2019 IL App (1st) 163267-U

No. 1-16-3267

Order filed April 29, 2019

First Division

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 11116
	)	
FRANSHAWN WHITTENBURG,	)	Honorable
	)	Marguerite Anne Quinn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: On appeal from a collateral proceeding that did not raise fines and fees claims, we review the claims and correct the fines and fees order.

¶ 2 Pursuant to a 2016 negotiated guilty plea, defendant Franshawn Whittenburg was convicted of criminal damage to property and theft and sentenced to concurrent prison terms of six years with fines and fees. Defendant now appeals from the denial of his 2016 petition for relief from judgment. 735 ILCS 5/2-1401 (West 2016). On appeal, he contends for the first time

that certain of his fees are actually fines for which he should receive credit for his presentencing custody. For the reasons stated below, we correct the fines and fees order and otherwise affirm.

¶ 3 Pursuant to a negotiated plea agreement, defendant pleaded guilty in case 14 CR 11116 to one count of theft (720 ILCS 5/16-1(a)(4) (West 2014)), and in case 14 CR 11117 to one count of criminal damage to property (720 ILCS 5/21-1(a)(1) (West 2014)), in exchange for concurrent prison terms of six years. The circuit court awarded him 763 days' credit for presentencing custody and, in case 14 CR 11116, assessed $439 in fines, fees, and costs against him.[1]

¶ 4 In August 2016, defendant filed his *pro se* section 2-1401 petition raising one claim: that his theft conviction in case 14 CR 11116 was void because the theft charge did not allege a *mens rea* or mental state element. The circuit court denied the petition on September 28, 2016, noting that the indictment indeed alleged a mental state—knowingly—for theft, finding that the theft charges sufficiently apprised defendant of the allegations against him, and noting that an error in the indictment does not render the judgment of conviction void.

¶ 5 On appeal, defendant raises no issues with the denial of his section 2-1401 petition. Instead, he contends for the first time that certain of his fees are actually fines for which he should receive presentence incarceration credit pursuant to section 110-14 of the Code of Criminal Procedure. 725 ILCS 5/110-14(a) (West 2014). The State responds that we lack jurisdiction over these claims as, by not raising them in his petition, defendant has forfeited them. Defendant acknowledges his failure to raise the claims in the trial court but argues his

[1]We note that the fines, fees, and costs order in the record lists both circuit court case numbers 14 CR 11116 and 14 CR 11117. However, in its oral pronouncement, the court imposed the assessments only in the context of 14 CR 11116.

claims for monetary credit cannot be forfeited and also are reviewable under the plain error doctrine and our authority under Illinois Supreme Court Rule 615(a).

¶ 6 We have previously held presentence incarceration credit claims under section 110-14 raised for the first time on appeal are reviewable not only as plain error but under the plain language of section 110-14 itself. *People v. Mullen*, 2018 IL App (1st) 152306, ¶¶ 40-42. As our supreme court found in *People v. Caballero*, 228 Ill. 2d 79 (2008), such claims "may be raised at any time and at any stage of court proceedings, even on appeal in a postconviction petition," as long as the basis for granting the application is "clear and available from the record." *Id*. at 87-88. We have held that this extends to all presentence incarceration credit claims raised for the first time on appeal, with no distinction between whether the claims are merely ministerial corrections or, as here, substantive claims regarding whether certain assessments were improperly treated as fees rather than fines. *Mullen*, 2018 IL App (1st) 152306, ¶¶ 40-42; see contra *People v. Smith*, 2018 IL App (1st) 151402, ¶ 6 (following *People v. Brown*, 2017 IL App (1st) 150203, ¶¶ 39-40 (distinguishing substantive claims from ministerial corrections and finding that the former do not fall under *Caballero*)). Accordingly, defendant's claims are reviewable.

¶ 7 We note that, on February 26, 2019, after this appeal was fully briefed, our Supreme Court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "application of *per diem* credit against fines." Ill. S. Ct. R. 472 (a)(2) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during the pendency of an appeal. *People v. Barr*, 2019 IL

App (1st) 163035, ¶¶ 5-6 (citing Ill. S. Ct. R. 472 (a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472 (c) (eff. Mar. 1, 2019).

¶ 8 Defendant here did not raise his challenges to the fines and fees order in the circuit court and, instead, raises them for the first time on appeal. However, as defendant filed his notice of appeal prior to the effective date of Rule 472 and this court has found the rule applies prospectively, we will address the merits of his claims. *Barr*, 2019 IL App (1st) 163035, ¶¶ 6, 8, 15. Our review is *de novo*. *Id*. ¶ 16.

¶ 9 Defendant's 763 days of presentencing custody entitle him to up to $3815 credit against his fines at the statutory $5 per day. 725 ILCS 5/110-14(a) (West 2014). He seeks credit for three charges that he contends are fines: the $50 court system charge (55 ILCS 5/5-1101(c)(1) (West 2014)), $15 charge for State Police operations (705 ILCS 105/27.3a(1.5) (West 2014)), and $10 charge for probation and court services operations (705 ILCS 105/27.3a(1.1) (West 2014)).[2]

¶ 10 We have held that the court system charge and State Police operations charge are fines subject to credit. *Smith*, 2018 IL App (1st) 151402, ¶ 14. We have held that the probation and court services operations charge is a fee where the probation office prepared a presentencing investigation report (PSI) for the defendant's case. *Mullen*, 2018 IL App (1st) 152306, ¶¶ 53-56; see contra *People v. Carter*, 2016 IL App (3d) 140196, ¶¶ 56-57. The adult probation department

[2]Defendant initially sought credit for five additional charges: $190 for filing a complaint with the circuit court clerk (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), $25 each for the clerk for automation and document storage (705 ILCS 105/27.3a(1), 27.3c(a)(c) (West 2014)), and $2 each for records automation for the Public Defender and State's Attorney (55 ILCS 5/3-4012, 4-2002.1(c) (West 2014)). Our supreme court held in *People v. Clark*, 2018 IL 122495, ¶ 51, that all these charges are fees not subject to credit. In light of *Clark*, defendant has in his reply brief withdrawn his contention that these charges are fines.

of the circuit court prepared a PSI in defendant's case—two, in fact—and thus the probation and court services operations charge is a fee here and not subject to credit.

¶ 11 Accordingly, we direct the clerk of the circuit court to correct the fines and fees order to reflect credit for the $50 court system fine and $15 State Police operations fine. The judgment of the circuit court is affirmed in all other respects.

¶ 12 Affirmed, order corrected.