

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).

2016 IL App (4th) 140404-U

NO. 4-14-0404

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 6, 2016

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

DARRYL KELLY,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Livingston County

) No. 13CF55

) Honorable

) Jennifer H. Bauknecht,

) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's imposition of a \$1,000 public-defender fee.

¶ 2 In February 2014, a jury convicted defendant, Darryl Kelly, on one count of obstructing justice. In April 2014, the trial court sentenced defendant to 24 months' probation and imposed a \$1,000 public-defender fee and a \$25 monthly probation fee. The same day, the circuit clerk charged defendant \$600 for probation fees.

¶ 3 Defendant appeals, arguing (1) the trial court erred in failing to properly assess defendant's financial circumstances and the costs of his legal representation before imposing a \$1,000 public-defender fee; and (2) the circuit clerk improperly assessed a \$600 probation fee. The State contends, and defendant concedes, the latter claim is moot after the Livingston County circuit clerk changed the probation fee to \$150, reflecting the six months Livingston County

supervised defendant's probation before it was transferred to Cook County. We accept this concession and, therefore, limit our review to defendant's claim regarding the public-defender fee.

¶ 4

I. BACKGROUND

¶ 5 In March 2013, the State charged defendant, by information, with one count of obstructing justice (720 ILCS 5/31-4 (West 2012)), alleging defendant, with the intent to avoid his own apprehension on an outstanding warrant, falsely identified himself and gave a false birth date to a Pontiac police officer. In February 2014, a jury convicted defendant.

¶ 6

A. Defendant's Financial Circumstances

¶ 7 Prior to trial, defendant filed an affidavit of assets and liabilities with the circuit court. The affidavit contained defendant's birth date and address and indicated defendant has four children. The sections titled "income," "assets," and "liabilities" were crossed out with large "X"s. The space to provide the name and address of defendant's employer was left blank.

¶ 8

The presentence investigation report (PSI) showed defendant had two adult children, a 16-year-old child, and was expecting a baby with his girlfriend. Defendant reported he worked for himself, performing maintenance work on houses. According to the PSI, defendant reported his income varied depending on the type and availability of work. Defendant described his financial situation as "good." Defendant reported receiving \$200 in Link funds. Defendant lived part-time with his mother and gave her \$200 to \$300 per month. Defendant also lived part-time with his girlfriend and gave her \$400 per month. The investigator's remarks included the following: "The defendant reports he is 'self-employed,' and if given enough time, has the ability to pay all financial obligations accrued in this case including fines, costs, and fees."

¶ 9

B. Public-Defender Fee

¶ 10 In April 2014, the trial court sentenced defendant to 24 months' probation. Prior to imposing the public-defender fee, the court informed defendant a special hearing must be held to impose the public-defender fee, but the hearing could be conducted immediately to avoid returning to court. The following exchange then occurred:

"[THE COURT]: You're entitled to have a separate hearing for the [c]ourt to determine if you have the ability to pay that assessment if given time. If I find you have the ability to pay that, then I need to determine an amount. The statute allows anything between zero and \$5,000. It's a very wide range.

In this particular case, I do note that you had a jury trial which normally would cost several thousands of dollars. I am familiar with your financial circumstances because of the PSI; and I would be inclined to impose \$1,000 for a [public-defender] assessment, not [\$]5,000. But just based on what I know so far[,] that's what I would be inclined to impose. ***

Is there anything else you want to tell me about your income or your ability to pay that assessment?

THE DEFENDANT: No.

THE COURT: Any objection to the \$1,000 assessment?

THE DEFENDANT: No."

Thereafter, the court imposed the \$1,000 public-defender fee.

¶ 11 This appeal followed.

¶ 12

II. ANALYSIS

¶ 13 Defendant's sole remaining argument on appeal is the trial court erred in failing to properly assess defendant's financial circumstances and the costs of his legal representation before imposing a \$1,000 public-defender fee. Accordingly, we turn to defendant's public-defender-fee claim.

¶ 14 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) provides the procedural framework for a hearing to determine whether (and how much) a defendant should be ordered to reimburse the county for a public defender. 725 ILCS 5/113-3.1(a) (West 2012). The "hearing need only (1) provide the defendant with notice that the trial court is considering imposing a payment order ***, and (2) give the defendant an opportunity to present evidence regarding his ability to pay and other relevant circumstances, and otherwise to be heard regarding whether the court should impose such an order." *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998). These procedural safeguards "are necessary to meet the demands of due process." *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 11, 27 N.E.3d 712. Notice is sufficient if the court informs the "defendant in open court immediately prior to the section 113-3.1 hearing of (1) the court's intention to hold such a hearing, (2) what action the court may take as a result of the hearing, and (3) the opportunity the defendant will have to present evidence and otherwise to be heard." *Johnson*, 297 Ill. App. 3d at 165, 696 N.E.2d at 1270.

¶ 15 In pertinent part, section 113-3.1(a) provides: "[i]n 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." 725 ILCS 5/113-3.1(a) (West 2012). "The hearing must focus on the costs of

representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *People v. Somers*, 2013 IL 114054, ¶ 14, 984 N.E.2d 471.

¶ 16 Defendant contends the trial court erred in failing to consider his financial affidavit and the costs of his representation. We disagree.

¶ 17 Nothing in section 113-3.1 requires the trial court to affirmatively state it considered defendant's financial affidavit. We decline to assume the court did not consider the affidavit absent affirmative evidence to the contrary. Indeed, in a situation such as this, it is unsurprising the court did not affirmatively mention the affidavit. The affidavit contained only defendant's name, birth date, number of children, and crossed-off sections regarding income, assets, and liabilities. In contrast, the more recent PSI contained information regarding defendant's self-employment, his income, and his expenses. Even if we were to construe the court's comment about its familiarity with defendant's finances because of the PSI as evidence it did not consider the financial affidavit, we would not find reversible error. Where the income, assets, and liabilities sections were merely crossed off the form, the affidavit was devoid of information for the court *to* consider.

¶ 18 Defendant contends this court has vacated a public-defender fee when the record did not indicate whether the court considered the financial affidavit. In support of this argument, defendant relies on *People v. Bass*, 351 Ill. App. 3d 1064, 815 N.E.2d 462 (2004). However, we find *Bass* distinguishable. In *Bass*, this court vacated a public-defender assessment and remanded for a hearing on the defendant's ability to pay where the trial court did not afford the defendant notice of the hearing and did not give the defendant the opportunity to present evidence. *Id.* at 1070, 815 N.E.2d at 468. Although this court noted the record did not show the trial court considered the financial affidavit, the cause was remanded for a hearing to comply

with the constitutional due-process requirements of notice and the opportunity to present evidence. *Id.* Defendant does not contend notice in this case was insufficient or he was deprived of the opportunity to present evidence or otherwise be heard regarding his ability to pay.

Accordingly, *Bass* offers no support for defendant's position.

¶ 19 We also find the trial court did consider the costs of defendant's representation. The judge noted defendant had appointed counsel for a jury trial. The judge further noted trials cost thousands of dollars. The record also shows appointed counsel appeared for defendant in a number of pretrial proceedings and at a first attempt at a jury trial, which ended in a mistrial after running out of jurors. There is no magic formula the court must use in considering the costs of a defendant's representation, and we conclude the court adequately considered the relevant factors in imposing the public-defender assessment.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 22 Affirmed.