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2014 IL App (3d) 130159-U

Order filed December 2, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0159
ROBERT E. HATTEN,)	Circuit No. 12-CF-263
Defendant-Appellant.)	Honorable Clark E. Erickson, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The defendant's \$15 State Police Operations fee, \$50 court fund fee, and \$10 probation operations fee are offset by his presentence incarceration credit. (2) The defendant's Violent Crime Victims Assistance Fund assessment is reduced to \$8.

¶ 2 The defendant, Robert E. Hatten, was convicted of unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to a term of four years' imprisonment. On appeal, the defendant argues that: (1) he is entitled to a \$5-per-day

credit against his State Police Operations fee, probation operations fee, and court fund fee; and (2) the trial court's imposition of a \$100 Violent Crime Victims Assistance (VCVA) Fund assessment violated *ex post facto* principles. We offset the defendant's fines by his presentence incarceration credit and modify the defendant's VCVA Fund assessment.

¶ 3

FACTS

¶ 4

Defendant was charged with unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2012)) following an incident that occurred on May 25, 2012. The defendant was taken into custody on May 25, 2012, and remained in custody until his sentencing date of March 6, 2013.

¶ 5

Following a bench trial, the court found the defendant guilty of unlawful possession of firearm ammunition by a felon. The trial court sentenced the defendant to four years of incarceration and two years of mandatory supervised release. The trial court also entered a judgment for costs. On March 11, 2013, the trial court entered a signed, written order assessing various fines, fees, and costs against the defendant. This order included a \$50 court fund fee, a \$15 State Police Operations fee, a \$10 probation operations fee, and a \$100 VCVA Fund assessment. Defendant appeals.

¶ 6

ANALYSIS

¶ 7

I. \$5-Per-Day Credit

¶ 8

The defendant argues that he is entitled to apply his presentence \$5-per-day incarceration credit against his State Police Operations fee, probation operations fee, and court fund fee. The State concedes that the defendant is entitled to a credit against his State Police Operations fee and court fund fee, as those assessments have been held to be fines rather than fees. See *People v. Millsap*, 2012 IL App (4th) 110668 (holding that the State Police Operations fee is a fine);

People v. Smith, 2013 IL App (2d) 120691 (holding that the court fund fee is a fine). The State argues that the probation operations fee is a fee rather than a fine and the defendant is not entitled to apply his presentence incarceration credit against it. We review *de novo* the propriety of a trial court's assessment of fines and fees. *Millsap*, 2012 IL App (4th) 110668.

¶ 9 Under section 110-14 of the Code of Criminal Procedure of 1963:

"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. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14(a) (West 2012).

The credit is applicable only to a defendant's fines and not to any other court costs or fees.

People v. Tolliver, 363 Ill. App. 3d 94 (2006). The issue of applying a presentence incarceration credit against a defendant's fine may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435 (1997). The defendant was incarcerated for over nine months prior to his sentencing hearing and accrued a credit of over \$1,000 to be applied against any fines imposed by the trial court.

¶ 10 The State Police Operations fee assessed against the defendant is actually a fine, and the defendant's presentence incarceration credit should be applied against it. See *Millsap*, 2012 IL App (4th) 110668. The court fund fee is also a fine, and the defendant's presentence incarceration credit should be applied against it as well. See *Smith*, 2013 IL App (2d) 120691.

¶ 11 The probation operations fee is also a fine. The probation operations fee is a flat \$10 charge that is assessed against defendants in any felony, traffic, misdemeanor, local ordinance, or conservation case upon a judgment of guilty or grant of court supervision except certain cases

governed by Supreme Court Rule 529. 705 ILCS 105/27.3a (1.1) (West 2012). The probation operations fee does not compensate the State or the county for the costs of prosecuting a particular defendant but rather is a flat amount imposed upon conviction regardless of the amount of probation services, if any, that were actually used by the defendant. Therefore, it is properly classified as a fine. See *Smith*, 2013 IL App (2d) 120691 (holding that an assessment was a fine rather than a fee where the assessment was not tied to the actual expenses involved in prosecuting the defendant); see also *People v. Dalton*, 406 Ill. App. 3d 158, 164 (2010) ("A central characteristic separating a fee from a fine is whether the charge seeks to compensate the State for costs incurred as the result of prosecution of the defendant.").

