

2011 IL App (2d) 100415-U
No. 2-10-0415
Order filed December 8, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	Nos. 07-CM-1550
)	07-TR-34276
FEDERICO IBARRA,)	Honorable
)	Gordon E. Graham,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: (1) Defendant's jury waiver was valid, as the record was sufficient to establish that, in addition to his written waiver, he was present and did not object when the waiver was discussed in open court; (2) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required notice of the hearing on defendant's ability to pay; we vacated the fee and remanded for the notice and a new hearing, despite the expiration of the 90-day period in which such hearing could be held; (3) defendant was entitled to a \$75 credit against his fines, to reflect the 15 days he spent in presentencing custody.

¶1 The defendant, Federico Ibarra, appeals from his convictions of obstruction of a police officer (720 ILCS 5/31-1 (West 2006)) and driving while his license was revoked (625 ILCS 5/6-303(a))

(West 2006)). He contends that his jury trial waiver was invalid, that a public defender fee should be vacated, and that he should receive credit for time served in presentence custody. The State concedes the fee and credit issues, but first contends that this court lacks jurisdiction. We affirm the convictions, vacate the public defender fee and remand for a hearing on Ibarra's ability to pay, and grant credit for time spent in presentence custody.

¶ 2

I. BACKGROUND

¶ 3 In June 2007, Ibarra was charged by complaint. He was taken into custody on July 1, 2008, and a public defender was appointed. He spent 15 days in presentence custody.

¶ 4 On October 13, 2009, when the parties appeared in court, Ibarra's counsel answered the trial call with "Mr. Ibarra is present and approaching." Counsel informed the court that he was seeking a continuance because witnesses were unavailable. Counsel also stated that "[Ibarra] did say he would waive jury (indiscernible) matter." The court reporter wrote "indiscernible" for some additional words used by counsel during the course of the hearing. Counsel used the phrase "present and approaching" on multiple other occasions throughout the course of his representation of Ibarra.

¶ 5 The court accepted the jury waiver, and Ibarra did not object. That same day, Ibarra filed a written jury waiver. The court also entered an order, dated October 13, 2008, stating that Ibarra was present with counsel and that the jury waiver was filed.

¶ 6 On December 18, 2009, the parties again appeared for a hearing, and Ibarra was again referred to by his counsel as "present and approaching." During the hearing, the trial court remarked that the case was set for a jury trial. Ibarra's counsel corrected the court, reminding it that a jury trial was waived at the October 13, 2009, appearance. Ibarra did not object.

¶ 7 On February 26, 2010, a bench trial was held. Ibarra was convicted and on March 15, 2010, he was sentenced to five days in jail and \$450 in fines. He was also ordered to pay a \$50 public defender fee without a hearing on his ability to pay. On March 31, 2010, Ibarra filed a late motion for a new trial. At the hearing on the motion, there was no objection to the timeliness of the motion, and the State actively participated in the hearing. The motion was denied on April 26, 2010, and Ibarra appealed the same day.

¶ 8 II. ANALYSIS

¶ 9 A. Jurisdiction

¶ 10 The State argues that this court lacks jurisdiction because Ibarra's posttrial motion was late. However, we previously denied the State's motion to dismiss for lack of jurisdiction. We decline to revisit that ruling.

¶ 11 B. Jury Waiver

¶ 12 Ibarra argues that his right to a jury trial was violated because it is not clear that he waived that right while present in open court. Specifically, he argues that his counsel's statement that Ibarra was "present and approaching" creates doubt about whether Ibarra actually was present and able to hear the jury waiver.

¶ 13 Ibarra concedes that he did not question the validity of the jury waiver in the trial court. Instead, he raises it for the first time on appeal. Thus, Ibarra asks us to review the issue under the plain-error doctrine. "Plain error review is permitted when either (1) the evidence is closely balanced (regardless of the seriousness of the error) or (2) the error itself is so serious that the 'integrity of the judicial process' is at stake (regardless of the closeness of the evidence)." *People v. Rincon*, 387 Ill. App. 3d 708, 717 (2008) (quoting *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001)). The

question of whether there was a valid waiver of a jury trial is reviewed under the second prong, because of the fundamental nature of the right at stake. *Id.* When the facts are not in dispute, our review is *de novo*. *Id.*

¶ 14 “The right to a jury trial is protected by the United States Constitution (U.S. Const., amends. VI, XIV) and the Illinois Constitution (Ill. Const. 1970, art. I, § 8), and it has been codified by the Illinois legislature (725 ILCS 5/103-6 (West 2006)).” *Id.* “Our supreme court has construed the statute to mean that ‘a defendant validly waives his right to a jury trial only if [the waiver is] made (1) understandingly[] and (2) in open court.’ ” *Id.* (quoting *People v. Scott*, 186 Ill. 2d 283, 285 (1999)). “The circuit court has a duty to ensure that a jury waiver is ‘made expressly and understandingly’ ” *Id.* at 717-18 (quoting *People v. Smith*, 106 Ill. 2d 327, 334 (1985)). However, there is no constitutional requirement that the court apprise a defendant of the jury trial right and, although a waiver should be in writing (see 725 ILCS 5/115-1 (West 2006)), the lack of a writing may be harmless error. *Id.* at 718. “Conversely, the presence of a writing does not in and of itself establish the validity of a waiver.” *Id.* “No set formula exists, and each case must be examined on its particular facts.” *Id.* However, “our supreme court has ‘never found a valid jury waiver where the defendant was not present in open court when a jury waiver, written or otherwise, was at least discussed.’ ” *Id.* (quoting *Scott*, 186 Ill. 2d at 285). “A valid waiver exists if there is an express statement by defense counsel in open court, in the defendant’s presence, without objection from him or her, that the defendant opts to waive his jury trial right in favor of a bench trial.” *Id.* “Something in the discussion must indicate to the defendant that his or her right to a jury trial is being waived.” *Id.*

