

No. 1-14-2615

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 852
)	
DAVID WATLEY,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* When the trial court conducted an insufficient hearing under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2012)), before imposing the public defender fee, the fee must be vacated and the cause remanded for a hearing in compliance with section 113-3.1(a).

¶ 2 Following a jury trial, defendant David Watley a/k/a Antonio Payne was found guilty of delivery of a controlled substance.¹ He was sentenced, because of his criminal background, to a

¹ On appeal, defendant contends that his mittimus must be corrected to reflect his conviction for possession of a controlled substance with intent to deliver. However, defendant was charged

Class X sentence of seven years in prison. On appeal, defendant contends that the trial court failed to comply with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/113-3.1(a) (West 2012)), when it imposed a \$250 public defender fee without first conducting a hearing during which defendant's ability to pay the fee was considered. Defendant requests this court to vacate the fee and remand the cause for a hearing in compliance with section 113-3.1(a). Defendant further contends that his mittimus must be corrected to reflect the proper name of the offense of which he was convicted. We affirm in part, vacate in part and remand for a hearing in compliance with section 113-3.1(a) of the Code.

¶ 3 At trial, Officer Melvin Ector testified that on the afternoon of December 9, 2013, he was working undercover as a "buy officer." As Ector parked his vehicle he observed defendant on the sidewalk. Ector exited his vehicle, approached defendant, and inquired of defendant if "the blows [were] up." Ector explained that this phrase was a way to ask if someone was selling heroin. Defendant replied that "blows" were on the way and to wait. Ector crossed the street and joined a group of people. He lost sight of defendant for about 30 minutes.

¶ 4 When defendant returned, he motioned to Ector and other individuals to "come down to him." When Ector reached defendant, he asked for two bags of heroin. Defendant removed two bags from a taped strip of bags in his hand and handed them to Ector. Ector gave defendant \$40. Ector then relocated to his vehicle and radioed other team members that "it was a positive narcotics transaction." He also gave his team members a description of defendant, as well as defendant's outfit and location. The items Ector purchased from defendant were later inventoried.

with, and convicted of, delivery of a controlled substance. Defendant's notice of appeal states that he is appealing from a conviction for delivery of a controlled substance.

¶ 5 Officer Edwin Utreras testified that he observed Ector approach defendant. After Ector and defendant spoke, defendant walked away and Ector joined a group of people. About 30 minutes later, a white vehicle pulled up and Kenneth Harte exited. Harte approached defendant and handed defendant "taped packages." Based upon Utreras's experience, he believed that these packages contained heroin. Once defendant had the packages, he "motioned" Ector over. Ector gave defendant currency in exchange for some of the "small items" defendant received from Harte. Utreras then observed defendant make "at least ten other hand-to-hand transactions." Defendant later got into a vehicle with Harte and drove off. This vehicle was stopped by officers.

¶ 6 When Utreras went to the passenger side of the vehicle, he observed "numerous amounts" of currency on defendant's lap. He placed handcuffs on defendant and stood defendant outside the vehicle so that Ector could drive by and identify defendant. After Ector identified defendant, defendant was placed in a police vehicle.

¶ 7 The contents of the bags Ector purchased from defendant tested positive for the presence of heroin and weighed 1.2 grams.

¶ 8 The jury found defendant guilty of delivery of a controlled substance. He was sentenced, because of his criminal background, to a Class X sentence of seven years in prison. The assistant State's Attorney then made a motion for "County fund reimbursement." The trial court inquired of defendant's trial counsel, an assistant Public Defender, how many times counsel had "appeared on this case." Counsel responded "12." The court noted that this was a jury trial, and therefore "attorney's fees of \$250." Defendant's mittimus states that he was convicted of "MFG/DEL 1<15 GR HEROIN/ANALOG" in violation of section 570/401(c)(1) of the Criminal Code of 2012 (see 720 ILCS 570/401(c)(1) (West 2012)).

¶ 9 On appeal, defendant first contends, and the State concedes, that the trial court did not sufficiently comply with section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2012)), which requires a hearing to determine a defendant's ability to pay before a public defender fee is imposed. The parties request of this court to vacate the \$250 assessment and remand this cause for a hearing consistent with the requirements of section 113-3.1(a).

¶ 10 Although defendant failed to raise this claim of error in the trial court, this court has previously held that it will not apply the forfeiture rule where a trial court imposes the public defender assessment without following the proper procedural requirements. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 31.

