

2014 IL App (2d) 120260-U
No. 2-12-0260
Order filed January 8, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-403
)	
ROBERT KYLE,)	Honorable
)	John A. Barsanti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke concurred in the judgment.
Justice Jorgensen concurred in part and dissented in part.

ORDER

¶ 1 *Held:* We affirmed defendant's sentence, as it was not excessive or an abuse of discretion. However, we vacated the public defender fee and the spinal cord fund fee, and we remanded the cause for a hearing on defendant's ability to pay the public defender fee.

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¶ 3 On October 12, 2011, defendant, Robert Kyle, pleaded guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2010)) and was sentenced to nine years' imprisonment. He was also ordered to pay a \$300 public defender fee and a \$5 spinal cord fund fee. On appeal, defendant contends that his sentence is excessive because the trial

court did not properly consider the mitigating factor of excessive hardship, and the amount of narcotics involved was small. Defendant also argues that the trial court erred in imposing the public defender fee without first holding a hearing to assess whether he had the means to pay. Finally, defendant claims that assessment of the spinal cord fund fee was improper. We reject defendant's argument that his sentence is excessive. However, we vacate the public defender fee and spinal cord fund fee, and we remand the cause for a hearing on defendant's ability to pay the public defender fee.

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I. BACKGROUND

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On September 21, 2010, an undercover agent called defendant to set up a purchase for less than one ounce of cocaine. Defendant and another individual drove to the designated meeting place; the other individual left the vehicle and exchanged the cocaine with the agent for \$140. Defendant was thereafter arrested.

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The amount of the cocaine exchanged was determined to be approximately 3.3 grams. Defendant was charged with: (1) unlawful delivery of a controlled substance for knowingly delivering one or more, but less than 15 grams, of a substance containing cocaine; and (2) unlawful possession of a controlled substance, *i.e.*, less than 15 grams of a substance containing cocaine.

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On February 10, 2011, at defendant's arraignment, the trial court considered whether to discharge the public defender who had been appointed to represent defendant. The trial court

asked defendant whether he had personally posted his \$7,500 bond. Defendant responded that he did so with his savings. The trial court then asked defendant whether he was employed or had any other funds. Defendant answered “no” to both inquiries. For these reasons, the trial court continued the public defender’s appointment.

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Defendant ultimately pleaded guilty to unlawful delivery of a controlled substance. On December 12, 2011, the trial court sentenced defendant to nine years’ imprisonment. In doing so, the trial court took into account aggravating and mitigating factors. Specifically, the trial court found that defendant’s prior history of delinquency and criminal activity was a significant aggravating factor (730 ILCS 5/5-5-3.2(a)(3) (West 2010)). Defendant had previously been convicted of various crimes, such as burglary, possession of a weapon by a felon, and possession of a controlled substance (twice). Moreover, it was brought to the trial court’s attention that, while out on bond for this offense, defendant was charged with yet another possession of a controlled substance.

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The trial court weighed the various mitigating factors as applied to defendant’s case; however, there was one specific mitigating factor that the trial court particularly noted: whether defendant’s imprisonment would entail excessive hardship to his dependents (730 ILCS 5/5-5-3.1(a)(11) (West 2010)). In evaluating this factor, the trial court stated: “I will always find that imprisonment causes hardship to the dependents. I don’t ever think that’s not true. Excessive meaning what, more than regular, more than anybody else in the same situation? I cannot find that excessive hardship.”

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Felony fees were also assessed. The State noted that defendant had posted bond, and it requested various fees be assessed against him, including a \$5 spinal cord fund fee (730 ILCS 5/5-9-1 (West 2010)) and a \$300 public defender fee (725 ILCS 5/113-3.1(a) (West 2010)). Defendant requested that the bond be returned to his father-in-law, who had acted as the surety.¹¹ Addressing the public defender fee, the trial court stated “[the State] also requested [a] \$300 public defender fee. I’m going to assess that, also. But I’m not taking any money out of the posted bond. That will be returned to the surety, except for the ten percent.” Accordingly, the court assessed against defendant the requested \$5 spinal cord fund fee and the \$300 public defender fee.

