

2014 IL App (2d) 120934-U
No. 2-12-0934
Order filed June 16, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Winnebago County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 08-CF-333 |
| |) | |
| SAMUEL HERBERT THOMAS, |) | Honorable |
| |) | Rosemary Collins, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant's probation fee was improperly calculated due to his failure to serve the full length of his probation; we vacate that fee and impose a fee based on probation served; (2) defendant's \$200 DNA analysis fee, previously imposed on a prior conviction, is vacated; (3) the court services fee, greater than the applicable statute allowed, is vacated and the proper amount imposed; (4) because the circuit clerk was not authorized to impose various fines, and because fines were miscalculated, we vacate the fines that the clerk imposed and remanded for the trial court to impose proper fines; and (5) the trial court correctly omitted certain fines the State wanted imposed since the fines were not applicable.
- ¶ 2 Defendant, Samuel Herbert Thomas, pleaded guilty to aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)) and was sentenced to a 48-month term of probation. His

probation was subsequently revoked. He was re-sentenced to eight years' imprisonment and ordered to pay various fines, fees, and costs. At issue in this appeal is the propriety of: (1) the calculation of the probation fee; (2) a \$200 deoxyribonucleic acid (DNA) analysis fee; (3) the court services fee; (4) various fines the clerk of the court imposed, including a \$10 mental health fee and a \$10 Child Advocacy Center fee; and (5) various fines the court did not impose, including a \$40 criminal surcharge/LEADS fine, a \$100 Trauma Center Fund fine, and a \$5 drug court fine. For the following reasons, we vacate the probation fee and impose a fee based on probation served, vacate the DNA analysis fee, vacate and re-impose a proper court services fee, vacate fines the clerk imposed, and remand for the court to impose proper fines.

¶ 3

I. BACKGROUND

¶ 4 On January 25, 2008, defendant shot Anthony Burgess with a handgun. Defendant was charged with various offenses based on this act. On January 23, 2009, he pleaded guilty to aggravated discharge of a firearm, and the State dismissed the remaining charges. Defendant was sentenced to a 48-month term of probation.

¶ 5 On November 9, 2009, defendant was arrested for possession with intent to deliver cannabis, in violation of the Cannabis Control Act (720 ILCS 550/5(d) (West 2008)) and the State petitioned to revoke defendant's probation. On March 12, 2010, because defendant admitted to willfully violating the terms of his probation, the State dismissed the Cannabis Control Act charges, and the court revoked probation. Defendant was re-sentenced to eight years' imprisonment, with credit for 354 days already served. Further, defendant received a \$5 *per diem* credit against his fines for the 354 days spent in pre-sentencing custody (totaling \$1,770) on the aggravated-discharge-of-a-firearm conviction.

¶ 6 In addition, the court imposed various fines, fees, and costs. The court assessed a \$1,200 probation fee and a \$200 DNA analysis fee. In addition to these fees, the clerk of the court imposed, among others, the following amounts: (1) \$25 for “Court Services”; (2) \$10 for “Mental Health”; (3) \$10 for “Child Advocacy Cent[er]”; (4) \$4 for a “Victims Fund-Fine”; (5) \$20 for a “Victims Fund-No Fin[e]”; (6) \$11 for “Fine-Municipality”; and (7) \$10 for a “Criminal Surcharge.” The court did not impose a Trauma Center Fund fine or a drug court fine. On June 3, 2010, defendant filed a motion to reconsider his eight-year sentence; however, he never challenged any of the fines or fees imposed. This timely appeal followed.

¶ 7

II. ANALYSIS

¶ 8 On appeal, defendant raises five issues. First, defendant argues that, because his probation was revoked after 15 months (January 2009 through March 2010), the probation fee should be reduced from \$1,200 to \$375, representing the probation fee of \$25 per month for 15 months. Second, defendant argues that his \$200 DNA analysis fee should be vacated because his DNA was previously collected, and the fee previously imposed, on a prior conviction. Third, defendant argues that the \$25 court services fee should be reduced to \$15, the maximum amount allowed by ordinance. Fourth, defendant argues that the \$10 mental health fee, the \$10 Child Advocacy Center fee, and the \$11 municipality fine are all fines and, therefore, satisfied due to defendant’s entitlement to *per diem* credit earned from pre-sentencing custody. Fifth, defendant argues that the \$20 Victims Fund fine should be vacated.

