2013 IL App (4th) 120089-U

NO. 4-12-0089

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 9, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
NORMAN G. JEFFERSON,	)	No. 11CF1
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The $250 public-defender-reimbursement fee was improperly imposed without a hearing to determine the reasonableness of the fee or defendant's ability to pay.

(2) The $200 deoxyribonucleic acid-analysis fee was improperly imposed as defendant had previously submitted a genetic sample for analysis and had paid the required fee.

¶ 2 Defendant, Norman G. Jefferson, pleaded guilty to unlawful restraint and was sentenced to probation. A few months later, the State filed a petition to revoke defendant's probation. He admitted the probation violation and the trial court resentenced him to 18 months in prison and ordered him to pay various fines and fees, including a $200 deoxyribonucleic-acid (DNA)-analysis fee. A docket entry from the date of sentencing also included a $250 public-defender-reimbursement fee. Defendant appeals his sentencing judgment, claiming both assessments should be vacated. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In January 2011, the State charged defendant with one count of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) and one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2010)) for an altercation involving his girlfriend. Both offenses were charged as Class 4 felonies. See 720 ILCS 5/10-3(b) (West 2010); 720 ILCS 5/12-3.2(b) (West 2010) (defendant was previously convicted of domestic battery so this charge was elevated from a Class A misdemeanor to a Class 4 felony). Defendant submitted a financial affidavit, indicating he worked as a self-employed landscaper, earning $450 per month. At defendant's arraignment and upon his request, the trial court appointed the public defender to represent him. The transcript from the proceeding indicates only that defendant was "sworn as to accuracy of financial affidavit." Otherwise, there was no discussion about defendant's financial circumstances. After the hearing, the court entered a payment order, ordering defendant to pay $250 in $15 installments beginning February 1, 2011, for court-appointed attorney fees.

¶ 5 Defendant pleaded guilty to the unlawful-restraint charge in exchange for the State's dismissal of the domestic-battery charge and its recommendation of a sentence of 12 months' probation. The sentencing order provided a detailed list of the various fines and fees to be paid, including "a genetic marker grouping analysis fee of $200 in accordance with 730 ILCS 5/5-4-3(j) [(West 2010)]."

¶ 6 With regard to the ordered $200 DNA fee, a February 2011 docket entry provided as follows:

> "Notice received from Court Services/Circuit Court that the defendant had previously provided a sample of his blood, saliva or

> tissue for DNA analysis. Therefore, per Administrative Order 10-1, that part of the sentencing order has been satisfied."

¶ 7 In October 2011, the State filed a petition to revoke defendant's probation based upon his failure to report to court services, his positive drug test, and his failure to enroll in a domestic-violence program. Defendant completed another financial affidavit, again listing himself as self-employed earning $600 per month. Defendant admitted the probation violation, and on January 9, 2012, the trial court resentenced him to 18 months in prison. The court stated:

> "Defendant will pay all statutorily required fees and costs. If he has not already done so, defendant will submit specimens of blood, saliva, or tissue to the Illinois State Police. If genetic testing is required, defendant will pay a $200 genetic-marker-grouping-analysis fee."

Though the subject was not discussed at sentencing, the docket entry from the same date indicated defendant was to pay a $250 public-defender fee. Defendant filed a motion to reconsider his sentence, which the trial court denied. This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Defendant claims both the $250 order of reimbursement for the public defender and the $200 DNA fee should be vacated. First, with regard to the public-defender fee, it is clear the trial court did not conduct a hearing to determine the reasonableness of the fee or defendant's ability to pay before imposing the fee as required by section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2010)). The statute provides:

> "(a) Whenever under either Section 113-3 of this Code [(725

> ILCS 5/113-3 (West 2010))] 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." (Emphasis added.) 725 ILCS 5/113-3.1 (West 2010).

¶ 10 Our supreme court has stated: "To comply with the statute, the court may not simply impose the fee in a perfunctory manner. [Citation.] Rather, 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." *People v. Somers*, 2013 IL 114054, ¶ 14. A hearing is required, not merely suggested. *People v. Love*, 177 Ill. 2d 550, 559 (1997). The standard principle of forfeiture does not apply and therefore, defendant's failure to object does not preclude our consideration of the issue. *Love*, 177 Ill. 2d at 565 ("The trial court's failure to adhere to the procedural safeguards mandated by section 113-3.1 requires vacatur of the reimbursement order, despite defendant's failure to object.")

¶ 11 Both parties agree that the trial court did not conduct a hearing as required by the statute. The issue is whether the public-defender fee was imposed by the trial court or by the circuit clerk. It is unclear from the record and the parties are split in their opinions. Defendant claims the clerk imposed it and the State claims the court imposed it. The answer to this question will dictate the appropriate remedy in this case.

