

2018 IL App (1st) 162406-U

No. 1-16-2406

Order filed on December 18, 2018.

Second 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. 14 CR 21160
)	
JOSEPH MELANCON,)	The Honorable
)	Raymond Myles,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.

Justice Pucinski concurred in the judgment.

Justice Hyman concurred in part and dissented in part.

ORDER

¶ 1 *Held:* Defendant's order assessing fines, fees and costs is modified to reflect the proper assessments and amount due.

¶ 2 Following a bench trial, defendant Joseph Melancon was found guilty of one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2014)) and sentenced to two years' imprisonment. On appeal, defendant contends that the order assessing fines, fees and costs should be corrected to vacate an improperly assessed fee and apply his presentence custody

credit to several assessed fees that were actually fines. We affirm and correct the fines, fees, and costs order.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with one count of possession of a controlled substance (heroin) with intent to deliver (720 ILCS 570/401(c)(1) (West 2014)), stemming from an arrest that occurred on November 3, 2014 on the 4200 block of west Madison Street.

¶ 5 The facts adduced at trial show that on November 3, 2014, Chicago police officers Matthew Gallagher, Kevin Clarke and Officer Beckman¹ were working in an undercover capacity in the 11th District. Gallagher was the driver of an unmarked police vehicle with Officer Clarke in the front passenger seat and Beckman in the rear seat. Although it was November and the temperatures were cool, the officers had the windows of the vehicle opened to hear for “shots fired” in the neighborhood.

¶ 6 As Gallagher drove westbound on Madison, he observed a woman walking westbound toward defendant, who was standing on the sidewalk in front of 4234 W. Madison. As the woman neared defendant, he shouted “blows, blows.” Based on his experience, Gallagher knew this expression as street terminology for heroin. Gallagher pulled the vehicle over and he, Clarke and Beckman exited and announced their office. The woman began walking eastbound on Madison while defendant started walking westbound. Defendant was placed under arrest for “soliciting unlawful business.” Officer Clarke searched defendant and in his front left pocket of his jeans found five clear and blue Ziploc plastic baggies with a red “Superman” logo stamped on each of the bags. Each bag contained a white powder that the officers believed to be heroin.

¹Police Officer Beckman’s first name was not provided.

The officers did not observe defendant exchange words with the woman that was approaching him nor did they see defendant exchange any objects for money.

¶ 7 Defendant was transported to the 11th police district for processing. Officer Beckman performed a custodial search of defendant and recovered \$66 from defendant's right front pant pocket. Beckman inventoried the five Ziploc plastic bags containing the heroin and the \$66 recovered from defendant.

¶ 8 The parties stipulated that the five inventoried plastic bags were tested by Rosa Lopez, a forensic scientist employed by the Illinois State Police Crime Laboratory, and the contents tested positive for 1.1 grams of heroin.

¶ 9 The court found defendant guilty of possession of a controlled substance, noting that the State did not prove the element of intent to deliver. Defendant was sentenced to two years' imprisonment, given credit for 632 days in custody, and assessed a total of \$1,059 in fines and fees.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant solely contends that his fines, fees, and costs order must be amended. Defendant argues that one assessment must be vacated because it was erroneously assessed. In addition, defendant argues he is entitled to apply presentence monetary credit against several assessments that were labeled as fees but are actually fines. Defendant requests that the total fines and fees he owes be reduced by \$314.

¶ 12 In setting forth this argument, defendant acknowledges that he did not preserve these issues for appeal because he did not challenge the assessments in the trial court. See *People v.*

Hillier, 237 Ill. 2d 539, 544 (2010). Nevertheless, he urges this court to review his assessments under the plain error doctrine.

¶ 13 The State acknowledges the forfeiture, but asserts that the *per diem* monetary credit is a statutorily mandated benefit that cannot be waived. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). The State further asserts that defendant's claims may be considered under the plain error doctrine (*People v. Lewis*, 234 Ill. 2d 32, 48 (2009)) or as a claim of ineffective assistance of counsel (*People v. Seidlinski*, 279 Ill. App. 3d 1003, 1005-07 (1996)).

¶ 14 However, defendant's request for the *per diem* monetary credit is not merely requesting credit that is due against his fines but, rather, is raising a substantive issue regarding whether the assessments labeled as fees are fines and therefore, is subject to forfeiture. See *People v. Brown*, 2017 IL App (1st) 150203, ¶ 40-41. Defendant's challenges are not reviewable under the plain error doctrine. *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017). Nor can they be reviewed as a claim of ineffective assistance of counsel. *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (failure to object to fines and fees is not an error of constitutional magnitude that will support a claim of ineffectiveness). *Pet for leave to appeal granted*, No. 123052 (Mar, 21, 2018).

¶ 15 That said, the rules of forfeiture and waiver also apply to the State and where the State fails to argue that defendant forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Thus, although the defendant did not properly preserve his challenge to the assessed fines and fees in the trial court, we will review his claims. Our review of the propriety of the court ordered fines and fees is *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 16 First, the parties agree and we concur that the \$5 Electronic Citation fee (705 ILCS 105/27.3e (West 2014)) must be vacated as that fee only applies to traffic, misdemeanor, municipal ordinance and conservation violations, and does not apply to defendant's felony conviction for possession of a controlled substance. (See *People v. Smith*, 2018 IL App (1st) 151402, ¶ 12.) As such, we vacate the \$5 Electronic Citation fee and direct the clerk of the circuit court to amend the fines, fee and costs order accordingly.

