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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-CM-1491
	)	
RICK FERMAZIN,	)	Honorable
	)	John A. Noverini,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because the evidence did not establish defendant's ability to pay the \$1000 fine that the trial court imposed, the appellate court vacated the fine and remanded the cause for a hearing on defendant's ability to pay, the imposition of an appropriate fine, if any, and the recalculation of defendant's criminal/traffic surcharge in light of any fine imposed and at the rate in the version of the statute applicable to defendant.

¶ 2 Defendant, Rick Fermazin, appeals from his conviction of aggravated assault (720 ILCS 5/12-2(a) (West 2014)). He argues that there was insufficient evidence that he had the ability to pay a \$1000 and that a criminal/traffic surcharge must be reduced. We vacate the fine and surcharge and remand for further proceedings.

¶ 3

### I. BACKGROUND

¶ 4 On April 17, 2014, defendant was charged with aggravated assault in that he pointed a plastic BB gun at a person while stopped at a red light. On May 21, 2014, defendant sought appointment of a public defender and filed a statement of assets and liabilities with the court. He provided his address as an apartment in Yorkville and stated that he had \$2.35 in a savings account, \$30 in a checking account, and \$5 in cash. He was unemployed because of mental health problems and physical disabilities. He received \$1190 each month from social security disability insurance. He owed \$156 per month to a finance company and paid \$900 in rent. He stated that he owned a car. The court appointed a public defender.

¶ 5 In February 2015, defendant was found guilty after a jury trial. Evidence at trial showed that he was driving a BMW at the time of the offense. At sentencing, defendant provided evidence that he took 11 medications and was in counseling. He provided documents indicating that he incurred expenses for the medications. His parents provided a letter mentioning that defendant's apartment in Yorkville was close to needed medical services, discussing his health problems, and expressing concern that he would be unable to obtain proper care in jail. There was no presentence report. The court asked defense counsel if defendant was employed, and counsel responded that he was not because of his medical conditions. Without making any mention of defendant's financial circumstances or ability to pay fines, the court sentenced defendant to 44 days in jail, a \$1000 fine, and 12 months' probation.

¶ 6 Defendant moved to reconsider, arguing that the \$1000 fine was excessive and that he was unable to pay it. At the April 2, 2015, hearing on the motion, defense counsel noted that defendant, who by that time was in a wheelchair, was burdened by costly medical expenses when his only income was from social security disability. The court asked whose car defendant was

driving at the time of the offense. Counsel responded that he did not know. The court then asked what type of car it was, and counsel responded that he believed that it was a BMW. No further information was provided about the car. The court then denied the motion without explanation.

¶ 7 The record indicates that the clerk of the court apportioned the \$1000 fine between \$552 in court costs and \$448 as an agency fine. Defendant was also charged a criminal/traffic surcharge of \$180 at the rate of \$15 for each \$40 of fines imposed, under the version of section 5-9-1(c) of the Unified Code of Corrections that became effective January 1, 2016. 730 ILCS 5/5-9-1(c) (West Supp. 2015). He appeals.

¶ 8 II. ANALYSIS

¶ 9 Defendant first contends that the trial court erred by failing to inquire into his financial capacity to pay the fine and that there was insufficient evidence to show that he had the ability to pay it.

¶ 10 “When a trial court assesses a fine against a defendant, it must determine that the defendant has the financial resources and future ability to pay the fine.” *People v. Morrison*, 111 Ill. App. 3d 997, 998 (1983); see 730 ILCS 5/5-9-1(d)(1) (West 2014). “Such a consideration must necessarily include factors such as income, assets, employment, health, family obligations, and cash bail, if any, posted.” *People v. Johnston*, 160 Ill. App. 3d 536, 543 (1987). The trial court is not required to specially state that the defendant has the ability to pay. *People v. Waters*, 136 Ill. App. 3d 858, 862 (1985). Instead, “[a] determination that a defendant has the ability to pay is implicit in the imposition of a fine where the trial court is aware of facts in the record which would support such a determination.” *Morrison*, 111 Ill. App. 3d at 998. However, when the record shows insufficient facts to support a determination that the defendant had the ability to

pay, courts typically vacate the fine and remand for the limited purpose of conducting a hearing to determine the defendant's ability to pay and, if established, the amount of the fine. See, e.g., *People v. Echols*, 146 Ill. App. 3d 965, 978 (1986); *Waters*, 136 Ill. App. 3d at 862; *Morrison*, 111 Ill. App. 3d at 999.

¶ 11 For example, in *Morrison*, there was insufficient evidence of the defendant's ability to pay a \$350 fine when the defendant was unemployed and there was no information about the amount of the defendant's unemployment insurance benefits, his assets, other sources of income, or his expenses. His wife was employed, but whether she contributed to the household income or how much she contributed was also unknown. *Morrison*, 111 Ill. App. 3d at 999. Likewise, in *Echols*, the evidence was insufficient when the defendant was unemployed, living on a general assistance grant, and it was unknown whether he had any assets or other forms of income. *Echols*, 146 Ill. App. 3d at 977.

¶ 12 Here, at the time of his arrest, defendant had limited resources that barely covered his rent and debt. At the time of the sentence, he was still unemployed, living at an apartment in Yorkville, and had a number of medical expenses that were not included in his statement of assets and liabilities filed when he was seeking appointment of the public defender. Thus, it would appear that defendant did not have the ability to pay the fine. On the motion to reconsider the sentence, the trial court appeared to base its decision solely on the fact that defendant was driving a BMW at the time of his offense, but no evidence was given as to whether defendant owned the vehicle or, if he did, whether he still owned it at the time of sentencing, when he was in a wheelchair and his parents expressed the importance of his being able to live close to medical services. There also was no evidence of the vehicle's condition and value. Thus, without further information about defendant's assets, the evidence was insufficient to show that

he had the ability to pay the fine. Accordingly, we vacate the fine and remand for the limited purpose of conducting a hearing to determine defendant's ability to pay and, if an ability to pay is established, the amount of the fine.

¶ 13 Defendant next contends that the criminal/traffic surcharge must be recalculated. Defendant's surcharge was incorrectly calculated at the rate of \$15 for each \$40 of fines imposed, under the version of section 5-9-1(c) of the Unified Code of Corrections that became effective January 1, 2016. 730 ILCS 5/5-9-1(c) (West Supp. 2015). The State concedes that the fine should be calculated at the rate of \$10 for each \$40 of fines imposed, under the 2014 version of the statute. 730 ILCS 5/5-9-1(c) (West 2014). Given that we are remanding for further proceedings to determine the appropriate amount of the fine, if any, we also vacate the surcharge and direct the court on remand to recalculate it in accordance with the 2014 version of the statute.

¶ 14

### III. CONCLUSION

¶ 15 For the reasons stated, we vacate defendant's fine and criminal/traffic surcharge and remand for a determination of defendant's ability to pay and a recalculation of the surcharge.

¶ 16 Vacated in part and remanded.