2015 IL App (1st) 133574-U

SIXTH DIVISION
Order Filed: November 20, 2015

No. 1-13-3574

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9880
	)	
VICTOR TOWNSEL,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court misstated the minimum sentence applicable to the defendant, the defendant's sentence is vacated and the cause is remanded for a new sentencing hearing. Because the public defender fee was assessed following an inadequate hearing, the fee is vacated and the cause is remanded for a proper hearing regarding the defendant's ability to pay the fee. The court system fee is vacated.

¶ 2 Following a bench trial, the defendant, Victor Townsel, was convicted of unlawful use of a weapon (UUW) by a felon and sentenced to nine years in prison. On appeal, the defendant contends that he is entitled to a new sentencing hearing because the trial court misapprehended

the pertinent sentencing range and the appropriate period of mandatory supervised release (MSR). The defendant further contends that the trial court erred in ordering him to pay a public defender fee and a court system fee. For the reasons that follow, we vacate the defendant's sentence and remand for a new sentencing hearing; vacate the two challenged fees; and remand for a hearing on the defendant's ability to pay a public defender fee.

¶ 3 The defendant's conviction arose from the events of April 28, 2012. On that date, Chicago police officers executed a search warrant at a Chicago apartment. As a result of the search, the defendant was arrested and charged with two counts of UUW by a felon, one count of possession of a controlled substance with intent to deliver, and one count of being an armed habitual criminal. Following a bench trial, the trial court found the defendant guilty of UUW by a felon.

¶ 4 At the sentencing hearing, the trial court first reviewed the defendant's criminal history. The prosecutor asserted that the defendant was subject to mandatory Class X sentencing due to his criminal history, which the prosecutor described as including the following convictions:

> "He then had a Class 2, 1996 other narcotics scheduled substance. That was four years in the Illinois Department of Corrections [(IDOC)]. He had another Class 2, 1994 narcotics case. That was four years in [IDOC]. Those were concurrent.
>
> He also had an additional 1994 case where he was given an opportunity on a Class 1 narcotics offense to two years probation."

The prosecutor asserted that the defendant was not rehabilitative and recommended a sentence of 15 years in prison. In mitigation, defense counsel argued that other than a prior conviction for

aggravated battery, the defendant's criminal history was not violent. Counsel also highlighted that the defendant had been working as a bouncer and had a difficult childhood. Counsel asked the trial court for a sentence of six years. The defendant declined his opportunity for allocution, stating only, "I just want to appeal it."

¶ 5 The trial court announced the defendant's nine-year sentence as follows:

> "It's still—you know, I hear or see nothing that even shows that he is remorseful or anything else. He knew that he had the gun. The gun was in the room. He doesn't live there but he is having sex with someone at this apartment.
>
> All I see is someone who completely disregards everything and everyone. You can have a drug problem but this was a gun problem and it was drugged in and it was all in his room. Did they prove it beyond a reasonable doubt? No. He was probably more than likely the seller. $3,500 [monthly income] is probably right but I don't know if it came from bouncing.
>
> I find nothing here that shows that he is remorseful in any way. He deserves the minimum so nine years [IDOC]."

The trial court also advised the defendant that he was subject to a three-year term of MSR.

¶ 6 After imposing sentence, the trial court admonished the defendant regarding his right to appeal. The trial court then engaged in the following conversation with the defendant:

> "THE COURT: Sir, do you currently have any type of income or assets?
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: $250 attorney fee."

The defendant's subsequent motion to reconsider sentence was denied.

¶ 7 On appeal, the defendant first contends that he is entitled to a new sentencing hearing because the trial court misapprehended both the pertinent sentencing range and the appropriate MSR period. More specifically, the defendant notes that he was convicted of a Class 2 felony with an enhanced sentencing range between 3 and 14 years' imprisonment. He asserts that the trial court clearly misapprehended the pertinent sentencing range when it stated that he deserved a "minimum" sentence of nine years. Relatedly, the defendant contends that the trial court's imposition of a three-year period of MSR indicates that it misapprehended the appropriate MSR period for Class 2 felonies, which is two years.

¶ 8 The defendant did not raise these issues at sentencing or in a post-sentencing motion but nevertheless argues that they are not forfeited. He argues that the imposed MSR term is void and can be challenged at any time because it is not authorized by law. He further asserts that both sentencing issues may be reached under the second prong of the plain error doctrine because he was "certainly denied his fundamental right to a fair sentencing hearing because the trial judge undisputedly misunderstood both the sentencing range and the proper MSR period in imposing sentence."

