2016 IL App (4th) 140671-U

NO. 4-14-0671

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,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
FRANK M. ZAPUSHEK,	)	No. 11CF1100
Defendant-Appellant.	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's conviction but vacated the trial court's imposition of a public defender fee.

¶ 2 Following a December 2013 bench trial, the trial court convicted defendant, Frank M. Zapushek, of theft of property having a value greater than $500 (720 ILCS 5/16-1(a)(1)(A) (West 2010)). In July 2014, the court sentenced defendant to conditional discharge for 18 months and ordered defendant to pay restitution and certain fines and fees. The court also ordered defendant to pay a $200 public defender fee.

¶ 3 Defendant appeals, arguing that the trial court (1) did not sufficiently confirm that he had waived his right to a jury trial, which required reversal of his conviction; and (2) erred by imposing a $200 public defender fee without conducting the requisite hearing to determine his ability to pay the fee. For the reasons that follow, we (1) affirm defendant's conviction and (2)

vacate the court's imposition of a public defender fee.

¶ 4 I. BACKGROUND

¶ 5 A. The State's Charge and the Pretrial Proceeding at Issue

¶ 6 In December 2011, the State charged defendant with theft of property having a value greater than $500. In May 2013, defendant signed a "Waiver or Demand of Jury and Plea to Complaint," which contained the following:

> "The undersigned defendant in the above entitled cause, comes now in open court in his own proper person, acknowledges receipt of copy of complaint in due time, acknowledges admonitions by the court as to effect of this plea, for plea herein says that he is not guilty in manner and form as charged in said complaint, and waives a jury in said cause."

¶ 7 That same day, the trial court conducted a pretrial hearing, at which the following exchange occurred:

> "THE COURT: [Case No.] 11-CF-1100 ***. State appears ***, defendant *** appears in person along with counsel *** and [case No.] 12-CF-1152, same title, same appearances. Both matters are set for final status. The court has a waiver in 11-CF-1100. [Defense counsel]?
>
> [DEFENSE COUNSEL]: Yes your honor, we are asking for a bench trial status in the 2011 case and for the 2012 case to be set for status with the bench trial.
>
> THE COURT: All right. [State]?

[THE STATE]: No objection your honor."

Thereafter the court scheduled a bench trial in case No. 11-CF-1100.

¶ 8 B. Bench Trial

¶ 9 At a bench trial that began in December 2013 and ended in January 2014, the trial court considered evidence regarding a September 2008 contractual agreement between defendant—a dealer in rare coins—and Lawrence Wolfram. The agreement provided that defendant would sell several rare collectible coins belonging to Wolfram in exchange for a 10% commission. Sometime thereafter defendant misappropriated a portion of the sale proceeds received from the sale of Wolfram's coins and either deposited those assets back into defendant's coin business or expended those assets for his personal use.

¶ 10 Following the presentation of evidence and argument, the trial court took the matter under advisement. Later that month, the court entered a written order, convicting defendant of theft of property having a value greater than $500.

¶ 11 C. Sentencing Hearing

¶ 12 During a July 1, 2014, sentencing hearing, the trial court stated, in part, as follows:

> "Frankly, the factors in mitigation far outweigh any aggravating factors ***. *** [The court does not] believe that placing [defendant] on probation would be of any use ***[.] [The court] think[s] a conditional discharge disposition is appropriate ***. [The court is] interested in *** Wolfram being reimbursed for the coins, and so restitution will be ordered in the amount of $3,824.20. The court does understand the financial conditions.

> [The court has] reviewed all of the documents in defendant's group exhibit ***. [The court has] listened to the testimony [and] the financial issues that are present *** and the amounts owed[.] [T]he court is going to order a minimum payment of $100 a month."

¶ 13 The same day, the trial court entered (1) an order for conditional discharge, which sentenced defendant to conditional discharge for 18 months; and (2) a supplemental sentencing order that outlined the restitution, fines, fees, and costs imposed, which totaled $4,930. Included in that grand total was a $200 fee for "public defender reimbursement."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 A. Jury Trial Waiver

¶ 17 Defendant argues that the trial court did not sufficiently confirm that he had waived his right to a jury trial, which required reversal of his conviction. We disagree.

