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2013 IL App (4th) 110523-U  
NOS. 4-11-0523, 4-11-0524, 4-11-0525 cons.

FILED  
February 7, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MICHAEL D. TERRY,	)	Nos. 08CF308
Defendant-Appellant.	)	10CF175
	)	11CF13
	)	
	)	Honorable
	)	Mark A. Fellheimer,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court (1) remanded for issuance of amended sentencing judgments reflecting proper calculation of mandatory surcharges, and (2) directed the trial court to instruct the circuit clerk to credit defendant's account for statutory presentencing credit.

¶ 2 In November 2008, the State charged defendant, Michael D. Terry, by information in case No. 08-CF-308, our case No. 4-11-0523, with burglary (720 ILCS 5/19-1(a) (West 2008)). In August 2009, the trial court sentenced defendant to probation and ordered defendant to pay a \$20 Violent Crime Victims Assistance Act (VCVA) fine (725 ILCS 240/10(b) (West 2008)) and a \$200 public-defender fee (725 ILCS 5/113-3.1) (West 2008)). In June 2010, the State charged defendant in case No. 10-CF-175, our case No. 4-11-0524, by information with theft (subsequent offense) (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and obstructing justice (720

ILCS 5/31-4(a) (West 2010)). In September 2010, the court sentenced defendant to probation in both Nos. 08-CF-308 and 10-CF-175 and ordered defendant to pay a \$100 public-defender fee in No. 10-CF-175. Additionally, the court in No. 10-CF-175 imposed a \$20 VCVA fine and a \$20 child-advocacy-center fine (55 ILCS 5/5-1101(f-5) (West 2010)). In January 2011, the State charged defendant in case No. 11-CF-13, our case No. 4-11-0525, by information with two counts retail theft (subsequent offense) (720 ILCS 5/16A-3(a), (f) (West 2010)). At a combined hearing in April 2011, in No. 11-CF-13 defendant pleaded guilty to retail theft (subsequent offense) and in Nos. 08-CF-308 and 10-CF-175 admitted violating probation.

¶ 3 At the May 2011 combined sentencing hearing, the trial court (1) in No. 08-CF-308 revoked probation and resentenced defendant to six years' imprisonment, (2) in No. 10-CF-175 revoked probation and resentenced defendant to three years' imprisonment, and (3) in No. 11-CF-13 sentenced defendant to two years' imprisonment. All prison sentences run concurrently. The court granted defendant sentencing credit (1) in No. 08-CF-308 from November 25, 2008, to January 20, 2009; August 24, 2009, to September 26, 2009; and June 24, 2010, to September 30, 2010, (2) in No. 10-CF-175 from June 24, 2010, to September 30, 2010, a total of 99 days; and (3) in No. 11-CF-13 from January 18, 2011, to May 11, 2011, a total of 114 days. Additionally, the court (1) ordered defendant to pay all original fines and costs in Nos. 08-CF-308 and 10-CF-175, and (2) in No. 11-CF-13 imposed a \$20 VCVA fine and a \$20 child-advocacy-center fine.

¶ 4 On appeal, defendant argues (1) he did not receive his statutory \$5-per-day credit pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14(a) (West 2010)) in (a) No. 10-CF-175 from June 24, 2010, to September 30,

2010, a total of 99 days, and (b) No. 11-CF-13 from January 18, 2011, to May 11, 2011, a total of 114 days; (2) the trial court improperly imposed a \$20 VCVA fine when it also imposed a \$20 child-advocacy-center fine in Nos. 10-CF-175 and 11-CF-13; and (3) the court failed to conduct an ability to pay hearing pursuant to section 113-3.1 of the Procedure Code (725 ILCS 5/113-3.1(a) (West 2008)) before imposing a public-defender reimbursement fee in Nos. 08-CF-308 and 10-CF-175. The State (1) concedes (a) defendant is entitled to his statutory \$5 per-day credit, and (b) defendant's \$20 VCVA fine should be reduced to \$4; and (2) asserts this court is without jurisdiction to review defendant's public defender reimbursement orders. We affirm as modified and remand with directions.

¶ 5

#### I. BACKGROUND

¶ 6 In November 2008, the State charged defendant in No. 08-CF-308 with burglary (720 ILCS 5/19-1(a) (West 2008)). In August 2009, defendant pleaded guilty and the trial court sentenced him to 30 months' probation subject to 180 days in jail, with credit for 56 days served. The written probation order reflects the court imposed a \$20 VCVA fine and ordered defendant to pay a \$200 public defender fee (725 ILCS 5/113-3.1 (West 2008)).

