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2012 IL App (4th) 110431-U

NO. 4-11-0431

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 29, 2012

Carla Bender

4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ELIZA HOLLOWAY,	)	No. 10CF1818
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

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JUSTICE COOK delivered the judgment of the court.  
Justices Appleton and Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court (1) vacated the trial court's improper imposition of a \$10 street-value fine without an evidentiary basis and (2) remanded to the trial court for (a) evidentiary hearing on street value of controlled substance, (b) imposition of mandatory \$50 performance-enhancing substance testing fine, (c) imposition of mandatory \$25 drug traffic prevention fund fine, and (d) imposition of mandatory \$30 juvenile record expungement fine.

¶ 2 In October 2010, the State charged defendant, Eliza Holloway, by information that on October 23, 2010, she committed the offense of possession of a controlled substance less than 15 grams (720 ILCS 570/402(c) (West 2010)). In April 2011, the trial court sentenced defendant to three years' imprisonment and imposed a \$10 street-value fine.

¶ 3 Defendant appeals arguing the trial court improperly imposed the \$10 street-value fine without an evidentiary basis. The State responds that the court failed to impose certain mandatory fines, namely, a \$50 Performance-enhancing Substance Testing Fund charge, a \$25

Drug Traffic Prevention Fund charge, and a \$30 juvenile record expungement charge. We agree with defendant the court improperly imposed the street-value fine without an evidentiary basis, and agree with the State that the court failed to impose the mandatory fines.

¶ 4

## I. BACKGROUND

¶ 5

On October 23, 2010, defendant contacted the Champaign police department to complain about her roommate, Jose Lopez, threatening her with a knife. Officer Nick Krippel of the Champaign police department observed defendant walking along the block near her apartment and stopped his patrol car to speak with her. He continued to defendant's residence where defendant invited him into the premises. Defendant's apartment consisted of a living room, kitchen area, bathroom, and a single bedroom. Krippel observed a mattress and female clothing in the living room and believed this area to be defendant's sleeping area. Lopez was in the bedroom and Krippel searched the bedroom for a knife but did not locate one. According to Krippel, defendant consented to a search of the entire residence. In the kitchen area, in plain view, Krippel observed a clear plastic sandwich bag on the corner of the trash can. Based on his experience, Krippel believed the bag contained cocaine residue. In a kitchen cabinet, Krippel located a black zipper-style case containing push rods, a Brillo pad, and some small white pieces of an off-white substance. Krippel believed the items to be used for cleaning a crack pipe. In the living room, Krippel observed what appeared a crack pipe on the bookshelf. Police officers arrested defendant for unlawful possession of a controlled substance. While at the Urbana jail, Krippel heard defendant tell another correctional officer that every time she smokes cocaine she discards everything into the trash.

¶ 6

Kristen Stiefvater, a drug chemist at the Illinois State Police crime lab, performed

tests on the crack pipe recovered from defendant's residence. She testified "there was only residue present so I was not able to perform a weight." Further, she performed a gas chromatography and mass spectrometry test on the pipe, and the test results indicated the presence of cocaine.

¶ 7 After the January 2011 bench trial, the trial court found defendant guilty of possession of a controlled substance.

¶ 8 At the April 19, 2011, sentencing hearing, defendant testified on her own behalf. She has been under the care of the Champaign County Mental Health Center since 1979 and is a diagnosed schizophrenic with bipolar disorder. She admitted crack cocaine use. During argument, the State recommended a three-year sentence and, among others, "a \$10 mandatory street value fine." The court considered the presentence report (PSI), a mental health court screening report, and the factors in aggravation and mitigation. A drug court screening report indicated defendant was ineligible for drug court because she appeared at an interview under the influence of alcohol. The court noted defendant has two prior felony convictions from 1994 and nine misdemeanor convictions. The court sentenced defendant to three years' imprisonment, and imposed "all fines, fees and costs as authorized by statute." Specifically, the court imposed a \$100 Violent Crime Victims Assistance Act fee, \$500 mandatory assessment, and \$10 street-value fine. The appeal followed.

¶ 9 Although not raised by the parties, we briefly note, defendant's *pro se* notice of appeal was placed in the Dwight correctional facility mailbox on May 18, 2011, and file-stamped by the Champaign County circuit clerk on May 23, 2011. Defendant's appeal is timely. *People v. Smith*, 2011 IL App (4th) 100430, ¶ 13, 960 N.E.2d 595, 599 ("A court will consider an

incarcerated defendant's postplea motion timely filed if the defendant placed it in the prison mail system within the 30-day period, regardless of the date on which the clerk's office received or filed-stamped it.").

