

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).

2013 IL App (4th) 110640-U

NO. 4-11-0640

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
DARKECE JOHNSON,)	No. 07CF821
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed as modified and remanded with directions, concluding that (1) the defendant's sentence was voidable, not void, and (2) the trial court's sentencing should be amended to reflect \$117 in fines, fees, and costs.

¶ 2 In October 2009, a jury convicted defendant, Darkece Johnson, of armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)), and the trial court later sentenced him to nine years in prison. The court also ordered him to pay \$2,276.83 in restitution to the Aldi Food Store and to pay various fines, fees, and costs totaling \$142.

¶ 3 In June 2011, defendant *pro se* filed a postconviction petition. Later that month, the trial court entered a written order finding that petition to be frivolous and patently without merit because "it fails to state any actionable basis for finding a violation of constitutional rights." The court thereafter dismissed defendant's petition.

¶ 4 Defendant appeals, arguing that the trial court erred by dismissing his postconviction petition because (1) the restitution order was void and (2) the amount of fines, fees, and costs defendant owes should be reduced to \$117, instead of \$142. We disagree with defendant's first argument but agree with his second. Accordingly, we affirm as modified and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 At defendant's October 2009 jury trial, the evidence showed that defendant and an accomplice entered the Aldi store in Bloomington, Illinois, and on July 26, 2007, robbed a clerk at knifepoint of approximately \$2,000. The trial court ordered a presentence investigation report (PSI) prepared for defendant's December 2009 sentencing hearing. The PSI stated the financial loss to Aldi's was \$2,251.83 in cash and a \$25 Aldi gift card. The PSI recommended restitution in the amount of \$2,276.83. Neither the prosecutor nor defense attorney challenged the information in the PSI regarding restitution.

¶ 7 The trial court later sentenced defendant to nine years in prison, ordered him to pay \$2,276.83 in restitution, and also ordered him to pay \$142 in a total amount of fines, fees, and costs. Defendant later filed a motion to reconsider sentence but did not raise any issues concerning restitution. The court denied defendant's motion.

¶ 8 Defendant appealed, arguing only that his sentence was an improper double enhancement. This court affirmed, concluding that defendant had forfeited this claim by not raising it in his written postsentencing motion. *People v. Johnson*, No. 4-10-0232 (May 19, 2011) (unpublished order under Supreme Court Rule 23).

¶ 9 On June 24, 2011, defendant *pro se* filed a postconviction petition. Later that

month, the trial court dismissed the petition on the grounds that it was frivolous and patently without merit.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that the trial court erred by imposing the restitution order and (2) the total amount of fines, fees, and costs he owes should be \$117 instead of \$142. We address defendant's contentions in turn.

¶ 13 A. The Trial Court's Restitution Order Was Not Void

¶ 14 Defendant first argues that the trial court erred by ordering restitution because it failed to (1) consider his ability to pay, (2) determine whether restitution should be paid in a single payment or installments, and (3) fix a period of time in which to pay before entering the order. In response, the State asserts that defendant has forfeited these claims for two reasons.

¶ 15 First, the scope of postconviction proceedings is limited to constitutional matters involved in the underlying conviction which have not been, and could not have been, previously adjudicated. This includes issues actually decided and issues that could have been decided on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 444-48, 831 N.E.2d 604, 615-18 (2005). The State asserts that because the issue of restitution could have been raised on direct appeal but was not, defendant has forfeited this claim.

¶ 16 Second, defendant's claim regarding restitution is forfeited because it was not raised in his postconviction petition. See *People v. Jones*, 213 Ill. 2d 498, 508-09, 821 N.E.2d 1093, 1099 (2004).

¶ 17 Defendant acknowledges the State's assertions and authority but contends that this

court should nonetheless address defendant's claims because the restitution order was entered in violation of the statute and was therefore void, not merely voidable. We agree with the State and reject defendant's argument.

¶ 18 The cases defendant cites in support of his position that the restitution order in this case was void are inapposite because they deal with situations in which the trial court was without authority to impose the sentence at issue. Thus, in *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1204-05 (2004), a case cited by defendant, the supreme court concluded that the trial court did not have the authority to impose an extended-term sentence on the defendant in that case for his conviction of violation of an order of protection. Similarly, the issue in *People v. Mocaby*, 378 Ill. App. 3d 1095, 1102, 882 N.E.2d 1162, 1168-69 (2008), was whether the trial court had the authority to impose the order of restitution it did, not, as in the present case, whether the trial court's order of restitution was procedurally proper. The Fifth District Appellate Court in *Mocaby* held that the restitution order was void because the trial court did not have the authority to order restitution paid to the investigating police agency. That agency was not a "victim" within the meaning of section 5-5-6 of the Unified Code of Corrections (730 ILCS 5/5-5-6 (West 2002)). *Mocaby*, 378 Ill. App. 3d at 1102, 882 N.E.2d at 1168. Likewise, in *People v. Felton*, 385 Ill. App. 3d 802, 806, 896 N.E.2d 910, 913-14 (2008), this court held that the trial court's order imposing restitution was void because it was based upon a dismissed count, thereby exceeding the trial court's authority.

¶ 19 As noted, defendant does not contend the trial court lacked authority to impose a restitution order regarding the money defendant took from the Aldi store during this armed robbery. Instead, defendant claims that the court erred regarding its procedural compliance with

section 5-5-6 of the Unified Code (730 ILCS 5/5-5-6 (West Supp. 2007)) because the court, when entering that restitution order, allegedly failed to consider defendant's ability to pay and to set a realistic payment timetable. Defendant's claims are groundless because the alleged errors in this case, at most, render the court's restitution order voidable, not void. Here, the court certainly possessed the authority to impose a restitution order upon defendant.

¶ 20 In so concluding, we reaffirm what this court wrote in *People v. Davis*, 344 Ill. App. 3d 400, 800 N.E.2d 539 (2003), in which the defendant argued that alleged improprieties in his probation order rendered that order void and thus capable of being reviewed on appeal. We rejected that argument, noting that "the alleged improprieties in the trial court's order of probation and, as a condition thereof, periodic imprisonment, would constitute voidable errors rather than void judgments." *Davis*, 344 Ill. App. 3d at 404-05, 800 N.E.2d at 544. We further noted that "[a] trial court might abuse its discretion by imposing an unreasonable condition of probation, but such an abuse of discretion is not equivalent to the court's exceeding its jurisdiction." *Davis*, 344 Ill. App. 3d at 406, 800 N.E.2d at 545. The same analysis applies to the present case so that, even if we agreed that alleged improprieties were present in the procedure surrounding the trial court's restitution order, that conclusion would render the order voidable and reviewable on direct appeal but not void as exceeding the court's authority.

¶ 21 C. The Total Amount of Fines, Fees, and Costs Owed
by Defendant Should Be Reduced

¶ 22 Last, defendant argues that the total amount of his fines, fees, and costs should be reduced from \$142 to \$117. The State concedes defendant's argument, and we accept the State's concession. Accordingly, we remand this case back to the trial court with directions to correct

the sentencing order accordingly.

¶ 23

III. CONCLUSION

¶ 24

For the reasons stated, we affirm the trial court's judgment as modified and remand with directions. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 25

Affirmed as modified and remanded with directions.