¶ 7 In June 2010, the State charged defendant in case No. 10-CF-175 with theft (subsequent offense) (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and obstructing justice (720 ILCS 5/31-4(a) (West 2010)). In July 2010, the State filed a petition to revoke probation in No. 08-CF-308.

¶ 8 In September 2010, defendant pleaded guilty to the charges in No. 10-CF-175. In late September 2010, defendant admitted violating probation in No. 08-CF-308, and the trial court consolidated the two cases for sentencing. On the same day, the court sentenced and

resentenced defendant in Nos. 10-CF-175 and 08-CF-308 respectively to two years' probation subject to 180 days in jail, with credit for 99 days served. At the September 2010 sentencing hearing, the court asked defendant whether he was employed and if he would be able to pay the \$100 public-defender reimbursement fee. Defendant acknowledged he had "a couple of jobs lined up once I am released" and he could afford a \$100 public-defender fee. The court ordered defendant to pay a \$100 public defender fee in No. 10-CF-175. The court expressly stated defendant was entitled to \$495 preincarceration credit.

¶ 9 The September 2010 written probation order in Nos. 08-CF-308 and 10-CF-175 includes a \$100 public-defender fee. The combined written order also includes a \$20 child-advocacy-center fee and a \$20 VCVA fine and specifies a \$495 preincarceration credit (the combined order does not specify in which case the credit is available).

¶ 10 In January 2011, the State charged defendant in case No. 11-CF-13, our case No. 4-11-0525, with two counts retail theft (subsequent offense) (720 ILCS 5/16A-3(a), (f) (West 2010)), both Class 4 felonies (720 ILCS 5/16A-10(2) (West 2010)). In March 2011, the State filed a petition to revoke probation in Nos. 08-CF-308 and 10-CF-175. On April 4, 2011, before Judge Jennifer Bauknecht, defendant pleaded guilty in No. 11-CF-13 but at sentencing on the same day, Judge Bauknecht decided she needed to recuse herself and the case was transferred to Judge Mark Fellheimer.

¶ 11 On April 22, 2011, Judge Fellheimer held a hearing wherein the trial court vacated the April 4, 2011, plea in No. 11-CF-13 and defendant was permitted to replead. Defendant pleaded guilty to retail theft (subsequent offense) (720 ILCS 5/16A-3(f) (West 2010)) in No. 11-CF-13 and admitted violating the terms of his probation in Nos. 08-CF-308 and 10-CF-175.

According to the factual basis, defendant entered a pawnshop and removed a Blu-Ray movie set and a Nintendo DS video game; after a short time, defendant returned to the pawnshop and sold the movie and video game to the store. After the parties presented evidence, the court continued the sentencing hearing.

¶ 12 On May 11, 2011, the trial court resumed the sentencing hearing. In No. 08-CF-308, the court revoked probation and resentenced defendant to six years' imprisonment. In No. 08-CF-308 the court stated: "The defendant is sentenced to his original fines and costs. \*\*\* Original fines and costs to be due within 12 months of his release." In No. 10-CF-175, the court revoked probation and resentenced defendant to three years' imprisonment. In summary, the court stated in Nos. 08-CF-308 and 10-CF-175 defendant was ordered to pay "original fine[s] and costs." In No. 11-CF-13, the court merged the two counts for retail theft (subsequent offense), sentenced defendant to three years' imprisonment, and imposed a \$20 VCVA fine and \$20 child-advocacy-center fine. The court ordered all prison sentences to run concurrently.

¶ 13 The written May 2011 sentencing judgments reflect the following: In No. 08-CF-308, the trial court granted sentence credit from November 25, 2008, to January 20, 2009; August 24, 2009, to September 26, 2009; and June 24, 2010, to September 30, 2010, a total of 190 days. In No. 10-CF-175, the court granted sentence credit from June 24, 2010, to September 30, 2010, a total of 99 days. In No. 11-CF-13, the court granted sentence credit from January 18, 2011, to May 11, 2011, a total of 114 days.