¶ 10

## II. ANALYSIS

¶ 11

On appeal, defendant argues the trial court improperly imposed a \$10 street-value fine pursuant to section 5-9-1.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-9-1.1(a) (West 2010)) because the State presented no evidence of its current street value. The State concedes the cocaine residue was "worthless," but argues (1) the fine was nevertheless properly imposed because "the calculated street value constitutes only a minimum floor for imposing the fine" and (2) the court failed to impose certain mandatory fines. Specifically, the State contends the court did not impose (1) a \$50 Performance-enhancing Substance Testing Fund charge (730 ILCS 5/5-9-1.1(d) (West 2010)); (2) a \$25 Drug Traffic Prevention Fund charge (730 ILCS 5/5-9-1.1(e) (West 2010)); and (3) a \$30 juvenile record expungement charge (730 ILCS 5/5-9-1.17(a) (West 2010)). Defendant challenges the State's ability to request these charges on appeal and argues the performance-enhancing substance testing and drug traffic prevention fines cannot be imposed where no street-value fine is imposed.

¶ 12

### A. Street-Value Fine

¶ 13

First, defendant argues the trial court improperly imposed a \$10 street-value fine pursuant to section 5-9-1.1(a) of the Unified Code (730 ILCS 5/5-9-1.1(a) (West 2010)) because the record affords no evidentiary basis of the cocaine's value. Further, defendant contends "the consumed cocaine residue on the glass pipe was worthless on the street or anywhere else." Defendant concedes she failed to preserve this issue but argues plain error applies. The State

asserts because the cocaine is "unweighable" and "worthless" on the street "it does not appear that any further testimony could have been given as to the amount seized or positive current street value of burnt crack cocaine residue," no remand is necessary. The State cites *People v. Elston*, 222 Ill. App. 3d 956, 961, 584 N.E.2d 896, 899 (1991), for its contention "a \$10 street value had been statutorily authorized in this case, given that the calculated street value constitutes only a minium floor for imposing the fine."

¶ 14 The question of the requirements for imposing a street-value fine is a question of statutory construction reviewed *de novo*. *People v. Lewis*, 234 Ill. 2d 32, 44, 912 N.E.2d 1220, 1227 (2009).

¶ 15 Section 5-9-1.1(a) of the Unified Code provides:

"When a person has been adjudged guilty of a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance, other than methamphetamine, as defined in the Cannabis Control Act, as amended, or the Illinois Controlled Substances Act, as amended, in addition to any other penalty imposed, a fine shall be levied by the court at not less than the full street value of the cannabis or controlled substances seized.

'Street value' shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled substance seized." 730 ILCS 5/5-9-1.1(a) (West 2010).

¶ 16 Defendant argues we should consider the imposition of a street-value fine under plain-error review. In *Lewis*, the supreme court stated "[i]f there is no evidence on value, the fine has no basis in the statute or the evidence and will be arbitrary" as a result "[p]lain-error review is appropriate because imposing the fine without any evidentiary support in contravention of the statute implicates the right to a fair sentencing hearing." *Lewis*, 234 Ill. 2d at 48, 912 N.E.2d at 1230. We follow *Lewis* and apply the plain-error doctrine to permit review of a street-value fine imposed without an evidentiary basis.

¶ 17 Our review of the record confirms no evidentiary basis of the controlled substance's street value was provided to the trial court. In *Lewis*, the supreme court stated, "[t]here must be some evidentiary basis for street value in the record for the court to comply with the statutory mandate of imposing a fine at least equal to the street value of the controlled substance." *Lewis*, 234 Ill. 2d at 46, 912 N.E.2d at 1228. Recently, in *People v. Devine*, 2012 IL App (4th) 101028, ¶ 3, 2012 WL 3877712, at \*1, this court considered a case where the prosecutor did not request a street-value fine because the amount of cocaine at issue was only residue. The trial court did not impose a street-value fine and we stated "[t]he plain language of the statute provides no basis for the imposition of a *de minimus* exception." *Id.* at ¶ 8, 2012 WL 3877712, at \*2. In *Devine* we remanded for imposition of the mandatory street-value fine. *Id.* at ¶ 9, 2012 WL 3877712, at \*2. Consistent with *Devine*, we do not accept the State's assertion the cocaine is "worthless" because the record contains *no* evidence as to the substance's street value. A determination of the cocaine's value—even if the substance is unweighable—without an evidentiary basis is arbitrary.

¶ 18 We reject the State's contention "a \$10 street value had been statutorily authorized

in this case." While *Elston* may support the State's position the street value is only the minimum fine authorized by section 5-9-1.1 (*Elston*, 222 Ill. App. 3d, at 961, 584 N.E.2d at 899), it does not authorize a street-value fine without an evidentiary basis. Further, we can find no suggestion in the statute that \$10 is the minimum street value for cocaine.

