2016 IL App (1st) 140507-U

SECOND DIVISION
March 15, 2016

No. 1-14-0507

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 13644
	)	
ROBERT MONTGOMERY,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Public defender reimbursement fee assessed after inadequate hearing vacated; methamphetamine fines not applicable to defendant's offense; fines and fees order corrected to reflect defendant's presentence custody credit toward fines; and mittimus corrected to properly reflect defendant's offense.

¶ 2 Following a bench trial, defendant Robert Montgomery was found guilty of delivery of a controlled substance and sentenced to 66 months in prison. On appeal, defendant challenges

certain fines and fees imposed by the trial court against him, including a $300 public defender reimbursement fee, seeks to receive presentence custody credit toward his fines and asks us to correct his mittimus to properly reflect the offense of which he was convicted. For the reasons that follow, we vacate multiple fines, order a correction of defendant's fines and fees order, order a correction of defendant's mittimus, remand for a hearing on the imposition of the public defender reimbursement fee, and affirm in all other respects the judgment of the circuit court.

¶ 3 At trial, the evidence showed that at 11:30 a.m. on June 26, 2013, Officer Marcus Myles of the Chicago police department was undercover and approached defendant, who was standing on the northwest corner of West 14th Street and South Tripp Avenue. After a brief conversation, Myles asked defendant for two "blows," a street term for heroin. Defendant ran toward a vacant lot, disappeared for 10 to 15 seconds and returned to Myles. Defendant handed Myles two clear plastic bags containing a white powdery substance in exchange for $20. Afterward, they both walked away in different directions. Myles returned to his vehicle, and via a radio transmission, he described defendant and his last known location to other officers near the scene.

¶ 4 Officer Paul Meagher received the radio transmission with the description of defendant and ultimately observed him on the 4200 block of South Roosevelt Road. Along with a partner, Meagher detained defendant. Myles came to Meagher's location and positively identified defendant as the individual who sold him the plastic bags containing a white powdery substance. Meagher then searched defendant and found the $20 that Myles had given him. The parties stipulated that the substance in one of the plastic bags tested positive for heroin.

¶ 5 Defendant did not testify or present other evidence on his behalf.

¶ 6 After argument, the trial court found defendant guilty of delivery of a controlled substance. The court denied defendant's posttrial motion for a judgment notwithstanding the finding and in the alternative, a new trial. The court subsequently sentenced him to 66 months in prison. Immediately after the sentence was imposed, the State reminded the court that prior to trial, it filed a motion to conduct a hearing to determine whether the court should impose the public defender reimbursement fee against defendant. The following colloquy then occurred:

"THE COURT: [Defense counsel], how ma[n]y times did you appear on this case?

[DEFENSE COUNSEL]: Seven times, your Honor.

THE COURT: And there was a trial and post-trial motion, is that correct?

[DEFENSE COUNSEL]: Yes, your Honor.

THE COURT: Appropriate fees would be three hundred dollars."

This appeal followed.

¶ 7 Before addressing the merits of defendant's appeal, we note that during its pendency, the State filed a motion to strike the portion of defendant's reply brief where he contended that his $5 electronic citation fee should be vacated. The State argues that defendant violated Illinois Supreme Court Rule 341(h)(7) and (j) (eff. Feb. 6, 2013) by including the argument for the first time in a reply brief. Additionally, the State avers that it was contacted by defendant's appellate counsel and informed that he intended to raise the argument in the reply brief. The State informed appellate counsel that raising the argument in a reply brief was inappropriate, but that it was amenable to appellate counsel filing a supplemental brief under Illinois Supreme Court Rule 341(k) (eff. Feb. 6, 2013). After reviewing the matter, we agree with the State that this argument

should have been raised in a supplemental brief rather than a reply brief. See *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49 (stating arguments raised for the first time should be made in an opening brief or supplemental brief, not a reply brief). Accordingly, we grant the State's motion.