¶ 12 Defendant claims this court should vacate the assessment, without remand for a hearing, pursuant to *People v. Gutierrez*, 2012 IL 111590, because, he claims, it is clear the fee was imposed by the clerk, not the trial court. In *Gutierrez*, the supreme court considered whether, upon finding a violation of section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2010)), the appellate court should have vacated the public-defender fee outright rather than remanding for a hearing on the defendant's ability to pay. *Gutierrez*, 2013 IL 111590, ¶ 21. The court noted that section 113-3.1(a) provides that the hearing shall be conducted on the court's own motion or on motion of the State's Attorney. See 725 ILCS 5/113-3.1(a) (West 2010). Since the fee was imposed by the circuit clerk, without prompting by either the court or the State's Attorney, it was improper and should have been vacated. *Gutierrez*, 2013 IL 111590, ¶ 24. Defendant insists the clerk imposed the fee in this case, and therefore, we should follow *Gutierrez* and vacate the fee outright.

¶ 13 On the other hand, the State urges us to follow *Somers*. There, the trial court imposed the fee after an abbreviated hearing. The supreme court held the defendant was entitled to a new hearing because the trial court had not fully complied with the statute. *Somers*, 2013 IL 114054, ¶ 15. Although the trial court asked the defendant a few questions about his employment status prior to imposing the fee, the supreme court found this cursory ability-to-pay hearing was insufficient to satisfy the requirements of section 113-3.1(a). *Somers*, 2013 IL 114054, ¶ 20. The court determined

the appropriate remedy was to remand for compliance. *Somers*, 2013 IL 114054, ¶ 20.

¶ 14 In this case, again, it is undisputed the trial court did not address the issue of public-defender reimbursement at a hearing. However, a public-defender fee was indicated in one of a series of docket entries entered the day of resentencing on January 9, 2012. This particular docket entry noted the sentence imposed and that defendant was "advised of Supreme Court Rule 605 Appeal Rights." It further provided that fines and costs in the amount of $509 were imposed, along with a $300 probation-monitoring fee, a $10 Crime Stoppers fee, a $250 public-defender fee, and a $200 State- offender-DNA fee. Immediately below these listed fees, it stated: "Status: Dispositioned & Sentenced Jan 09, 2012 Judge: CLEM HARRY E". Further, the docket entry provided as follows: "Fine + Cost Fee $1269.00 Signed Judge CLEM HARRY E." The State claims this "docket entry suggests that the trial court ordered the public[-]defender fee along with defendant's other costs and fees," as opposed to the same being imposed by the circuit clerk. We agree with the State.

¶ 15 The sentencing judgment did not specifically include a list of mandated fines, fees, and costs. It stated only that defendant was "ordered to pay costs of prosecution herein." However, the docket entry, which set forth the itemized amounts, was presumably entered at the direction of the trial court, as it indicated the same had been "signed" by Judge Clem. From our review of the docket entry, it appears Judge Clem ordered each amount as itemized and authorized the total of $1,269. The wording of the docket entry supports the presumption that the fee was imposed by the court rather than the clerk. As such, we follow *Somers*, vacate the fee, and remand for a proper hearing under section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2010)). *Somers*, 2013 IL 114504, ¶ 20. A new hearing may be held, despite the fact that 90 days has passed since the entry

of a final judgment, because the initial hearing was held within 90 days. *Somers*, 2013 IL 114054, ¶ 17.

¶ 16 This court recently addressed the difficult dilemma that reviewing courts sometimes face when trying to determine who imposed the listed fees, fines, and costs. *People v. Folks*, 406 Ill. App. 3d 300, 308-09 (2010). We noted the clerks generally calculate the assessments after sentencing with the help of their computer systems, outside the presence of the trial court and the defendant. We suggested the legislature address this issue to help streamline the imposition and calculation of the various assessments so as to avoid issues like the one presented here, as well as the often litigated issue of the clerk improperly assessing fines—a function outside of their statutory authority. We suggested that, in the interim, "the current 'Notice to Party' form could be utilized in the courtroom and on the record and signed by the presiding judge after the defendant is admonished that the specific mandatory and discretionary fines will be imposed in addition to any unspecified clerk's fees and costs." *Folks*, 406 Ill. App. 3d at 309. Until then, we can only interpret the record as we see it.

¶ 17 Next, defendant contends this court should vacate the $200 DNA-analysis fee because his genetic sample was already on file with the Illinois State Police and he had previously paid the required and applicable fee. The trial court originally imposed this fee when defendant was sentenced to probation in January 2011. In February 2011, a docket entry indicated "that part of the sentencing order has been satisfied" since defendant had previously provided a sample and paid the fee. However, upon resentencing in January 2012, after his probation was revoked, the court again assessed the genetic-sampling fee, but noted it was assessed only if defendant had not previously satisfied this requirement. Nevertheless, the circuit clerk's schedule of fees dated March 2012

included the $200 genetic-sampling fee.

¶ 18 The State concedes, citing *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011), that a defendant should only be required to submit a sample and pay the associated fee one time and that any subsequent order should be vacated. Defendant has demonstrated he (1) submitted a DNA sample in 2007, (2) is in the DNA index database, and (3) has previously been assessed the $200 fee. Accordingly, we accept the State's concession and agree defendant's $200 DNA assessment should be vacated.

¶ 19 III. CONCLUSION

¶ 20 We vacate the sentencing judgment of the circuit court of Champaign County in part. Specifically, we vacate the $200 DNA assessment and the $250 public-defender fee and affirm the sentencing judgment in all other respects. The cause is remanded for a public-defender fee hearing in compliance with section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2010)).

¶ 21 Affirmed in part and vacated in part; cause remanded.