¶ 19 Consistent with *Devine* and *Lewis*, section 5-9-1.1(a) requires the imposition of a street-value fine and evidence as to the value of the drug must be introduced. Although the error involves only \$10, we are not prevented from remanding this case to the trial court for a proper evidentiary basis. The *Lewis* court rejected a *de minimus* exception to plain-error review as "[a]n error may involve a relatively small amount of money or unimportant matter, but still affect the integrity of the judicial process and the fairness of the proceeding if the controversy is determined in an arbitrary or unreasoned manner." *Lewis*, 234 Ill. 2d at 48, 912 N.E.2d at 1230.

¶ 20 We remand for an evidentiary hearing as to the then-existing street value of the cocaine so as to permit the trial court to determine a value for the cocaine residue. The evidentiary basis may be provided by testimony, "a stipulation to the current value, or reliable evidence presented at a previous stage of the proceedings." *Lewis*, 234 Ill. 2d at 46, 912 N.E.2d at 1228. Such evidence may include valuation of a larger determinate quantity of cocaine to permit the court to knowingly calculate a value for the cocaine here. See *People v. Reed*, 376 Ill. App. 3d 121, 129, 875 N.E.2d 167, 175 (2007) ("Although the amount of evidence necessary to adequately establish the street value of a given drug varies from case to case, the trial court must have a concrete evidentiary basis for the fine imposed."). For example, this evidence could reflect the street value of an ounce or a fraction thereof on October 23, 2010, to assist the court in determining the residue's value.

¶ 21 In sum, we vacate the \$10 street-value fine and remand to the trial court for a proper evidentiary basis in accord with the statute and *Lewis*.

¶ 22 B. Imposition of Mandatory Fines

¶ 23 The State argues the trial court failed to properly assess (1) a mandatory fine of \$50 for the Performance-enhancing Substance Testing Fund (730 ILCS 5/5-9-1.1(d) (West 2010)); (2) a mandatory fine of \$25 for the Drug Traffic Prevention Fund (730 ILCS 5/5-9-1.1(e) (West 2010)); and (3) a mandatory fine of \$30 for the expungement of juvenile records (730 ILCS 5/5-9-1.17(a) (West 2010)). Defendant asserts this court does not have jurisdiction to address these fines. Specifically, defendant contends the State's "argument cannot be justified as being an attack on a void order." On the merits, defendant argues the performance-enhancing substance fine and drug traffic prevention fine "apply only when a Street Value Fine is imposed." Defendant's argument the State cannot impose additional fines unless a street-value fine is imposed involves an issue of statutory interpretation that we review *de novo*. *Lewis*, 234 Ill. 2d at 44, 912 N.E.2d at 1227.

¶ 24 A trial court's sentence is void where it does not conform to a statutory requirement. *People v. Mitchell*, 395 Ill. App. 3d 161, 166, 916 N.E.2d 624, 629 (2009) (quoting *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995)). A trial court exceeds its authority if it orders a lesser sentence than what the statute mandates, including failing to impose statutory fines. *Mitchell*, 395 Ill. App. 3d at 166, 916 N.E.2d at 629. This court may reimpose mandatory fines. *People v. Folks*, 406 Ill. App. 3d 300, 306, 943 N.E.2d 1128, 1133 (2010). However, the State's argument need not be justified as an attack on a void order as, at sentencing, the trial court imposed "all fines, fees and costs as authorized by statute." Thus, the court



imposed *all* mandatory fines and fees. The fact neither the court's written order nor the circuit clerk's account summary reflect these fines is not determinative. See *People v. Roberson*, 401 Ill. App. 3d 758, 774, 927 N.E.2d 1277, 1291 (2010) ("When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls.").

¶ 25 "The cardinal rule of statutory construction—the rule to which all other rules are subordinate—is to ascertain and give effect to the legislature's intent." *People v. Jamison*, 229 Ill. 2d 184, 188, 890 N.E.2d 929, 931 (2008). The best indicator of legislative intent is the statute's plain and ordinary meaning. *Jamison*, 229 Ill. 2d at 188, 890 N.E.2d at 931.

¶ 26 Section 5-9-1.1(d) of the Unified Code provides, in relevant part:

"In addition to any penalty imposed under subsection (a) of this Section for a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance \*\*\*, a fee of \$50 shall be assessed by the court, \*\*\* for deposit into the Performance-enhancing Substance Testing Fund. This additional fee of \$50 shall not be considered a part of the fine for purposes of any reduction in the fine for time served either before or after sentencing. The provisions of this subsection (d), other than this sentence, are inoperative after June 30, 2011." 730 ILCS 5/5-9-1.1(d) (West 2010) (eff. July 23, 2010).

¶ 27 Section 5-9-1.1(e) of the Unified Code provides, in relevant part:

"In addition to any penalty imposed under subsection (a) of this Section, a \$25 assessment shall be assessed by the court \*\*\*

for deposit into the Drug Traffic Prevention Fund." 730 ILCS 5/5-9-1.1(e) (West 2010) (eff. July 23, 2010).

