2015 IL App (4th) 140202-U

NO. 4-14-0202

FILED
December 1, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
DARYL PERKINS,	)	No. 11CF463
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's two convictions for domestic battery violated the one-act, one-crime rule.
(2) The trial court did not hold a sufficient hearing to determine defendant's ability to reimburse the county for the public-defender fee.
(3) Probation fees were improperly assessed for time defendant was not under supervision of the probation and court services department.

¶ 2 In December 2013, a jury found defendant, Daryl Perkins, guilty of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010); 720 ILCS 5/12-3.2(a)(2) (West 2010)). In February 2014, the trial court sentenced defendant to two years' probation, with the first 180 days spent in the Vermilion County Public Safety Building, and 200 hours of community service. Defendant appeals, arguing (1) one of the domestic battery convictions must be vacated under

the one-act, one-crime rule because the State never tried to prove he committed two separate batteries; (2) the court erred in failing to conduct a hearing to determine his ability to reimburse the county for the public-defender fee; and (3) the circuit court clerk's office erred when it assessed probation fees for time he spent in jail. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In December 2013, a jury found defendant guilty of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010); 720 ILCS 5/12-3.2(a)(2) (West 2010)).

¶ 5 The first domestic battery charge alleged defendant knowingly and without legal justification caused bodily harm to Tammy J. Steward on or about July 31, 2011 (count II). 720 ILCS 5/12-3.2(a)(1) (West 2010).

¶ 6 The second domestic battery charge alleged defendant knowingly and without legal justification made physical contact of an insulting or provoking nature with Tammy J. Stewart on or about July 31, 2011 (count III). 720 ILCS 5/12-3.2(a)(2) (West 2010).

¶ 7 In February 2014, the trial court sentenced defendant to two years' probation (with $600 in probation fees, $25 per month for 24 months), with the first 180 days spent in the Vermilion County Public Safety Building, and 200 hours of community service.

¶ 8 At sentencing, the State requested reimbursement for the public defender.

¶ 9 The public defender stated she spent at least 50 hours on the case for the investigation and the jury trial.

¶ 10 The court ordered defendant's $1,500 bond to apply first to costs and the balance toward reimbursement to the public defender's office.

¶ 11 The public defender's office received $1,475 from defendant's bond.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues (1) one of the domestic battery convictions must be vacated under the one-act, one-crime rule because the State never tried to prove he committed two separate batteries; (2) the court erred in failing to conduct a hearing to determine his ability to reimburse the county for the public-defender fee; and (3) the circuit court clerk's office erred when it assessed probation fees for time when he spent in jail. The State concedes this court should vacate the lesser-included offense and remand for a proper fee assessment for both the public-defender and probation fees.

¶ 15 A. One-Act, One-Crime

¶ 16 Defendant argues his conviction for two counts of domestic battery violates the one-act, one-crime rule because the State never tried to prove that he committed two separate batteries. The State agrees defendant was improperly convicted of two counts of domestic battery because no effort was made to differentiate between the acts which caused harm and the acts that were insulting or provoking conduct. The State contends vacatur is appropriate for respondent's less serious battery conviction for insulting or provoking contact.

¶ 17 Our supreme court has held "[p]rejudice results to the defendant * * * in those instances where more than one offense is carved from the same physical act." *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977). Under the one-act, one-crime rule, we must vacate the less serious offense. *People v. Lee*, 213 Ill. 2d 218, 226-27, 821 N.E.2d 307, 312 (2004). When a defendant is convicted of two counts of domestic battery for (1) bodily harm and (2)

insulting or provoking contact, the less serious offense is the latter. See *People v. Young*, 362 Ill. App. 3d 843, 853, 840 N.E.2d 825, 833 (2005). We accept the State's concession and vacate count III, defendant's less serious domestic battery conviction for insulting or provoking contact.

¶ 18 B. Public-Defender Fee

¶ 19 The second issue on appeal is whether the trial court erred in ordering defendant to reimburse the county for the public-defender fee. Although defendant did not object to the public-defender fee at sentencing or include this issue in a posttrial motion, this court will consider this issue. Whether the court properly imposed the public-defender fee is a question of law, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697, 873 N.E.2d 453, 465 (2007).

¶ 20 Defendant argues the trial court erred in ordering him to pay the public-defender reimbursement fee because the court did not give him notice or hold a hearing to assess his ability to pay the fee. The State concedes, although the court did hold a hearing, it was deficient. The State further concedes the public-defender fee should be vacated and this court should remand for a determination of defendant's ability to pay the fee. We agree with the State vacatur of the fee is appropriate and remand for a hearing to determine defendant's ability to pay the public-defender fee.

¶ 21 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (the Procedure Code) provides the following:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of

> the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. *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.* Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney 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." (Emphasis added.) 725 ILCS 5/113-3.1(a) (West 2010).

¶ 22 Before ordering a defendant to pay reimbursement for appointed counsel, the trial court must conduct a hearing into the defendant's financial circumstances and ability to pay. *People v. Love*, 177 Ill. 2d 550, 563, 687 N.E.2d 32, 38 (1997). Prior to the required hearing, the defendant must be given notice he will have an opportunity to present evidence concerning his ability to pay and any other relevant circumstances. *People v. Roberson*, 335 Ill. App. 3d 798, 803-04, 780 N.E.2d 1144, 1148 (2002). The hearing must focus on the foreseeable ability of the defendant to pay reimbursement and the costs of the representation provided. *Love*, 177 Ill. 2d at 563, 687 N.E.2d at 38.

¶ 23 Nothing in the record indicates the trial court conducted a sufficient hearing to determine defendant's foreseeable ability to reimburse the county for the public-defender fee as required under section 113-3 of the Procedure Code. Instead, the court ordered defendant's

$1,500 bond be applied to costs, then the remainder to satisfy the public-defender fee without any inquiry into defendant's ability to pay. Defendant was not given an opportunity to be heard or present evidence regarding his financial ability to pay. The payment order must be vacated. We vacate the payment order and remand for a hearing to determine defendant's ability to pay the public-defender fee.

¶ 24 C. Probation Fee

¶ 25 Last, defendant argues the circuit clerk's office erred in assessing his probation fees for time he was in jail. The State concedes this case should be remanded for the proper determination of the probation services fee. We agree with the State's concession, and we remand for the determination of the appropriate probation services fee. Section 5-6-3(i) of the Unified Code of Corrections (730 ILCS 5/5-6-3(i) (West 2010)) provides a probation fee "shall be imposed only upon an offender who is actively supervised by the probation and court services department."

¶ 26 Defendant was assessed a $600 probation fee for his two-year probation sentence ($25 per month for 24 months). Defendant was ordered to spend the first 180 days of his sentence in confinement at a county facility as a condition of probation. At the time this appeal was filed, defendant was in jail awaiting trial on another offense and not under the active supervision of the probation and court services department.

¶ 27 The parties agree defendant has not been actively supervised by the probation and court services department. Since we do not know for how long defendant was supervised, we remand for determination of the appropriate probation fee.

¶ 28 III. CONCLUSION

¶ 29 We vacate the conviction and sentence on count III and the recoupment order, and we remand for a hearing to determine defendant's ability to pay the recoupment ordered and a determination on the appropriate probation fee. We otherwise affirm.

¶ 30 Affirmed in part, vacated in part, and remanded with directions.