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On December 22, 2011, defendant moved to reconsider the sentence, arguing in part that the court failed to give certain mitigating factors appropriate weight, including the excessive hardship his incarceration would place on his dependents. Defendant did not challenge the public defender fee or the spinal cord fund fee in this motion to reconsider. On February 29, 2012, the trial court denied the motion. This timely appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant raises three issues on appeal, arguing: (1) his nine-year sentence is excessive because the trial court did not properly take into account the impact that incarceration will have on his dependents and that the amount of drugs involved was small; (2) the trial court erred when it assigned defendant a \$300 public defender fee without holding a hearing; and (3) the trial

¹¹ The trial court did not address the discrepancy between defendant’s original claim that he paid the \$7,500 bail bond out of his savings and the later determination that, as evidenced by the signature on the bond slip, defendant’s father-in-law, in fact, posted the bail bond.

court erred in imposing a \$5 spinal cord fund fee. We consider each issue in turn.

¶ 14 A. Sentence Imposed

¶ 15 The trial court has broad discretion when imposing a sentence, and the reviewing court gives great deference to the court's sentence determination. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). When the trial court imposes a sentence within the statutory range, we will not disturb it absent an abuse of discretion. *People v. Starnes*, 374 Ill. App. 3d 329, 337 (2007). A sentence is considered an abuse of discretion "where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. "Before this court will interfere with the sentence imposed, it must be manifest from the record that the sentence is excessive and not justified under any reasonable view which might be taken of the record." *People v. Smith*, 214 Ill. App. 3d 327, 338 (1991). A reviewing court must take into account the particular circumstances and facts of the case when evaluating the trial court's use of discretion. *People v. Fern*, 189 Ill. 2d 48, 62 (1999); *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977).

¶ 16 Defendant argues first that his sentence is excessive because the trial court did not properly take into account a specific mitigating factor: the effect incarceration will have on his dependents. The Unified Code of Corrections provides that, when sentencing a defendant, the court shall consider whether "the imprisonment of the defendant would entail excessive hardship to his dependents." 730 ILCS 5/5-5-3.1(a)(11) (West 2010). Here, the trial court addressed this mitigating factor and stated, "I will always find that imprisonment causes hardship to the dependents. I don't ever think that's not true. Excessive meaning what, more than regular, more than anybody else in the same situation? I cannot find that

excessive hardship.” Defendant contends that the trial court’s statement that he “will always find that imprisonment causes hardship to the dependents” shows that the trial court did not take into account defendant’s particular circumstances and treated him similar to any other defendant with dependents. Defendant asserts that he was active in the lives of his two minor sons at the time of sentencing, and the trial court did not properly evaluate this fact while assessing the hardship imprisonment will have on his dependents. Defendant argues that the court’s statement shows that it instead essentially invalidated this mitigating factor. We disagree.

¶ 17 In *People v. Young*, the trial court, addressing this same mitigating factor, made a comparable statement to the trial court’s statement in this case. *People v. Young*, 250 Ill. App. 3d 55, 65 (1993). The trial court in *Young* stated that defendant’s “imprisonment, indeed, will entail hardship upon his dependents, and most imprisonment does exactly that.” *Id.* at 61. The defendant appealed, arguing that the trial court did not properly consider the hardship that his imprisonment would impose on his dependents because the trial court’s statement had essentially written this mitigating factor out of the statute. *Id.* at 65. The reviewing court recognized that the statement was unclear, but found that the trial court meant either that: (1) the hardship would not be *excessive* (as required by 730 ILCS 5/5-5-3.1(a)(11) (West 1992)); or (2) the court had concluded that this mitigating factor did not outweigh the aggravating factors. *Id.* The appellate court held that, under either interpretation, the trial court’s evaluation of the mitigating factor was not an abuse of discretion. *Id.*

¶ 18 Similarly, in this case, the trial court’s statement that it “will always find that

imprisonment causes hardship,” may be interpreted as meaning that, although imprisonment will certainly cause hardship on defendant’s dependents, it does not rise to the level of *excessive* hardship. Indeed, even if the trial court’s statement that he “will always find that imprisonment causes hardship to the dependents” appears to be a blanket statement nullifying this mitigating factor, the trial court did not stop there. Rather, the trial court continued, further considering what constitutes *excessive* hardship and concluding that, here, there was no “*excessive* hardship” (emphasis added.).

