

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).

2018 IL App (3d) 160377-U

Order filed October 16, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|--------------------------------------|---|--|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 10th Judicial Circuit, Marshall County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-16-0377 |
| DANIEL D. CLIFT, |) | Circuit No. 15-CF-46 |
| Defendant-Appellant. |) | Honorable Michael P. McCuskey, Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in imposing restitution and a public defender fee.

¶ 2 Defendant, Daniel D. Clift, appeals his convictions and sentences. He contends that the circuit court erred in requiring him to pay restitution and reimburse the public defender's office.

We vacate and remand.

¶ 3 **FACTS**

¶ 4 Following a bench trial, defendant was found guilty of three counts of aggravated criminal sexual assault of a family member, R.L., who was under the age of 18 (720 ILCS 5/11-1.60(b)(West 2014)).

¶ 5 At the sentencing hearing, the circuit court considered an impact statement from R.L. In reviewing R.L.’s impact statement, the court discovered that as a result of defendant’s criminal acts, R.L.’s mother paid for R.L. to attend therapy once a month. No evidence concerning the cost of R.L.’s therapy was presented at the sentencing hearing. Defense counsel also asked the court to impose a \$300 fee to reimburse the public defender’s office. No evidence was presented concerning defendant’s ability to reimburse the public defender’s office or to pay restitution.

¶ 6 Ultimately, the court sentenced defendant to three consecutive terms of 11 years’ imprisonment. The court also ordered restitution so “that all mental health therapy to R.L. in the future will be paid for by [defendant] to the extent allowed by law which I believe is \$25,000. *** No fine. So the \$25,000 is to pay for therapy ***.” The court also imposed a \$1000 fee to reimburse the public defender’s office (although defense counsel only requested \$300).

¶ 7 ANALYSIS

¶ 8 On appeal, defendant challenges the restitution order and the court’s order imposing a public defender fee. At the outset, we note that in defendant’s opening brief, he acknowledges that he forfeited review of these claims, but he contends that we should review his forfeited claims under the void sentence rule. The State concedes that error occurred on both issues, but correctly responds that the void sentence rule is no longer good law. See *People v. Castleberry*, 2015 IL 116916. However, in defendant’s reply brief, he contends that the issues are properly considered under the second prong of the plain error doctrine. Because defendant can raise a plain error argument in his reply brief, we analyze each argument in turn. *People v. Ramsey*, 239

Ill. 2d 342, 412 (2010) (“although defendant did not argue plain error in his opening brief, he has argued plain error in his reply brief, which is sufficient to allow us to review the issue for plain error.”).

¶ 9 First, defendant contends the circuit court’s restitution order requiring defendant to pay \$25,000 for R.L.’s counseling expenses should be vacated and remanded for a proper hearing. Defendant contends that the court’s restitution order should be vacated and the cause remanded because the State failed to present any evidence that R.L. incurred out-of-pocket expenses for counseling. Defendant also contends that the court failed to consider his ability to pay restitution or determine a payment schedule, as required by section 5-5-6(f) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-6(f) (West 2014)). The State concedes error. Upon review of the record, we accept the State’s concession.

¶ 10 Section 5-5-6(f) of the Code provides that when the sentencing court decides to order restitution, the court must take into account defendant’s ability to pay, as well as establish a payment schedule. *Id.* A restitution order “should be so complete as to not require further action by the court or a ministerial officer to ascertain its meaning.” *People v. White*, 146 Ill. App. 3d 998, 1003 (1986). In order to provide for the finality of a sentence, such an order should include the following factors:

“(1) a maximum dollar limit; (2) a time frame for counseling and proof of expenses incurred, *e.g.*, within one year of sentencing, or the term of probation where probation is imposed; (3) that the court services department or probation office monitor and administer the payment of restitution; (4) in the event that a dispute develops, that either party may petition the court for resolution thereof; and (5) when bond money is being withheld for use for restitution, a date when

any bond monies not so used will be remitted to defendant.” *People v. Cole*, 193 Ill. App. 3d 990, 996 (1990), *abrogated on other grounds by People v. Schott*, 145 Ill. 2d 188 (1991).

Alleged losses that are not supported by the evidence must not be the basis for awarding restitution. *People v. Jones*, 206 Ill. App. 3d 477, 482 (1990).