¶ 8 On appeal, defendant first contends that the trial court improperly assessed him a $300 public defender reimbursement fee because it failed to inquire into defendant's financial circumstances and his ability to pay the fee. He further argues the fee should be vacated outright without remand. The State agrees that the court improperly imposed the fee and it should be vacated, but maintains that we should remand the case for a proper hearing on the fee.

¶ 9 Under section 113-3.1(a) of the Code of Criminal Procedure of 1963, when the trial court appoints counsel for 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." 725 ILCS 5/113-3.1(a) (West 2012). Section 113-3.1(a) further directs the trial court to conduct a hearing to determine a reasonable reimbursement amount. *Id.* The hearing, which is mandatory (*People v. Love*, 177 Ill. 2d 550, 559-60 (1997)), must occur within 90 days after the entry of trial court's final order. 725 ILCS 5/113-3.1(a) (West 2012). It "must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay," and the trial court must consider the defendant's financial affidavit. *People v. Somers*, 2013 IL 114054, ¶ 14; see 725 ILCS 5/113-3.1(a) (West 2012).

¶ 10 Whether the trial court properly conducted the hearing on the public defender reimbursement fee presents a question of law, which we review *de novo*. *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 11 Initially, we accept the State's concession and agree that the exchange between the trial court and defense counsel regarding counsel's involvement in defendant's case was insufficient because the court failed to consider defendant's financial circumstances, his ability to pay the fee and his financial affidavit, if it existed. See 725 ILCS 5/113-3.1(a) (West 2012); *Somers*, 2013 IL 114054, ¶ 14. Although defendant did not raise the hearing's deficiency at trial or in a posttrial motion, which generally is a basis to find the issue forfeited on appeal (see *People v. Leach*, 2012 IL 111534, ¶ 60), both parties agree this court will not apply the general forfeiture rule if the appropriate procedures for imposing the public defender reimbursement fee are not followed. See *People v. Moore*, 2015 IL App (1st) 141451, ¶ 31; *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11. Accordingly, because the trial court did not comply with the requirements of section 5/113-3.1(a) when it imposed the public defender reimbursement fee, we vacate the order imposing the $300 fee.

¶ 12 Consequently, the issue on appeal is the proper remedy for the trial court's improper imposition of the fee. The State argues the proper remedy is to remand the cause back to the trial court for a hearing properly focusing on the defendant's financial circumstances and his ability to pay the fee. Defendant, meanwhile, argues that because the trial court failed to inquire at all into his financial circumstances and ability to pay, no hearing occurred within 90 days of the trial court's final order. Accordingly, he argues, we should simply vacate the fee without remand.

¶ 13 Generally, Illinois courts have held that when no hearing at all is conducted on the public defender reimbursement fee, the proper remedy is to vacate the fee without remand and when an

inadequate hearing is conducted on the fee, the proper remedy is to vacate the fee and remand for a proper hearing. See *Somers*, 2013 IL 114054, ¶¶ 8-20; *Gutierrez*, 2012 IL 111590, ¶¶ 21-28.

¶ 14 In *Gutierrez*, 2012 IL 111590, ¶¶ 21-28, our supreme court vacated the fee outright without remand when the circuit court clerk imposed the fee on its own. In *People v. Daniels*, 2015 IL App (2d) 130517, ¶¶ 29-30, this court vacated the fee without remand when the trial court imposed it by written order after defendant was already sentenced and never referenced the fee in open court. Thus, additional hearings have been deemed improper where the fee has been imposed against defendants absent an express ruling by the trial court in open court.

¶ 15 In *Somers*, 2013 IL 114054, ¶ 20, our supreme court found that three questions to the defendant concerning his employment status was insufficient to impose the fee, but constituted a hearing nonetheless, and remanded the matter for a proper hearing. Our supreme court found that "the trial court did have some sort of a hearing within the statutory time period" by inquiring into the defendant's employment status, and only after such inquiry did the court impose the fee. *Id.* ¶ 15.

