

NOTICE
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2014 IL App (5th) 120508-U

NO. 5-12-0508

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Johnson County.
)	
v.)	No. 12-CM-28
)	
GABRIEL S. SCHULTZ,)	Honorable
)	James R. Williamson,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's jury waiver as valid, but the record before us is confusing as to the fines assessed by the trial court; therefore, the fines must be vacated and the cause remanded for proper assessment of fines and fees.

¶ 2 After a stipulated bench trial in the circuit court of Johnson County, defendant, Gabriel S. Schultz, was convicted of one count of a violation of an order of protection (720 ILCS 5/12-3.4(a)(1)(i) (West 2010)), sentenced to 12 months of conditional discharge, and assessed various fines. The issues raised by defendant in this direct appeal are: (1) whether defendant's jury waiver was valid, and (2) whether the trial court erred in assessing various fines and fees. We affirm in part, vacate in part, and remand with

directions.

¶ 3

BACKGROUND

¶ 4 On April 13, 2012, defendant's wife, Ruth Schultz, obtained an interim order of protection against defendant. The order of protection was extended twice and was in effect until July 23, 2012. On June 11, 2012, defendant was charged by information with two counts of violation of an order of protection after allegedly entering Ruth's home on June 10, 2012, and having direct verbal and physical contact with her.

¶ 5 At defendant's first appearance date, the trial court admonished defendant, *inter alia*, that he had "the right to have a public trial" and that it was his "decision whether to have a bench trial or a jury trial." Thereafter, defendant filed a motion to dismiss on the basis that the interim order of protection had been improperly extended. The trial court denied the motion to dismiss on September 5, 2012, and on that same date arraigned defendant because the State filed an amended information. Defense counsel asked the court to enter a not guilty plea, to which the trial court replied: "Not guilty plea, all right. We'll put him down for a jury, you want a jury trial?" Defense counsel replied, "Yes." The trial court then set the case for jury trial on November 20, 2012.

¶ 6 A transcript of proceedings dated November 7, 2012, specifically states that it is "for the purpose of Stipulated Bench Trial." The trial court began the proceedings by explaining: "It says here, November 2, by agreement of both attorneys the case was set for today for a stipulated bench trial." When the trial court asked if they were ready to proceed, the assistant State's Attorney, defense counsel, and defendant all replied that

they were ready, with defendant stating, "Yes, sir." The trial court then noted, "Waiver of jury trial given to me by Defendant." On that same day, a written waiver of jury trial was entered.

¶ 7 The waiver of jury trial states as follows:

"I understand that I am charged with committing a criminal offense. The nature of the offense(s) and the possible penalties have been explained to me and I have received a copy of the charge(s). I have been advised of my right to a trial by jury. I understand that I have a right to prompt and public jury trial. I further certify that I have been fully advised by the [c]ourt of all my rights in regard to this matter, I understand same, and I hereby waive my right to a trial by jury."

Defendant signed and dated the waiver, and checked a box which stated, "I am represented by an attorney and have had sufficient time to consult with my attorney prior to executing this waiver of jury trial."

¶ 8 The waiver of jury trial also stated:

"I am specifically giving up my right to a jury trial and I hereby elect to be tried by the judge in a bench trial. I further understand that the [c]ourt can sentence me up to the maximum penalty provided for the offense(s) with which I am [c]harged should I be convicted at a bench trial."

The case then proceeded to a stipulated bench trial.

¶ 9 The stipulations entered on November 7, 2012, provided that Ruth Schultz had an interim order of protection against defendant that was extended twice and was in effect

until July 23, 2012. It further provided that on June 20, 2012, defendant entered the residence of Ruth Schultz, which was prohibited by the order of protection. Based upon these stipulations, the trial court found defendant guilty of count I, violation of an order of protection, and dismissed count II.

¶ 10 The trial court sentenced defendant to 12 months' conditional discharge and assessed a \$200 domestic violence fine and a \$10 domestic battery fine, plus costs. The record before us is not clear as to whether additional fines or fees were assessed. Defendant filed a timely notice of appeal.

