

FIRST DIVISION
August 10, 2015

No. 1-13-3502

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 23211
)	
SANTIAGO GARCIA,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Public defender fee assessed in inadequate hearing remanded for proper hearing. Fines and fees order corrected.

¶ 2 Following a 2013 bench trial, defendant Santiago Garcia was convicted of second degree murder and sentenced to 11 years' imprisonment with fines and fees. On appeal, defendant challenges certain fines and fees – the principal being a \$5,000 public defender fee – and seeks credit against others.

¶ 3 Following a joint bench trial, defendant and codefendant Osmar Alejo were convicted of second degree murder for the death of Christopher Pinkins during a physical struggle on August 23, 2011. Both defendants were sentenced to 11 years' imprisonment. Codefendant has appealed separately, raising in relevant part similar fines-and-fees issues including the public defender fee. *People v. Alejo*, No. 1-13-3508.

¶ 4 On appeal, the parties first correctly agree that we must correct defendant's order assessing fines and fees. He was assessed \$80 in fines: \$30 to fund juvenile expungement, \$30 for the children's advocacy center, \$10 for mental health court, \$5 for youth diversion/peer court, and \$5 for drug court. 55 ILCS 5/1101(d-5) - (f-5); 730 ILCS 5/5-9-1.17 (West 2010); *People v. Graves*, 235 Ill. 2d 244, 251-56 (2009); *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 35; *People v. Smith*, 2014 IL App (4th) 121118, ¶¶ 59-61. Thus, his violent crime victim assistance fine is \$8 rather than \$25 (725 ILCS 240/10(b) (West 2010)), and he must receive \$80 presentencing detention credit against his fines. 725 ILCS 5/110-14(a) (West 2010); *Graves*, 235 Ill. 2d at 250-51.

¶ 5 The parties also correctly agree that defendant's \$5,000 public defender fee must be vacated because the court did not comply with the statutory requirement to hold a hearing, no later than 90 days after the dispositional order, where the defendant's financial resources and ability to pay are assessed. 725 ILCS 5/113-3.1 (West 2010). However, the parties dispute the proper remedy beyond vacatur. The State contends that we should remand for a new hearing because there was a timely, albeit inadequate, hearing. Defendant contends that there was no hearing pursuant to section 113-3.1(a) and thus there is no authority for a remand as more than 90 days have passed since the dispositional order of his sentencing. We agree with the State.

¶ 6 Upon the motion of the State or the court, the court may order a defendant to pay "a reasonable sum to reimburse" the cost of court-appointed counsel, not to exceed \$5,000 for a felony. 725 ILCS 5/113-3.1(a), (b) (West 2010). "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." 725 ILCS 5/113-3.1(a), citing 725 ILCS 5/113-3 (West 2010). "Such hearing shall be conducted *** 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." 725 ILCS 5/113-3.1(a) (West 2010). Our supreme court has explained regarding section 113-3.1 that the trial court must 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. [Citation.] The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay. [Citation.] The trial court must consider, among other evidence, the defendant's financial affidavit." *People v. Somers*, 2013 IL 114054, ¶ 14.

¶ 7 Where the requisite hearing is not held, the public defender fee has been vacated outright with no remand. In *People v. Gutierrez*, 2012 IL 111590, ¶¶ 21-26, our supreme court vacated the fee without remand where the clerk of the court imposed it *sua sponte*. In *People v. Daniels*, 2015 IL App (2d) 130517, this court vacated the fee without

remand because the court made no reference to the fee during the sentencing hearing but imposed the fee some time after the sentencing hearing by written order, so that there was "simply no evidence that there was a hearing 'held to resolve defendant's representation by the public defender.' " *Id.*, ¶ 29, quoting *Somers*, 2013 IL 114054, ¶ 20.

