

**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).

NO. 4-09-0890

Order Filed 3/29/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
BERNADINE NIELSEN,	)	No. 09CF103
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and Pope concurred in the judgment.

**ORDER**

*Held:* (1) Where defendant did not receive an opportunity to present evidence and argument on her ability to pay for public-defender services, plain error occurred, and the trial court's \$400 public-defender assessment must be vacated.

(2) Defendant was entitled to a \$10 credit under section 110-14(a) of the Procedure Code.

In April 2009, the State charged defendant, Bernadine Nielsen, with one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)). After a September 2009 trial, a jury found defendant guilty as charged. Defendant filed a motion for a new trial. At a joint November 2009 hearing, the trial court denied defendant's posttrial motion and sentenced her to five years' imprisonment and ordered her to pay, *inter alia*, a \$400 public-defender assessment and a \$200 deoxyribonucleic acid (DNA) assessment.

Defendant appeals, asserting (1) the trial court erred by ordering her to pay the \$400 public-defender assessment without holding a hearing and (2) she is entitled to \$10 credit under section 110-14(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14(a) (West 2008)) against her \$200 DNA assessment. We affirm in part as modified, vacate in part, and remand for further proceedings.

#### I. BACKGROUND

The State's April 2009 information asserted defendant committed residential burglary in February 2008. In May 2009, the trial court appointed the public defender to represent defendant. That same month, defendant was released on \$1,000 bond that was provided by Cristina Zeleznik.

On September 23, 2009, the trial court held a jury trial on the charge, and the jury found defendant guilty of residential burglary. The court set defendant's sentencing hearing and ordered a presentence investigation report. On November 16, 2009, defendant filed a motion for a new trial.

On November 18, 2009, the trial court held a joint hearing on defendant's posttrial motion and sentencing. The court first denied the posttrial motion and then addressed sentencing. The court sentenced defendant to five years' imprisonment and ordered her to pay \$1,040 in restitution. The court then explained to defendant her sentence and mandatory supervised

release. After that, the court stated, in pertinent part, the following:

"All right. There is a \$1,000 bond posted in this case. That's going to be applied to costs, fines, restitution. I am going to and I think I heard enough evidence of Miss Nielsen's financial situation through her own testimony and statement but also from the presentence report, and while I don't believe that, you know, she's not employable I guess at this point, she was able to post a substantial bond. She did have the services of the public defender not only for handling pretrial matters but there was a jury trial in this case and then of course the sentencing, etc. So it's been a lot of PD involvement so I am going to impose a \$400 PD assessment on top of the fines, costs."

The written sentencing judgment reflected, *inter alia*, the \$400 public-defender assessment and a \$200 DNA assessment.

On November 23, 2009, defendant filed a notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. July 1, 1971).

## II. ANALYSIS

### A. Public-Defender Assessment

Defendant argues the trial court erred by ordering her to pay a \$400 public-defender assessment without holding a hearing on her ability to pay. The State asserts defendant has forfeited this issue by failing to object in the trial court. Defendant argues we should address the issue under the plain-error doctrine because the error affects her fundamental rights. The State disagrees.

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.

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."

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." *People v. Love*, 177 Ill. 2d 550, 555, 687 N.E.2d 32, 35 (1997). 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 [ordering] the defendant to pay reimbursement for appointed counsel." *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38.

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.

In this case, defendant was not given (1) the notice information set forth in *Johnson* and (2) an opportunity to present evidence and argument on her ability to pay. Thus, defendant's section 113-3.1 hearing did not comply with Illinois law, and an error occurred. Accordingly, we proceed to an analysis under the plain-error doctrine.

Defendant appears to assert plain error occurred under the second prong of the plain-error doctrine as she contends the hearing violated her due-process rights. 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.

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 defen-

dant'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*.

Since defendant was not given an opportunity to present evidence and argument on her ability to pay, we find (1) a due-process violation occurred and (2) defendant has shown plain error under the second prong. Accordingly, we must vacate the court's \$400 public-defender assessment and remand for a proper section 113-3.1 hearing.

#### B. *Per Diem* Credit

Defendant last asserts she is entitled to a \$5 *per diem* credit against her DNA assessment under section 110-14(a) of the Procedure Code (725 ILCS 5/110-14(a) (West 2008)) for her two days in presentence custody. The \$5 *per diem* credit is available for defendant's \$200 DNA assessment. See *People v. Long*, 398 Ill. App. 3d 1028, 1034-35, 924 N.E.2d 511, 516-17 (2010) (finding the DNA assessment is a fine and subject to offset under section 110-14(a)). Accordingly, defendant is entitled to a \$10 credit against her \$200 DNA assessment.

#### III. CONCLUSION

For the reasons stated, we vacate the trial court's \$400 public-defender assessment and affirm as modified the judgment in all other respects. We further remand the cause to

the Livingston County circuit court for further proceedings consistent with this order and an amended sentencing judgment, reflecting a section 110-14(a) credit of \$10. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

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