

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).

2012 IL App (4th) 100912-U

Filed 6/18/12

NO. 4-10-0912

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
FARRON K. KELLY,	)	No. 10CF940
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

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JUSTICE McCULLOUGH delivered the judgment of the court.  
Presiding Justice Turner and Justice Appleton concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) Trial court erred in imposing fee for reimbursement of court-appointed counsel without first conducting a hearing to determine defendant's ability to pay.

(2) Clerk of court lacked authority to impose drug-court fee.

¶ 2 On August 17, 2010, defendant, Farron K. Kelly, entered a negotiated plea of guilty to residential burglary and the trial court sentenced him to seven years in prison with credit for 49 days served and ordered him to pay a \$200 deoxyribonucleic acid (DNA) fine and "a Violent Crime Victims Assistance Act fee."

¶ 3 On appeal, defendant argues (1) the trial court erred in ordering him to reimburse the public defender and (2) he is entitled to a \$5 credit per day in presentence custody under section 110-14(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14(a) (West 2008)) against his fines. We affirm in part, vacate in part, and remand for

further proceedings.

¶ 4 On June 3, 2010, the State charged defendant by information with one count of residential burglary (720 ILCS 5/19-3 (West 2008)) and one count of theft (with a prior robbery conviction) ( 720 ILCS 5/16-1(a)(4)(A), (b)(2) (West 2008)). Defendant agreed to plead guilty to residential burglary in exchange for the State's agreement to recommend a sentence of seven years in prison and dismiss the theft charge. On August 17, 2010, defendant pleaded guilty to residential burglary and the trial court sentenced him to seven years in prison with credit for 49 days served and ordered him to pay a \$200 DNA fine and "a Violent Crime Victims Assistance Act fee." Additional fines not ordered by the court were set forth on a form by the circuit clerk, including a \$5 drug-court assessment. Further, the circuit clerk's form set forth a \$20 fine under the Violent Crime Victims Assistance Act.

¶ 5 On September 13, 2010, defendant appeared before the trial court to begin serving his sentence. The court noted defendant had filed "what appears to be possibly a motion to withdraw guilty plea," alleging appointed counsel rendered ineffective assistance. Appointed counsel requested new counsel be appointed to represent defendant and the court appointed new counsel to represent defendant on the "motion." Thereafter, the following exchange occurred.

"[TRIAL COURT]: I'm also going to assess court-appointed counsel. It looks like when he filled out his affidavit on the 3rd of June of 2010, he had marginal employment and was paying some child support. Any change in his status.

[DEFENSE COUNSEL]: Your Honor, he is employed as a bartender locally here at a restaurant. I believe he does have two

minor children to support.

[TRIAL COURT]: I'm going to fix court-appointed counsel fees in the amount of \$500 to be taken out of the cash bond posted. The remaining cash will apply to his monetary obligations, if any remaining cash will be refunded pursuant to the bond orders in the file."

¶ 6 Following a hearing on November 10, 2010, the trial court denied defendant's motion to vacate guilty plea. This appeal followed.

¶ 7 Defendant argues the trial court erred in imposing a fee for reimbursement of his court-appointed counsel without first conducting a hearing to determine his ability to pay. We agree.

¶ 8 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) provides, in part, as follows:

"Whenever \*\*\* the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under [s]ection 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1(a) (West 2008).

Section 113-3.1 requires the trial court to conduct a hearing into a defendant's financial circumstances and find an ability to pay before ordering him to pay reimbursement for his appointed counsel. *People v. Love*, 177 Ill. 2d 550, 555, 687 N.E.2d 32, 35 (1997). "[T]he defendant must (1) have notice that the trial court is considering imposing a payment order under section 113-3.1 of the Code and (2) be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Barbosa*, 365 Ill. App. 3d 297, 301, 849 N.E.2d 152, 154 (2006). " 'Notice' includes informing the defendant of the court's intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard." *People v. Spotts*, 305 Ill. App. 3d at 704, 713 N.E.2d 1191, 1193 (1999). "The focus of the hearing required by section 113-3.1(a) must be on the defendant's ability to pay because reimbursement is properly ordered only where the court finds that the defendant has a reasonably foreseeable ability to pay such reimbursement." *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38. We note the existence of a bond is not conclusive evidence of an ability to pay. See *Love*, 177 Ill. 2d at 560-63, 687 N.E.2d at 37-38. " 'Such a hearing is necessary to assure that an order entered under section 113-3.1 complies with due process.' " *Spotts*, 305 Ill. App. 3d at 704, 713 N.E.2d at 1193. Rules of forfeiture do not apply. *Love*, 177 Ill. 2d at 564, 687 N.E.2d at 39.

