2016 IL App (4th) 140657-U

NO. 4-14-0657

FILED
June 2, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
MICHAEL F. HOLLIDAY,	)	No. 13CM224
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Brannan,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in failing to declare a mistrial after a juror identified his attorney as a public defender during *voir dire*.

¶ 2 (2) The trial court did not err in finding defendant's posttrial ineffective-assistance-of-counsel claims meritless.

¶ 3 (3) We accept the State's concession the trial court erred in failing to hold a hearing to determine defendant's ability to reimburse the county for the public-defender fee and remand for a proper hearing.

¶ 4 In April 2014, a jury convicted defendant, Michael F. Holliday, of aggravated assault (720 ILCS 5/12-2(b)(4) (West 2012)) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)). In July 2014, the trial court sentenced defendant to concurrent jail terms of 300 days for aggravated assault and 30 days for resisting a peace officer.

¶ 5 Defendant appeals, arguing the trial court erred in failing to (1) declare a mistrial

after a juror identified his attorney as a public defender; (2) conduct a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), on his ineffective-assistance-of-counsel claim; and (3) hold a hearing to determine his ability to reimburse the county for the public-defender fee. We affirm in part, vacate in part, and remand with directions.

¶ 6 I. BACKGROUND

¶ 7 On May 24, 2013, the State charged defendant by information with aggravated assault (720 ILCS 5/12-2(b)(4) (West 2012)) (count I) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)) (count II). In count I, the State alleged defendant committed aggravated assault when, in committing assault, he "knowingly balled his fists and stepped toward David Distin in a threatening manner, thereby placing [Distin] in reasonable apprehension of receiving a battery, knowing [Distin] to be an employee of the Quincy Police Department and while [Distin] was engaged in the performance of his official duties." Count II alleged defendant resisted a peace officer when "he knowingly resisted the performance of *** an authorized act [by Distin] within his official capacity, [*i.e.*, defendant's arrest,] knowing [Distin] to be a peace officer engaged in the execution of his official duties, in that he pulled away from [Distin] and refused to be handcuffed."

¶ 8 During the April 14, 2014, *voir dire*, the following exchange took place between the trial court and a potential juror:

> "THE COURT: Are any of you acquainted with the defense attorney or members of his or her law firm? Yes.
>
> [JUROR]: I just know her from the office.
>
> THE COURT: Okay. And how—how do you know her

from the office when you say—

[JUROR]: I work for the Adam's County Sheriff's Department. She's in the public defender's office."

THE COURT: Is there anything about that knowledge that you have of her that would cause you to be influenced one way or the other with regard to the testimony in this case?

[JUROR]: No, sir.

THE COURT: Do you think you could be fair and impartial?

[JUROR]: I do."

Shortly thereafter, defendant's counsel requested a sidebar and the following exchange took place between the court and counsel:

"[DEFENDANT'S TRIAL COUNSEL]: [The juror] noted that I was with the public defender's officer. I can't cite you the appellate case off the top of my head, but that's a big no-no. I think it's tainted the jury.

THE COURT: You mean his comment?

[DEFENDANT'S TRIAL COUNSEL]: Un-huh. I think it taints the jury when the jury is advised that the defendant has a public defender, rather than a 'real lawyer' as most of society puts it."

¶ 9 The State objected to the idea of declaring a mistrial, stating it was unaware of any such case. The trial court then took a brief recess to allow defense counsel an opportunity to

locate the case she was referencing. Upon reconvening, the issue was not addressed on the record, and the court continued with *voir dire*.

¶ 10 The next morning, the trial court asked defendant's trial counsel if she had found any authority regarding the disclosure of her being a public defender. Counsel advised the court she could not find any such authority. The State advised it did not find anything on the topic. The court then stated it was not going to declare a mistrial.

¶ 11 During trial, Quincy police officer David Distin testified he and fellow officer Terry Hagan responded to a call on May 24, 2013, at approximately 12:30 a.m., from a woman requesting police remove defendant from her apartment. Distin testified after he knocked on the door, he "heard shuffling" and a male voice say, " 'Oh shit. It's the police.' " Distin asked defendant to step outside. Once outside, defendant placed his hands in his pockets. Distin asked defendant to remove his hands. Defendant refused. Distin repeated the request two more times. After the third request, defendant, who is six feet tall and weighs 305 pounds, quickly removed his hands, balled his fists, and abruptly darted toward Distin in a threatening manner. At that point, Distin placed defendant under arrest.

