2018 IL App (1st) 160918-U
No. 1-16-0918
Order filed June 7, 2018

Fourth Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 15771
	)	
JOSE HERNANDEZ-AVENDANO,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: We order the fines, fees and costs order modified.

¶ 2 Following a bench trial, defendant Jose Hernandez-Avendano was convicted of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2008), recodified as 720 ILCS 5/11-1.40(a)(1) (effective July 1, 2011)), and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2008), recodified as 720 ILCS 5/11-1.60(c)(1)(i) (effective July 1, 2011)), and sentenced to a total of 13 years' imprisonment. On appeal, defendant challenges

various fines and fees imposed by the trial court. For the following reasons, we order the fines, fees and costs order corrected.

¶ 3 Defendant does not challenge the sufficiency of the evidence. Therefore, we recite only those facts necessary to our disposition. Defendant was charged by indictment with predatory criminal sexual assault and two counts of aggravated criminal sexual assault of the victim, A.A., who was under 13 years old. The evidence at trial established that, between 2004 and 2008, defendant babysat A.A. during the week in defendant's home. Starting when A.A. was four years old, defendant initiated sexual contact with A.A. between three and four times a week. The contact concluded when A.A. was eight years old and moved away. The contact included defendant (1) forcing A.A. to take his clothes off and rub defendant's penis on several occasions; (2) attempting to insert his penis into A.A.'s anus and rubbing his penis on A.A.'s anus; and (3) forcing A.A. to put defendant's penis in his mouth and move it around on numerous occasions.

¶ 4 The trial court found defendant guilty of all charges and sentenced him to concurrent terms of 3 years' imprisonment for each count of aggravated criminal sexual abuse to be served consecutively to a 10-year sentence for predatory criminal sexual assault. The court imposed $1,034 in fines, fees, and court costs.

¶ 5 On appeal, defendant contests several fines and fees assessed against him. Defendant acknowledges that he did not challenge his fines, fees and costs order in the trial court. Nevertheless, he argues that the improper imposition of fines and fees is reviewable under plain error. The State agrees that the order should be corrected, concedes that issues relating to presentence incarceration credit may be raised for the first time on appeal, but does not address defendant's contention that fees are reviewable under plain error. Accordingly, the State has

forfeited any argument regarding defendant's forfeiture, and we will consider defendant's claims. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (the rules of waiver and forfeiture apply to the State). We review *de novo* the propriety of court-ordered fines and fees. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 6 The parties agree that defendant was improperly assessed the $100 streetgang fine, the $20 probable cause hearing fee, the $5 electronic citation fee, and the $5 court system fee. We agree. Accordingly, we vacate the $100 streetgang fine because the record contains no evidence that defendant was a streetgang member at the time of the offense. See 730 ILCS 5/5-9-1.19 (West 2016); see, *e.g., People v. Smith*, 2015 IL App (1st) 132176, ¶ 34 (finding that the fine was improperly assessed where there was no evidence that the defendant was a member of a gang at the time he committed the offense). Similarly, we vacate the $20 probable cause hearing fee because defendant was charged by way of indictment, and did not have a preliminary hearing to determine whether probable cause existed. See 55 ILCS 5/4-2002.1(a) (West 2016); *People v. Smith*, 236 Ill. 2d 162, 174 (2010) (Where a probable cause hearing was not held, a defendant cannot be assessed a "preliminary examination" fee). We also vacate the $5 electronic citation fee because defendant was not convicted in "any traffic, misdemeanor, municipal ordinance, or conservation case." See 705 ILCS 105/27.3e (West 2014). Finally, we vacate the $5 court system fine because defendant was not convicted of a violation of the Illinois Vehicle Code or a similar municipal ordinance. See 55 ILCS 5/5-1101(a) (West 2014).

¶ 7 Next, defendant asserts that several assessed fees are actually fines subject to offset by his $5 per day presentence incarceration credit.

¶ 8 The trial court assessed $1034 in fines, fees and costs on defendant. Section 110-14 of the Code of Criminal Procedure of 1963 (the Code) provides that a defendant is entitled to a credit of $5 toward his fines for each day he was incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). The Code specifies that "the credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Our supreme court has instructed that whether an assessment is a fine or a fee depends on its purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Fees reimburse the State "for a cost incurred in the defendant's prosecution." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63 (citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006)). Fines, alternatively, are punitive in nature and "part of the punishment for a conviction." *Id.* The record shows that defendant was entitled to credit for 77 days for presentence custody. Thus, he has $385 in credit available toward his fines.