¶ 14 We take judicial notice of the Livingston County circuit clerk account summary printout showing: (1) in No. 08-CF-308 a (a) \$20 VCVA fine, and (b) \$200 public defender fee; (2) in No. 10-CF-175 a (a) \$20 VCVA fine, (b) \$20 child-advocacy-center fine, and (c) \$100

public defender fee; and (3) in No. 11-CF-13 a (a) \$20 VCVA fine and (b) \$20 child-advocacy-center fine. The account summary does not indicate a \$5-per-day credit against fines in any of the cases.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues (1) he did not receive his statutory \$5-per-day credit pursuant to section 110-14 of the Procedure Code (725 ILCS 5/110-14(a) (West 2010)) for (a) in No. 10-CF-175 from June 24, 2010, to September 30, 2010, a total of 99 days, and (b) in No. 11-CF-13 from January 18, 2011, to May 11, 2011, a total of 114 days; (2) the trial court improperly imposed a \$20 VCVA fine when it also imposed a \$20 child-advocacy-center fine in Nos. 10-CF-175 and 11-CF-13; and (3) the court failed to conduct an ability to pay hearing pursuant to section 113-3.1 of the Procedure Code before imposing a public-defender reimbursement fee in Nos. 08-CF-308 and 10-CF-175. We address each argument in turn.

¶ 18 A. Defendant's Statutory Credit Claim

¶ 19 Pursuant to section 110-14 of the Procedure Code (725 ILCS 5/110-14(a) (West 2010)), defendant is entitled to a statutory \$5-per-day credit against creditable fines for time spent in presentence custody. "Such credit may only be applied to offset eligible fines, not fees." *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 33, 977 N.E.2d 327, 333. The child-advocacy-center assessment is such a fine. *People v. Folks*, 406 Ill. App. 3d 300, 305, 943 N.E.2d 1128, 1132 (2010). The VCVA assessment is a creditable fine. *People v. Dickey*, 2011 IL App (3d) 100397, ¶ 32, 961 N.E.2d 816, 823. The State concedes defendant is entitled to such credit.

¶ 20 In No. 08-CF-308, defendant does not address his appropriate presentence credit.

However, our review shows in its May 2011 order, the trial court awarded defendant credit for time served from November 25, 2008, to January 20, 2009 (57 days); August 24, 2009, to September 26, 2009 (34 days); and June 24, 2010, to September 30, 2010 (99 days), a total of 190 days. Additionally, the court awarded defendant credit in No. 10-CF-175 for the June 2010 to September 2010 period as well. Defendant cannot receive credit for the same time period in separate cases. In No. 08-CF-308, defendant is entitled to 91 days' credit or \$455 in available credit against fines.

¶ 21 In No. 10-CF-175, defendant is entitled to 99 days' credit or \$495 in available credit against fines.

¶ 22 In No. 11-CF-13, the trial court granted defendant credit for time served from January 18, 2011, to May 11, 2011, a total of 114 days. In No. 11-CF-13, defendant is entitled to \$570 in available credit against fines.

¶ 23 At the May 2011 sentencing hearing, the trial court took the time to properly determine the appropriate sentencing credit. As we noted in *Folks*, "[t]he judicial and clerical time expended on accurate calculation of the precise assessment of these monies, much of which may never be collected, is phenomenal." *Folks*, 406 Ill. App. 3d at 309, 943 N.E.2d at 1135. On remand, we direct the trial court to instruct the circuit clerk to credit defendant's accounts accordingly.

¶ 24 B. Child-Advocacy-Center Fine and VCVA Fine

¶ 25 Defendant asserts the VCVA fine (725 ILCS 240/10(b) (West 2010)) in Nos. 10-CF-175 and 11-CF-13 should be reduced to \$4 because another fine was imposed. The State concedes defendant's VCVA fine should be \$4.

¶ 26 Pursuant to section 10(b) of the VCVA, the VCVA fine is \$4 for each \$40 or fraction thereof of fine imposed. 725 ILCS 240/10(b) (West 2010); *Vlahon*, 2012 IL App (4th) 110229, ¶ 37, 977 N.E.2d at 334. Pursuant to section 10(c) of the VCVA, a \$20 VCVA fine is improper where another fine is imposed. 725 ILCS 240/10(c) (West 2010); see *People v. Jake*, 2011 IL App (4th) 090779, ¶¶ 32, 34, 960 N.E.2d 45, 52 (modifying \$25 VCVA fine to \$4 where other fine was imposed); *People v. Childs*, 407 Ill. App. 3d 1123, 1134, 948 N.E.2d 105, 114 (2011) (modifying \$20 VCVA fine where other fines were imposed).

¶ 27 We note, in No. 08-CF-308, defendant's August 2009 written sentencing judgment reflects the trial court did not order a \$20 child-advocacy-center fine but the September 2010 written resentencing order (combined with No. 10-CF-175) reflects the court imposed a \$20 child-advocacy-center fine. This is inconsistent with the court's oral pronouncement of sentence at the September 2010 sentencing hearing: "In 08-CF-308 it would be the original fines and costs." 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."). At the May 2011 sentencing hearing, the court ordered all "original fines and costs" from No. 08-CF-308 to continue. Defendant's August 2009 original fines did not include the \$20 child-advocacy-center fine. The written judgment in No. 08-CF-308 should be amended to conform with the court's original August 2009 sentence to reflect no child-advocacy-center fine and a \$20 VCVA fine.