¶ 19 Alternatively, as in *Young*, the trial court’s statement could have meant that, even considering the hardship to defendant’s dependents, the hardship did not outweigh the aggravating factors. In that regard, we cannot find, based on the record, that the court’s finding constitutes an abuse of discretion. Here, the only evidence defendant provided relating to this factor was that, when not incarcerated, he lived at the same address as his two minor children and he helped in raising them (no further specific facts were given). On the other hand, defendant had a significant criminal background upon which the trial court heavily relied when weighing the sentencing factors. Accordingly, under either interpretation, the court did not abuse its discretion.

¶ 20 Defendant next maintains that his sentence is excessive because the trial court did not properly weigh the seriousness of the offense. Defendant states that the court failed to mention the fact that, while the offense charged requires an amount of controlled substance greater than 1 gram but less than 15 grams, defendant was found to have delivered only 3.3 grams of cocaine (*i.e.*, on the low end of the range). We reject defendant’s argument. The court was informed as to the amount of cocaine involved and, absent some indication to the

contrary, we presume it considered the evidence when weighing the sentencing factors. *People v. Torres*, 200 Ill. App. 3d 253, 267 (1990). We will not alter a sentence simply because we may have weighed the sentencing factors differently than the trial court. *Starnes*, 374 Ill. App. 3d at 337. We also note that defendant received a sentence of 9 years' imprisonment, on the low end of a possible 6-to-30 year sentencing range.¹ In sum, given the standard of review and the fact that defendant had a significant criminal past, we conclude that the trial court did not abuse its discretion when sentencing defendant within the appropriate statutory range.

¶ 21 B. Public Defender Fee

¶ 22 Defendant next argues that the trial court erred when it imposed a \$300 public defender fee. While defendant did not raise this issue in the trial court, application of the forfeiture rule is inappropriate where, as here, a trial court imposes a fee without following the appropriate statutory requirements. *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 (2011). This issue is a question of law, and we review it *de novo*. See *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 23 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 states:

¶ 24 “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 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 Section 113-3 of this Code and any other information pertaining to the defendant’s

¹ Although defendant pleaded guilty to a Class 1 felony (see 720 ILCS 570/401(c) (West 2010)), he was subject to Class X sentencing due to prior convictions (see 730 ILCS 5/5-4.5-95(b) (West 2010)).

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." 725 ILCS 5/113-3.1(a) (West 2010).

¶ 25 Our supreme court has noted that the requirements of a proper section 113-3.1(a) hearing have been clearly established. Specifically, a trial court may not perfunctorily impose a public defender fee. *People v. Somers*, 2013 IL 114054, ¶ 14. Instead, the court must give the defendant notice that it may impose such a fee, and the defendant must have the opportunity to present evidence about his or her financial situation. *Id.* "The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." The trial court is to consider the defendant's financial affidavit, among other evidence. *Id.*

¶ 26 Defendant maintains that the \$300 public defender fee should be vacated because the trial court imposed this fee without prior notice and without holding a hearing within 90 days of final judgment to consider defendant's ability to pay. The State concedes that the fee must be vacated (see *id.*; *People v. Love*, 177 Ill. 2d 550, 559 (1997)), and we therefore vacate the order.

¶ 27 While the parties agree that the public defender fee should be vacated, the State argues that the matter should be remanded because the trial court held a hearing within the statutory time limit, and the hearing was simply insufficient. Defendant, on the other hand, argues that no timely hearing on his ability to pay was held in the first place, so there can be no remand for such a hearing. Defendant argues that the only time the trial court discussed

his financial situation was at the February 2011 arraignment, which was more than 10 months before his sentencing, and at which defendant informed the court that he had no savings and was unemployed. Defendant argues that at sentencing, the trial court made no inquiry to determine whether his financial position had changed such that he could afford to pay a public defender fee.