¶ 9 The State agrees the \$1,200 probation fee should be reduced to \$375, the \$200 DNA analysis fee should be vacated, the \$25 court services fee should be reduced to \$15, and the mental health and Child Advocacy Center fees are offset by the *per diem* credit earned. The State contends the clerk of the court imposed an \$11 “Municipality” fine which must be vacated,

as there is no explanation in the record for this fine. The State argues that the \$20 Victims Fund fine (as opposed to the \$4 Victims Fund fine) was merely miscalculated and should be \$16. The State claims that the court failed to impose other mandatory fines, such as \$40 for the criminal surcharge/LEADS fine, \$100 for the Trauma Center Fund, and \$5 for the drug court. The State finally argues that the various fines the clerk of the court imposed must be vacated and re-imposed.

¶ 10 A. Forfeiture and Standard of Review

¶ 11 We first note that defendant never raised, before the trial court, any issue related to the imposed fines and fees. Nevertheless, defendant claims certain charges assessed against him were unauthorized and, therefore, void, and he is entitled to credit against various authorized fines. Defendant may challenge an imposed fine or fee for the first time on appeal. *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 8. Additionally, the failure of the trial court to grant *per diem* credit against applicable imposed fines does not preclude a defendant from challenging the issue on appeal, even if it was never raised in the trial court. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997). Since the issues raised concern pure questions of law, our review is *de novo*. *Wynn*, 2013 IL App (2d) 120575, ¶ 8.

¶ 12 B. Probation Fee

¶ 13 The first issue we address is whether the probation fee should be reduced since defendant did not serve his entire term of probation. Defendant argues that, because his probation was revoked after 15 months, he should not have to pay the entire probation fee of \$1,200. The State agrees.

¶ 14 Section 5-6-3(i) of the Unified Code of Corrections (Code) (730 ILCS 5/5-6-3(i) (West 2008)) provides that “a circuit court may not impose a probation fee *** in excess of \$25 per

month” and “the fee shall be imposed only upon an offender who is actively supervised by the probation and court services department.”

¶ 15 Here, the record reflects, and the parties agree, that defendant was actively supervised by the probation department from January 23, 2009, through March 12, 2010, or 15 months, when his probation was revoked. Defendant was assessed a monthly probation fee of \$25. Therefore, the probation fee should be reduced to \$375, 15 months of probation multiplied by the \$25 monthly probation fee. *Wynn*, 2013 IL App (2d) 120575, ¶ 33. Accordingly, we vacate the \$1,200 probation fee, and impose a \$375 probation fee.

¶ 16 C. DNA Analysis Fee

¶ 17 The second issue we consider is whether the DNA analysis fee is improper because defendant’s DNA was previously collected on a prior conviction. Defendant argues that, because he submitted a DNA sample for a previous conviction, it was improper to impose another DNA analysis fee. The State agrees it is improper.

¶ 18 Section 5-4-3(a) of the Code (730 ILCS 5/5-4-3(a) (West 2008)) requires that any person convicted of a felony under Illinois law “shall, regardless of the sentence or disposition imposed, be required to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police.” Section 5-4-3(j) of the Code (730 ILCS 5/5-4-3(j) (West 2008)) further provides that, anyone required “to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping *** shall pay an analysis fee of \$200.”¹

¹ This section was subsequently amended, and the DNA analysis fee was changed to \$250. Pub. Act 97-383 (eff. Jan. 1, 2012) (amending 730 ILCS 5/5-4-3(j) (West 2008)).

¶ 19 The supreme court has held that “a one-time submission into the police DNA database is sufficient to satisfy the purpose of the statute, *** because once an offender’s DNA data is stored in the database, it remains there.” *People v. Marshall*, 242 Ill. 2d 285, 296 (2011). Additionally, since the “analysis fee is intended to cover the costs of the DNA analysis, and only one analysis is necessary per qualifying offender, then[,] by extension[,] only one analysis fee is necessary as well.” *Id.* at 296-97.

¶ 20 The trial court noted that defendant did not have to submit to a DNA analysis if, upon a prior conviction, he previously completed DNA testing. Here, defendant’s DNA was previously collected on December 19, 2002, following a previous conviction. It was improper to again impose the fee. Accordingly, we vacate the DNA analysis fee.

¶ 21 **D. Court Services Fee**

¶ 22 The third issue we consider is whether the \$25 court services fee should be reduced. Defendant argues that, because the maximum amount allowed by Winnebago County ordinance for the court services fee is \$15, the \$25 fee is void. The State agrees.

¶ 23 Section 5-1103 of the Counties Code (55 ILCS 5/5-1103 (West 2008)) states: “A county board may enact by ordinance or resolution a court services fee dedicated to defraying court security expenses incurred by the sheriff in providing court services or for any other court services deemed necessary by the sheriff to provide for court security.” In setting such fee, “the county board may impose *** differential rates for the various types or categories of criminal and civil cases, but the maximum rate shall not exceed \$25.” *Id.*

¶ 24 In Winnebago County criminal cases, the “fee shall be \$15.00 and the fee shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty,

resulting in a judgment of conviction, or order of supervision.” Winnebago County, Ill., Code art. II, div. I, § 34-34(a)(2) (1995).

