No. 123052

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS<br><br>Plaintiff-Appellee,<br><br>v.<br><br>AARON RIOS-SALAZAR,<br><br>Defendant-Appellant. | ) | Appeal from the Appellate Court of Illinois, Third Judicial District No. 3-15-0524.<br><br>There on Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, No. 10-CF-2114.<br><br>The Honorable Carla Alessio-Policandriotes, Judge Presiding. |

**BRIEF OF PLAINTIFF-APPELLEE**
**PEOPLE OF THE STATE OF ILLINOIS**

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

NICHOLAS MOELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5643
eserve.criminalappeals@atg.state.il.us
nmoeller@atg.state.il.us

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

**ORAL ARGUMENT REQUESTED**

E-FILED
8/21/2018 9:14 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Defendant pleaded guilty to predatory criminal sexual assault of a child and the Circuit Court of Will County sentenced him to twenty-four years of imprisonment and various fines and fees. C66, C122-25.[1]

Defendant appealed, arguing that his trial counsel was ineffective for not objecting to two of the assessments, and the Illinois Appellate Court, Third District, affirmed. *People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶¶ 6-9. Defendant now appeals the judgment of the appellate court. No issue is raised on the pleadings.

## ISSUE PRESENTED

Whether counsel's decision not to object to defendant's $100 Violent Crime Victim Assistance fine and $25 judicial facilities fee constituted ineffective assistance.

## JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b)(2). On March 21, 2018, this Court granted defendant's petition for leave to appeal. *People v. Rios-Salazar*, No. 123052 (Mar. 21, 2018).

## STATEMENT OF FACTS

In 2010, defendant was charged in a seven-count indictment for sex offenses he committed against his eight-year-old step-granddaughter, A.R.

---

[1] Citations to the common law record appear as "C__"; to the reports of proceedings as "R __"; and to defendant's brief and appendix as "Def. Br. __" and "A__," respectively.

C11-17. In March 2015, defendant pleaded guilty to count one (charging predatory criminal sexual assault of a child) in exchange for the State's agreement to dismiss the remaining charges. C11, 59; R74-92. There was no agreement as to sentencing. R91. Following a hearing, the Circuit Court of Will County sentenced defendant to twenty-four years of imprisonment and ordered that he pay "costs of prosecution." C66; R145-48.

The court subsequently signed a "Criminal Cost Sheet" assessing numerous costs and fees, including a Violent Crime Victim Assistance (VCVA) fine, pursuant to section 10(b)(1) of the Code of Criminal Procedure (725 ILCS 240/10(b)(1)). C123. Relying on the amount listed on the form order, the court incorrectly assessed a $100 VCVA fine, rather than the $68 amount mandated by the statutory language in effect in 2010, when defendant committed his crime. *Compare* 725 ILCS 240/10(b)(1) (2015) ($100 VCVA fine) *with* 725 ILCS 240/10(b) (2010) (VCVA fine is "$4 for each $40, or fraction thereof, of fine imposed").[2]

The court also assessed a $25 "ct house fee" without a statutory citation. C122. It is clear from the record[3] that the assessment was made pursuant to section 5-1101.3 of the Counties Code (55 ILCS 5/5-1101.3), which permits the county boards of Kane and Will Counties to impose a

---

[2] Defendant was assessed $645 in other fines; $645 divided by $40 equals 16 plus a fraction thereof; 17 multiplied by $4 equals $68.

[3] A computer printout also lists some of the assessments against defendant. *See* C132. It does not include a "ct house" fee, but includes a $25 assessment labelled "JUDICIAL FACILITIE." *Id.*

"judicial facilities fee to be used for the building of new judicial facilities." 55 ILCS 5/5-1101.3. The judicial facilities fee became effective in 2015. Pub. Act 98-1085 (eff. Jan. 1, 2015).

The court assessed $645 in other fines,[4] but did not assess a $170 criminal surcharge required by section 5-9-1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c)). *See* C122-25.