¶ 18 Although not cited by either party in this case, in *People v. Sailor*, 43 Ill. 2d 256, 260, 253 N.E.2d 397, 399 (1969), decided over 47 years ago, the supreme court considered the same argument that defendant now raises to this court. In rejecting that claim, the supreme court stated, as follows:

> "The record reveals that defendant's counsel, in her presence and without objection on her part, expressly advised the court that the plea was 'not guilty' and that a jury was waived. An accused ordinarily speaks and acts through his attorney, who stands in the role of agent, and defendant, by permitting her attorney, in her presence and without objection, to waive her right to a jury trial is deemed

> to have acquiesced in, and to be bound by, his action. [Citations.] As was observed by the court in [*People v. Melero*, 99 Ill. App. 2d 208, 211-12, 240 N.E.2d 756, 758 (1968)]: 'The trial court was entitled to rely on the professional responsibility of defendant's attorney that when he informed the court that his client waived a jury, it was knowingly and understandingly consented to by his client. Defendant is not permitted to complain of an alleged error which was invited by his behavior and that of his attorney.' " *Id.* at 260-61, 253 N.E.2d at 399.

¶ 19 As the record clearly shows, in May 2013, defendant signed a waiver expressing his intent to forego a jury's consideration of his case and opt, instead, for a bench trial in which the trial judge would determine if the State had met its burden of proof. That same day, defendant and his counsel appeared before the trial court, and defendant confirmed to the court—through counsel—his continued intent to waive his constitutional right to a jury trial. We adhere to the supreme court's guidance in *Sailor* and reject defendant's claim that the court erred by not inquiring further as to his knowing and intelligent waiver of that constitutional right. See *People v. Bracey*, 213 Ill. 2d 265, 270, 821 N.E.2d 253, 256 (2004); *People v. Dereadt*, 2013 IL App (2d) 120323, ¶ 16, 997 N.E.2d 802; *People v. Smith*, 326 Ill. App. 3d 831, 848, 761 N.E.2d 306, 322 (2001); *People v. Dockery*, 296 Ill. App. 3d 271, 276, 694 N.E.2d 599, 603 (1998) (citing *Sailor* approvingly).

¶ 20 Despite so concluding, we express concern that—although not required—the trial court did not personally question defendant to confirm that his jury trial waiver was knowing and voluntary. A brief inquiry could have consisted of nothing more than asking defendant whether

he (1) knew that he had a constitutional right to have a jury of 12 citizens decide his case; (2) was familiar with the concept of a jury trial from television or the movies; and (3) understood that by waiving that right, he was opting to have the trial judge decide whether the State had met its burden of proof. Such an inquiry, which would have taken no more than approximately 48 seconds to complete, would have been respectful of the fundamental constitutional right that defendant was waiving by opting for a bench trial.

¶ 21 B. Public Defender Fee

¶ 22 Defendant argues that the trial court erred by imposing a $200 public defender fee without conducting the requisite hearing to determine his ability to pay the fee. We agree.

¶ 23 1. *The Statute at Issue*

¶ 24 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2014)) provides, as follows:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court [(Ill. S. Ct. R. 607 (eff. Feb. 6, 2013))] 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*." (Emphasis added.) 725 ILCS 5/113-3.1(a) (West 2014)).

¶ 25 2. *Defendant's Public-Defender-Fee Claim*

¶ 26 In support of his argument, defendant contends that because the trial court failed to conduct a hearing in compliance with section 113-3.1(a) of the Code within 90 days of its July 2014 sentencing order, the $200 public defender fee must be vacated outright. The State responds by conceding that the public defender fee must be vacated but asserts that because the court timely conducted a hearing—albeit an insufficient one—during his July 2014 sentencing hearing, this court should remand the matter for a proper hearing instead of vacating the fee outright, as defendant advocates. In support of that position, the State relies on *People v. Somers*, 2013 IL 114054, 984 N.E.2d 471.

