2017 IL App (1st) 151755-U

No. 1-15-1755

Order filed September 29, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 11516
	)	
PERRY BLACKBURN,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court but vacate the improperly-assessed public defender's fee and remand to the circuit court to conduct a hearing in compliance with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2014)).

¶ 2 Following a jury trial, defendant Perry Blackburn was convicted of felony driving with a suspended license (625 ILCS 5/6-303(a), (d-3) (West 2014)) and sentenced to 17 months' imprisonment as a Class 4 offender. On appeal, he argues the trial court erroneously imposed

$400 in public defender's fees where he was not notified of a hearing, the attorney's fees were not established, and no effort was made to determine his ability to pay. We vacate this improperly-assessed fee and remand for a new hearing in compliance with the statute.

¶ 3 Defendant was charged by information with four counts of felony driving while license is suspended or revoked stemming from acts occurring on June 25, 2014, in Chicago. On July 11, 2014, the public defender of Cook County was appointed to represent defendant.

¶ 4 At trial, a Chicago police officer testified that he observed defendant driving while not wearing his seatbelt. After curbing the vehicle and processing defendant's information, the officer determined defendant's license had been suspended. After being provided his *Miranda* warnings and stating that he understood them, defendant told the officer that his license was suspended and he was just driving around the block. The parties stipulated that defendant's license was suspended on June 25, 2014.

¶ 5 The jury found defendant guilty of driving with a suspended license. Prior to sentencing, the State filed a motion for reimbursement of the public defender's expenses. At the sentencing hearing, the trial court imposed a sentence of 17 months' imprisonment. Immediately after denying defendant's written motion to reconsider sentence, the court asked defendant's public defender how many times he had appeared in the case. The public defender responded that he had appeared 10 times. The court stated, "Okay. $400 would be appropriate, plus a jury trial. $400 would be appropriate." Defendant filed a timely notice of appeal.

¶ 6 Defendant argues on appeal that the trial court improperly assessed a $400 public defender's fee where he was not notified of a hearing, the attorney's fees were not established, and no inquiry was made into his ability to pay. He asks us to vacate the fee outright. The State

agrees that the hearing was improperly conducted but argues the proper remedy is to vacate the fee and remand for a new hearing in compliance with the statute.

¶ 7 As an initial matter, the parties agree that the issue has not been properly preserved and is subject to forfeiture. They further agree the issue may be reviewed under the second prong of the plain-error doctrine. The plain-error doctrine contained in Illinois Supreme Court Rule 615(a) (eff. Feb. 6, 2013) provides a narrow exception to the general rule of procedural default. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). Our supreme court recently explained: "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). The burden of persuasion remains with the defendant under both prongs of the plain-error test. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). The first step of plain-error review is to determine whether any error occurred. *Walker*, 232 Ill. 2d at 124-25. Our supreme court instructed in *People v. Lewis*, 234 Ill. 2d 32, 48 (2009), that, when a trial court fails to follow a statute which provides a process for determining a fine, plain-error review is appropriate. In a case involving a "street-value fine," our supreme court in *Lewis* found:

> "The error here is more than a simple mistake in setting the fine. Rather, it is a failure to provide a fair process for determining the fine based on the current street value of the controlled substance. Plain-error review is appropriate because imposing the fine

> without any evidentiary support in contravention of the statute implicates the right to a fair sentencing hearing." *Lewis*, 234 Ill. 2d at 48.

Similarly, because defendant is arguing he was not provided a fair process for determining the public defender fee, we agree plain-error review is appropriate. See also *People v. Love*, 177 Ill. 2d 550, 564 (1997) (holding that the issue of whether the hearing regarding the defendant's ability to pay the public defender's fee was proper is not subject to waiver).

¶ 8 Although the experienced and knowledgeable trial judge in this case set a minimum fee that any defendant should be happy with, probably reasoning that he was saving judicial economy and no defendant would be dissatisfied with the result, this defendant argues that his ability to pay must be determined before a fee is assessed. We agree. Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) provides that the trial court may order the defendant to pay the clerk of the circuit court a reasonable sum to reimburse either the county or the State for the services of appointed counsel after holding a hearing within 90 days after the entry of a final order disposing of the case. 725 ILCS 5/113-3.1(a) (West 2014). In order to comply with the statute, the trial court must give defendant notice it may impose the fee and allow him an opportunity to present evidence regarding his ability to pay. *People v. Somers*, 2013 IL 114054, ¶ 14. "The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *Somers*, 2013 IL 114054, ¶ 14. The defendant runs a risk that, after the hearing, the trial court may impose a sum more than the $400 imposed here.

¶ 9 Here, we agree with the parties that the trial court failed to comply with the requirements of the statute before imposing the public defender's fee. The court simply asked the public

defender how many times he had appeared on the case and imposed a fee of $400 without attempting to determine defendant's ability to pay. The court did not inquire into defendant's financial status or provide defendant with an opportunity to present evidence concerning his ability to pay the fee. Therefore, the trial court erred in imposing a public defender's fee without first conducting a sufficient hearing under the statute.

¶ 10 Having determined the trial court failed to conduct a hearing in accordance with the statute, we must determine what the appropriate remedy should be. Our supreme court in *Somers* advised that when "some sort of a hearing" is held, even if insufficient, the proper remedy is to remand the case to the trial court. *Somers*, 2013 IL 114054, ¶ 15.

¶ 11 Defendant, relying on *People v. Moore*, 2015 IL App (1st) 141451, argues that, because the colloquy between the public defender did not constitute a hearing at all, we should simply vacate the fee outright. In *Moore*, this court held that a hearing that fails to address the defendant's ability to pay does not qualify as a sufficient hearing under section 113-3.1(a) as described our supreme court's decision in *Somers*. *Moore*, 2015 IL App (1st) 141451, ¶¶ 40-41. Since there was "no inquiry, however slight, into the defendant's ability to pay the public defender's fee," the court concluded there was no such hearing as required by section 113-3.1(a) held within the 90-day time period. *Moore*, 2015 IL App (1st) 141451, ¶ 41. The *Moore* court therefore vacated the imposition of the fee without remand for a proper hearing. *Moore*, 2015 IL App (1st) 141451, ¶¶ 41, 44.

¶ 12 This court has also found that remand is an appropriate remedy when "some sort of a hearing" is held, even if the trial court did not hold a hearing in compliance with section 113-3.1(a) of the Code. See *People v. Glass*, 2017 IL App (1st) 143551, ¶ 17; *People v. Adams*, 2016

IL App (1st) 141135, ¶ 26 (finding the trial court engaged in "some sort of a hearing" where it asked the public defender how many times he had appeared on the case and remanding for a proper hearing); *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21 (finding the trial court's questioning regarding how many times the public defender appeared on the case amounted to "an abbreviated hearing" and remanding for a proper hearing).

¶ 13 Here, the trial court, after the State had filed a motion for reimbursement of the public defender's expenses, asked the public defender how many times he had appeared on the case. Following the public defender's response that he had appeared 10 times on the case, the trial court stated, "Okay. $400 would be appropriate, plus a jury trial. $400 would be appropriate." We agree with the reasoning in *Glass*, *Adams*, and *Rankin* and conclude this colloquy between the trial court and the public defender amounted to "some kind of hearing" under *Somers*. Accordingly, we remand the case with directions to include in a hearing defendant's ability to pay the public defender's fee in compliance with section 113-3.1(a) of the Code.

¶ 14 For the reasons set forth above, we vacate the improperly-assessed $400 public defender's fee and remand the case to the trial court 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.

¶ 15 Affirmed in part, vacated in part, and remanded with directions.