Defendant appealed, arguing that his trial counsel was ineffective for failing to object to the excess VCVA assessment and the judicial facilities fee on *ex post facto* grounds. *Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 6. A divided panel of the Third District held that defense counsel was not ineffective. *See id.* ¶ 9; *see also id.* ¶ 14 (Wright, J., concurring). In the lead opinion, Justice Schmidt reasoned that defendant had failed to establish prejudice because the monetary value of the assessment errors was *de minimis* and did not rise to the level of constitutional error. *Id.* ¶ 8. Concurring in the judgment only, Justice Wright reasoned that defendant

[4] Those fines included: a $50 court system fine under 55 ILCS 5/5-1101(c), *People v. Ackerman*, 2015 IL App (3d) 120585,¶ 30; a $200 sexual assault fine under 730 ILCS 5/5-9-1.7(b)(1), *People v. Anderson*, 402 Ill. App. 3d 186, 193–94 (3d Dist. 2010); a $30 Children's Advocacy Center assessment under 55 ILCS 5/5-1101(f-5), *People v. Jones*, 397 Ill. App. 3d 651, 660 (1st Dist. 2009); a $5 drug court fine under 55 ILCS 5/5-1101(f), *People v. Rexroad*, 2013 IL App (4th) 110981, ¶ 53 (assessment is a fine where the defendant did not participate in drug court); a $10 specialized court fine under 55 ILCS 5/5-1101(d-5), *People v. Folks*, 406 Ill. App. 3d 300, 305-07 (4th Dist. 2010); and $350 of the $500 sex offender assessment under 730 ILCS 5/5-9-1.15(a) (2010), *see People v. Dalton*, 406 Ill. App. 3d 158, 162-64 (2d Dist. 2010) (holding that $350 of the $500 sex offender assessment is a fine).

was not prejudiced because the amount of the challenged assessments was less than the amount of the mandatory criminal surcharge that the circuit court had failed to assess. *Id.* ¶ 16. Justice Lytton dissented, finding that plaintiff had established both deficient performance and prejudice. *Id.* ¶ 24.

**ARGUMENT**

Defendant's ineffective assistance claim fails because he can show neither deficient performance nor prejudice. Although defendant contends that counsel should have challenged the judicial facilities fee and the excess VCVA fine on *ex post facto* grounds, the judicial facilities fee was just that — a fee, not a fine — and thus an *ex post facto* challenge to that assessment would have failed. And any financial detriment resulting from the challenged assessments was outweighed by the circuit court's failure to assess the larger criminal surcharge required by section 5-9-1(c).

The circuit court's $32 VCVA assessment error financially harmed defendant, but the court's failure to impose the mandatory $170 section 5-9-1(c) fine financially benefitted him. An objection to the challenged assessments risked alerting the prosecutor and the court to this larger, beneficial error. Because this Court must presume counsel's competence, and because counsel's decision not to object was a reasonable strategy, defendant cannot show deficient performance.

Similarly, defendant cannot demonstrate *Strickland* prejudice because the unassessed $170 section 5-9-1(c) fine far exceeds the $32 excess VCVA fine (and the $25 judicial facilities fee). In practical effect, defendant's

claimed prejudice is that counsel prevented him from receiving the entire $170 windfall from the circuit court's error. That alleged harm does not establish the unfair prejudice required to prevail on an ineffective assistance claim. Accordingly, this Court should affirm the appellate court's judgment.

## I. The *Ex Post Facto* Claims

Defendant contends that his counsel was ineffective for failing to challenge the excess VCVA fine and judicial facilities fee on *ex post facto* grounds. Defendant is correct that *ex post facto* principles required the court to assess the amount of the VCVA fine in accordance with the statutory formula effective in 2010. But the judicial facilities fee is a compensatory fee, and therefore *ex post facto* principles do not apply to it.

The United States and Illinois Constitutions prohibit *ex post facto* laws. U.S. Const., art. I, § 10; Ill. Const.1970, art. I, § 16. Thus, no criminal law may apply retroactively to disadvantage a defendant. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). A law is disadvantageous if it "increases the punishment for a previously committed offense." *Id.* Fines are pecuniary punishment, but fees are merely compensatory. *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006). Accordingly, *ex post facto* principles prohibit retroactive fines, but not retroactive fees. *People v. Rogers*, 2014 IL App (4th) 121088, ¶¶ 30-31; *People v. Dalton*, 406 Ill. App. 3d 158, 163 (2d Dist. 2010); *People v. Bishop*, 354 Ill. App. 3d 549, 561 (1st Dist. 2004).