¶ 28 Central to our analysis of this issue are *Gutierrez* and *Somers*. In *Gutierrez*, the circuit clerk imposed a public defender fee. *Gutierrez*, 2012 IL 11590, ¶ 24. Our supreme court held that the circuit clerk lacked the authority to impose the fee, as neither the State nor the trial court requested it. *Id.* The supreme court stated that the fee should have therefore been vacated outright, without a remand. *Id.*

¶ 29 In *Somers*, the trial court imposed a public defender fee after asking the defendant three questions regarding his financial circumstances. *Id.* On appeal to the supreme court, the defendant argued that the fee must be vacated outright because the trial court failed to comply with section 113-3.1(a) of the Code. *Id.* ¶ 12. The supreme court stated that the trial court's few questions to the defendant about his financial circumstances clearly did not satisfy the requirements of section 113-3.1(a). *Id.* ¶ 14. The supreme court continued:

¶ 30 “Just as clearly, though, the trial court did have *some sort of a hearing within the statutory time period*. The trial court inquired of defendant whether he thought he could get a job when he was released from jail, whether he planned on using his future income to pay his fines and costs, and whether there was any physical reason why he could not work. Only after hearing defendant's answers to these questions did the court impose the fee. Thus, we agree with the State's contention that *the problem here is not that the trial*

court did not hold a hearing within 90 days, but that the hearing that the court did hold was insufficient to comply with the statute.” (Emphases added.) Id. ¶ 15.

¶ 31 The supreme court therefore remanded the cause for a proper hearing. *Id.* ¶ 18.

¶ 3 Defendant argues that unlike in *Somers*, there was no discussion at sentencing of his ability to pay any fees. He argues that, as in *Gutierrez*, we should vacate the public defender fee without remand for a hearing.

¶ 4 The State argues that, similar to *Somers*, the trial court here simply held an insufficient hearing. It contends that the trial court’s statement during sentencing, “you also requested \$300 public defender fee. I’m going to assess that, also,” demonstrates that the trial court made a conscious decision to impose the fee, as opposed to committing a mere perfunctory act. Further, the State argues that the trial court evaluated defendant’s financial resources at defendant’s arraignment, where he asked defendant whether he had personally posted bail, whether he had any other funds, and if he was employed. The State maintains that, although this questioning occurred on a date before the trial court imposed the fee, the information was available to the trial court and was essentially a financial resource hearing that continued to the time of sentencing.

¶ 5 This court recently addressed the issue of a remand for a hearing on public defender fees in *People v. Williams*, 2013 IL App (2d) 120094. There, the defendant similarly argued that there could be no remand for a hearing on his ability to pay a public defender fee because,

unlike in *Somers*, the trial court did not ask him any questions about his ability to pay before imposing the fee. *Id.* ¶ 19. This court disagreed, stating:

¶ 35 “*Somers* requires only that the trial court hold ‘some sort of a hearing within the statutory time period.’ *Id.* ¶ 15. While the trial court in *Somers* asked the defendant a few questions related to his finances, our supreme court never stated that such questioning was required for a hearing. Rather, the supreme court stated that a hearing ‘clearly’ took place (*id.* ¶ 15), implying that less would also suffice to constitute a ‘hearing.’ Black’s Law Dictionary defines a ‘hearing’ as a ‘judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying.’ Black’s Law Dictionary 788 (9th ed. 2009); see also *People v. Johnson*, 206 Ill. 2d 348, 358 (2002) (citing same definition of ‘hearing’). The proceeding here, while obviously insufficient to meet the requirements of section 113-3.1(a), still met this definition of a ‘hearing,’ as it was a judicial session open to the public, held to resolve defendant’s representation by the public defender. Relatedly, the trial court imposed what it deemed to be an appropriate public defender fee. Therefore, we hold that the trial court conducted ‘some sort of a hearing’ on the issue of the public defender fee within the statutory time period. Like in *Somers*, the trial court’s error was not in failing to hold a hearing within 90 days, but instead in failing to hold a sufficient hearing.” *Id.* ¶ 20.

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As in *Williams*, here the trial court held “some sort of hearing” within the statutory period,
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In *Williams*, Justice Jorgensen dissented, arguing that a hearing under section 113-3.1 requires an inquiry into the defendant's current or foreseeable ability to pay. *Id.* ¶ 39. The dissent argued that the statute requires a hearing to determine the amount of payment and that the *Somers* court clearly stated that the statute requires a hearing on the defendant's ability to pay. *Id.* We responded that we agreed that a proper hearing under the statute requires that the trial court consider a defendant's ability to pay before setting a public defender fee. *Id.* ¶ 22. We stated that the trial court set a payment amount after considering the public defender's time and effort in representing the defendant, but, because the trial court did not consider the defendant's ability to pay, the hearing was inadequate. *Id.* The same rationale applies in this case.

