

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).

2011 IL App (4th) 100318-U

Filed 7/27/11

NO. 4-10-0318

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
RONALD LEMONS,	)	No. 09CF482
Defendant-Appellant.	)	
	)	Honorable
	)	Holly F. Clemons,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Appleton and McCullough concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where defendant received an opportunity to present evidence and argument on his ability to pay for public-defender services, the deficiencies in the notice of the section 113-3.1 hearing and the hearing itself did not rise to the level of plain error.
- ¶ 2 In April 2009, a grand jury indicted defendant, Ronald Lemons, with one count of driving while license revoked (625 ILCS 5/6-303(a), (d-2) (West 2006) (as amended by Pub. Act 95-27, § 5 (eff. Jan. 1, 2008) (2007 Ill. Legis. Serv. 1125, 1125 (West)) and Pub. Act 95-377, § 5 (eff. Jan. 1, 2008) (2007 Ill. Legis. Serv. 4673, 4678 (West)))). After a January 2010 trial, a jury found defendant guilty as charged. Defendant filed a posttrial motion. At a joint March 2010 hearing, the Champaign County circuit court dismissed defendant's posttrial motion as untimely, sentenced him to two years' imprisonment, and ordered him to pay a \$150 court-appointed-counsel fee. Defendant then filed a motion to reconsider his sentence, which the court

denied in April 2010.

¶ 3 Defendant appeals, asserting the trial court erred by ordering him to pay the \$150 court-appointed-counsel fee without (1) giving him notice of the hearing held under section 113–3.1 of the Code of Criminal Procedure (Procedure Code) (725 ILCS 5/113–3.1 (West 2008)) and (2) holding an adequate section 113–3.1 hearing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The April 2009 indictment alleged that, on May 5, 2008, defendant drove a motor vehicle on a public highway at a time when his license to drive was revoked due to a prior violation of section 11–501 of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11–501 (West 2008)) and defendant had previously committed violations of section 6–303(a) of the Vehicle Code (People v. Lemons, Nos. 02–TR–34534, 06–TR–7869 (Cir. Ct. Champaign Co.)). The indictment also indicated defendant was eligible for extended-term sentencing. On May 14, 2009, the public defender was appointed to represent defendant. Defendant's affidavit in support of his request for appointed counsel indicated he had eight dependents, was currently a student, and was unemployed.

¶ 6 On January 5, 2010, the trial court held a jury trial on the charge, and the jury found defendant guilty of driving while his license was revoked. The court set defendant's sentencing hearing and ordered a presentence investigation report. On March 5, 2010, defendant filed his posttrial motion. The March 19, 2010, presentence investigation report indicated defendant had posted a \$200 bond in another case (People v. Lemons, No. 08–TR–10786 (Cir. Ct. Champaign Co.)). It also noted defendant was married and resided with his spouse, his stepdaughter, his stepdaughter's son, his daughter, and four sons. Moreover, defendant had been

employed since October 2009. He was earning \$10 per hour and worked 20 to 40 hours per week. Defendant listed his net monthly income as "\$1,000 - \$1,700" and monthly expenses of \$750. His expenses were shared by his wife.

¶ 7 On March 24, 2010, the trial court held a joint hearing on defendant's posttrial motion and sentencing. The court first dismissed the posttrial motion because it was untimely and then addressed sentencing. In addition to receiving the presentence investigation report, the court considered defendant's two exhibits and heard testimony from defendant's wife and two stepchildren and defendant's own statement. We note defendant's two exhibits are not part of the record on appeal. The court sentenced defendant to two years' imprisonment and ordered him to pay court costs. The court then explained to defendant his sentence, mandatory supervised release, and court costs. The court remanded defendant to the custody of the sheriff and ordered the mittimus to issue. After that, the court stated the following:

"All right. Cause called for court-appointed counsel fee hearing. I believe certainly I have considered with respect to this portion of the hearing the information presented in the presentence report and in the defendant's exhibits, along with the affidavit that was placed on file May 19th, 2009. [Defense counsel], is there anything else you wish to add at this time?"

Defense counsel noted defendant would be serving a lengthy prison term and had four minor children that his wife would have to support without his income. The court noted defendant was entitled to one day of presentence credit and then ordered defendant to pay a court-appointed-counsel fee of \$150 on or before September 24, 2010.

¶ 8 On March 26, 2010, defendant filed a motion to reconsider his sentence, asserting his sentence was excessive given his mitigation evidence. After an April 19, 2010, hearing, the court denied the motion.

¶ 9 On April 21, 2010, defendant filed a notice of appeal. On May 3, 2010, defendant filed an amended notice of appeal that indicated he was appealing both his sentence and conviction. The amended notice complied with Illinois Supreme Court Rules 606 (eff. Mar. 20, 2009) and 303(b)(5) (eff. May 30, 2008). Thus, this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. July 1, 1971).

¶ 10 II. ANALYSIS

¶ 11 Defendant's sole argument is the trial court erred by ordering him to pay a \$150 court-appointed-counsel fee without (1) giving him notice of the section 113–3.1 hearing and (2) holding an adequate hearing. Defendant acknowledges he did not object to the fee in the trial court. However, citing *People v. Love*, 177 Ill. 2d 550, 564, 687 N.E.2d 32, 39 (1997), he argues the issue is not subject to forfeiture and may be reviewed as plain error because a defendant's right to a section 113–3.1 hearing is so fundamental.