¶ 9 The parties agree that the $15 State Police operations charge (705 ILCS 105/27.3a(1.5) (West 2016)) is actually a fine that should be offset by defendant's presentence custody credit. We agree the charge is a fine because it does not reimburse the State for expenses incurred in defendant's prosecution. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution"). This offset is not reflected on the fines and fees order, and we order the clerk of the circuit court to correct the order accordingly.

¶ 10 Defendant next asserts that he is entitled to presentence custody credit for the $10 mental health court (55 ILCS 5/5-1101(d-5) (West 2014)), the $5 youth diversion/peer court (55 ILCS 5/5-1101(e) (West 2014)), the $5 drug court (55 ILCS 5/5-1101(f) (West 2016)), the $30

Children's Advocacy Center (55 ILCS 5/5-1101(f-5) (West 2016)), and the $30 juvenile expungement (730 ILCS 5/5-9-1.17 (West 2016)) assessments because they are fines. The State agrees defendant is entitled to credits against these fines, but notes that the fines and fees order already correctly lists these fines as subject to offset by presentence custody credit. It also points out that the order correctly reflects that defendant spent 77 days in presentence incarceration and states "[a]llowable credit toward fine will be calculated." Thus, the State argues, this court need not reduce the amount owed by $80 because the clerk of the circuit court will apply defendant's credit.

¶ 11 The parties are correct that defendant is entitled to credit against these fines. *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 18 (drug court assessment is a fine); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009) (Children's Advocacy Center charge is a fine); *People v. Paige*, 378 Ill. App. 3d 95, 102 (2007) (mental health court and youth diversion/peer court charges are fines); *People v. Glass*, 2017 IL App (1st) 143551, ¶ 22 (listing the juvenile expungement assessment as a fine). However, as the State notes, the fines and fees order already correctly reflects that these fines are subject to offset by defendant's presentence credit, and lists the number of days he spent in presentence custody. Therefore, the application of the presentence credit and the calculation of the total amount owed by defendant is a simple ministerial act and, absent evidence to the contrary, we presume that the clerk of the circuit court will fulfill its duty to follow the order of the circuit court.

¶ 12 Defendant next asserts that his presentence incarceration credit should apply to the $190 felony complaint clerk charge (705 ILCS 105/27.2a(w)(1)(A) (West 2016)), the $15 clerk automation charge (705 ILCS 105/27.3a(1) (West 2016)), the $25 court services (sheriff)

assessment (55 ILCS 5/5-1103 (West 2016)), and the $15 document storage charge (705 ILCS 105/27.3c(a) (West 2016)). We previously determined these assessments were fees because they are "compensatory and a collateral consequence of conviction." *People v. Tolliver,* 363 Ill. App. 3d 94, 97 (2006). Defendant acknowledges this court's determinations in *Tolliver*, but argues that case was wrongly decided because it is contrary to our supreme court's decision in *Graves*. However, we rejected this argument in *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81. In *Brown*, we explained that *Tolliver* is consistent with *Graves* because the analysis followed the *Graves* framework to determine whether a charge is a fee or fine. *Brown*, 2017 IL App (1st) 142877, ¶ 81. Having previously considered these challenges in *Tolliver* and *Brown*, we conclude defendant's presentence custody credit does not apply to the felony complaint clerk, document storage, court services (sheriff), and clerk automation fees.

¶ 13 Finally, defendant contends that the $2 public defender records automation charge (55 ILCS 5/3-4012 (West 2014)), and the $2 State's Attorney's records automation charge (55 ILCS 5/4-2002.1(c) (West 2014)) are fines subject to offset by his presentence custody credit because they are not intended to reimburse the State's Attorney's office and public defender's office for costs associated with prosecuting and defending defendant. We previously determined that these assessments are fees, to which a defendant's presentence credit does not apply. *Brown*, 2017 IL App (1st) 142877, ¶¶ 76, 78. Although we recognize that in *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56, a panel of this court determined these assessments are fines, we follow *Brown* and the cases cited therein and find that the State's Attorney and public defender records automation charges are fees. Accordingly, defendant may not offset those charges with his presentence credit.

¶ 14 In sum, we vacate the $100 streetgang fine, and the $20 probable cause hearing, $5 electronic citation, and $5 court system fees, for a new total assessment of $904 ($1034 total minus $130). The $15 State Police operations, $30 juvenile expungement, $10 mental health court, the $5 youth diversion/peer court, the $5 drug court, and the $30 Children's Advocacy Center assessments are creditable fines that should be offset by defendant's presentence custody credit, a total of $95. Accordingly, the total fines, fees and costs due from defendant is $809 ($904 less $95 presentence custody credit). We order the clerk of the circuit court to modify the fines, fees and costs order accordingly. The judgment of the circuit court is affirmed in all other respects.

¶ 15 Affirmed; fines, fees, and costs order modified.