¶ 9 When a defendant challenges a sentence as void, this court will review the sentencing issue even though it was not properly preserved for review because a void sentence can be corrected at any time. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Id.* at 545. To obtain relief under the plain error doctrine in the sentencing context, a defendant must show either that

(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Id*. Before we consider application of the plain error doctrine, however, we must determine whether any error occurred. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. This is because "without error, there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007).

¶ 10 The State asserts that no error occurred in the instant case because the defendant's criminal history required that he be sentenced as a Class X offender and, in turn, receive a three-year Class X term of MSR. The State also argues that when the trial court commented that the defendant "deserves the minimum" it either misspoke or an error occurred in transcription. We agree with the State regarding the MSR issue, but disagree regarding the trial court's comment that the defendant "deserves the minimum."

¶ 11 Under section 5-4.5-95(b) of the Unified Code of Corrections, a defendant who is more than 21 years old must be sentenced as a Class X offender if he is convicted of a Class 2 felony after having twice been convicted of an offense classified as Class 2 or greater and those charges were separately brought and tried and arose out of different series of acts. 730 ILCS 5/5-4.5-95(b) (West 2012). In addition, section 5-4.5-95(b) does not apply unless: (1) the first felony was committed after February 1, 1978; (2) the second felony was committed after conviction on the first; and (3) the third felony was committed after conviction on the second. 730 ILCS 5/5-4.5-95(b)(1)-(3) (West 2012). The application of mandatory Class X sentencing is a question of law that is reviewed *de novo*. *People v. Baumann*, 314 Ill. App. 3d 947, 948 (2000).

¶ 12 Here, the presentence investigation (PSI) report and the records attached to it reflect that the defendant's criminal history included convictions that qualified him for mandatory Class X

sentencing. First, as the defendant acknowledges, he was convicted on September 4, 1996, of two different Class 2 drug offenses in case numbers 94 CR 17533 and 96 CR 19449. Second, on November 14, 1994, the defendant was convicted in case number 94 CR 07524 of manufacturing, delivering, or possessing with the intent to deliver 1 to 15 grams of heroin, a Class 1 felony. See 720 ILCS 570/401(c)(1) (West 1994). Accordingly, the defendant must be sentenced as a Class X offender, which carries a sentencing range of 6 to 30 years' imprisonment.

¶ 13 In his reply brief, the defendant notes that the 1994 conviction is not listed in the "sentencing information" section of IDOC's website and, therefore, characterizes the information included in the PSI as "dubious." We disagree. A PSI report is generally considered a reliable source for the purpose of inquiring into a defendant's criminal history. *People v. Williams*, 149 Ill. 2d 467, 491 (1992). In this case, the information regarding the defendant's 1994 conviction is included not only in the "History of Convictions" section of the PSI report, but also in the attached Chicago Police Department "Criminal History Report" and the attached Illinois State Police "Criminal History Record Information" printout. Given that two different sources support the PSI report, we reject the defendant's assertion that the absence of the 1994 conviction on the IDOC website renders the information in the PSI report unreliable.

¶ 14 In the instant case, the trial court sentenced the defendant to 9 years' imprisonment, a sentence that falls within the 6-to-30-year sentencing range for Class X offenses. 730 ILCS 5/5-4.5-25(a) (West 2012). However, in announcing that sentence, the trial court stated, "He deserves the minimum so nine years [IDOC]." As noted above, the State suggests that either the trial court misspoke at this point or an error occurred when the hearing was transcribed, and that

the trial court actually intended to sentence the defendant to a term longer than the minimum. We decline the State's invitation to speculate in this manner. The transcript of proceedings indicates that the trial court misstated the minimum sentence applicable to the defendant. As such, we agree with the defendant that error occurred.

¶15 A misstatement of the understanding of the minimum sentence by a trial judge constitutes second-prong plain error and necessitates a new sentencing hearing when it appears that the judge's mistaken belief arguably influenced the sentencing decision. *People v. Hausman*, 287 Ill. App. 3d 1069, 1071-72 (1997). Here, the trial court incorrectly stated that the minimum sentence was nine years. Regardless of whether this was an inadvertent misstatement or a mistaken belief, we find that it arguably influenced the court's sentencing decision. Accordingly, we vacate the defendant's sentence and remand for a new sentencing hearing. See *id.* At that hearing, the trial court can resolve the issue of whether it intended to sentence the defendant to the "minimum," *i.e.*, six years, or whether it intended to impose a sentence of nine years without regard to the minimum sentence.