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The dissent further argued that the definition of a "hearing" in the version of Black's Law Dictionary in effect when the General Assembly enacted the statute contemplated a more formal occurrence, including the parties' right to be heard. *Id.* ¶ 49. We note that in the instant case, the State requested the \$300 fee in conjunction with arguing that defendant should receive a 12-year sentence, so defendant clearly had the right and opportunity to be heard on this issue. Again, the hearing was inadequate under section 113-3.1, but it still constituted "some sort of a hearing" on the issue of the public defender fee, which allows for a remand under *Somers*.

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Defendant additionally argues that he had no employment or assets prior to trial and has been incarcerated ever since he was convicted, making a remand for a hearing on his ability to pay pointless. We note there is somewhat of a contradiction in defendant's argument that the trial court failed to inquire into whether his financial position had changed such that he could afford to pay a public defender fee, and his argument that we may rely on the record to determine his financial circumstances. In any event, the foreseeable ability of a defendant to pay may be considered in assessing a public defender fee (*Somers*, 2013 IL 114054, ¶ 14), and the record indicates that defendant has mechanic skills. Also, although defendant received a nine-year prison sentence, the defendant in *Somers* was sentenced to six years (*id.* ¶ 4), and the supreme court still deemed it appropriate to remand the cause. We likewise do so here.

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C. Spinal Cord Fund Fee

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We now address defendant's final issue on appeal. Defendant claims that the trial court erred when it assessed against him a \$5 spinal cord fund fee.

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The \$5 spinal cord fund fee was assessed pursuant to section 5-9-1(c-7) of the Unified Code of Corrections, which provides that "any person convicted or receiving an order of supervision for driving under the influence of alcohol or drugs shall pay an additional \$5 fee to the clerk." 730 ILCS 5/5-9-1(c-7) (West 2010). Defendant was not convicted of, nor did he receive an order of supervision for, driving under the influence of alcohol or drugs. The State concedes this fact and agrees, as do we, that the fee should be vacated. Thus, we vacate

the \$5 spinal cord fee.

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III. CONCLUSION

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For the foregoing reasons, we affirm defendant’s sentence but vacate the public defender fee and the spinal cord fund fee. We further remand the cause for a proper hearing on the issue of defendant’s ability to pay the public defender fee.

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Affirmed in part and vacated in part; cause remanded.

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JUSTICE JORGENSEN, concurring in part and dissenting in part.

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I agree with the majority’s analysis affirming defendant’s sentence and vacating both the public defender and spinal cord fund fees. I dissent, however, from the majority’s decision to remand the cause for a hearing on defendant’s ability to pay the public defender fee. For the reasons set forth in my partial dissent in *Williams*, 2013 IL App (2d) 120094, ¶¶ 48-56, I disagree with the majority’s rationale for concluding that the imposition of a public defender fee in open court, but without any inquiry into a defendant’s ability to pay, constitutes even an inadequate hearing for purposes of section 113-3.1(a). Rather, and, again, for the reasons explained in my *Williams* dissent, I would hold that where, as here, the trial court imposes the fee without either inquiring into defendant’s ability to pay, receiving any current information regarding defendant’s ability to pay, or confirming that the dated financial information remains accurate, *no* hearing was held under section 113-3.1(a) and the fee

should be vacated without a remand.

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I further note that the majority’s assertion that, because the State requested the \$300 public defender fee at sentencing, defendant “clearly had the right and opportunity to be heard on this issue,” (*supra* at ¶ 32) is, in my view, incorrect. Again, the fact that the fee was both requested and imposed in open court does not alter the fact that absolutely no inquiry was made into ability to pay.

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Finally, I disagree that there is any contradiction in defendant’s argument. See *supra* at ¶ 33. Indeed, the record reflects that the *only* information ever received regarding defendant’s financial resources occurred at defendant’s arraignment, 10 months prior to sentencing. At that time, the court learned that defendant was unemployed and had no funds. As defendant has since remained incarcerated, and the court imposed the public defender fee without making any record regarding whether defendant’s financial situation had changed since his arraignment, there is nothing contradictory about defendant pointing to the record as reflecting nothing other than an inability to pay.

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In conclusion, and for the foregoing reasons, I partially dissent.