2016 IL App (1st) 142843-U

FIFTH DIVISION
AUGUST 12, 2016

No. 1-14-2843

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 12712
	)	
JOHN TRAKSELIS,	)	Honorable
	)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* We vacate defendant's $5 court system fee as it did not apply to his conviction for aggravated driving while under the influence of PCP and his $200 DNA analysis fee as successive.

¶ 2 Defendant John Trakselis appeals the circuit court's order summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant does not claim any error in the circuit court's dismissal order. Instead, he challenges the propriety of two fees the circuit court imposed against him as

part of his sentence for aggravated driving while under the influence: a $5 court system fee (55 ILCS 5/5-1101(a) (West 2010)) and a $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)). We vacate both fees.

¶ 3 On January 12, 2012, following defendant's negotiated guilty plea to aggravated driving while under the influence of PCP, the circuit court sentenced him to three years' imprisonment. The court also imposed various monetary assessments against him. Defendant did not appeal.

¶ 4 On May 1, 2014, defendant filed a *pro se* document in the circuit court titled "Petition to Withdraw Plea of Guilty and Vacate Judgement [*sic*] Due to Ineffective Assistance of Counsel" and referenced the Act. The circuit court treated the document as a motion to withdraw defendant's guilty plea and a postconviction petition.

¶ 5 On July 14, 2014, the court dismissed the motion to withdraw defendant's guilty plea due to a lack of jurisdiction because he untimely filed it more than 30 days after he pled guilty. The court also summarily dismissed his postconviction petition, finding the claims frivolous and patently without merit. This appeal followed.

¶ 6 Defendant first contends, and the State concedes, that the circuit court improperly imposed against him the $5 court system fee. The fee applies to defendants found guilty of violating "the Illinois Vehicle Code other than Section 11-501." 55 ILCS 5/5-1101(a) (West 2010). Defendant, however, was convicted of aggravated driving while under the influence pursuant to section 11-501(a)(4) of the Illinois Vehicle Code (625 ILCS 5/11-501(a)(4) (West 2010)). Therefore, the $5 court system fee did not apply to him.

¶ 7 Defendant next contends, and the State concedes, that the circuit court improperly imposed against him the $200 DNA analysis fee. Although the parties agree that the fee applies only where a defendant is not currently registered in the state DNA database (see *People v. Marshall*, 242 Ill. 2d 285, 303 (2011)), they disagree on why defendant was previously registered in the database.

¶ 8 Defendant highlights an amendment in the DNA analysis fee statute, which became effective on August 22, 2002, providing that:

> "Notwithstanding other provisions of this Section, any person incarcerated in a facility of the Illinois Department of Corrections on or after the effective date of this amendatory Act of the 92nd General Assembly shall be required to submit a specimen of blood, saliva, or tissue prior to his or her release on parole or mandatory supervised release, as a condition of his or her parole or mandatory supervised release." Pub. Act 92-829 (eff. Aug. 22, 2002) (amending 730 ILCS 5/5-4-3(a)(5) (West 2002)).

Defendant argues he has already submitted a DNA specimen because of a prior conviction for possession of a controlled substance (case No. 96 CR 15361) for which he began serving an eight-year prison sentence on May 11, 1999. Defendant bases this argument off of his Illinois Department of Corrections (IDOC) online record that he attached to his brief, and of which we can take judicial notice (*People v. Gipson*, 2015 IL App (1st) 122451, ¶ 66), stating his custody date for that conviction was May 11, 1999.

