

SECOND DIVISION  
December 22, 2015

No. 1-14-0028

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 11416
	)	
JOHN TURNER,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Simon and Hyman concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Public defender fee assessed in inadequate hearing remanded for proper hearing. Methamphetamine fines not applicable to defendant's offense. Mittimus corrected to properly reflect defendant's offense.
- ¶ 2 Following a 2013 bench trial, John Turner, the defendant, was convicted of possession of a controlled substance with intent to deliver and sentenced to impact incarceration (boot camp) with fines and fees. On appeal, defendant challenges certain fines and fees – the principal being a \$1,000 public defender's fee – and seeks to correct his mittimus to properly reflect his offense. For the reasons that follow, we vacate that part of the order setting the fines and fee in question,

remand for a proper hearing on the public defender's fee, correct the mittimus, and affirm, in all other respects, the judgment of the circuit court.

¶ 3 Defendant was charged with possession of a controlled substance (one gram or more, but less than 15 grams, of heroin) with intent to deliver, allegedly committed on or about May 15, 2013. Counsel was appointed for defendant and, before trial, the State filed a motion for reimbursement of Cook County's expense for appointed counsel.

¶ 4 Following the trial, the court found defendant guilty as charged and, following a sentencing hearing, the court sentenced him to boot camp with fines and fees. The mittimus describes defendant's offense as "MFG/DEL 1<15 GR HEROIN/ANALOG."

¶ 5 After the court admonished defendant of his appeal rights, the State mentioned its reimbursement motion but made no argument upon it. The court asked defense counsel how many times he appeared in this case, and counsel replied "five." Without further questions or argument, the court assessed \$1,000 in attorney fees. Defendant's motion to reconsider his sentence was denied, and this appeal timely followed.

¶ 6 On appeal, the parties correctly agree that we must vacate certain fines and fees. Defendant was assessed a \$100 methamphetamine law enforcement fund fine and \$25 methamphetamine drug traffic prevention fund fine. However, these fines apply only to methamphetamine-related offenses. 730 ILCS 5/5-9-1.1-5(a) - (c) (West 2012).

¶ 7 The parties are also correct that defendant's \$1,000 public defender's fee must be vacated. The trial court did not comply with the requirement in section 113/3.1 (a) that the court conduct a hearing no later than 90 days after the entry of a final order, where the defendant's financial resources and ability to pay are assessed and "the court shall consider" the defendant's financial affidavit. 725 ILCS 5/113-3.1 (West 2012).

¶ 8 Here, the court's consideration of the State's motion for a public defender's fee consisted of the court asking defense counsel how many times he appeared in this case, being informed that counsel appeared five times, and the court imposing \$1,000 in attorney fees. 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 statutory requirement to consider it.

¶ 9 As to the appropriate remedy, the State contends that we should remand for a new hearing because there was a timely, but inadequate, hearing. Defendant primarily contends that there was no hearing in accordance with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code), and thus there is no authority for a remand because more than 90 days have passed since the final order of his sentencing. However, defendant requests remand as alternative relief. For the following reasons, we remand.

¶ 10 Section 113.3.1(a) of the Code provides 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 2012). "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 2012). "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 2012).

¶ 11 Our supreme court has interpreted section 113-3.1 and explained 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.

¶ 12 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.

¶ 13 By contrast, the supreme court in *Somers* remanded for a new hearing on the fee and explained:

"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.

¶ 14 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.

¶ 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."

¶ 16 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."

¶ 17 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.

¶ 18 We find that the appropriate remedy in this case is to remand for a hearing that complies with section 113.3.1(a) of the Code as in *Somers*, *Williams*, *McClinton*, *Collins*, and *Rankin*. Unlike *Gutierrez* or *Daniels*, the trial court expressly ruled upon the fee in open court.

¶ 19 Lastly, defendant contends that his mittimus should be corrected to properly reflect his offense. The State disagrees, arguing that the description in the mittimus is the caption of the statute creating the offense. 720 ILCS 570/401 (West 2012). However, the statute encompasses manufacture, delivery, possession with intent to manufacture, and possession with intent to deliver. Here the charge against the defendant was possession with intent to deliver. We agree with defendant that his mittimus must be corrected. See, e.g., *People v. Wade*, 2013 IL App (1st) 112547, ¶ 40.

¶ 20 Accordingly, we vacate the \$1,000 public defender fee, the \$100 methamphetamine law enforcement fund fine, and the \$25 methamphetamine drug traffic prevention fund fine and remand for the court to hold a hearing on the public defender's fee that complies with section 113-3.1(a) of the Code. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the mittimus to reflect that defendant was convicted

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of possession of a controlled substance with intent to deliver. The judgment of the circuit court is otherwise affirmed.

¶ 21 Affirmed in part, vacated in part, mittimus corrected, and remanded with directions.