¶ 28 Section 5-9-1.17(a) of the Unified Code provides, in relevant part:

"There shall be added to every penalty imposed in sentencing for a criminal offense an additional fine of \$30 to be imposed upon a plea of guilty or finding of guilty resulting in a judgment of conviction." 730 ILCS 5/5-9-1.17(a) (West 2010) (eff. Jan. 1, 2010).

¶ 29 Defendant, in her reply brief, does not address imposition of the mandatory juvenile record expungement fine. This is a mandatory fine. See *People v. Ousley*, 235 Ill. 2d 299, 311, 919 N.E.2d 875, 884 (2009) (" 'when the issue is whether the force of the statutory language is mandatory or permissive, then "shall" does usually indicate the legislature intended to impose a mandatory obligation.' ") (quoting *People v. Robinson*, 217 Ill. 2d 43, 54, 838 N.E.2d 930, 936 (2005)); *People v. Coleman*, 391 Ill. App. 3d 963, 977-84, 909 N.E.2d 952, 965-70 (2009) (discussing statutory language of mandatory fines). As the trial court did not impose this mandatory fine, we remand for imposition of a \$30 fine pursuant to section 5-9-1.17 of the Unified Code (730 ILCS 5/5-9-1.17 (West 2010)).

¶ 30 As to the other fines, defendant asserts that where no street-value fine is imposed, no fine under sections 5-9-1.1(d) and (e) can be imposed. For support, defendant relies on *People v. Roberts*, 338 Ill. App. 3d 245, 788 N.E.2d 782 (2003), for her assertion no fine under these subsections can be imposed without a fine imposed under subsection (a). *Roberts* is distinguishable. There, the defendant was convicted of possession of a look-alike substance and

ordered to pay \$20 as a street-value fine. *Roberts*, 338 Ill. App. 3d at 246, 788 N.E.2d at 784. The Second District found no mention of look-alike substances in section 5-9.1.1 (730 ILCS 5/5-9-1.1(a) (West 2000)) and thus that "provision does not authorize imposition of a street value fine for look-alike substances." *Roberts*, 338 Ill. App. 3d at 252, 788 N.E.2d at 788. Further, the court stated "[w]e also hold that section 5-9-1.1 does not authorize imposition of a trauma center fine when the substance seized is a look-alike substance." *Roberts*, 338 Ill. App. 3d at 253, 788 N.E.2d at 789. *Roberts* is not as broad as defendant suggests. It speaks to where a substance is not within the scope of subsection (a), not where a fine has not been imposed under subsection (a). Thus, *Roberts* provides no guidance to where the substance, here cocaine, is clearly within subsection (a).

¶ 31 While not briefed by either party, we find *People v. Jamison*, 229 Ill. 2d 184, 890 N.E.2d 929, particularly instructive on the issue at hand. In *Jamison*, the supreme court considered the relationship of the fines pursuant to sections 10(b) and 10(c) of the Violent Crime Victims Assistance Act (VCVA Act) (725 ILCS 240/10(b), (c) (West 2004)) and section 5-9-1(c-9) of the Unified Code (730 ILCS 5/5-9-1(c-9) (West 2004)) (imposing \$4 fine "in addition to any other fine, costs, fees, and penalties"). *Jamison*, 229 Ill. 2d at 191, 890 N.E.2d at 931-32. First, the supreme court noted that the section 5-9-1(c-9) penalty "clearly" could be imposed in addition to other fines under section 10 of the VCVA Act. *Jamison*, 229 Ill. 2d at 190, 890 N.E.2d at 932. The court stated, "[s]ince each statute contains 'additional penalty' language, it seems a reasonable inference that the legislature intended a fine under each to be imposed." *Jamison*, 229 Ill. 2d at 191, 890 N.E.2d at 933. And "[t]he fine established in section 5-9-1(c-9) could be imposed without reference to whether any other fine, costs, fees or penalties applied."

*Jamison*, 229 Ill. 2d at 191, 890 N.E.2d at 933.

¶ 32 Under *Jamison* it follows the language "[i]n addition to any penalty imposed under subsection (a)" contained in both subsection (d) and (e) means those fines can be imposed without reference to whether any fine is imposed under subsection (a). Those provisions are independent of the controlled substance's street value and can be imposed in addition to any penalty imposed—regardless of value—under subsection (a).

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we (1) vacate the street-value fine and remand to the trial court for a evidentiary-basis hearing, and (2) remand to the trial court with directions to reimpose (a) a mandatory fine of \$50 for the Performance-enhancing Substance Testing Fund, (b) a mandatory fine of \$25 for the Drug Traffic Prevention Fund; and (c) a mandatory fine of \$30 for the expungement of juvenile records. We otherwise affirm. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed in part as modified; vacated in part, and cause remanded with directions.