



substance-abuse evaluation. Defendant admitted she used heroin and the court struck the allegation relating to the administrative sanction upon the State's request. The trial court revoked defendant's probation and in November 2010, resentenced her to 3 years in prison with credit for 52 days served. The court also ordered defendant to pay a \$100 public-defender fee.

¶ 5 In December 2010, defendant filed a motion to reconsider sentence. On January 11, 2011, the trial court denied defendant's motion following a hearing.

¶ 6 This appeal followed.

¶ 7 II. ANALYSIS

¶ 8 The only issue on appeal is whether the trial court erred in ordering defendant to pay a \$100 public-defender fee. Although defendant did not object to the public-defender fee at sentencing or include this issue in a posttrial motion, this court will still consider the issue because where a court lacks the authority to impose a cost, the imposition of that cost is void *ab initio* and may be attacked at any time. *People v. Hunter*, 358 Ill. App. 3d 1085, 1094, 831 N.E.2d 1192, 1198-99 (2005). Further, our supreme court has held that rules of forfeiture do not apply to challenges to the imposition of public-defender fees imposed without a hearing. *People v. Love*, 177 Ill. 2d 550, 564, 687 N.E.2d 32, 39 (1997). Whether a trial court properly imposed a public-defender fee is a question of law, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697, 873 N.E.2d 453, 465 (2007).

¶ 9 Defendant contends that the \$100 public-defender fee must be vacated because it was assessed without conducting a hearing to determine defendant's ability to pay the fee. The State concedes that the public-defender fee should be vacated but asserts the proper remedy is for this court to remand for a hearing to determine defendant's ability to pay the fee. Defendant

argues remand is not appropriate because the statute requires a hearing within 90 days of the final order disposing of the case in the trial court, which did not occur here. See 725 ILCS 5/113-3.1(a) (West 2008). We agree with the State that vacation of the fee and remand for a hearing is the appropriate remedy.

¶ 10 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Procedure Code) provides the following:

"Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay 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 Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel *but no later than 90 days after the entry of a final order disposing of the case at the trial level.*" (Emphasis added.) 725 ILCS 5/113-3.1(a) (West 2008).

The "trial court [must] conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel." *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38. Prior to the required hearing, the defendant must be given notice that he will have an opportunity to present evidence concerning his ability to pay

and other relevant circumstances. *People v. Roberson*, 335 Ill. App. 3d 798, 803-804, 780 N.E.2d 1144, 1148 (2002); *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998). "The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided." *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38.

¶ 11 In this case, nothing in the record indicates defendant completed a financial affidavit or that the trial court conducted a hearing to determine defendant's foreseeable ability to pay the fee as required under section 113-3 of the Procedure Code. Instead, the trial court imposed the \$100 public-defender fee at defendant's sentencing hearing without any inquiry into defendant's ability to pay, even after it acknowledged that defendant was homeless and unemployed. Because defendant was not given an opportunity to present evidence and be heard regarding her financial ability to pay at a hearing as required, the \$100 public-defender fee must be vacated. See *People v. Bass*, 351 Ill. App. 3d 1064, 1069-70, 815 N.E.2d 462, 467-68 (2004).

¶ 12 While we find the public-defender fee must be vacated, we must now determine whether remand for a hearing on defendant's foreseeable ability to pay a public-defender fee is appropriate. Defendant asserts remand is not appropriate because section 113.1(a) of the Procedure Code mandates that a hearing be held within 90 days of a final order disposing of the case at the trial level. Because this hearing did not occur within the specified time, defendant contends remand is not proper. We disagree.

¶ 13 Whether a statutory command is mandatory or directory is a question of statutory interpretation that is reviewed *de novo*. *People v. Robinson*, 217 Ill. 2d 43, 54, 838 N.E.2d 930, 936 (2005). When a statute expressly prescribes a consequence for the failure to obey a statutory

provision, "that is very strong evidence the legislature intended that consequence to be mandatory." *Robinson*, 217 Ill. 2d at 54, 838 N.E.2d at 936. However, even absent the express proscription of consequences for failure to comply, a statutory provision "will be considered mandatory if it contains 'negative words importing that the acts required shall not be done in any other manner or time.'" *People v. Gutierrez*, 2012 IL 111590, ¶ 20, 962 N.E.2d, 437, 442 (quoting *Robinson*, 217 Ill. 2d at 57, 838 N.E.2d at 938).