¶ 12 Officer Hagan testified defendant was yelling and pulling away from him while he was walking defendant to the squad car. At one point, Hagan was worried defendant was going to be able to pull away from him completely. As a result, Hagan grabbed defendant by the arm and took him to the ground and held him there until Distin could help get him into the car. According to Hagan, defendant continued to try to pull away from them. Defendant was also spinning around while they were trying to search him. Hagan testified defendant "didn't go nice and easy into the squad car but we got him in there."

¶ 13 Following trial, the jury convicted defendant of aggravated assault (720 ILCS 5/12-2(b)(4) (West 2012)) (count I) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2012)) (count II).

¶ 14 On July 17, 2014, the trial court held a sentencing hearing. During that hearing the State asked for a sentence of 300 days in jail for aggravated assault and 60 days in jail for resisting a peace officer. The State also asked the court to assess a $500 public-defender fee because defendant had posted a $500 bond and the case had gone to a jury.

¶ 15 Defendant's counsel stated she was not asking for probation because "based on everything in the [presentence investigation] report, that would be setting him up for failure." Counsel did not believe defendant would accept any services. Instead, defendant's counsel asked for a sentence of time served. Before ending her argument, defendant's trial counsel noted, "[defendant] does not believe I've been an effective advocate on his behalf thus far. He did advise me earlier when we met that he has a lot to say, so I will leave that to him."

¶ 16 When asked by the trial court if he would like to make a statement, defendant indicated he would. Defendant then stated, *inter alia*, the following:

> "Jail time, no one's dead here, no one's been murdered, or whatever. When there's meth labs and people outside being raped and robbed, and they're not doing their jobs at all. I'm here for whatever reason. You all want to do what you all got to do. I don't think it was really a fair trial. I had the upmost respect for this lady here. We haven't even talked about the case, not really. We haven't sit down and talked about this case. I haven't had a chance to even

> see a lawyer or do anything. I feel like I've been railroaded through this. I've just—I've just put up with this, sir."

¶ 17 In imposing its sentence, the trial court addressed defendant's statements regarding his trial counsel as follows:

> "You also suggest, in a way, that your lawyer sold you out. From what I observed, as the judge sitting in that trial, your lawyer did a commendable job. I've been a defense attorney. I've been a prosecutor. The fact of the matter is, as an attorney, as a prosecutor, as a defense attorney, we got to deal with the facts that we've got as an attorney, and sometimes we can make a lot out of it and sometimes, quite frankly, there's not a whole lot we can make out of it ***."

The court then sentenced defendant to concurrent jail terms of 300 days for aggravated assault and 30 days for resisting a peace officer. The court also required defendant pay a $500 public-defender fee, which was to be taken from the $500 bond he previously posted.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred in failing to (1) declare a mistrial after a juror identified his attorney as a public defender, (2) conduct a *Krankel* hearing on his ineffective-assistance-of-counsel claim, and (3) hold a hearing to determine his ability to reimburse the county for the public-defender fee.

¶ 21 A. Defendant's Mistrial Claim

¶ 22 Defendant argues "the [trial] court erred when it did not declare a mistrial after a juror identified [his] counsel as a public defender in the presence of the jury venire." Defendant contends, as a result, "[t]his court should therefore vacate [his] conviction and remand the case for a new trial." Defendant implies he was denied his right to a fair trial. While defendant objected at trial, he concedes he failed to preserve the issue for review by failing to include the alleged error in a posttrial motion. However, he nevertheless urges our review of the matter under the plain-error doctrine.

¶ 23 The plain-error doctrine provides a narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009). As our supreme court has explained:

> "Under the plain-error doctrine, this court will review forfeited challenges when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431.

The defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *Lewis*, 234 Ill. 2d at 43, 912 N.E.2d at 1227.

¶ 24 In this case, defendant essentially is arguing a jury becomes biased against a defendant to the extent he is denied a fair trial when they learn he is represented by a public defender. However, defendant does not cite any case law from any jurisdiction for the proposition he advances. Instead, defendant cites three law review articles and one newspaper article in support his contention. We note these articles were not presented to the trial court. Defendant also attempts to compare the instant situation to one where a defendant is forced to go to trial wearing jail clothing. See *Estelle v. Williams*, 425 U.S. 501, 505-06 (1976) (a defendant's right to a fair trial is violated when he is forced to appear before the jury in jail attire). We are, however, unpersuaded by the comparison. Under the circumstances of this case, the trial court did not err in continuing the trial. As such, defendant's claim is forfeited.