¶ 28 In Nos. 10-CF-175 and 11-CF-13, defendant's \$20 VCVA fine should be \$4 because the trial court imposed a \$20 child-advocacy-center fine.

¶ 29 C. Public Defender Fee



¶ 30 Defendant contends the public-defender reimbursement orders in Nos. 08-CF-308 and 10-CF-175 must be vacated because the trial court did not hold an ability-to-pay hearing in compliance with section 113-3.1(a) of the Procedure Code (725 ILCS 5/113-3.1(a) (West 2010)). The State responds because the public-defender fee was a condition of probation and defendant did not appeal either of his earlier orders of probation, this court is without jurisdiction to review the reimbursement orders in an appeal after revocation of probation.

¶ 31 In *People v. Love*, 177 Ill. 2d 550, 563, 687 N.E.2d 32, 38 (1997), the supreme court held that section 113-3.1 of the Procedure Code:

"requires that the trial court conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel.

\*\*\* The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided."

¶ 32 In *People v. Somers*, 2012 IL App (4th) 110180, ¶ 35, 970 N.E.2d 606, 612, this court held it did not have jurisdiction to reconsider a public-defender fee where it was imposed as a condition of probation and the defendant did not directly appeal the original probation order. In *Somers*, this court relied on *People v. Jolliff*, 183 Ill. App. 3d 962, 539 N.E.2d 913 (1989). In *Jolliff*, the defendant asserted the public-defender reimbursement fee was improper because the trial court failed to hold an ability-to-pay hearing. *Jolliff*, 183 Ill. App. 3d at 971, 539 N.E.2d at 919. This court found the defendant waived this issue because he did not appeal the original probation order or raise the issue at the second sentencing hearing. *Id.* In *Somers*, the trial court

stated " 'all financial obligations previously imposed remain in full force [and] effect,' " and this court held the court's order did not expressly reimpose the public-defender fee to take it outside the ambit of *Jolliff. Somers*, 2012 IL App (4th) 110180, ¶ 35, 970 N.E.2d at 612.

¶ 33 Defendant asserts the trial court reimposed the public-defender fee at the May 2011 sentencing hearing in Nos. 08-CF-308 and 10-CF-175. In No. 08-CF-308, the court ordered the "original fines and costs" to be paid within 12 months of defendant's release from prison and stated in summary for Nos. 08-CF-308 and 10-CF-175 "original fine[s] and costs due within a year." It does not appear the court expressly reimposed the public-defender fee in Nos. 08-CF-308 and 10-CF-175. We decline to address defendant's assertion *Somers* was wrongly decided.

¶ 34 In No. 08-CF-308, the \$200 public-defender fee originally imposed in August 2009 is not reviewable on appeal after resentencing upon revocation.

¶ 35 In No. 10-CF-175, the \$100 public-defender fee originally imposed in September 2010 is not reviewable after the May 2011 revocation. Additionally, as the State notes, the trial court at the September 2010 sentencing hearing in No. 10-CF-175 asked defendant whether he would be able to afford a \$100 reimbursement fee. Defendant answered affirmatively.

Defendant does not contend this was an improper *Love* hearing.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we remand with directions for the trial court to (1) instruct the circuit clerk to credit defendant in (a) No. 08-CF-308 with \$455 available sentencing credit (due to the overlap and crediting of 99 days in No. 10-CF-175), (b) No. 10-CF-175 with \$495 available sentencing credit, (c) No. 11-CF-13 with \$570 available sentencing credit, (d) No.

10-CF-175 for the child-advocacy-center fine in full, and (e) No. 11-CF-13 for the child-advocacy-center fine in full, and (2) amend defendant's September 2010 sentencing judgment to reflect in (a) No. 08-CF-308, a \$20 VCVA fine and no child-advocacy-center fine; (b) No. 10-CF-175, a \$4 VCVA fine; and (c) No. 11-CF-13, a \$4 VCVA fine. We remand with directions. We otherwise affirm as modified. As the State has successfully defended a portion of this appeal, we award it its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010); *People v. Walton* 376 Ill. App. 3d 149, 162, 875 N.E.2d 197, 207 (2007).

¶ 38 No. 4-11-0523, Affirmed as modified; cause remanded with directions.

¶ 39 No. 4-11-0524, Affirmed as modified; cause remanded with directions.

¶ 40 No. 4-11-0525, Affirmed as modified; cause remanded with directions.