5-9-1(c) (West 1996). The clerk originally assessed a surcharge of $250 but under the old formula the proper amount would be $100 ($1,000 / $40 = 25; 25 x $4 = $100). The VCVA assessment also must be recalculated as it was based on a fine amount that included the DNA fee. The VCVA assessment is calculated at a rate of $4 for every $40 of fine imposed. 725 ILCS 240/10(b) (West 2008). The original $120 assessment was based on a total fine amount of $1,200; however, once the $200 DNA fee is subtracted from the total fine amount, the VCVA assessment comes to $100 ($1,000 / $40 = 25; 25 x $4 = $100). Thus, the VCVA assessment must be reduced by $20.

For the reasons stated, we affirm the dismissal of the motion for a new trial; we vacate the $200 public-defender fee and remand for further proceedings; we vacate the $200 DNA-analysis fee, the $10 drug-court fee and the $15 children's-advocacy-center fee; and we further direct the trial court to reduce the lump-sum surcharge from $250 to $100 and the VCVA assessment from $120 to $100. Because the State has in part successfully defended a portion of the trial court's judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

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