¶ 11 Here, the court had a basis to order restitution because the victim’s impact statement showed that R.L.’s mother paid for R.L. to attend ongoing counseling as result of defendant’s criminal acts. However, the amount ordered by the court (\$25,000) lacked a basis because neither party presented evidence as to R.L.’s expenses for therapy. *Id.* The restitution order is also deficient because it did not fix a sufficiently clear and definite sentence. The court ordered “that all mental health therapy to R.L. in the future will be paid for by [defendant] to the extent allowed by law which I believe is \$25,000. *** No fine. So the \$25,000 is to pay for therapy ***.” Importantly, the court did not set a time frame for repayment or consider defendant’s ability to pay. Therefore, we vacate the restitution order and remand the cause for a new hearing on the matter. *People v. Rayburn*, 258 Ill. App. 3d 331, 336-37 (1994).¹

¶ 12 Next, defendant contends that the circuit court erred in imposing the public defender fee without first conducting a hearing as to defendant’s financial circumstances and ability to pay. Although defendant did not raise this issue below, we may consider the issue as forfeiture does not apply. See *People v. Hardman*, 2017 IL 121453, ¶ 49. In response, the State concedes that the fee must be vacated, but it argues that, because the court held a hearing, albeit an insufficient one, the case should be remanded for a proper hearing. Upon review, we accept the State’s

¹Although defendant forfeited review of this error by failing to raise it in the circuit court, a restitution order that lacks any evidentiary basis, fails to take into consideration defendant’s ability to pay, and fails to set a payment schedule constitutes second-prong plain error. See *People v. Adame*, 2018 IL App (2d) 150769, ¶ 20 (citing *Jones*, 206 Ill. App. 3d at 482; *Rayburn*, 258 Ill. App. 3d at 335).

concession that the public defender fee must be vacated. Additionally, we agree with the State that the cause should be remanded for a proper hearing on the public defender fee.

¶ 13 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/113-3.1(a) (West 2014)) authorizes the circuit court to order a criminal defendant for whom counsel has been appointed to pay a reasonable amount to reimburse the county or the state. However, prior to ordering reimbursement, the court must conduct a hearing, within 90 days of sentencing, regarding the defendant’s financial resources. *Id.*; *People v. Daniels*, 2015 IL App (2d) 130517, ¶ 25. The hearing must not be conducted in a perfunctory manner. *People v. Somers*, 2013 IL 114054, ¶ 14. Instead, “the 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.* Where the circuit court conducts a timely hearing, but one that is insufficient to comply with the requirements of section 113-3.1(a) of the Criminal Code, the proper remedy is to vacate the public defender fee and remand for a proper hearing on the defendant’s ability to pay. *Id.* ¶¶ 14-18. The fee must be vacated outright only where there was no hearing whatsoever. *Daniels*, 2015 IL App (2d) 130517, ¶¶ 29-30.

¶ 14 Defendant contends that *vacatur* of the fee should be the end of the matter. The State, however, argues that the circuit court should, on remand, hold a hearing on defendant’s ability to pay. The parties agree that the issue of remand turns on whether the court can be described as having held “some sort of a hearing” on the matter. See *Hardman*, 2017 IL 121453.

¶ 15 Recently, our supreme court explained that the proper remedy is a remand as long as “ ‘some sort of a hearing’ ” took place within the statutory time period. *Id.* ¶ 70. The supreme court clarified that “ ‘some sort of a hearing’ encompasses a proceeding that meets the ordinary

definition of a hearing.” *Id.* ¶ 66. That the circuit court failed to inquire into defendant’s financial resources does not automatically mean that “ ‘no hearing’ ” occurred. *Id.* ¶ 67. Rather, a hearing is a “ ‘judicial session usu[ally] open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying.’ ” *Id.* ¶ 64 (quoting *People v. Johnson*, 206 Ill. 2d 348, 358 (2002), quoting Black’s Law Dictionary 725 (7th ed. 1999)).

¶ 16 We find that, despite failing to review defendant’s financial circumstances, the circuit court met the minimal threshold of conducting “some sort of hearing” regarding the public defender fee. This issue was addressed within the 90-day statutory time period at an open court session with all parties present. Although the issue was first raised by defense counsel, the court took up the issue of the public defender fee on its own motion by discussing the amount the public defender sought for reimbursement. Because “some sort of hearing” occurred during the statutory time period, we find that remand for a hearing on the public defender fee is the proper remedy in this case. *People v. Glass*, 2017 IL App (1st) 143551, ¶ 12.

¶ 17 On remand, defendant will be given notice and the opportunity to present evidence regarding his ability to pay the public defender fee and any other relevant circumstances. *Id.* The hearing will focus on the costs of representation, defendant’s financial circumstances, and the foreseeable ability of defendant’s ability to pay.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Marshall County imposing restitution and a public defender fee is vacated and remanded.

¶ 20 Vacated and remanded.