

2015 IL App (1st) 130915-U

SECOND DIVISION

February 3, 2015

No. 1-13-0915

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	.
v.)	No. 12 CR 14007
)	
DIANDRE PARRISH,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court assessed a public defender fee without providing notice to defendant and without holding an adequate hearing concerning defendant's ability to pay that fee, the appellate court vacated the fee and remanded for a new hearing on defendant's ability to pay even though 90 days had expired since the final trial court order disposing of the case. The appellate court also ordered the mittimus corrected to reflect that defendant spent 189 days in presentence custody, and ordered the assessment order

corrected to reflect that the total \$1,135 assessment should be reduced by a credit in the amount of \$630 to \$505 because the weight of authority holds that the \$50 court system fee is actually a fine subject to a \$5 per day credit for each day spent in presentence custody.

¶ 2 Following a bench trial, defendant Diandre Parrish was convicted of the Class 4 felony of possession of a controlled substance (a residual amount of heroin), was sentenced to a three-year prison term with credit for 188 days spent in presentence custody, and was ordered to pay various fines and fees in the amount of \$1,135, including a court system fee in the amount of \$50. The trial court also allowed defendant credit in the amount of \$580 toward the fines. The State had filed a motion for a hearing to determine whether defendant should reimburse a reasonable amount to the county for some or all of the public defender's fee, and the trial court indicated that \$555 should be deducted from defendant's bond. The mittimus and the assessment order were dated January 17, 2013. Defendant filed a motion to reconsider the sentence, which was denied. On appeal, defendant contends that the trial court improperly assessed the \$555 public defender fee without providing notice and without holding a hearing on his ability to pay. Defendant further contends that the mittimus should be amended to reflect credit for 189 days spent in presentence custody and to reflect that his total assessment was \$505 after application of a \$630 credit (instead of the \$580 credit allowed by the court) against some of his fines, including the \$50 court system fee, which he alleges is a fine subject to the \$5 per day credit for presentence custody.

¶ 3 Regarding the public defender fee, the presentence investigative report (PSI) disclosed that defendant had no income because he was incarcerated. He had two children for whom he did

not pay support, although during allocution he stated, "I do take care of my kids." He was a high school graduate, but he had a criminal background and he had no history of employment and no military service. He reported that he had been shot in the head in 2003, suffered from a seizure disorder, and was taking Dilantin to control the seizures, but he claimed he could not remember the name or address of his doctor. He received monthly disability benefits from Social Security in the amount of \$690 or \$600, plus a monthly Link card in the amount of \$200. He resided with his mother prior to his incarceration and he reported that he had no assets.

¶ 4 Defendant contends first that the \$555 public defender fee should be vacated because the court assessed it without providing notice to him that the court was considering imposing a fee, and the court assessed it without holding a hearing or making a determination that he was able to pay. He argues that the court improperly deducted the fee from his bond without determining who had actually paid for the bond. He maintains that the alleged error was not waived or forfeited because the trial court failed to conduct a sufficient hearing. In his opening brief, he asks this court to vacate the fee or remand the cause for a hearing on his ability to pay it.

¶ 5 The State responds that the cause should be remanded for a hearing to determine defendant's ability to pay the public defender fee.

¶ 6 Defendant replies that the statutory 90-day deadline (725 ILCS 5/113-3.1 (West 2012)) for holding a hearing on his reimbursement of the public defender fee has expired and that the fee must be vacated because it is no longer possible to remand for a timely hearing within the 90-day deadline.

¶ 7 Section 113-3.1 of the Code of Criminal Procedure (Code) provides for reimbursement to the county or the state for court-appointed counsel. 725 ILCS 5/113-3.1 (West 2012). Section 113-3.1 states that, in a hearing to determine payment, the court shall consider the defendant's financial affidavit "and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted *** 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 (West 2012). Thus, the statute requires a hearing into the defendant's financial resources. *People v. Hubner*, 2013 IL App (4th), 120137, ¶ 39. The hearing is not required to be lengthy or complex, but must not be perfunctory and must provide the defendant with notice that the trial court is contemplating assessing a reimbursement fee pursuant to section 113-3.1, and must provide the defendant with an opportunity to present evidence concerning his ability to pay. *Id.*; *People v. Somers*, 2013 IL 114054, ¶¶ 13-14, 17, 20. The hearing is required even where a cash bail bond was posted for the defendant (*People v. Love*, 177 Ill. 2d 550, 560-64 (1997)), and even where the defendant posted a cash bond (*People v. Hanna*, 296 Ill. App. 3d 116, 125 (1998)). The court must consider the defendant's financial affidavit, and must focus on the costs of representation, and the defendant's financial circumstances and foreseeable ability to pay. *Somers*, 2013 IL 114054, ¶ 14. The Illinois Supreme Court strongly expressed its "disappointment" that defendants are still being denied proper hearings for reimbursement of public defender fees. See *People v. Gutierrez*, 2012 IL 111590, ¶ 25 (especially criticizing circuit court clerks for assessing such fees without a court hearing). Review of the trial court's compliance with section 113-3.1 is *de novo*. *People v. Williams*, 2013 IL App (2d) 120094, ¶ 13.

