2017 IL App (3d) 140603-U

Order filed February 16, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0603 Circuit No. 12-CF-235
TERRY L. BURNETT,	)	
Defendant-Appellant.	)	Honorable Michael E. Brandt, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The DNA analysis fee assessed against defendant is not void. However, defendant is entitled to a $5-*per-diem* credit for the time he spent in presentence incarceration.

¶ 2 Defendant, Terry L. Burnett, appeals from the dismissal of his postconviction petition. Defendant argues that the DNA analysis fee assessed against him is void and that he is entitled to a $5-*per-diem* credit against his eligible fines for the time he spent in presentence incarceration. We affirm, but remand with directions.

¶ 3 FACTS

¶ 4 On April 13, 2012, the State charged defendant by information with burglary (720 ILCS 5/19-1(a) (West 2012)) and retail theft (720 ILCS 5/16-25(a)(1) (West 2012)). Defendant remained in custody from April 13, 2012, until he posted a $750 bond on May 1, 2012 (19 days). Defendant forfeited his bond on June 4, 2012, for failing to appear at a pretrial conference. However, the trial court later entered an order acknowledging that defendant had been in custody in the Peoria County jail on other charges and vacated the bond forfeiture.

¶ 5 Subsequently, on July 19, 2013, defendant pled guilty to burglary in exchange for a six-year sentence to be served concurrently with two unrelated cases. The sentencing order provided for a judgment of costs and all mandatory assessments to be paid out of the bond. In addition, the order required defendant to pay a $200 DNA analysis fee. Defendant received presentence custody credit of 428 days. The order made no mention of the $5-*per-diem* credit. Thereafter, defendant moved to withdraw his guilty plea, which the trial court dismissed as untimely. Defendant did not appeal.

¶ 6 A sheet entitled "Lists of Costs" appears in the record and is dated July 19, 2013 (the day defendant pled guilty). The cost sheet does not bear the signature of the trial judge. Each individual assessment is identified by name, but there are no citations to statutory authorization. The amount assessed against defendant totaled $752. The relevant assessments and corresponding titles included (1) $50 "Court System" fee, (2) $8 "State Police Ops" fee, (3) $5 "Drug Court" fee, and (4) $10 "Prob Ops" fee. Also included in the record is an undated computer printout showing payment history. The computer printout shows that $750 of the $752 in assessments had been paid. Thus, at the time of this appeal, defendant apparently still owed

$2. Neither the cost sheet nor the payment history sheet show that defendant received a $5-*per-diem* credit for the time he spent in presentence custody.

¶ 7 On July 21, 2014, defendant filed a postconviction petition contesting his guilty plea. The petition did not raise any issue with the fines and fees or the $5-*per-diem* credit. The trial court summarily dismissed the petition. On August 7, 2014, defendant filed a notice of appeal from the dismissal of his postconviction petition.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant does not challenge the dismissal of his postconviction petition. Instead, for the first time defendant challenges the DNA analysis fee imposed in the trial court's sentencing order. Defendant asserts he previously submitted to DNA analysis and should not be compelled to pay a successive DNA analysis fee. Defendant concedes that he forfeited the issue by failing to challenge this assessment in the trial court or on appeal. However, relying on the recently abolished void sentence rule, defendant argues the fee is unauthorized by statute and, therefore, void. Thus, defendant contends that he can attack this assessment at any time either directly or collaterally. Because the void sentence rule is no longer the law in Illinois, we reject defendant's argument.

¶ 10 After defendant pled guilty, our supreme court abolished the void sentence rule in *People v. Castleberry*, 2015 IL 116916. Under *Castleberry*, where the sentencing court has jurisdiction, a statutorily unauthorized sentence is merely voidable, and is not subject to collateral attack. *Id.* ¶ 11. Despite this, defendant asserts that he may still rely on the void sentence rule because *Castleberry* does not apply retroactively to his claim. Although the retroactive application of *Castleberry* was unclear at the time the parties submitted their briefs in this case, this court entered a minute order informing the parties: "cause is stayed pending the Supreme Court's

decision in *People v. Price*, No. 118613." On December 30, 2016, the *Price* court determined that the abolition of the void sentence rule in *Castleberry* applied retroactively. *People v. Price*, 2016 IL 118613, ¶ 27. Thus, *Castleberry* applies to the instant case, and defendant cannot rely on the void sentence rule. Consequently, defendant's DNA analysis fee is merely voidable, and defendant may not collaterally attack it. See *People v. Ramones*, 2016 IL App (3d) 140877, ¶ 18.