¶ 12 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine have been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 13 Section 113–3.1(a) of the Procedure Code (725 ILCS 5/113–3.1(a) (West 2008)) provides, in pertinent part, as follows:

"Whenever \*\*\* 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."

¶ 14 Our supreme court has held "[t]he language of Section 113–3.1(a) clearly requires the trial court to conduct a hearing into the defendant's financial resources as a precondition to ordering reimbursement." *Love*, 177 Ill. 2d at 555, 687 N.E.2d at 35. The *Love* court further explained (1) "[t]he hearing must focus on the foreseeable ability of the defendant to pay

reimbursement as well as the costs of the representation provided" and (2) the court must "find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel." *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38.

¶ 15 Regarding a proper section 113–3.1 hearing, this court has held the defendant must (1) receive notice that the trial court is considering imposing a payment order under section 113–3.1 of the Procedure Code and (2) be given the opportunity to present evidence and argument regarding his ability to pay and other relevant circumstances. *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998). The *Johnson* court explained "notice" meant the trial court should inform the defendant in open court immediately before the section 113–3.1 hearing of the following:

"(1) the court's intention to hold such a hearing, (2) what action the court may take as a result of the hearing, and (3) the opportunity the defendant will have to present evidence and otherwise to be heard regarding whether any payment order should be entered, and, if so, in what amount." *Johnson*, 297 Ill. App. 3d at 165, 696 N.E.2d at 1270.

¶ 16 In this case, defendant was not given (1) the second and third parts of the notice information set forth in *Johnson* and (2) no evidence was presented at the hearing as to the cost of the representation provided by defense counsel. Thus, defendant's section 113–3.1 hearing did not fully comply with Illinois law, and an error occurred. Accordingly, we proceed to an analysis under the plain-error doctrine.

¶ 17 Defendant appears to assert plain error occurred under the second prong of the

plain-error doctrine as he contends he was denied a fundamental right. In *Love*, 177 Ill. 2d at 564, 687 N.E.2d at 39, our supreme court declined to apply forfeiture based on fairness where the trial court "wholly ignored the statutory procedures mandated for a reimbursement order under section 113–3.1." Here, the trial court did not completely ignore the requirements for a section 113–3.1 hearing, and thus we will conduct a plain-error analysis on the facts of this case.

¶ 18 In *People v. Cook*, 81 Ill. 2d 176, 187, 407 N.E.2d 56, 61 (1980), our supreme court found the predecessor version of section 113–3.1 unconstitutional because it violated a defendant's equal-protection and due-process rights. As to due process, the court found "[a] summary decision which orders reimbursement without affording a hearing with opportunity to present evidence and be heard acts to violate an indigent defendant's right to procedural due process." *Cook*, 81 Ill. 2d at 186, 407 N.E.2d at 61. In *Love*, 177 Ill. 2d at 559, 687 N.E.2d at 36, our supreme court pointed out section 113–3.1 clearly intended to correct the due-process violation identified in *Cook*.

¶ 19 Here, the trial court asked defense counsel if she had anything she wished to add in addition to the evidence cited by the court, which included defendant's affidavit in support of his request for appointed counsel, the two exhibits defendant presented at his sentencing hearing, and the presentence investigation report. Defense counsel chose to make arguments regarding defendant's inability to pay. Thus, defendant was afforded procedural due process in accordance with *Cook* as he had an opportunity to present evidence and make arguments. While defendant contends he was entitled to advance notice, defendant cites no authority addressing notice for a section 113–3.1 hearing that is contrary to *Johnson*, which explained notice meant informing the defendant in open court *immediately* before the hearing. *Johnson*, 297 Ill. App. 3d at 165, 696

N.E.2d at 1270. Moreover, defendant does not explain how his section 113–3.1 hearing was unfair due to the lack of evidence as to the cost of his counsel's representation. Clearly, the fees of an attorney that represented a criminal defendant during pretrial, trial, and sentencing is well in excess of \$150. Additionally, we note that contrary to defendant's argument, the material considered by the trial court was not devoid of evidence showing defendant's ability to pay the \$150 fee. According to the presentence investigation report, defendant had been making more money than his monthly expenses for several months and had posted \$200 bail in a separate traffic case.

¶ 20 Last, we point out this case is distinguishable from *People v. Bass*, 351 Ill. App. 3d 1064, 1070, 815 N.E.2d 462, 468 (2004), where this court vacated the court-appointed-counsel fee. In *Bass*, 351 Ill. App. 3d at 1070, 815 N.E.2d at 468, the record did not show the court considered the defendant's financial affidavit, and the defendant was not given an opportunity to present evidence or argument on the imposition of the fee. There, the defendant's procedural due-process right noted in *Cook* was clearly violated. In this case, the trial court expressly stated it considered defendant's financial affidavit as well as other financial information presented at the sentencing hearing, and defendant had an opportunity to present evidence and argument.

¶ 21 Since defendant has not sustained his burden of showing the errors affected the fairness of his section 113–3.1 hearing, we find the deficiencies in the notice of the section 113–3.1 hearing and the deficiency in the hearing itself do not constitute plain error.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the Champaign County circuit

court. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24           Affirmed.