¶ 25 Here, while the Counties Code allows a maximum fee of \$25 for court services, Winnebago County has authorized a maximum fee of only \$15. The \$25 court services fee assessed by the clerk is void. Accordingly, we vacate the \$25 court services fee and impose a \$15 court services fee.

¶ 26 E. Mental Health and Child Advocacy Center Fees

¶ 27 The fourth issue we consider is whether the mental health and Child Advocacy Center fees are satisfied by defendant’s entitlement to *per diem* credit earned for pre-sentencing custody. Defendant argues that the revised criminal case ledger prepared by the clerk’s office did not reflect the *per diem* credit he earned in custody before sentencing and that credit should be applied to these fees. The State agrees.

¶ 28 Section 5-1101(d-5) of the Counties Code (55 ILCS 5/5-1101(d-5) (West 2008)) allows a “\$10 fee to be paid by the defendant on a judgment of guilty or a grant of supervision *** to finance the county mental health court.” Additionally, section 5-1101(f-5) of the Counties Code (55 ILCS 5/5-1101(f-5) (West 2008)) provides that “the county board may adopt a mandatory fee of between \$5 and \$30 to be paid by the defendant on a judgment of guilty or a grant of supervision” for a Child Advocacy Center. Winnebago County adopted a mandatory Child Advocacy Center fee of \$10 upon “a judgment of guilty or a grant of supervision.” Winnebago County, Ill., Code art. I, § 34-12 (1995) (eff. Feb. 26, 2009).

¶ 29 Our supreme court has concluded that, while labeled a fee, the mental health court assessment is actually a fine. *People v. Graves*, 235 Ill. 2d 244, 255 (2009). Likewise, the Child Advocacy Center fee is also a fine. *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009). The

mental health and Child Advocacy Center fines are mandatory. *Wynn*, 2013 IL App (2d) 120575, ¶ 10; *People v. Evangelista*, 393 Ill. App. 3d 395, 401 (2009). Mandatory fines shall be imposed. *Evangelista*, 393 Ill. App. 3d at 401. However, as fines “shall be assessed by the court,” the clerk here lacked authority to impose the fines. 725 ILCS 240/10(b) (West 2008); *Evangelista*, 393 Ill. App. 3d at 401. Since the fines were imposed by the clerk, we vacate these fines. *Evangelista*, 393 Ill. App. 3d at 401. The State notes that the Child Advocacy Center fine was imposed by the clerk in 2010 after defendant’s probation was revoked; however, the fine should have been imposed by the court on January 23, 2009, after defendant pleaded guilty. Regardless of when the fine was imposed, where the clerk imposes it, the fine must be vacated.

¶ 30 Turning to credit earned, the trial court awarded defendant \$1,770 in *per diem* credit based on his 354 days in pre-sentencing custody, earning \$5 *per diem* credit. Section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)) instructs that any person “incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant.” The mental health and Children Advocacy Center fines “must be fully credited for the time defendant served in custody before sentencing.” *Wynn*, 2013 IL App (2d) 120575, ¶ 18.

¶ 31 Accordingly, we vacate the mental health and Child Advocacy Center fines because the clerk imposed the fines, and, on remand, we direct the trial court, not the clerk, to impose the proper fines as part of the 2010 re-sentencing order. Additionally, defendant can satisfy the mental health and Child Advocacy Center fines with his *per diem* credit.

¶ 32 F. Municipality Fine

¶ 33 The fifth issue we address is the \$11 for “Fine-Municipality” assessment. Defendant did

not oppose this charge, but the State argues that the fine must be vacated, as there is no explanation for this fine anywhere in the record. As it is apparently unauthorized here, we agree with the State and vacate the \$11 “Fine-Municipality” assessment.

¶ 34 G. Violent Crime Victims Assistance Fund

¶ 35 The sixth issue we consider is whether the Violent Crime Victims Assistance Fund charge was calculated correctly. The clerk imposed two separate charges, “Victims Fund-No Fin[e]” for \$20 on January 23, 2009, and “Victims Fund-Fine” for \$4 on March 3, 2010. Defendant argues that the imposition of both a \$4 and \$20 fine was unauthorized under the statute, and the latter fine should be vacated. The Victims Fund charge is a mandatory fine that only the court has authority to impose. *Evangelista*, 393 Ill. App. 3d at 401. Here, since the clerk imposed both Victim Fund fines, the fines must be vacated.

