2016 IL App (3d) 150123-U

Order filed November 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0123
v.	)	Circuit No. 14-CF-17
	)	
CHARLES C. McGEE, Jr.,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Schmidt concurred in the judgment.
Justice Wright, dissenting.

ORDER

¶ 1 *Held*: Defendant's duplicate DNA analysis fee is vacated and remanded with directions to issue a refund in the amount of the erroneous fee.

¶ 2 Defendant, Charles C. McGee, Jr., argues that his $250 DNA analysis fee must be vacated because his DNA was previously registered in the Illinois State Police (ISP) database. We vacate the DNA fee and remand with directions for the circuit clerk to issue a $250 refund.

¶ 3 FACTS

¶ 4 Defendant was convicted of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2014)). The court sentenced defendant to six years' imprisonment and ordered defendant to submit to and pay for a $250 DNA analysis fee if his DNA had not already been registered in the ISP database. The court applied defendant's bond to the total costs imposed in this case, which included the DNA analysis fee. Defendant filed a notice of appeal from the judgment. On appeal, defendant filed a motion for a summary order. The State did not file an objection to defendant's motion.

¶ 5 ANALYSIS

¶ 6 Defendant argues that the order for his DNA analysis must be vacated and the $250 refunded because he was previously registered in the ISP database. Upon review, we find that defendant was erroneously ordered to submit to and pay for a duplicative DNA analysis . Because our decision is not unanimous and a summary order is not appropriate, we issue this order under Illinois Supreme Court Rule 23(b) (eff. July 1, 2011).

¶ 7 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3(a), (j) (West 2014)) provides, in relevant part, that any person found guilty of a felony offense shall submit a DNA specimen to the ISP and pay a $250 analysis fee. Section 5-4-3 provides for a single DNA analysis and fee. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). When a defendant is already registered in the ISP database due to a prior felony conviction, the trial court is without authority to order a subsequent DNA analysis and fee. *Id*.

¶ 8 Here, defendant's presentence investigation indicates that defendant had several prior felony convictions. We also take judicial notice of an ISP DNA indexing laboratory form that defendant attached to his motion. See *People v. Carter*, 2016 IL App (3d) 140196, ¶ 59 (taking judicial notice of an ISP Division of Forensic Services form that showed defendant's DNA had

been previously submitted). The ISP form states that defendant's DNA was collected in 1992. Therefore, we vacate the order for the DNA analysis and fee as defendant has already submitted a DNA sample. See *Marshall*, 242 Ill. 2d at 303. Because defendant has already paid the DNA analysis fee, he is entitled to a $250 refund. *People v. Scalise*, 2015 IL App (3d) 130720, ¶ 11 (refunding to defendant the bond that was applied to pay various erroneously imposed financial assessments).

¶ 9 CONCLUSION

¶ 10 The trial court's order for a DNA analysis and fee is vacated, and the cause is remanded with directions for the circuit clerk to issue a refund of $250.

¶ 11 Vacated and remanded with directions.

¶ 12 JUSTICE WRIGHT, dissenting.

¶ 13 I respectfully dissent. This matter comes before the court on defendant's motion for summary order, which the State has not opposed. However, in the interest of developing a uniform body of law to be applied consistently in all similar cases, I do not accept the State's apparent concession of error.

¶ 14 Obviously, having reached an agreement that defendant is entitled to a refund of $250, the parties have not briefed the issue regarding a request to refund a successive DNA analysis fee that was not challenged within 30 days of the sentencing order. Hence, my respected colleagues do not have the benefit of a complete recitation of the facts, including a description of the procedural posture of this case.

¶ 15 By way of review, the record reveals that defendant, Charles C. McGee, Jr., was charged by information with committing the offense of unlawful possession of a controlled substance with intent to deliver, a class 1 felony (720 ILCS 570/401(c)(2) (West 2012)) and another

offense unrelated to this appeal. According to the charging instrument, these offenses occurred on December 30, 2013.

¶ 16 On January 13, 2014, defendant was arrested pursuant to an arrest warrant. The next day, defendant was arraigned and released on a $50,000 bond after a third party, Theresa Johnson, posted $5000 on his behalf. On January 22, 2014, defendant executed a bond assignment in favor of private counsel.