¶ 11 ISSUES

¶ 12 I. VALIDITY OF JURY WAIVER

¶ 13 The first issue raised on appeal is whether defendant's jury waiver was valid. Defendant argues the jury waiver was invalid because the trial court accepted the written waiver without ensuring that he knowingly, voluntarily, and intelligently waived his right to a jury trial. The State replies that defendant's jury waiver was valid because defense counsel specifically requested a stipulated bench trial and defendant entered a signed jury waiver in open court. We agree with the State.

¶ 14 It is generally accepted that in order to be valid, a jury waiver must be both understandingly and knowingly made. *People v. Frey*, 103 Ill. 2d 327, 332, 469 N.E.2d 195, 197 (1984). Section 103-6 of the Code of Criminal Procedure of 1963 (Code) specifically provides that "[e]very person accused of an offense shall have the right to a trial by jury unless [it is] understandingly waived by defendant in open court." 725 ILCS

5/103-6 (West 2010). "Whether a jury waiver is valid cannot be determined by application of a precise formula, but rather turns on the particular facts and circumstances of each case." *People v. Bracey*, 213 Ill. 2d 265, 269, 821 N.E.2d 253, 256 (2004).

¶ 15 Section 115-1 of the Code provides that "[a]ll prosecutions *** shall be tried by the court and a jury unless the defendant waives a jury trial in writing." 725 ILCS 5/115-1 (West 2010). Thus, a written waiver is the recommended means by which a defendant's intent may established, but it is not always dispositive. *Bracey*, 213 Ill. 2d at 269-70, 821 N.E.2d at 256. Nor is the lack of a written waiver fatal, if it can be ascertained from the record that defendant understandingly waived his right to a jury trial. *Bracey*, 213 Ill. 2d at 270, 821 N.E.2d at 256. In general, a jury waiver will be found valid if it is presented by defense counsel in the defendant's presence in open court, without any objection by the defendant. *Bracey*, 213 Ill. 2d at 270, 821 N.E.2d at 256; *Frey*, 103 Ill. 2d at 332, 469 N.E.2d at 197.

¶ 16 The instant case is similar to *People v. Rincon*, 387 Ill. App. 3d 708, 900 N.E.2d 1192 (2008), in which our colleagues in the Second District found that the defendant knowingly and intelligently waived his right to a jury trial where the defendant remained silent during his attorney's announcement of waiver and also waived his right to a jury trial in writing. The *Rincon* court pointed out that "[d]efendant only selectively cites the record to support his contention that there was error in that there was no discussion of a jury waiver in his presence." *Rincon*, 387 Ill. App. 3d at 718, 900 N.E.2d at 1200-01. Defendant in the instant case has the same type of selective memory.

¶ 17 Here, defendant was represented by counsel, advised of his right to a jury trial, and signed a jury waiver. The record shows that on June 22, 2012, the trial court advised defendant that he had the right to a jury or a bench trial. The cause was set for jury trial on November 20, 2012. However, on November 7, 2012, defendant was present in open court when his counsel advised the trial court that defendant was ready to proceed by way of a stipulated bench trial. Defendant made no objection and when asked by the trial court whether he was ready to proceed, defendant responded, "Yes, sir." The trial court then specifically noted, "Waiver of jury trial given to me by Defendant." A written jury waiver signed by defendant was entered into the record on November 7, 2012, and defendant admits he signed the jury waiver.

¶ 18 Despite the signed jury waiver and defendant's acquiescence in the stipulated bench trial, defendant argues the trial court's admonitions were insufficient to assure a knowing and intelligent waiver. In support of his argument, defendant relies on *People v. Sebag*, 110 Ill. App. 3d 821, 443 N.E.2d 25 (1982), in which a perfunctory interaction between the trial court and defendant was held insufficient to establish a jury waiver. However, our review of *Sebag* shows that it is distinguishable from the instant case because in that case defendant was without benefit of counsel and the only discussion on the record related to the offense of battery even though defendant had also been charged with public indecency. *Sebag*, 110 Ill. App. 3d at 829, 443 N.E.2d at 31.