¶ 36 Section 10(b) of the Code of Criminal Procedure of 1963 (725 ILCS 240/10(b) (West 2008)) provides that “there shall be an additional penalty collected from each defendant upon conviction of any felony *** of \$4 for each \$40, or fraction thereof, of fine imposed.” Section 10(c)(2) of the Code (725 ILCS 240/10(c)(2) (West 2008)) further provides that, when no other fine is imposed, the clerk shall collect (*i.e.*, not impose) \$20 for any felony.

¶ 37 Here, the clerk charged defendant twice, once when he pleaded guilty and again when his probation was revoked. The State notes that the \$20 charge on January 23, 2009, was improperly calculated. Defendant was charged \$20, since no other fine was imposed; however, as discussed above, the mental health and Child Advocacy Center fees are actually fines. Since a fine was imposed, the \$20 “Victims Fund-No Fin[e]” charge was improper. Accordingly, we vacate both Victims Fund fines because the clerk lacked authority to impose the fines, and, on remand, we direct the court, not the clerk, to impose and re-calculate the Victims Fund fine

based on the fines imposed. 725 ILCS 240/10(c)(2) (West 2008). The *per diem* credit defendant had earned cannot be applied to the Victims Fund fine. *Id.*

¶ 38 H. Additional Fines

¶ 39 We consider next whether the trial court failed to impose various mandatory fines. The State argues that the trial court failed to impose: (1) \$100 for the Trauma Center Fund; (2) \$40 for the criminal surcharge/LEADS; and (3) \$5 for drug court. We note that the State is seeking relief against defendant without filing a cross-appeal; as such, we decline to grant relief here. However, we evaluate the merits of each fine proposed in turn.

¶ 40 i. Criminal Surcharge/LEADS

¶ 41 The State argues that the trial court should have imposed a criminal surcharge/LEADS (surcharge) fine. Section 5-9-1(c) of the Code (730 ILCS 5/5-9-1(c) (West 2008)) provides that “the additional penalty of \$10 for each \$40, or fraction thereof, of fine imposed, if not otherwise assessed, shall also be added to every fine imposed upon a plea of guilty.” The Violent Crime Victims Assistance Fund fine is excluded from calculations of a surcharge. *People v. Curtis*, 407 Ill. App. 3d 1042, 1052 (2011). The surcharge shall not be offset by any *per diem* credit defendant earned pre-sentencing. 730 ILCS 5/5-9-1(c) (West 2008).

¶ 42 Here, the criminal case ledger reflects that a charge of \$10 for “Criminal Surcharge” was imposed by the clerk, on March 12, 2010. To the extent the State is suggesting a second surcharge should be imposed based upon the Cannabis Control Act charges, that argument fails because those charges were dismissed. Nevertheless, we note that the surcharge was imposed by the clerk, not the court. However, the “amount shall be assessed by the court imposing the fine.” *Id.* The court, not the clerk, must impose the surcharge.

¶ 43 Accordingly, we vacate the \$10 “Criminal Surcharge” imposed by the clerk, and, on remand, we direct the court, not the clerk, to calculate and impose a new surcharge. Further, defendant cannot offset the surcharge with his *per diem* credit. 730 ILCS 5/5-9-1(c) (West 2008).

¶ 44 ii. Trauma Center Fund

¶ 45 The State argues that, in 2009, at the time of the original sentence, the court should have imposed the mandatory Trauma Center Fund fine. Section 5-9-1.1(a)-(b) of the Code (730 ILCS 5/5-9-1.1(a)-(b) (West 2008)) provides that “[w]hen a person has been adjudged guilty of a drug related offense *** defined in the Cannabis Control Act ***, a fine of \$100 shall be levied by the court *** for deposit into the Trauma Center Fund.”

¶ 46 Here, defendant was never found guilty of a drug-related offense. The State dismissed the Cannabis Control Act charges after defendant’s probation was revoked. Thus, the Trauma Center Fund fine is not applicable.

¶ 47 iii. Drug Court Fine

¶ 48 The State argues that the trial court should have imposed a drug court fine. Section 1101(f) of the Counties Code (55 ILCS 5/5-1101(f) (West 2009)) provides that “[i]n each county in which a drug court has been created, the county may adopt a mandatory fee of up to \$5 to be assessed” on a judgment of guilty for a felony. The State does not cite in its reply brief, nor have we found, a Winnebago County ordinance that adopts a drug court fine. The Counties Code allows a county to adopt a mandatory fee; however, it appears that Winnebago County has not adopted such a fee. Thus, a drug court fine is not applicable.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we determine that \$1,770 must be credited against defendant's applicable fines for the time he served in custody before sentencing. We vacate and re-impose the probation and court services fees, vacate the DNA analysis fee and the fines the clerk imposed, and remand this cause for the court to calculate and impose charges in a manner consistent with this decision.

¶ 51 Affirmed in part and vacated in part; cause remanded.