The VCVA assessment is a fine. *People v. Jamison*, 229 Ill. 2d 184, 188-93 (2008). The $100 VCVA fine effective in 2012, *see* Pub. Act. 97-816 (eff. July 16, 2012), exceeds the $68 VCVA fine that should have been assessed under the formula in effect at the time of defendant's offense, *see* 725 ILCS 240/10(b) (2010). Thus, imposition of the excess amount ($32) violated *ex post facto* principles. *See Malchow*, 193 Ill. 2d at 418.

By contrast, the judicial facilities fee is not a fine, and its retroactive imposition therefore does not violate *ex post facto* principles. Whether a charge assessed against a defendant is a fee turns on whether its purpose is compensatory. *See Jones*, 223 Ill. 2d at 600 (2006). A charge is a fee if it compensates the State for some cost of defendant's prosecution; otherwise, it is a fine. *Id.* at 581-82.

Determining the legislature's purpose in authorizing a charge against a defendant is a matter of statutory interpretation. *Id.* at 580. The best indication of legislative intent is the plain and ordinary meaning of the statutory language, *id.* at 581, and therefore a charge's characterization as a fee in its authorizing statute is "strong evidence as to how the charge should be characterized," *id.* at 599. Where a statute labels a charge a "fee" but does not otherwise indicate that the charge is intended to recoup a cost of prosecution, the Court considers secondary indications of legislative intent, including the assessment's contingency upon conviction (which may indicate that an ambiguous charge is intended as punishment rather than

compensation) or directions that revenue generated by the charge be deposited into a county fund unrelated to such costs (which may indicate that the ambiguous charge is not intended to compensate the county for a cost of prosecution). *See id.* at 600.

A straightforward application of these principles establishes that the judicial facilities fee is a fee, not a fine. Section 5-1101.3 of the Counties Code (55 ILCS 5/5-1101.3), permits the county boards of Kane and Will Counties to impose a "judicial facilities fee to be used for the building of new judicial facilities." 55 ILCS 5/5-1101.3. The legislature expressly termed the assessment a fee. *Id.* Although the statute does not expressly provide that the charge is intended to recoup a specific cost of prosecution, it is clear from the statute and its legislative history that the fee is intended to compensate the counties for the use of judicial facilities during the prosecution. Assessment is not dependent solely on conviction, because it also applies to civil litigants. 55 ILCS 5/5-1101.3(a)(1). Nor is it assessed in ordinance, traffic, and conservation cases where a party has paid fines in full without an appearance, and thus, without the use of judicial facilities. 55 ILCS 5/5-1101.3(a)(3). And although the statute directs that the funds be deposited into a county fund for new judicial facilities, that fund is related to the costs being compensated: the depreciation of the current judicial facility. This is confirmed by the legislative history, which reveals that the legislature intended to enact "basically a user fee." 98th Ill. Gen. Assemb., House

Proceedings, May 21, 2014, at 87 (Statements of Rep. Walsh). Accordingly, the judicial facilities assessment is a compensatory fee and not subject to *ex post facto* principles.

## II. Defendant Received Effective Assistance of Counsel.

*Strickland v. Washington*, 466 U.S. 668 (1984), governs claims of ineffective assistance of counsel. *People v. Domagala*, 2013 IL 113688, ¶ 36. "To prevail on a claim of ineffective assistance, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Id.* The failure to establish either prong — deficient performance or prejudice — is fatal to an ineffective assistance claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). The ultimate legal question of whether counsel provided constitutionally effective representation is reviewed *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15.

### A. Counsel's Performance Was Not Deficient.

Defendant cannot demonstrate deficient performance because he cannot overcome the presumption that counsel's decision not to object to the excess VCVA fine and the judicial facilities fee was a matter of sound trial strategy.