¶ 14 Section 113-3.1(a) specifically prescribes that a hearing "shall be conducted \*\*\* no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113.3.1(a) (West 2008). We agree with defendant that the clear and unambiguous language of section 113-3.1(a) is accompanied by negative words, requiring a hearing be conducted within 90 days following final disposition in the trial court. Therefore, we agree that the 90-day requirement is mandatory. However, we hold that this 90-day period is suspended during the pendency of a defendant's appeal.

¶ 15 The purpose of the section 113-3.1(a) hearing requirement is to give defendants an opportunity to present evidence and other relevant information pertaining to their financial ability to pay a fee to the county or the State for their court-appointed attorney prior to the fee being ordered. We recognize that a request for a hearing on defendant's ability to pay should generally be raised by the court or the State within 90 days of the final order of judgment in the trial court. However, as is the case here, defendant filed her notice of appeal prior to termination of this 90-day period as was required. See Ill. S. Ct. R. 303(a)(1) (eff. Jun. 4, 2008) (notice of appeal must be filed within 30 days of the final order in the trial court).

¶ 16 Once defendant filed her notice of appeal on January 11, 2011, this court's

jurisdiction was invoked. Once appellate jurisdiction attaches, "the lower court loses jurisdiction and any actions taken by it when it has no jurisdiction are null and void." *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 43, 960 N.E.2d 739, 749 (citing *People v. Henry*, 329 Ill. App. 3d 397, 402, 769 N.E.2d 34, 39 (2001)). "Lack of subject matter jurisdiction cannot be waived, nor may a party be deemed estopped to raise the issue. [Citation.] The parties cannot, by agreement, acquiescence, or otherwise, reconstitute jurisdiction in the trial court when jurisdiction lies in the appellate court." *Stevenson*, 2011 IL App (1st) 093413, ¶ 43, 960 N.E.2d at 749.

¶ 17 Here, the trial court filed its sentencing order on December 6, 2010. On January 11, 2011, the trial court denied defendant's motion to reconsider sentence. Defendant immediately filed a notice of appeal. Under section 113-3.1(a), the trial court has 90 days after the entry of a final order to conduct the hearing. However, on January 11, 2011, the trial court lost its jurisdiction and was thus prohibited from taking any action to correct its error by conducting a hearing. We do not believe that the legislature intended for defendants with court-appointed attorneys to be able to escape paying a portion of the fees incurred by the county or the State in appointing such an attorney, simply by filing an appeal in cases where a section 113-3.1(a) hearing was not held prior to entry of the final order. The plain language of the statute allows the hearing to be held "no later than 90 days after the entry of a final order" and thus, necessarily considers that a public-defender fee may be imposed after final disposition in the trial court. To give effect to the intention of the legislature, we hold that the 90-day period in which to conduct the hearing is suspended beginning on the date appellate jurisdiction is invoked and continues through the pendency of a defendant's appeal.

¶ 18 Accordingly, the appropriate remedy is to vacate the \$100 public-defender fee and

remand for a hearing to determine defendant's ability to pay a public-defender fee. Defendant's due-process rights are not violated and the purpose of the statute will be upheld because she will have an opportunity to present evidence and other relevant information pertaining to her financial ability to pay a public-defender fee. See also *People v. Somers*, 2012 IL App. 4th 110180, ¶ 45, 2012 WL 2128004, \*7 (holding remand for a section 113.1 hearing was appropriate even though the trial court failed to follow the *Love* requirements because the court imposed the public-defender fee prior to the 90-day period allowed by statute, and, thus, indicated its intent to timely order reimbursement).

¶ 19

### III. CONCLUSION

¶ 20 For the reasons stated, we vacate defendant's \$100 public-defender fee and remand for a hearing to determine defendant's ability to pay. 725 ILCS 5/113-3.1(a) (West 2008). As part of our judgment, since the State successfully defended a portion of the appeal, we award the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 21

Affirmed in part, vacated in part and cause remanded with directions.