¶ 15 Here, Ibarra was present on two occasions when the court discussed a jury waiver, and he did not object. Ibarra attempts to create ambiguity about his presence by noting his counsel's use of the words "present and approaching" and arguing that perhaps Ibarra was not yet in the court room or could not hear. However, if Ibarra was absent from the court room, his counsel would not have used the term "present" to describe him. In addition, his counsel used the phrase "present and approaching" on multiple occasions when initially addressing the court, making it obvious that counsel used the phrase as a way of acknowledging that he was addressing the court on Ibarra's behalf. Further, an order from the court, dated October 13, 2009, and setting the bench trial, specifically stated that Ibarra was present and that he waived a jury trial. Ibarra also signed a jury waiver on that same date. While the presence of a written waiver does not in and of itself establish the validity of the waiver, that it was coupled with the court's order stating that Ibarra was present, and with counsel's statements that Ibarra was "present and approaching," provides sufficient proof that Ibarra was indeed in court that day and understandingly waived his jury trial right.

¶ 16 Ibarra also argues that the inability of the court reporter to discern parts of the October 13, 2008, colloquy suggests that Ibarra might not have heard his counsel's statement about waiving the jury trial. But the court reporter clearly reported the overall substance of the waiver, Ibarra never indicated that he could not hear, and the waiver was discussed again on another occasion without objection from Ibarra. Accordingly, Ibarra's argument that he did not validly waive a jury trial lacks merit.

¶ 17

C. Public Defender Fee

¶ 18 Ibarra contends, and the State agrees, that the public defender fee must be vacated because it was imposed under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)) without a hearing on Ibarra's ability to pay.

¶ 19 Section 113-3.1(a) provides:

“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.” 725 ILCS 5/113-3.1(a) (West 2008).

¶ 20 “[S]ection 113-3.1 requires that the trial court conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel.” *People v. Love*, 177 Ill. 2d 550, 563 (1997). The hearing is required even where a cash bail bond has been posted, because the existence of a bond is not conclusive evidence of an ability to pay. *Id.* at 560-63. “The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided.” *Id.* at 563.

¶ 21 “The hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his

ability to pay and other relevant circumstances.” *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (1999). “Notice” includes informing the defendant of the court’s intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard. *Id.* at 704. “Such a hearing is necessary to assure that an order entered under section 113-3.1 complies with due process.” *Id.* Rules of forfeiture do not apply. *Love*, 177 Ill. 2d at 564.

¶ 22 In *Love*, despite the passage of 90 days, our supreme court remanded the matter for a hearing when one had not been held. *Id.* at 565. We have followed suit. See, e.g., *People v. Schneider*, 403 Ill. App. 3d 301, 304 (2010); *Spotts*, 305 Ill. App. 3d at 705. “We view the supreme court’s practice to remand such cases as binding.” *Schneider*, 403 Ill. App. 3d at 304.

¶ 23 Here, the fee could not be imposed without notice and a hearing before the trial court. Thus, we vacate the fee and remand for notice and a hearing on the matter.

¶ 24 Ibarra argues that the fee should be vacated outright without a remand, but also recognizes that we rejected that position in *People v. Gutierrez*, 405 Ill. App. 3d 1000, 1003 (2010), *appeal allowed*, No. 111590 (Ill. Mar. 30, 2011). He asks that, since appeal was allowed in that case, that we hold his case in abeyance while the matter is pending. We decline to do so.

¶ 25 C. Credit

¶ 26 Ibarra contends that he is entitled to a \$75 credit against his fines for 15 days spent in presentence custody. The State agrees that he is entitled to the credit.

¶ 27 Section 110-14(a) of the Code of Criminal Procedure of 1963 provides: “Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon

application of the defendant.” 725 ILCS 5/110-14(a) (West 2008). The defendant is entitled to the credit for each day or part of a day spent in jail prior to the imposition of the sentence. *People v. McCreary*, 393 Ill. App. 3d 402, 408 (2009). However, the total credit may not exceed the amount of the fine. 725 ILCS 5/110-14(a) (West 2008). A defendant may apply for the credit for the first time on appeal, as rules of forfeiture do not apply. *People v. Woodard*, 175 Ill. 2d 435, 457 (1997).

¶ 28 Here, Ibarra was not given credit against his fines for time spent in presentence custody. He is entitled to that credit. Accordingly, we amend the mittimus to reflect the credit.

¶ 29

III. CONCLUSION

¶ 30 We affirm Ibarra’s conviction, vacate the public defender fee and remand for a hearing on Ibarra’s ability to pay, and amend the mittimus to reflect the \$75 credit.

¶ 31 Affirmed as modified in part and vacated in part; cause remanded.