To establish the first prong of *Strickland*, a defendant must demonstrate that counsel's performance was so deficient "'that counsel was not functioning as the counsel guaranteed … by the Sixth Amendment.'" *Clendenin*, 238 Ill. 2d at 317 (quoting *Strickland*, 466 U.S. at 687). The defendant "must overcome the strong presumption that the challenged action

or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* To do so, a defendant must show that counsel's decisions were so irrational that no reasonably effective defense attorney in similar circumstances would pursue such a strategy. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85; *see also People v. Peterson*, 2017 IL 120331, ¶ 80 (citing *Lewis* favorably). Even if a particular strategy might ultimately prove unsuccessful, or another attorney might have pursued a different strategy, counsel's representation is not necessarily ineffective. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, counsel's strategic choices are "virtually unchallengeable." *Id.*

Decisions regarding whether to object to purported errors are matters of strategy and raise the presumption that counsel acted reasonably. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). Counsel may reasonably decline to make meritorious objections where the error benefits defendant, *see People v. Graham*, 206 Ill. 2d 465, 479 (2003) (counsel's decision not to object to hearsay was reasonable trial strategy where it comported with defense theory); *People v. Pecoraro*, 175 Ill. 2d 294, 326-327 (1997) (decision not to object to irrelevant and prejudicial testimony was reasonable trial strategy where it bolstered defense theory), or where a sustained objection would potentially harm defendant, *see Perry*, 224 Ill. 2d at 343-46 (decision not to object to hearsay was reasonable strategy where the State may have called the declarants and presented further damaging testimony). Similarly,

defense counsel may reasonably decline to object to an error to diffuse the error's importance and avoid drawing further attention to it. *See, e.g.*, *People v. Evans*, 209 Ill. 2d 194, 221 (2004) (decision not to object to other crimes evidence was sound trial strategy to avoid further emphasis on the error); *see also Hardamon v. United States*, 319 F.3d 943, 949 (7th Cir. 2003) ("A competent trial strategy frequently is to mitigate damaging evidence by allowing it to come in without drawing additional attention to it, such as an objection would.").

Although the record is silent on why counsel did not object to the challenged assessments, *Strickland*'s strong presumption requires defendant to show that no possible reasonable trial strategy could have supported defense counsel's actions.[5] *See Darden v. Wainwright*, 477 U.S. 168, 186-87 (1986); *see also Perry*, 224 Ill. 2d at 344-45 (representation not deficient where it was "entirely likely" that counsel declined to object for strategic reasons); *Evans*, 209 Ill. 2d at 221 (representation not deficient where it was "highly possible" that counsel acted for strategic reasons). Here, because the judicial facilities assessment was a fee, counsel did not err in declining to object to it on *ex post facto* grounds. And even if it were a fine, it is "entirely likely" that defense counsel chose not to object to either assessment because

[5] Alternatively, should this Court find the record insufficient to determine counsel's motivations, defendant's claim "might be better suited to collateral proceedings, such as postconviction review, where defendant and the State would have an opportunity to develop a factual record bearing on the issue." *Peterson*, 2017 IL 120331, ¶ 81.

such an objection would have drawn the judge's or the prosecutor's attention to a larger error in defendant's favor. Had defense counsel objected to the excess VCVA fine and the judicial facilities fee, the judge and the prosecutor likely would have reviewed the entirety of the fines and fees order to ensure that there were no further errors. And, in doing so, they would have discovered the mandatory fine that the court had failed to assess.

As noted in Justice Wright's concurrence, the circuit court failed to assess the criminal surcharge required by section 5-9-1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c) (2010)), *see* C122-25, which requires the imposition of "an additional penalty of $10 for each $40, or fraction thereof, of fine imposed" in criminal cases. 730 ILCS 5/5-9-1(c). Given that the circuit court assessed $645 in other fines, the court failed to assess an additional $170 in fines pursuant to section 5-9-1(c).[6] Thus, in attempting to recover a $32 overcharge,[7] defense counsel would have risked alerting the court to the much larger error in defendant's favor: rather than gaining $32 (or even $57), defendant risked a net loss of over one hundred dollars. Any argument that the court might have overlooked the error in his favor is undermined by the fact that the identical argument drew the appellate court's attention to the

---

[6] $645 divided by 40 equals 16 and a "fraction thereof"; 17 multiplied by $10 equals $170.