¶ 8 Forfeiture is not appropriate where the trial court assesses a public defender fee without following the procedural requirements. *People v. Carreon*, 2011 IL App (2d), 100391, ¶ 11; see also *Hanna*, 296 Ill. App. 3d at 126 (rejecting the State's argument that the defendant waived objection to the reimbursement order).

¶ 9 In *Somers*, 2013 IL 114054, ¶ 4, an adequate hearing under section 113-3.1 was not held where the trial court asked the defendant whether he thought that he could get a job upon his release from incarceration, whether he would use income from the job to pay his fines and costs, and whether there was any physical reason why he could not work.

¶ 10 Here, the trial court did not conduct even a perfunctory hearing of the type held in *Somers*. There was no evidence of defendant's ability to pay except for the information in the PSI, or how the \$555 fee was assessed. The trial court did not ask any questions that would have elicited information, but during the sentencing proceeding the trial court did say that it had considered the PSI among other circumstances. The trial court ordered defendant to pay the public defender fee in a perfunctory manner without determining his ability to pay it, and therefore the order must be vacated even though defendant failed to object. See *Love*, 177 Ill. 2d at 564-65. Under the circumstances, the court failed to comply with the requirements of section 113-3.1. The remedy is to vacate the order and remand for a proper hearing. *People v. Collins*, 2013 IL App (2d), 110915, ¶ 25. Therefore, because the trial court did hold a timely hearing on January 17, 2013, at the very beginning of the 90-day period for holding the hearing and because the issue was raised on appeal, we remand for a hearing pursuant to section 113-3.1 on the State's motion regarding the reimbursement issue. See *Williams*, 2013 IL App (2d) 120094, ¶¶ 19-24;

see also *People v. Fitzpatrick*, 2011 IL App (2d) 100463, ¶ 13, *issue forfeited on appeal*, *People v. Fitzpatrick*, 2013 IL 113449, ¶ 26.

¶ 11 Next, defendant contends, and the State agrees, that the mittimus should be corrected to reflect that he spent 189 days in presentence custody. Defendant further contends, and the State agrees, that he must be credited \$945 (\$5 per day for 189 days) toward his fines for time spent in custody prior to sentencing, but defendant contends that he is entitled to credit for the \$50 court system fee because he alleges it is a fine and that his total assessments should be reduced by \$630 down from \$1135 to \$505, but the State maintains that defendant is not entitled to credit for the \$50 court system fee and that his total fines, fees, and costs should be reduced by \$580 down from \$1,135 to \$555.

¶ 12 The parties agree that defendant spent 189 days in presentence custody. Pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2012)), defendant is entitled to credit in the amount of \$5 per day for each day of presentence incarceration toward the fines that were imposed. A defendant is entitled to the \$5 per day credit for the days he spent in custody even though he subsequently posted a bail bond. See *People v. Smith*, 258 Ill. App. 3d 261, 267-68 (1994) (the posting of bail does not preclude the application of section 110-14); *People v. Taylor*, 84 Ill. App. 3d 467, 471 (1980) (the defendant's fine was reduced by \$10--\$5 for each of two days she spent in presentence custody prior to posting bail).

¶ 13 The court system fee in section 5-1101(c) of the Counties Code can be assessed against a defendant who committed a felony. See 55 ILCS 5/5-1101(c) (West 2012); *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 86, *vacated and remanded on other grounds*. The State argues that

a fee reimburses the state, while a fine punishes (*People v. Jones*, 223 Ill. 2d 569, 581-82, 600 (2006)), that the court system fee is deposited into the county's general fund to finance the court system (55 ILCS 5/5-1101(g) (West 2012)), and therefore that it is intended to compensate the county and it constitutes a fee or a cost, not a fine that would be subject to presentence custody credit. However, pursuant to the weight of authority, the court system fee is actually a fine that is subject to the \$5 per day presentence custodial credit. See *People v. Graves*, 235 Ill. 2d 244, 253-54 (2009); *People v. Ackerman*, 2014 IL App (3d) 120585, ¶¶ 30-31; *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54; *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 21-22; *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 17-18, all of which determined that the court system fee was a fine, and all of which (except *Smith*, 2014 IL App (4th) 121118, ¶ 92, which involved a sexual assault for which credit was not available) determined that the defendants were entitled to a credit of \$5 per day against their fines for each day spent in presentence custody. Although the State maintains that *Smith*, 2013 IL App (2d) 120691, ¶¶ 21-22, was wrongly decided, it was decided consistently with the pronouncement of the Illinois Supreme Court in *Graves*, which we are bound to follow.

¶ 14 We therefore direct the clerk of the circuit court to amend the fines, fees, and costs order to reflect that the total amount in fines, fees, and costs was \$505. See Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999).

¶ 15 For the foregoing reasons, the judgment of the circuit court is affirmed; the mittimus is ordered corrected to reflect 189 days of presentence custodial credit; the fines, fees, and costs

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order is ordered corrected to reflect a total of \$505 in fines, fees, and costs; and the cause is remanded for a hearing to determine the propriety of assessing a public defender fee.

¶ 16 Affirmed as modified, remanded.