¶ 16 In *People v. Moore*, 2015 IL App (1st) 14145, ¶ 30, we recently ruled on this same issue involving virtually the same facts occurring before the same sentencing judge. We found this limited questioning by the trial court of only defense counsel posed, without any information, inquiry or consideration of the defendant's financial circumstances or potential ability to pay, did not constitute a hearing (¶¶ 38-40). We explained that in *Somers*, our supreme court ordered a remand for a proper hearing because the trial court asked some, but not enough, questions directed at the defendant's financial circumstances. *Id.* ¶¶ 38-39, citing *Somers*, 2013 IL 114054,

¶ 14. We found that merely imposing the public defender fee, in open court while the defendant was present, without complying with the requirements of the statute or in compliance with the directive of our supreme court as stated in *Somers* did amount to a hearing and did not warrant an order of remand. We stated,

> "Consequently, we decline the State's invitation to remand for a proper hearing under section 113–3.1(a) because the trial court's questioning the attorneys regarding the public defender's involvement in this case was not a hearing as articulated in *Somers.* There was no hearing within the 90–day required period, because there was no inquiry, however slight, into the issue of the defendant's ability to pay the public defender fee, the defendant's financial circumstances and his foreseeable ability to pay or the defendant's financial affidavit, if any. *Moore,* 2015 IL App (1st) 141451, ¶ 41.

¶ 17 Thus, in *Moore* we found remand was only warranted when some questions were directed at the defendant's financial circumstances. *Moore*, 2015 IL App (1st) 141451, ¶ 40 citing *Somers*, 2013 IL 114054, ¶ 14. Because no hearing took place within ninety days we vacated the fee without remand. *Moore,* 2015 IL App (1st) 141451, ¶¶ 41, 44.

¶ 18 We acknowledge that the earlier decisions in *People v. Williams*, 2013 IL App (2d) 120094 and *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21, reach a different conclusion on whether the trial court in those cases conducted a sufficient hearing when imposing the public defender fee. In *Williams*, the court found that even though the trial court did not inquire into the defendant's financial circumstances or his ability to pay the fee, because the fee was imposed

during a judicial session that was open to the public, this was sufficient to qualify as a "hearing." In *Rankin*, another division of this court found the trial court (the same court in this appeal) improperly imposed the fee after the almost identical limited questioning. *Id.* ¶ 21. Relying on *Somers*, the *Rankin* court found the limited inquiry was sufficient to constitute a hearing, albeit an insufficient one, and remanded the matter for a proper hearing. *Id.*

¶ 19 We respectfully differ with rulings in *Williams* and *Rankin*. In the instant case, it is without dispute that the trial court failed to inquire into defendant's financial circumstances, his ability to pay the fee or his financial affidavit, if it existed. Consistent with our ruling in *Moore*, we vacate the public defender fee for failure to conduct a mandatory hearing within ninety days as required by section 113–3.1(a), without remand. 725 ILCS 5/113-3.1(a) (West 2012). *Moore*, 2015 IL App (1st) 141451, ¶¶ 41, 44.

¶ 20 Next, defendant contends that his fines and fees orders should be reduced because he was improperly assessed some fines and fees, and he failed to receive presentence custody credit toward his fines. The propriety of a trial court's imposition of fines and fees is reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 21 We note defendant did not challenge these fines and fees issues at trial or in a posttrial motion, which generally, as previously discussed, results in a forfeiture of those issues on appeal. See *Leach*, 2012 IL 111534, ¶ 60. However, forfeiture itself can be forfeited by a party. See *People v. Williams*, 193 Ill. 2d 306, 347 (2000). By failing to argue that defendant forfeited these fines and fees issues, the State forfeited the issue of forfeiture. *Id.* Therefore, we address the merits of defendant's fines and fees claims.

¶ 22 First, defendant argues, the State concedes, and we agree, that the trial court improperly assessed him a $100 methamphetamine law enforcement fund fine and a $25 methamphetamine drug traffic prevention fund fine. These fines only apply to methamphetamine-related offenses (see 730 ILCS 5/5-9-1.1-5 (West 2012)); however, defendant was convicted of a heroin-related offense. Accordingly, we vacate those fines in the amount of $125.