[7] Defendant argues that the trial court overcharged him $57, Def. Br. 8, but because the judicial facilities assessment is a fee, the only "overcharge" is the $32 difference between the amount charged as the VCVA fee ($100) and the lesser amount that should have been charged under the version of the statute in effect at the time of his offense ($68).

fines and fees order, where it discovered the circuit court's failure to assess the section 5-9-1(c) fine. *See Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 16 (Wright, J., concurring). Thus, it was a reasonable strategy for defense counsel to accept defendant's windfall, rather than risk a higher total assessment by objecting and drawing attention to the erroneous fines and fees order. Counsel's performance was not objectively unreasonable.

**B. Defendant Cannot Demonstrate *Strickland* Prejudice.**

Defendant was not prejudiced by counsel's decision not to object to the assessments because the purported overcharge is significantly less than the mandatory section 5-9-1(c) fine the circuit court failed to assess. Under *Strickland*'s second prong, defendant must show a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Cherry*, 2016 IL 118728, ¶ 24 (quoting *Strickland*, 466 U.S. at 694). *Strickland* prejudice is not merely an outcome-determinative test; "defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). Thus, a *Strickland* claim fails when the claimed prejudice is that counsel failed to obtain an undeserved windfall from the trial court's error. *See Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993) ("To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."); *see also Nix v. Whiteside*, 475 U.S. 157, 175 (1986) ("[I]n

judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'") (quoting *Strickland*, 466 U.S. at 695).

Defendant cannot satisfy *Strickland*'s prejudice prong because the only prejudice he has identified is that counsel's inaction prevented him from receiving a windfall based upon the circuit court's error regarding the unassessed section 5-9-1(c) fine. Because any objection to the judicial facilities fee would have been overruled, defense counsel's inaction with respect to that fee did not prejudice defendant. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) (failure to raise nonmeritorious objection does not prejudice defendant). But even accepting defendant's argument that the facilities fee was a fine and he was overcharged $57, he still should have been assessed the mandatory $170 section 5-9-1(c) fine. In effect, defendant argues that he received only a $113 windfall from the court's failure to assess the section 5-9-1(c) fine, rather than the full $170. Although defendant is arguably worse off under a strict outcome-determinative calculus, he cannot show that his sentencing was rendered fundamentally unfair as required to demonstrate *Strickland* prejudice. *See Richardson*, 189 Ill. 2d at 411.

Even if defendant's diminished windfall could support an ineffective assistance claim, he cannot show that there was a reasonable probability that had counsel objected, he ultimately would have benefited. As discussed, an objection likely would have alerted the judge and the prosecutor to the

unassessed section 5-9-1(c) fine, just as it did the appellate court. *See Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 16 (Wright, J., concurring). Indeed, in all likelihood, an objection would have prompted the court to impose the missing mandatory fine and thereby harmed, rather than benefited, defendant.

That the People could pursue a mandamus action to collect the $170 section 5-9-1(c) fine does not affect the prejudice analysis. *Cf*. Def. Br. 19 (noting that "in the event the court failed to impose mandatory fines, the State could still pursue through *mandamus* the additional mandatory fines that the circuit court neglected."). "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Defendant does not complain that the People have pursued a mandamus action to recover the missing fine — merely that the People could do so. Def. Br. 19-20. And even if the Court were inclined to speculate on the point, it is extremely unlikely that the People would now expend additional government resources years after defendant's conviction to pursue such a small sum. *See People v. Wade*, 2016 IL App (3d) 150417, ¶ 13 ("If the State believes that it is worth the time and money to pursue these fines (less than $150), it must file a petition for writ of *mandamus* seeking an order requiring the trial court to impose the statutorily required fines," but "[i]t seems . . . that the economically rational thing to do is to vacate the fines and move on to the next case.").

## CONCLUSION

This Court should affirm the judgment of the Illinois Appellate Court, Third District.

August 21, 2018

Respectfully Submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

/s/ Nicholas Moeller
NICHOLAS MOELLER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5643
eserve.criminalappeals@atg.state.il.us
nmoeller@atg.state.il.us

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is fifteen pages.

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General

## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 21, 2018 the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was electronically filed with the Clerk of the Supreme Court of Illinois and served upon the following by e-mail:

Dimitri G. Golfis
Office of the State Appellate
Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

Additionally, upon the brief's acceptance by the Court's electronic filing system, the undersigned will mail an original and thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Nicholas Moeller
Nicholas Moeller
Assistant Attorney General