¶ 19 Here, not only was defendant represented by counsel, but he also signed a detailed jury waiver which was entered into the record on the day of the stipulated bench trial. As the waiver explains, defendant had sufficient time to consult with his attorney prior to

executing the waiver. By signing the waiver, defendant gave up his right to a jury trial and agreed to a bench trial. We also point out that, unlike *Sebag*, defendant was charged with two counts of the same offense. Defendant responded in open court that he was ready to proceed in the stipulated bench trial. Under these circumstances, we find defendant knowingly and understandingly waived his right to a jury trial.

¶ 20

II. FINES

¶ 21 The second issue raised by defendant on appeal is whether the trial court erred in assessing various fines. Defendant contends the trial court only assessed him a \$200 domestic violence and \$10 domestic battery fine and that the circuit clerk improperly assessed a \$15 state police operations fine, \$30 lump sum surcharge, \$12 violent crime fine, and \$10 medical costs fine. Defendant also contends the trial court failed to award him \$5 *per diem* credit for time served. Defendant initially requested that we vacate the fines improperly imposed by the circuit clerk and remand for the proper imposition of fines, including the *per diem* credit to which he is entitled. However, defendant later withdrew this request, asserting instead that the clerk-imposed fines are void because the clerk has no power to impose them and imposing additional amounts on remand from this appeal would result in an increase in his sentence, which is not allowed. Defendant now requests the clerk-imposed fines be removed from his assessment and that he receive a \$20 credit for time spent in custody against his \$200 general fine. Without filing a cross-appeal, the State attempts to raise its own arguments concerning the imposition of fines. The State asserts (1) defendant was fined an additional \$200 fine as part of the stipulated agreement between the parties, (2) the state police operations fine, the medical costs fine,

the lump sum surcharge, and the violent crime fine should be vacated with directions to the trial court to reimpose all four of those fines with recalculations with regard to the lump sum surcharge and the violent crime fine, and (3) two other mandatory fines not imposed should be imposed, specifically the violation of an order of protection fine and the expungement of juvenile records fine. The State admits defendant is entitled to a *per diem* credit of \$5 per day for a total of \$20.

¶ 22 We first address the State's attempt to piggyback an appeal on defendant's appeal. This is not a practice of which we approve, nor one for which we can find any support. Supreme Court Rule 604(a) is specific as to when the State may appeal, and it does not include any language authorizing the State to appeal sentencing orders or the imposition of fines or fees. Ill. S. Ct. R. 604(a) (eff. July 1, 2006). Because Supreme Court Rule 604(a) does not expressly authorize the State to appeal sentencing orders or the imposition of fines or fees in criminal cases, it follows that the State cannot cross-appeal an issue that it cannot appeal directly "since a reviewing court acquires no greater jurisdiction on cross-appeal than it could on appeal." *People v. Farmer*, 165 Ill. 2d 194, 200, 650 N.E.2d 1006, 1009 (1995). However, we again point out that the State did not even attempt to file a cross-appeal, but simply raised additional issues in its brief, which were not raised by the defendant in his direct appeal. Accordingly, this court lacks jurisdiction to address any of the State's arguments regarding the imposition of new fees or the recalculation of mandatory fines which were not imposed at defendant's original sentencing. We want to make it perfectly clear that the State's attempt to piggyback an appeal on defendant's appeal is a practice we will not allow.

¶ 23 However, to say that we are confused by the record before us is somewhat of an understatement. We are well aware of the "morass of legal fines, fees, and costs created by the legislature" and that calculating "these sums is a monumental feat which has commonly been accomplished by the clerk after sentencing, in the clerk's office with the aid of computers." *People v. Folks*, 406 Ill. App. 3d 300, 308, 943 N.E.2d 1128, 1135 (2010). Nevertheless, the record before us is devoid of the actual fines and assessments ordered in the instant case. All that is before us is the trial court's oral and written orders. Defendant attached a printout from the circuit clerk's office to his brief, which we assume reflects the fines and fees allegedly imposed. However, attaching a printout from the Internet without obtaining leave of this court to do so is a practice to be discouraged. See *People v. Hill*, 2014 IL App (3d) 120472, ¶ 21 n.1, 6 N.E.3d 860. Thus, the record before us concerning the fines and fees actually imposed is sparse.