¶ 17 Defendant further argues that several of the assessments labeled as fees were actually fines that are subject to offset by his \$5-per-day presentence incarceration credit. A defendant incarcerated on a bailable offense who does not supply bail, and against whom a fine is levied, is allowed a credit of \$5 for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2014). Here, defendant received credit for 632 days in custody prior to sentencing. Therefore, at \$5-per-day, he was entitled to \$3,160 of presentencing credit.

¶ 18 Defendant argues that he is entitled to use this credit to offset the applicable fines assessed against him. See *People v. Jones*, 223 Ill. 2d 569, 599 (2006) (“[T]he credit for presentence incarceration can only reduce fines, not fees.”). “Broadly speaking, a ‘fine’ is a part of the punishment for a conviction, whereas a ‘fee’ or ‘cost’ seeks to recoup expenses incurred by the State.” *Id.* at 582. A “fine” is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill.2d 244, 250 (2009). A “fee” is a charge that seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id.* The legislature’s label for a charge is strong evidence of whether the charge is a fee or a fine, but the most important factor is whether the charge seeks to compensate the State for any cost incurred as a result of prosecuting the defendant. *Id.*

¶ 19 Defendant argues that the \$15 State Police Operations fee (705 ILCS 105/27.3a-1.5 (West 2012)), the \$2 State's Attorney Records Automation fee (55 ILCS 5/4-2002.1(c) (West 2012)), the \$2 Public Defender Records Automation fee (55 ILCS 5/3-4012 (West 2012)), the \$190 Felony Complaint Filing fee (705 ILCS 105/27.2(w)(1)(A) (West 2012)), the \$25 Automation fee (705 ILCS 105/27.3a(1) (West 2012)), the \$25 Document Storage fee (705 ILCS 105/27.3c(a) (West 2012)), and the \$50 Court Systems fee (55 ILCS 5/5-1101(c)(1) (West 2012)) are all fines and therefore, are subject to the \$5-per-day presentence incarceration credit.

¶ 20 The State concedes that the \$15 State Police Operations fee and the \$50 Court System fee are all fines subject to be offset. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (holding the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 37 (defendant may apply his presentence incarceration credit toward the \$50 Court System fee). We agree with the parties that these two charges, totaling \$65, should be offset by defendant's presentence incarceration credit.

¶ 21 As to the remaining assessments, defendant argues that a portion of his presentence custody credit should be applied to the \$2 State's Attorney Records Automation fee and the \$2 Public Defender Records Automation fee because these assessments are fines, not fees, where they do not reimburse the State or the Public Defender's Office for costs incurred in prosecuting and defending a particular defendant. 55 ILCS 5/4-2002.1(c) (West 2012); (55 ILCS 5/3-4012 (West 2012)). However, in addressing both the \$2 Public Defender Records Automation fee and the \$2 State's Attorney records automation fee this court has held: "[T]he bulk of legal authority has concluded that both assessments are fees rather than fines because they are designed to

compensate those organizations for the expenses they incur in updating their automated record-keeping systems while prosecuting and defending criminal defendants.” *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (consolidating cases); see contra *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (finding the assessments are fines, not fees). Accordingly, defendant is not entitled to presentence custody credit toward this assessment.

¶ 22 Defendant maintains that the \$190 Felony Complaint Filing fee (705 ILCS 105/27.2a(w)(1)(A) (West 2012)), the \$25 Automation fee (705 ILCS 105/27.3a(1) (West 2012)), and the \$25 Document Storage fee (705 ILCS 105/27.3c(a) (West 2012)) are all fines subject to presentence incarceration credit. This court has considered challenges to the Felony Complaint Filing fee; Automation fee; and the Document Storage fee and found that they are fees as they “are compensatory and a collateral consequence of defendant’s conviction.” *People v. Smith*, 2018 IL App (1st) 151402, ¶¶ 15, 16. These charges represent part of the costs incurred for prosecuting a defendant and are, therefore, not fines subject to offset by presentence custody credit. See *People v. Graves*, 235 Ill. 2d 244, 250 (2009); *Tolliver*, 363 Ill. App. 3d at 97. It should be noted however that the Illinois Supreme Court is considering whether these assessments should be considered fines or fees. See *People v. Clark*, *pet. for leave to appeal granted*, No. 122495 (Sep. 27, 2017).

¶ 23

CONCLUSION

¶ 24 In sum, the \$5 Electronic Citation fee is vacated; the \$50 Court System fee and the \$15 State Police Operations fee are offset by defendant’s presentence custody credit. Defendant’s amended total amount due should be reduced by \$70 to reflect a new total of \$989. We direct the

clerk of the circuit court to modify the fines, fees and costs order accordingly. We affirm defendant's conviction and sentence in all other respects.

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

¶ 26 JUSTICE HYMAN, concurring in part and dissenting in part:

¶ 27 I concur in the majority's decision to affirm the trial court's judgment and to vacate certain assessments. But, I disagree with the majority's conclusion that the \$2 Public Defender Records Automation assessment and the \$2 State's Attorney Record Automation assessment are fees rather than fines. As we held in *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 50, because the costs associated with developing and maintaining automated record keeping systems for the State's Attorney and Public Defender's offices are not related to the prosecution of a specific defendant, they are fines rather than fees. *Id.* ¶ 56. I continue to follow *Camacho*.