¶ 23 Second, defendant argues, the State concedes, and we agree, that he must receive $5 per day of presentence custody credit toward the following: a $25 drug traffic prevention fund assessment (730 ILCS 5/5-9-1.1(e) (West 2012)), a $10 mental health court assessment (55 ILCS 5/5-1101(d-5) (West 2012)), a $5 youth diversion program assessment (55 ILCS 5/5-1101(e) (West 2012)), a $5 drug court assessment (55 ILCS 5/5-1101(f) (West 2012)), a $50 court system assessment (55 ILCS 5/5-1101(c) (West 2012)), a $30 Children's Advocacy Center assessment (55 ILCS 5/5-1101(f-5) (West 2012)), and a $1,000 controlled substance assessment (720 ILCS 570/411.2(a) (West 2012)). The State also acknowledges in its brief that defendant should receive credit toward his $15 State Police operations assessment (705 ILCS 105/27.3a(1.5) (West 2012)).

¶ 24 Defendant is entitled to $5 credit for each day incarcerated prior to sentencing toward the fines levied against him. 725 ILCS 5/110-14(a) (West 2012). The foregoing assessments are all fines because they do not seek to compensate the state for the costs of prosecuting the defendant. See 730 ILCS 5/5-9-1.1 (West 2012) (drug traffic prevention fund assessment is a fine); *People v. Graves*, 235 Ill. 2d 244, 251-55 (2009) (mental health court and youth diversion program assessments are fines); *People v. Warren*, 2014 IL App (4th) 120721, ¶ 131 (drug court

assessment is a fine); *People v. Smith*, 2013 IL App (2d) 120691, ¶ 17 (court system assessment is a fine); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 107 (Children's Advocacy Center assessment is a fine); *People v. Jones*, 375 Ill. App. 3d 289, 296 (2007) (controlled substance assessment is a fine); see also *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (State Police operations assessment is a fine). Accordingly, defendant must be given $5 per day of presentence custody credit toward these fines.

¶ 25 Defendant also complains that his $2 Public Defender records automation assessment (55 ILCS 5/3-4012 (West 2012)) and his $2 State's Attorney records automation assessment (55 ILCS 5/4-2002.1(c) (West 2012)) are both fines despite their statutory label as fees, and he should be given presentence custody credit toward them. The State disagrees, arguing these assessments are fees. We agree with the State because both assessments are intended to fund the maintenance and development of record keeping systems used by both the State and the public defender's office, which are costs associated with the prosecution of the defendant, the hallmark of fees. See *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65. Accordingly, the $2 Public Defender records automation assessment and $2 State's Attorney records automation assessment are fees and not eligible for presentence custody credit.

¶ 26 In sum, defendant was incarcerated for 218 days prior to his date of sentencing, resulting in a maximum $5 per day presentence custody credit of $1,090. Accordingly, we order the clerk of the circuit court to award defendant a $1,090 credit toward his fines, which totaled $1,140. Defendant, therefore, owes $50 in fines, in addition to the other assessments imposed by the trial court.

¶ 27 Finally, defendant contends, the State concedes, and we agree, that his mittimus should be corrected to properly reflect his actual offense. Defendant was convicted of delivery of a controlled substance yet his mittimus states: "OTHER AMT NARCOTIC SCHED I&II." Therefore, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), and our ability to correct a mittimus without remand (*People v. Morales*, 2012 IL App (1st) 101911, ¶ 62), we order the clerk of the circuit court to amend the mittimus to correctly identify the offense of which defendant was convicted.

¶ 28 For the reasons stated above, we: (1) vacate defendant's public defender reimbursement fee of $300, without remand; (2) vacate defendant's $100 methamphetamine law enforcement fund fine and $25 methamphetamine drug traffic prevention fund fine; (3) order the clerk of the circuit court to modify defendant's fines and fees order to reflect his proper presentence custody credit toward his fines and to reflect $559 in total remaining assessments; and (4) order the clerk of the circuit court to correct defendant's mittimus to reflect his actual offense of delivery of a controlled substance.

¶ 29 Affirmed in part, vacated in part, fines and fees order corrected, mittimus corrected.