¶ 24 Our review of the record shows the stipulation between the parties was explained by the prosecutor as follows:

"Your Honor, the recommendation is going to be twelve months conditional discharge, two hundred dollar fine, plus costs. Then also, there is also going to be a two hundred domestic violence fine, ten dollar domestic battery fine that are associated with the charge."

Defense counsel stated he had "no objection to the State's recommendation." The trial court then set a pay or appear hearing for June 13, 2012.

¶ 25 The trial court also entered a written order after the stipulation hearing in which it specifically checked a box which indicated defendant is to "Pay \$200 fine plus costs and

surcharges." That order also stated defendant is to "Pay \$200 as non-violence fine; 210 dom vio fine." However, the box before it is not checked in any manner. As previously noted the printout from the Johnson County circuit clerk's office showing additional assessments is not part of the record on appeal, and based upon the record before us, we are unsure whether the trial court imposed one or two \$200 fines.

¶ 26 We are also unsure what other fines, if any, were imposed by the trial court. What is clear, however, is that the imposition of any fine is a judicial act, and the clerk of a court is a nonjudicial member of the court who has no power or authority to impose sentences or levy fines, including mandatory ones. *People v. Chester*, 2014 IL App (4th) 120564, ¶ 32, 5 N.E.3d 227; *People v. Scott*, 152 Ill. App. 3d 868, 873, 505 N.E.2d 42, 46 (1987). We encourage all parties to work together to ensure there is a proper record for us to review.

¶ 27 Our colleagues in the Fourth District recently gave some advice that is appropriate here:

"The circuit clerks may be the entity with the software to apply to this situation, and the circuit clerk may need to input the specific sentence imposed to have the software determine and assess the appropriate fines and fees ***. Complexities continue to arise because the legislature has required the imposition of more and more fines. Variables remain that require human analysis. There is no software to answer every question or make any task automatic. These facts do not change the overarching mandate running throughout the statutory provisions that sentence

must be imposed by the trial judge and this task cannot be delegated to the clerk; these matters must be brought back before the sentencing judge and reviewed and signed by that judge. The trial judge must fulfill that duty with assistance from the prosecution, the defense, and the circuit clerk. We need the above specificity from the parties to fulfill our duties on review." *Chester*, 2014 IL App (4th) 120564, ¶ 35, 5 N.E.3d 227.

With this in mind and due to the confusion of the record before us on appeal, we have no choice but to vacate the fines and fees imposed and remand the cause for proper imposition of such by the trial court.

¶ 28 We point out that a fee compensates the State for the costs incurred due to prosecuting a defendant, whereas a fine does not. *People v. Sulton*, 395 Ill. App. 3d 186, 193, 916 N.E.2d 642, 648 (2009). The trial court's written sentencing order specifically provided that defendant was not only fined, but assessed "costs and surcharges." Thus, we disagree with defendant that if additional mandatory assessments are imposed upon defendant on remand, this would be an impermissible increase in his sentence.

¶ 29 We point out that this court has the authority to reimpose mandatory fines. See *People v. Evangelista*, 393 Ill. App. 3d 395, 401, 912 N.E.2d 1242, 1247 (2009) (reimposing the mandatory Violent Crime Victims Assistance Fund assessment). However, because of the confusion of the record before us and defendant's attempt to improperly supplement the record on appeal, we believe defendant's first request for relief, asking us to remand for the proper imposition of fines, including the *per diem* credit (725 ILCS 5/110-14 (West 2010) (providing for a \$5-per-day credit against fines

for each day of incarceration on a bailable offense)) to which the State agrees he is entitled, is the most appropriate. The trial court should also clarify whether its sentence included one or two \$200 fine(s).

¶ 30 For the foregoing reasons, we affirm in part the judgment of the circuit court of Johnson County, vacate in part, and remand with directions for the trial court to clarify its sentence and to impose the proper fines and fees.

¶ 31 Affirmed in part, vacated in part, and remanded with directions.