¶ 11 Section 113-3.1(a) of the Code provides that where the defendant has been appointed counsel, the court may order defendant to pay the clerk of the circuit court a reasonable sum to reimburse either the county or the State for such representation. 725 ILCS 5/113-3.1(a) (West 2012). Before ordering payment, the trial court is required to hold a hearing focusing on "the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided." *People v. Love*, 177 Ill. 2d 550, 563 (1997). The 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 2012).

¶ 12 A trial court may not impose the public defender fee in a "perfunctory manner." *People v. Somers*, 2013 IL 114054, ¶ 14. Before imposing the fee, the trial court must have "some sort of a hearing within the statutory time period." *Id.* ¶ 15. "[T]he court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to

present evidence regarding his or her ability to pay and any other relevant circumstances." *Id.* ¶

14. Whether the trial court complied with section 113-3.1(a) of the Code when imposing the fee presents a question of law that we review *de novo*. *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 13 In those cases where the trial court imposes the public defender fee without conducting a hearing within 90 days of the entry of the final order, the fee has been vacated outright. *People v. Romanowski*, 2016 IL App (1st) 142360, ¶¶ 40, 44 (Aug. 22, 2016). On the other hand, when the trial court holds "some sort of a hearing" within the 90-day period but does not fully comply with section 113-3.1(a), the fee is vacated and the case is remanded for a hearing in compliance with the requirements of the statute. See *Somers*, 2013 IL 114054, ¶¶ 15, 20 (remanding when the trial court's limited inquiry into the defendant's ability to pay within the 90-day period was deficient pursuant to section 113-3.1(a), but nevertheless constituted "some sort of a hearing" within the required time period); see also *People v. McClinton*, 2015 IL App (3d) 130109, ¶¶ 16-18 (finding that "some sort of hearing" took place when, although the trial court did not question the defendant, the court relied on the presentence investigation report and defendant's statement in allocution before sentencing).

¶ 14 Following *Somers*, courts have disagreed as to whether a hearing during which the trial court does not inquire into the defendant's ability to pay the public defender fee can constitute "some sort of a hearing" under section 113-3.1(a). See *Somers*, 2013 IL 114054, ¶ 15. In *People v. Moore*, 2015 IL App (1st) 141451, ¶ 40, the court concluded that "'some sort of hearing' is more than the mere imposition of the public defender fee by way of a pronouncement in open court while the defendant is present." The court therefore determined that because there was no inquiry, "however slight," into the defendant's ability to pay the fee, "the trial court's questioning

the attorneys regarding the public defender's involvement in this case was not a hearing as articulated in *Somers*." *Id.* ¶ 41. However, in *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21, and *People v. Adams*, 2016 IL App (1st) 141135, ¶ 26 the court determined that the trial court's inquiry regarding the number of times the public defender appeared in court constituted a hearing, although the hearing was insufficient pursuant to section 113-3.1(a), and that the appropriate remedy was remand for a hearing in compliance with the statute.

¶ 15 In the case at bar, we need not resolve this question, as the parties concede that a hearing took place, albeit a hearing that did not comply with the requirements of section 113-3.1(a) of the Code. We accept this concession and therefore remand this cause to the trial court for a hearing in compliance with section 113-3.1(a) of the Code. See *People v. Suggs*, 2016 IL App (2d) 140040, ¶ 94 (June 28, 2016) (when a timely yet insufficient hearing was held, the remedy is to remand the case for a proper hearing, however, when no hearing was held, the remedy is to vacate the fee.).

¶ 16 Defendant next contends that his mittimus must be amended to reflect the correct name of the offense of which he was convicted, *i.e.*, possession of a controlled substance with intent to deliver. The State responds that the mittimus correctly reflects a conviction for delivery of a controlled substance, and, therefore, no correction is necessary. We agree with the State.

¶ 17 Here, defendant was charged with, and convicted of, delivery of a controlled substance. A review of the mittimus confirms that the accurate statutory citation for the offense (720 ILCS 570/401(c)(1) (West 2012)), is listed, and the conviction is described as "MFG/DEL" of heroin. The mittimus is correct because the title of the offense in the statute is "Manufacture or delivery unauthorized by [the] Act." See 720 ILCS 570/401 (West 2012). Under the statute, delivery of a

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controlled substance is considered the same violation as manufacturing a controlled substance when the statute states "it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance." 720 ILCS 570/401 (West 2012). Therefore, defendant is not entitled to the relief he seeks.

¶ 18 Accordingly, we vacate the trial court's order requiring defendant to pay a \$250 public defender fee and remand this cause for a hearing in compliance with section 113-3.1(a) of the Code. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 19 Affirmed in part; vacated in part; remanded with directions.