¶ 11 Next, defendant contends that he is entitled to $5-*per-diem* credit to offset the $50 "Court System" fee, $8 "State Police Ops" fee, $5 "Drug Court" fee, and $10 "Prob Ops" fee. These are considered fines eligible for presentence credit purposes. See *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30 (court systems assessment is a fine); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (State Police Operations Assistance Fund assessment is a fine); *People v. Unander*, 404 Ill. App. 3d 884, 891 (2010) (drug court assessment is a fine); *People v. Rodgers*, 2014 IL App (4th) 121088, ¶ 38 (probation operations assistance assessment is a fine when defendant does not receive probation). While not expressly conceding the matter, the State does not dispute that defendant is entitled to such credit. Upon review, we find that defendant is entitled to receive the $5-*per-diem* credit to offset these eligible fines.

¶ 12 "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." 725 ILCS 5/110-14 (West 2012). An application for monetary credit pursuant to this statute "may be raised at any time and at any stage of court proceedings." *People v. Caballero*, 228 Ill. 2d 79, 88 (2008).

¶ 13 Here, the trial court credited defendant with 428 days spent in presentence custody. However, defendant did not receive the monetary credit to which he is entitled. In an effort to avoid the confusion created by the fact that defendant later came into simultaneous custody on

other charges, defendant only seeks credit for 19 of the 428 days of presentence custody (from the date of the information until he posted bond). The 19 days identified by defendant were exclusively due to his incarceration in this case. The $95 credit to which defendant is entitled for these 19 days will offset the applicable fines.

¶ 14 In finding that defendant is entitled to receive the $5-*per-diem* credit, we reject the State's argument that defendant is not entitled to credit toward the fines he agreed to as part of his guilty plea. "A defendant has the right to first request sentencing credit at any time unless *** he agreed to forego it as part of a plea or other sentencing agreement." *Cf. People v. Williams*, 384 Ill. App. 3d 415, 417 (2008). The record shows that defendant never waived the *per diem* credit as part of the plea agreement. See *People v. Johnson*, 401 Ill. App. 3d 678, 683-84 (2010).

¶ 15 CONCLUSION

¶ 16 For the foregoing reason, we affirm the dismissal of defendant's postconviction petition and the imposition of the $200 DNA analysis fee. We also remand with directions for the clerk of the circuit court of Tazewell County to correct the fines, fees and cost sheet to reflect the $5-*per-diem* credit toward the $50 "Court System" fee, $8 "State Police Ops" fee, $5 "Drug Court" fee, and $10 "Prob Ops" fee.

¶ 17 The judgment of the circuit court of Tazewell County is affirmed and remanded with directions.

¶ 18 Affirmed and remanded with directions.

¶ 19 JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 20 I concur with the majority's conclusion that the DNA analysis fee at issue in this appeal is not void and the imposition of the DNA fee must stand. However, my reasoning differs slightly from the majority's analysis.

¶ 21 Here, it is undisputed defendant paid $750 of the $752 in assessments without objection from posted bond. The bond was applied by the circuit clerk within days of sentencing and could have easily been challenged before the trial court lost jurisdiction. Defendant stood silent.

¶ 22 The $750 bond was sufficient to pay the DNA fee, all fines, and all costs with the exception of the $2 State's Attorney automation fee. The majority fails to recognize that the $5 *per diem* credit is *not* automatic. The credit need not be applied unless there is an "application" from the defendant. 725 ILCS 5/110-14 (West 2012).

¶ 23 The trouble is, this defendant did not make an application to receive the $5 *per diem* credit *before* paying his fines and the DNA fee in full – from bond – without objection. I respectfully submit that in this case the $5 *per diem* credit has been waived by defendant's payment in full without first applying for the *per diem* credit.

¶ 24 In a recent dissent I expressed concerns that the refund approach adopted by this court in *People v. Wade*, 2016 IL App (3d) 150417, created unsound precedent. See *People v. Walker*, 2016 IL App (3d) 140766. As expressed in *Walke*r, a refund approach could generate additional appeals by convicted offenders hoping to obtain refunds years after payments in full. Who can blame them?

¶ 25 Here we go again. This single issue appeal successfully secures a refund for another defendant three years after payment in full. Respectfully, I submit forfeiture by payment in full should not be ignored in this case. Consequently, I would deny defendant the relief he seeks and allow the $2 balance due to stand as unpaid court costs.