FIRST DIVISION
August 10, 2015

No. 1-13-3581

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. 13 CR 12765
	)	
ROBERT CARTER,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** Where the public defender fee was assessed following an inadequate hearing, remand for a proper hearing is required. The fines, fees, and costs order is modified and the mittimus is corrected.

¶ 2 Following a jury trial, defendant Robert Carter was convicted of delivery of a controlled substance and sentenced to seven years in prison. The trial court also imposed a total of $1,529 in fines, fees, and costs and a $200 fee to reimburse the County for the services of the public defender. On appeal, defendant challenges the amount of fines and fees imposed by the trial court. For the reasons that follow, we affirm defendant's conviction and sentence but order

modification of the fines, fees, and costs order and correction of the mittimus, and we remand for a hearing on defendant's financial circumstances and ability to pay the public defender fee.

¶ 3 Defendant's first contention on appeal is that the $5 Electronic Citation fee (705 ILCS 105/27.3e (West 2012)) should be vacated because it does not apply to felony convictions. The State concedes that this assessment was improperly imposed. We accept the State's concession and vacate the fee.

¶ 4 Next, defendant contends that the fines, fees, and costs order should be modified to reflect that he is entitled to 139 days' worth of $5-per-day presentence custody credit against the imposed fines. The State agrees that defendant is entitled to $5-per-day credit, but maintains that defendant was in presentence custody for only 138 days. At the sentencing hearing, the trial court stated that defendant was to be given credit for 109 days of presentence custody. In contrast, the mittimus indicates defendant's term of presentence custody was 139 days. We have reviewed the record and determined that defendant was arrested and taken into custody on June 13, 2013, and sentenced on October 29, 2013, which entitles him to 138 days' worth of $5-per-day presentence custody credit. See *People v. Williams*, 239 Ill. 2d 503, 510 (2011) (the date a defendant is sentenced is to be counted as a day of sentence and not as a day of presentence credit). Accordingly, we order the clerk of the circuit court to correct the mittimus to reflect 138 days of presentence custody credit, and order modification of the fines, fees, and costs order to reflect a $690 credit toward the assessed fines.

¶ 5 Defendant's final contention is that this court should vacate the trial court's order directing him to pay a $200 fee to reimburse Cook County for the services of the public defender. Defendant argues that the order was made without notice to him or a hearing regarding his ability to pay. 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.

¶ 6 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 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.

¶ 7 Defendant is correct that 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).

¶ 8 In contrast to *Gutierrez* and *Daniels*, our supreme court remanded for a new hearing on the fee in *Somers* 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.*

¶ 9 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 (quoting *Somers*, 2013 IL 114054, ¶ 15).

¶ 10 We also remanded in *People v. McClinton*, 2015 IL App (3d) 130109, ¶¶ 5, 18, where the trial court, based solely on the presentence investigation report and the statements made by 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. Most 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 (citing *Somers*, 2013 IL 114054, ¶¶ 14-15).

¶ 11 We find that the appropriate remedy here 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, which had filed a written motion, informed the court that it was asking for reimbursement of county funds. In response, the trial court asked counsel how many times he had appeared. When counsel replied that he had appeared five times, the trial court stated, "All

right. There will be appropriate attorney's fees, and you had your associate also. *** All right. $200.00." 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 $200 fee and remand to the trial court for a hearing in compliance with the statute.

¶ 12 For the reasons explained above, we affirm defendant's conviction and sentence; order the clerk of the circuit court to modify the fines, fees, and costs order and correct the mittimus; and vacate the $200 public defender fee and remand for a hearing in compliance with section 113-3.1(a).

¶ 13 Affirmed as modified; mittimus corrected; vacated in part and remanded with directions.