¶ 27 In *Somers*, the issue before the supreme court was whether section 113-3.1(a) of the Code authorized the appellate court to remand for a hearing on the defendant's ability to pay a public defender fee if more than 90 days had elapsed since the entry of the trial court's final judgment. *Id*. ¶ 9. In addressing that issue, the supreme court considered the situation in which the trial court attempted to comply with section 113-3.1(a) of the Code by conducting a hearing within the aforementioned 90-day period that the appellate court later determined to be insufficient. *Id*. ¶ 13. Specifically, the trial court conducted a hearing at which the court asked the defendant three questions concerning his employment status. *Id*. ¶ 4. Based on the defendant's answers, the court imposed a $200 public defender fee. *Id*.

¶ 28 On appeal, the supreme court affirmed the appellate court's remand for a proper public-defender-fee hearing under section 113-3.1(a) of the Code (*id*. ¶ 20), concluding that the

trial court's questions about defendant's employment status were insufficient to satisfy the statute. *Id*. ¶ 14. The supreme court continued, as follows:

> "Clearly, then, the trial court did not fully comply with the statute, and defendant is entitled to a new hearing. 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." *Id*. ¶ 15.

¶ 29 Defendant contends that *Somers* is distinguishable because, contrary to the State's assertion, no mention of a public defender fee occurred at the July 2014 sentencing hearing or at any other hearing in this case. In this regard, defendant contends that the situation before us is controlled by *People v. Daniels*, 2015 IL App (2d) 130517, 28 N.E.3d 216.

¶ 30 In *Daniels*, the issue before the appellate court was not the sufficiency of the trial court's public-defender-fee hearing, but instead, whether the court conducted a hearing at all that complied with section 113-3.1(a) of the Code. *Id*. ¶ 26. The State, relying on a document entitled, "Exhibit A," which listed the $750 public defender fee along with other fines, fees, costs, and restitution ordered following the defendant's sentencing hearing, argued that the court im-

posed the public defender fee "contemporaneously with sentencing defendant." *Id*. ¶¶ 12, 26. In rejecting that argument, the appellate court stated, as follows:

> "Although there is no question that a sentencing hearing took place and that the trial court imposed the public defender fee on the same date as that hearing, Exhibit A does not support the conclusion that the trial court conducted a hearing on the issue of the public defender fee. A review of the transcript of the sentencing hearing shows that here, unlike in *Somers*, during the hearing the trial court made absolutely no reference to the public defender or to its intent to impose the fee. Instead, the fee was imposed at some time after the hearing, by written order. There is simply no evidence that there was a hearing 'held to resolve defendant's representation by the public defender.'
>
> We note that the State makes no argument in the alternative that, despite the absence of a hearing, the proper remedy would be to remand for a hearing. Accordingly, we grant [the] defendant the relief he seeks, and we vacate the fee outright." *Id*. ¶¶ 29-30, 28 N.E.3d 216.

¶ 31 We first note that although defendant relies on *Daniels* to support his position that the public defender fee imposed in this case should be vacated outright, the State makes no mention of *Daniels* in its brief to this court. Instead, the State relies on *Somers* for the proposition that a public-defender-fee hearing did occur in this case, albeit an insufficient one. We agree with defendant that *Daniels* controls our analysis.

¶ 32 Compliance with section 113-3.1(a) of the Code requires a trial court to do more than impose a public defender fee in a perfunctory manner. *People v. Roberson*, 335 Ill. App. 3d 798, 804, 780 N.E.2d 1144, 1148 (2002). Instead, the trial court must give the defendant notice of its intent to impose the fee and must allow the defendant the opportunity to present evidence regarding his ability to pay. *Id*. at 803-04, 780 N.E.2d at 1148. In other words, the hearing contemplated under section 113-3.1(a) of the Code focuses on the costs of representation, the defendant's finances, and the ability of the defendant to satisfy the fee imposed. *Somers*, 2013 IL 114054, ¶ 14, 984 N.E.2d 471.

¶ 33 In this case, as in *Daniels*, our review of the proceedings that occurred at defendant's July 2014 sentencing hearing reveals that the trial court did not mention its intent to impose a public defender fee, much less give defendant an opportunity present evidence regarding his ability to pay such a fee. Instead, the court imposed the fee in a supplemental sentencing order immediately following defendant's July 2014 sentencing hearing. Accordingly, we vacate the $200 public defender fee imposed outright.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we (1) affirm defendant's conviction and (2) vacate the trial court's imposition of a public defender fee.

¶ 36 Affirmed in part and vacated in part.