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2012 IL App (3d) 110210-U

Order filed August 31, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 9th Judicial Circuit,
Plaintiff-Appellee,	) Warren County, Illinois,
	)
v.	) Appeal No. 3-11-0210
	) Circuit No. 10-CF-108
RONALD E. HANSON,	)
	) Honorable
Defendant-Appellant.	) Gregory K. McClintock,
	) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court
Justice McDade concurred in the judgment.
Presiding Justice Schmidt specially concurred.

ORDER

¶ 1 *Held:* The trial court erred in ordering defendant to pay a public defender fee of $3,500 without first holding a hearing to determine defendant's ability to pay.

¶ 2 Following a jury trial, defendant, Ronald E. Hanson, was convicted of intimidation (720 ILCS 5/12-6(a)(5) (West 2010)). Because defendant had been represented by a court-appointed attorney, the State requested that the court impose a public defender fee. At sentencing, the trial court ordered defendant to pay a public defender fee of $3,500. The court's order was issued without

first holding a hearing to determine defendant's ability to pay. Defendant appeals.

¶ 3 ANALYSIS

¶ 4 Defendant argues that the trial court erred in ordering him to pay for the services of a court-appointed attorney without first holding a hearing on the matter. Pursuant to section 113-3.1(a) of the Code of Criminal Procedure of 1963, the trial court may order a defendant to pay a reasonable sum to reimburse either the county or the State for the services of court-appointed counsel. 725 ILCS 5/113-3.1(a) (West 2010). However, section 113-3.1(a) requires that prior to ordering reimbursement, the trial court should conduct a hearing to determine a defendant's ability to pay. *People v. Gutierrez*, 2012 IL 111590.

¶ 5 In this case, the circuit court did not conduct a hearing to determine defendant's financial resources or his ability to pay a fee for court-appointed counsel. The State admits that the court failed to conduct a hearing; however, it argues that a hearing was not necessary. We disagree and find that a hearing was needed to comply with section 113-3.1(a). Therefore, the court's order requiring defendant to pay a fee for the public defender must be vacated and the cause remanded to the trial court for a proper hearing on defendant's ability to pay the fee.

¶ 6 CONCLUSION

¶ 7 The circuit court of Warren County's order requiring defendant to pay $3,500 for the services of his public defender is vacated, and the cause is remanded for a hearing on defendant's ability to pay the fee.

¶ 8 Order vacated and cause remanded.

¶ 9 PRESIDING JUSTICE SCHMIDT, specially concurring.

¶ 10 I concur with the majority because I believe the supreme court's decision in *People v. Love*, 177 Ill. 2d 550 (1997), dictates this result. While I am not sure that the supreme court's handling of the forfeiture issue in *Love* would be the same today, rewriting *Love* is above my pay grade.

¶ 11 The error in the public defender fee was not raised in the trial court. Normally, one would think it would have been forfeited. We are basically talking about due process concerns. Even constitutional protections can be waived or forfeited. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). In fact, in the case before us, the defendant does not even argue for plain-error review on appeal. See *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000) (failure to argue plain error forfeits plain-error review). Normally, I would have thought the issue would have been forfeited in light of our supreme court's more recent plain error decisions. See, *e.g.*, *People v. Hillier*, 237 Ill. 2d 539, 549 (2010); *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010); *People v. Givens*, 237 Ill. 2d 311, 329 (2010).

¶ 12 However, in *Love*, the issue of the failure to have a hearing before assessing the public defender fee was also not raised in the trial court. The defendant argued plain error and ineffective assistance of counsel. Then, the supreme court simply stated that the "application of the waiver rule is inappropriate under the circumstances of this case. Where, as here, the trial court wholly ignored the statutory procedures mandated for reimbursement order under section 113-3.1, and instead ordered reimbursement *sua sponte* without any warning to defendant, fairness dictates that waiver should not be applied." *Love*, 177 Ill. 2d at 564. There was no plain-error analysis by the supreme court, but, rather, just a passing reference to fairness. It seems the supreme court carved out a special

circumstance where waiver and forfeiture do not apply. This action by the supreme court dissuades me from distinguishing this case from *Love* on the basis that Hanson did not raise plain error. Also, the supreme court did not hold in *Love* that the order was void for failure to hold the hearing. Maybe the supreme court meant to say that the failure to hold this hearing amounts to structural error. However, if so, it did not say it. I find the analysis perplexing. At any rate, the supreme court's decision in *Love* leads me to resist my urge to apply forfeiture rules; therefore, I concur with the majority.