¶ 12 In support of its position that the probation operations fee is a fee rather than a fine, the State points to the fact that the circuit clerk is permitted to assess it under section 27.3a(1.1) of the Clerks of Courts Act. 705 ILCS 105/27.3a(1.1) (West 2012). Because the imposition of a fine is a judicial act, circuit clerks are not permitted to impose fines but may only assess fees and costs. See *People v. Isaacson*, 409 Ill. App. 3d 1079 (2011). However, the Illinois Supreme Court has held that an assessment labeled by the legislature as a fee may actually be a fine; the legislature's label cannot overcome the actual attributes of the charge at issue. *People v. Graves*, 235 Ill. 2d 244 (2009). Despite the statutory language characterizing it as a fee to be assessed by the circuit clerk, the probation operations fee has the attributes of a fine rather than a fee. Therefore, the probation operation fee is actually a fine.

¶ 13 Thus, we apply defendant's presentence incarceration credit against his \$10 probation operations fee as well as the \$15 State Police Operations fee and the \$50 court fund fee.

¶ 14 II. VCVA Fund Fine

¶ 15 The defendant argues that he is entitled to a reduction of his VCVA Fund assessment

because the trial court improperly imposed an unconstitutional *ex post facto* fine when it assessed a \$100 VCVA Fund assessment against the defendant. The State concedes that the defendant is entitled to such a reduction. We review this issue *de novo*. *People v. Davis*, 408 Ill. App. 3d 747 (2011).

¶ 16 Both the United States Constitution and the Illinois Constitution prohibit the enactment of *ex post facto* laws. See U.S. Const., art. I, § 9; Ill. Const. 1970, art. I, § 16. A criminal law violates the prohibition against *ex post facto* laws if a legislative change is retroactively applied to a defendant which " 'alters the definition of criminal conduct or increases the penalty by which a crime is punishable.' " *Hadley v. Montes*, 379 Ill. App. 3d 405, 409 (2008) (quoting *California Department of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995)). "To establish an *ex post facto* violation, a 'plaintiff must show the following: (1) a legislative change; (2) the change imposed a punishment; and (3) the punishment is greater than the punishment that existed at the time the crime was committed.' " *Hadley*, 379 Ill. App. 3d at 409 (quoting *Neville v. Walker*, 376 Ill. App. 3d 1115, 1118-19 (2007)). Fines are subject to the prohibition against *ex post facto* laws. *Dalton*, 406 Ill. App. 3d 158. A sentence imposed in violation of the prohibition against *ex post facto* laws is void and may be challenged at any time. *People v. Carreon*, 2011 IL App (2d) 100391.

¶ 17 At the time of the offense at issue in this case, the VCVA Act imposed a penalty of \$4 for each \$40, or fraction thereof, of other fines imposed. 725 ILCS 240/10(b) (West 2010). Effective July 16, 2012, section 10 was amended by Public Act 97-816, which increased the VCVA penalty to \$100 for any felony conviction. See 725 ILCS 240/10(b)(1) (West 2012). As the updated version of section 10(b) of the VCVA Act was not yet in effect at the time of the defendant's offense, the trial court erred in assessing a \$100 VCVA Fund assessment against the

defendant. We held above that the defendant was assessed other fines in the amount of \$75. Therefore, the defendant's VCVA Fund assessment is modified from \$100 to \$8.

¶ 18

CONCLUSION

¶ 19

The judgment of the circuit court of Kankakee County is affirmed as modified.

¶ 20

Affirmed as modified.