¶ 16 With regard to MSR, we reject the defendant's argument that the three-year term imposed by the trial court is void. As discussed above, the defendant qualified for mandatory sentencing as a Class X offender. The MSR term attached to a Class X sentence is three years. 730 ILCS 5/5-8-1(d)(1) (West 2012). As such, the trial court imposed the appropriate term of MSR. *People v. Lenoir*, 2013 IL App (1st) 113615, ¶¶ 22-25; *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 36-38; *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 60-62. A Class X term of MSR may be imposed at resentencing.

¶ 17 The defendant's next contention is that the trial court erred in ordering him to pay a $250 fee to reimburse Cook County for the services of the public defender where the order was made without a proper hearing regarding his ability to pay. He asserts that this court must vacate the fee or, in the alternative, remand for a proper hearing. The State agrees that the trial court did not conduct a proper hearing, but asserts that the appropriate remedy is to remand the case, not simply vacate the trial court's order.

¶ 18 Under section 113-3.1(a) of the Code of Criminal Procedure, the trial court may order a defendant to pay a "reasonable sum" to reimburse the county or the State for the services of appointed counsel. 725 ILCS 5/113-3.1(a) (West 2012). Before entering such an order, the trial court is to hold a hearing, no later than 90 days after the entry of a final order disposing of the case at the trial level, to determine the amount of payment. *Id.* At the hearing, the trial court must consider the defendant's affidavit requesting appointed counsel and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. *Id.* The trial court may not order reimbursement in a perfunctory manner. *People v. Somers*, 2013 IL 114054, ¶ 14. Our supreme court has explained as follows:

> "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. [Citation.]" *Somers*, 2013 IL 114054, ¶ 14.

¶ 19 In some cases, where the requisite hearing is not held, the public defender fee has been vacated outright with no remand. For example, 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, ¶ 29, this court vacated the fee without remand because the court made no reference to the fee during the sentencing hearing but imposed it by written order some time after the sentencing hearing. The *Daniels* court reasoned 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).

¶ 20 In contrast to *Gutierrez* and *Daniels*, our supreme court in *Somers* remanded for a new hearing where the trial court "did have some sort of a hearing within the statutory time period." *Somers*, 2013 IL 114054, ¶ 15. Specifically, the trial court in *Somers* inquired of the 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. *Id.*

¶ 21 Similar to *Somers*, this court has remanded for a hearing in compliance with section 113-3.1(a) in several cases where some kind of hearing was held, but the hearing was inadequate. For instance, we remanded in *People v. Williams*, 2013 IL App (2d) 120094, holding as follows:

> "*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.

We also remanded in *People v. McClinton*, 2015 IL App (3d) 130109, ¶¶ 5, 18, where the trial court, based solely on the PSI report and the statements made by the defendant in allocution prior to sentencing, found that the defendant was physically able to work and had the ability to reimburse the county. This court determined that "the actions of the trial court were sufficient under *Somers*; it appears that some sort of a hearing was held." *Id.* ¶ 18. Again, we remanded in *People v. Collins*, 2013 IL App (2d) 110915, ¶¶ 24-25, where the trial court imposed the fee at the sentencing hearing. More recently, we remanded in *People v. Rankin*, 2015 IL App (1st) 133409, ¶¶ 20-21. In *Rankin*, this court found that the trial court held "an abbreviated hearing" when it asked the assistant public defender how many times he had appeared in court. *Id.* ¶ 21.

¶ 22 In the instant case, we find that the appropriate remedy 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 the defendant's sentencing hearing just after he was admonished of his appeal rights. The trial court asked the defendant if he had any type of income or assets. When the defendant replied in the negative, the trial court stated, "$250 attorney fee." We conclude that this interaction constitutes "some sort of a hearing." See

Somers, 2013 IL 114054, ¶ 15. However, since the hearing did not comply with the requirements of section 113-3.1(a), the appropriate remedy is to vacate the $250 fee and remand to the trial court for a hearing in compliance with the statute.

¶ 23 The defendant's final contention on appeal is that the $5 court system fee (55 ILCS 5/1101(a) (West 2012)) should be vacated because it does not apply to convictions for UUW by a felon. The State concedes that this assessment was improperly imposed. We accept the State's concession and vacate the fee.

¶ 24 For the reasons explained above, we vacate the defendant's nine-year sentence of incarceration and remand for a new sentencing hearing; affirm his three-year term of MSR; vacate the $5 court system fee; and vacate the $250 public defender fee and remand for a hearing in compliance with section 113-3.1(a) of the Code of Criminal Procedure.

¶ 25 Affirmed in part, vacated in part, remanded with directions.