¶ 25 B. Ineffective-Assistance Claim

¶ 26 Defendant next argues the trial court erred in failing to conduct a *Krankel* hearing on his ineffective-assistance-of-counsel claim.

¶ 27 A *Krankel* inquiry "is triggered when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. Pursuant to *Krankel* when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the following procedure should be followed to determine whether new counsel should be appointed:

> " '[W]hen a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the

court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed.' " *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127 (quoting *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003)).

¶ 28 In examining the factual basis, the trial court may (1) ask defense counsel to "answer questions and explain the facts and circumstances" relating to the claim, (2) briefly discuss the claim with the defendant, or (3) evaluate the claim based on "its knowledge of defense counsel's performance at trial" as well as "the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 78-79, 797 N.E.2d at 638.

¶ 29 Whether the court properly conducted a preliminary *Krankel* inquiry is a legal question reviewed *de novo*. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 72, 35 N.E.3d 1095. "If, however, the trial court has properly conducted the *Krankel* inquiry and reached a determination on the merits, we will reverse only if the trial court's action was manifestly erroneous." *Robinson*, 2015 IL App (1st) 130837, ¶ 72, 35 N.E.3d 1095 (manifest error is plain, evident, and indisputable).

¶ 30 In this case, the trial court stated it observed defense counsel's performance during trial and found she did a commendable job. As stated, a trial court may reject a defendant's posttrial ineffective-assistance claim based on the court's "knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face." *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. Our review of the record does not reveal a contrary conclusion. Further, defendant's statement he never had a chance to even see his attorney is

without support. The record shows defendant met with his counsel in her office on January 16, 2014. While the record also reflects that meeting went poorly, the fact it took place at all belies defendant's assertion the two never met. The court did not err in finding defendant's ineffective-assistance-of-counsel-claims meritless.

¶ 31 C. Public-Defender Fee

¶ 32 Finally, defendant argues the trial court erred in ordering him to pay the public-defender fee without first holding a hearing to assess his ability to pay the fee.

¶ 33 During the sentencing hearing, the State made the following request:

> "Your Honor, in this case, the defendant does have $500 bond up. Due to the substantial amount of jail time that we are requesting, we're not asking for a fine at this time, but we would ask that the mandatory court costs be assessed, and we would also ask for a $500 public defender reimbursement. As I stated, he has $500 in bond up, and I think that's appropriate considering this was taken to a jury trial."

¶ 34 After imposing sentence, the trial court ruled regarding the public-defender fee as follows:

> "The court is not going to impose a fine. I think you're getting a break there. On the other hand, in light of your financial circumstances, I think that's fair. You will have to pay the court costs

> associated with this. I will require you to make a $500 public defender reimbursement, and that will come out of the bond that you previously posted."

¶ 35 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/113-3.1(a) (West 2012)) 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 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 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."

¶ 36 Prior to ordering a defendant to pay reimbursement for appointed counsel, however, the trial court must conduct a hearing into the defendant's financial circumstances and ability to pay. *People v. Love*, 177 Ill. 2d 550, 563, 687 N.E.2d 32, 38 (1997). Before the hearing, the defendant must be given notice he will have an opportunity to present evidence

concerning his ability to pay and any other relevant circumstances. *People v. Roberson*, 335 Ill. App. 3d 798, 803-04, 780 N.E.2d 1144, 1148 (2002). The hearing must focus on the foreseeable ability of the defendant to pay reimbursement and the costs of the representation provided. *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38. The court is also required to consider, *inter alia*, the defendant's financial affidavit. 725 ILCS 5/113-3.1(a) (West 2012).

¶ 37 In this case, the State concedes the trial court did not hold a hearing on defendant's ability to pay the fee. Following our review of the record, we agree. Nothing in the record indicates the court inquired into defendant's ability to reimburse the county for the public-defender fee as required under section 113-3 of the Procedure Code. Instead, at sentencing, the court simply stated, "I will require you to make a $500 public defender reimbursement, and that will come out of the bond that you previously posted." We note the existence of a bond "does not allow the trial court to dispense with the hearing required by section 113-3.1(a)." *Love*, 177 Ill. 2d at 560, 687 N.E.2d at 37. As a result, defendant was not given an opportunity to be heard or present evidence regarding his ability to pay the fee. The parties, however, disagree as to the proper remedy.