¶ 9 In this case, the public defender was appointed to represent defendant on June 3, 2010. In July 2010, a \$1,000 cash bond had been posted. On August 17, 2010, defendant pleaded guilty to residential burglary and the trial court sentenced him to seven years in prison. On September 13, 2010, the trial court set the public-defender fee at \$500 and directed the fees be taken from bond.

¶ 10 Here, the trial court failed to conduct an adequate *Love* hearing. Although it could be said defendant was on notice that reimbursement was a possibility, he was not given notice that the matter would be taken up on the date defendant appeared before the court to begin serving his sentence. Further, he was not given the opportunity to present evidence or argument regarding his ability to pay. Defense counsel's only response to the court's inquiry, "[a]ny change in his status," was defendant was "employed as a bartender locally here at a restaurant [and] I believe he does have two minor children to support." No affidavit of defendant's assets and liabilities was on file following his conviction to shed light on his ability to pay. The court's failure to follow the procedures required by section 113-3.1 of the Code requires us to vacate the reimbursement order and remand for a hearing on the matter. See *Barbosa*, 365 Ill. App. 3d at 302, 849 N.E.2d at 155.

¶ 11 Defendant next argues he is entitled to a \$5 *per diem* credit against his \$5 drug-court assessment under section 110-14(a) of the Procedure Code (725 ILCS 5/110-14(a) (West 2008)).

¶ 12 In *People v. Swank*, 344 Ill. App. 3d 738, 747-48, 800 N.E.2d 864, 871 (2003), this court explained the proper roles of judicial and nonjudicial members in imposing statutory fines as follows:

"The imposition of a fine is a judicial act. The clerk of a court is a nonjudicial member of the court and, as such, has no power to impose sentences or levy fines. [Citation.] Instead, the circuit clerk has authority only to collect judicially imposed fines. [Citation.]" (Internal quotation marks omitted.)

Regarding the \$5 drug-court assessment, this court has found the fine mandatory. See *People v. Folks*, 406 Ill. App. 3d 300, 305, 943 N.E.2d 1128, 1132 (2010). Since the drug-court assessment is a fine, the circuit clerk did not have authority to impose the fine. *Folks*, 406 Ill. App. 3d at 306, 943 N.E.2d at 1133. When presented with a mandatory fine assessed by the clerk, we may vacate the fine and reimpose the fine ourselves. See *People v. Evangelista*, 393 Ill. App. 3d 395, 401, 912 N.E.2d 1242, 1247 (2009). Thus, we vacate the \$5 drug-court assessment and reimpose the fine ourselves.

¶ 13 While the trial court ordered defendant to pay a Violent Crime Victims Assistance Act fine in the sentencing order, it did not determine the proper amount of that fine. Under the Violent Crime Victims Assistance Act, if no other fines are imposed, the penalty to be collected is \$25 for crimes of violence and \$20 for any other felony. See 725 ILCS 240/10 (c)(1), (c)(2) (West 2008). If other fines are imposed, the penalty is "\$4 for each \$40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2008). Here, defendant's fines total less than \$40, and thus his fine under section 10(b) of the Violent Crime Victims Assistance Act is \$4. Because the fine is mandatory, we remand the cause for the trial court to expressly impose the amount of the fine. See *People v. Scott*, 152 Ill. App. 3d 868, 873, 916, 505 N.E.2d 42, 46 (1987). We note the Violent Crime Victims Assistance fine is not subject to the \$5-per-day credit provision of section 110-14(a). 725 ILCS 240/10(c) (West 2008).

¶ 14 For the reasons stated, we vacate the reimbursement order and remand for a hearing in conformity with section 113-3.1 of the Procedure Code, a reconsideration of the assessed fees, and for issuance of an amended sentencing judgment; we otherwise affirm.

¶ 15 Affirmed in part and vacated in part; cause remanded with directions.