¶ 9 Defendant asserts that even if he served only 50% of that eight-year sentence, his earliest release would have been May 11, 2003, well after the amendment in the DNA analysis fee

statute requiring individuals to provide a DNA specimen upon their release from IDOC became effective. For support that he has already submitted a DNA specimen and paid the fee, defendant cites to *People v. Leach*, 2011 IL App (1st) 090339. In *Leach*, this court found that, in order for the defendant to prove he had previously submitted a DNA specimen and paid the fee, he only needed to show a previous felony conviction from after January 1, 1998, the effective date of the DNA specimen and fee requirement. *Leach*, 2011 IL App (1st) 090339, ¶ 38. If the defendant can do so, *Leach* found we may presume the requirement was imposed following the previous felony conviction. *Leach*, 2011 IL App (1st) 090339, ¶ 38. Defendant argues that, because the amendment in the DNA analysis fee statute requiring individuals to provide a DNA specimen upon their release from IDOC became effective before his release from prison, we may similarly presume he submitted a DNA specimen upon his release from IDOC and paid the fee. See 730 ILCS 5/5-4-3(j) (West 2002) ("Any person required by subsection (a) to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police for analysis and categorization into genetic marker grouping, in addition to any other disposition, penalty, or fine imposed, shall pay an analysis fee of $200.").

¶ 10 The State meanwhile argues that defendant was convicted of a felony in case No. 11 CR 12712 according to his IDOC online record. Citing to *Leach*, 2011 IL App (1st) 090339, ¶¶ 37-38, the State asserts that because defendant was convicted of a felony after the DNA requirement went into effect on January 1, 1998, this court may presume that the circuit court imposed the DNA specimen requirement, and thus fee, as part of his sentence following that conviction.

¶ 11 The flaw in the State's argument is that the DNA analysis fee imposed as part of defendant's sentence for aggravated driving while under the influence in case No. 11 CR 12712 is the fee being challenged. Nevertheless, we agree with defendant and find that we may presume he already submitted a DNA specimen at the time of his release from prison for possession of a controlled substance which apparently occurred after the effective date of Public Act 92-829 (eff. Aug. 22, 2002). See *Leach*, 2011 IL App (1st) 090339, ¶¶ 37-38. Therefore, the $200 DNA analysis fee imposed in case No. 11 CR 12712 was successive and improperly imposed against defendant.

¶ 12 We note defendant did not challenge the imposition of the fees at sentencing or in a postsentencing motion, which generally results in a party's failure to preserve the claim of error for review. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, citing to *People v. Caballero*, 228 Ill. 2d 79, 88 (2008), defendant argues that he may challenge a monetary assessment at any time and in any proceeding, including for the first time on appeal from the summary dismissal of a postconviction petition.

¶ 13 Arguably, as correcting a fines and fees order does not bring forth a constitutional challenge, we may not consider it in the context of a postconviction proceeding. See 725 ILCS 5/122-1(a)(1) (West 2014) (stating the Act provides a means by which a defendant may challenge his conviction or sentence for violations of his federal or state constitutional rights). As our supreme court explained in *Caballero*, 228 Ill. 2d at 88, a defendant's claim for presentence incarceration credit under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2002)) was statutory in nature and therefore not cognizable under the Act.

Despite this, the court held that the claim may be considered as an " 'application of the defendant' " made under statute and may be raised at any time, including on appeal in a postconviction proceeding. *Caballero*, 228 Ill. 2d at 88. Furthermore, where the basis for granting the application is clear from the record, "the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested." *Caballero*, 228 Ill. 2d at 88.

¶ 14 Therefore, although defendant's claim that his $5 court system fee and a $200 DNA analysis fee should be vacated is not cognizable under the Act, in the interests of an orderly administration of justice, we grant him the requested relief. *Caballero*, 228 Ill. 2d at 88. Accordingly, because the circuit court improperly imposed the two fees against defendant, we vacate them and order the clerk of the circuit court to correct defendant's fines and fees order. See *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 23 (appellate court may vacate improperly imposed assessments and correspondingly order the clerk of the circuit court to correct the defendant's fines and fees order without remand).

¶ 15 For the foregoing reasons, we vacate defendant's $5 court system fee and $200 DNA analysis fee, correct defendant's fines and fees order, and affirm the judgment of the circuit court in all other respects.

¶ 16 Affirmed in part; vacated in part.