¶ 38 Defendant argues the fee should simply be vacated without remanding the matter to the trial court for a hearing on his ability to pay it. While the State agrees the fee should be vacated, it maintains the cause should be remanded to allow the trial court to conduct a proper hearing.

¶ 39 Defendant's argument is based on the portion of section 113-3.1(a) of the Procedure Code requiring a hearing "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). According to

defendant, some sort of hearing must have taken place within that 90-day period. If not, remand is improper. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 41, 45 N.E.3d 696 (declining to remand for a proper hearing because the trial court did not hold a meaningful hearing in the first place where there was no inquiry whatsoever into the issue of the defendant's ability to pay the public-defender fee); *People v. Castillo*, 2016 IL App (2d) 140529, ¶ 14 (following *Moore*'s reasoning a meaningful hearing requires an inquiry, " 'however slight,' " into the defendant's ability to pay the fee). The question, as defendant sees it, is not whether the trial court held a hearing sufficient to comply with the requirements of section 113-3.1(a), but whether the trial court held a hearing at all.

¶ 40 In *People v. Somers*, 2013 IL 114054, ¶ 4, 984 N.E.2d 471, the trial court imposed a public-defender fee after asking the defendant three questions regarding his financial circumstances. On appeal to the supreme court, the defendant argued the fee must be vacated outright because the trial court failed to comply with section 113-3.1(a) of the Procedure Code. *Somers*, 2013 IL 114054, ¶ 12, 984 N.E.2d 471. While the supreme court found those three questions insufficient for section 113-3.1(a) purposes, the court concluded the questioning still constituted a hearing. *Somers*, 2013 IL 114054, ¶ 15, 984 N.E.2d 471. Specifically, the supreme court found the following:

> "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." *Somers*, 2013 IL 114054, ¶ 15, 984 N.E.2d 471.

The matter was then remanded for a proper hearing. *Somers*, 2013 IL 114054, ¶ 18, 984 N.E.2d 471.

¶ 41 By comparison, in *People Gutierrez*, 2012 IL 111590, ¶ 3, 962 N.E.2d 437, the circuit clerk, not the trial court, imposed a $250 public-defender fee. The appellate court vacated the fee because the defendant had not been provided with notice and a hearing and remanded the cause for a hearing. *Gutierrez*, 2012 IL 111590, ¶ 4, 962 N.E.2d 437. The defendant appealed to the supreme court, arguing remand was improper because (1) the statutory language required a hearing within 90 days; (2) the appellate court's order for remand came almost two years after the trial court's final order, and, as a result; (3) no hearing on remand could happen within the 90-day period. *Gutierrez*, 2012 IL 111590, ¶ 19, 962 N.E.2d 437. The supreme found, because neither the State nor the trial court sought the public-defender fee, *i.e.*, no hearing of any kind ever took place, it should have been vacated outright. *Gutierrez*, 2012 IL 111590, ¶ 24, 962 N.E.2d 437.

¶ 42 In this case, the State requested the fee and the trial court imposed it at the sentencing hearing, which was before the case had been disposed of for purposes of the statutory 90-day period. In ordering the reimbursement, the court stated it was not going to impose a fine "in light of [defendant's] financial circumstances." The court considered the $500 in cash bond

posted with the circuit clerk. The consideration of a cash bond, standing alone, is not sufficient to require reimbursement, *i.e.*, the court must consider, *inter alia*, defendant's financial affidavit. Although the court was deficient in following the section 113-3.1 requirements, "it did indicate its intent to order reimbursement and did so within the applicable time frame," after considering defendant's financial circumstances and the fact he had a cash bond posted. *People v. Somers*, 2012 IL App (4th) 110180, ¶ 45, 970 N.E.2d 606 (a similar case involving a different defendant than the one in the supreme court case discussed *supra*). Put another way, the trial court held "some sort of a hearing within the statutory time period." *Somers*, 2013 IL 114054, ¶ 15, 984 N.E.2d 471. As such, remand for a proper hearing pursuant to section 113-3.1 of the Procedure Code is appropriate. *Somers*, 2012 IL App (4th) 110180, ¶ 45, 970 N.E.2d 606.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we vacate the trial court's assessment of the public-defender fee and remand for a hearing on defendant's ability to pay that fee in compliance with section 113-3.1(a) of the Procedure Code (725 ILCS 5/113-3.1(a) (West 2012)). We otherwise affirm the trial court's judgment. Because the State has successfully defended a portion of the criminal judgment, we grant the State its statutory assessment of $75 against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

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