¶ 8 By contrast, the supreme court in *Somers* remanded for a new hearing on the fee, explaining:

"Clearly, then, the trial court did not fully comply with the statute, and defendant is entitled to a new hearing. Just as clearly, though, the trial court did have some sort of a hearing within the statutory time period. The trial court inquired of defendant whether he thought he could get a job when he was released from jail, whether he planned on using his future income to pay his fines and costs, and whether there was any physical reason why he could not work. Only after hearing defendant's answers to these questions did the court impose the fee. Thus, we agree with the State's contention that the problem here is not that the trial court did not hold a hearing within 90 days, but that the hearing that the court did hold was insufficient to comply with the statute." *Somers*, 2013 IL 114054, ¶ 15.

¶ 9 Since, and in light of, *Gutierrez* and *Somers*, this court has remanded for a hearing in compliance with the statute in several cases where, as here, some hearing was held but that hearing was inadequate. We remanded in *People v. Williams*, 2013 IL App (2d) 120094, holding that:

"*Somers* requires only that the trial court hold 'some sort of a hearing within the statutory time period.' [Citation.] While the trial court in *Somers* asked the

defendant a few questions related to his finances, our supreme court never stated that such questioning was required for a hearing. Rather, the supreme court stated that a hearing 'clearly' took place [citation], implying that less would also suffice to constitute a 'hearing.' *** The proceeding here, while obviously insufficient to meet the requirements of section 113-3.1(a), still met this definition of a 'hearing,' as it was a judicial session open to the public, held to resolve defendant's representation by the public defender. Relatedly, the trial court imposed what it deemed to be an appropriate public defender fee. Therefore, we hold that the trial court conducted 'some sort of a hearing' on the issue of the public defender fee within the statutory time period." *Id.*, ¶ 20, quoting *Somers*, 2013 IL 114054, ¶ 15.

We also remanded in *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 18, noting that the "intent of section 113-3.1 is to have a qualified defendant reimburse either the counties or the State for the cost of public defender representation. [Citation.] In light of this statutory purpose, we interpret the language broadly and find that the actions of the trial court were sufficient under *Somers*; it appears that some sort of a hearing was held." We remanded in *People v. Collins*, 2013 IL App (2d) 110915, ¶ 25, noting that the *Gutierrez* court "expressly declined to address the issue of whether the 90-day period was mandatory or directory." Most recently, we remanded in *People v. Rankin*, 2015 IL App (1st) 133409, ¶¶ 20-21. "As in *Somers*, the trial court in this case did hold an abbreviated hearing on the State's motion for the assessment of a fee for the defendant's court-appointed attorney when it asked the assistant public defender how many times that he had appeared in court." *Id.*, ¶ 21, citing *Somers*, 2013 IL 114054, ¶¶ 14-15.

¶ 10 We find the appropriate remedy in this case is to remand for a proper hearing as in *Somers, Williams, McClinton, Collins, and Rankin*. The entire proceeding on the public defender fee occurred at the end of defendant's sentencing hearing just after he was admonished of his appeal rights. The State mentioned that it filed a reimbursement motion (though the record does not include such a written motion) and the court asked defense counsel "How many times did you appear on this?" Counsel replied "34," and the court imposed \$5,000 in attorney fees. Thus, neither party presented evidence nor did the court ask any questions regarding defendant's ability to pay. Moreover, neither party nor the court mentioned defendant's financial affidavit despite the express statutory requirement to consider it. Thus, the parties are correct that the trial court erred in imposing the public defender fee. Regarding remand, the State expressly sought the fee and the court expressly ruled upon it in open court, unlike *Gutierrez* or *Daniels*. Instead, this case falls squarely under *Rankin* and we similarly find that remand for a proper hearing is appropriate.

¶ 11 Accordingly, we vacate the \$5,000 public defender fee and remand for the court to hold a hearing compliant with section 113-3.1(a). Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the order assessing fines and fees to reflect a violent crime victim assistance fine of \$8, and \$80 in presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 12 Affirmed in part, vacated in part, order corrected, and remanded with directions.