¶ 17 During a stipulated bench trial that took place on October 7, 2014, the court received evidence establishing law enforcement seized approximately 4 grams of a substance containing cocaine, other contraband, and approximately $2600 in cash from defendant's residence. These items were seized pursuant to a search warrant. At the conclusion of the bench trial, the court found defendant guilty of unlawful possession with intent to deliver a controlled substance, a class 1 felony (720 ILCS 570/401(c)(2) (West 2012)) and another offense not relevant to this appeal.

¶ 18 The sentencing hearing took place on January 20, 2015. The court sentenced defendant to serve six years in the Department of Corrections and to pay court costs only. The court also ordered $1000 of the $5000 posted as bond should be held by the clerk until all court ordered monies were paid in full. It is undisputed the circuit clerk applied $659 from the $5000 posted as bond to satisfy all court ordered costs. Thereafter, consistent with the trial court's directive, on March 18, 2015, the bond posted in this case was reclassified and submitted to private counsel pursuant to the bond assignment.

¶ 19 I write separately to share my observation that I agree the successive DNA charge was assessed in error. However, I contend the sentencing error is harmless for the reasons set forth below.

¶ 20 I am opposed to granting relief by summary order in this case because this approach allows the parties to avoid addressing two significant issues. First, the State's concession of error does not address whether the prosecution has considered that defendant has grossly underpaid the financial penalties that should have been imposed by the court in this case. For example, the clerk's tally sheet undercharged defendant by failing to include the $100 lab analysis fee. 730 ILCS 5/5-9-1.4(b) (2012). Second, the trial judge failed to impose the following punitive fines required by statute: Drug Street Value Fine (approximately $400 based on the evidence**)**, 730 ILCS 5/5-9-1.1(a) (2012); $25 Drug – CJIA Projects Fund Fine, 730 ILCS 5/5-9-1.1(e) (2012); $20 Prescription Pill and Drug Disposal Fund Fine, 730 ILCS 5/5-9-1.1(f) (2012); $100 Drug Trauma Center Fund Fine, 730 ILCS 5/5-9-1.1(b) (2012); $2000 Drug Assessment Fine, 720 ILCS 550/10.3(a) (2012), 720 ILCS 570/411.2(a) (2012).

¶ 21 The bottom line in my mind is that the prosecution is turning a blind eye to the fact that defendant avoided paying over $2500 in mandated fines and penalties due to multiple sentencing errors that are now forfeited. It seems insignificant to me that defendant may have unnecessarily paid an *unchallenged* $250 DNA analysis fee when it cannot be disputed that he escaped paying at least $2500 in mandated fines required by statute that the sentencing judge overlooked. Ability to pay was not an issue at the time sentence was imposed, since defendant had $5000 available in bond, which was more than sufficient to pay all mandated statutory charges.

¶ 22 I also write separately to emphasize that the multiple miscalculations and errors in the monetary component of this sentence does not give rise to a void sentence that this court has a duty to correct. See *People v. Castleberry*, 2015 IL 116916. Recent case law clearly recognizes that the successive DNA analysis fee, as paid by defendant in this case, does not render the sentence void such that it may be corrected on appeal if not properly preserved below. *People v.*

Buffkin, 2016 IL App (2d) 140792. The parties ignore forfeiture and do not address revestment. For the reasons stated above, I cannot accept the State's concession of error which does not address revestment, nor do I believe the interests of justice require this court to refund $250 in light of the procedural posture of this record.

¶ 23 If defendant timely challenged the duplicate DNA analysis fee *before* the trial court lost jurisdiction to correct its sentence, the court may have discovered other sentencing errors. A timely challenge would have deleted the $250 duplicate DNA analysis fee and could have resulted in the court adding ten times that amount in mandated fines the prosecution should have requested.

¶ 24 Finally, I cannot accept the State's concession of error allowing a refund because it does not appear the State is even aware that defendant no longer has any interest in the funds due to the bond assignment in favor of counsel. Consequently, the appellate defender and appellate prosecutors have expended both time and resources for the benefit of private counsel, who has not claimed the successive $250 DNA analysis fee should be revisited in the first place.

¶ 25 For these reasons, I respectfully dissent.