2017 IL App (1st) 151526-U

No. 1-15-1526

Order filed December 7, 2017

Fourth Division

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).

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. 13 CR 17569
	)	
CHRISTOPHER HOLMES,	)	Honorable
	)	Vincent Michael Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: Trial court imposed a $500 public defender reimbursement fee without holding a sufficient hearing under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2012)). We vacate fee and remand for proper hearing under section 113-3.1(a).

¶ 2 Following a bench trial, defendant Christopher Holmes was convicted of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(2) (West 2012)), and sentenced to 18 months' imprisonment. On appeal, defendant contends that the trial court erroneously imposed a

$500 fee for reimbursement for public defender services without holding the requisite hearing to determine his ability to pay pursuant to section 113-3.1(a) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/113-3.1(a) (West 2012)). For the following reasons, we affirm in part, vacate in part, and remand with instructions.

¶ 3 Because defendant does not challenge his conviction, we recite only those facts necessary to our disposition. Defendant was charged with AUUW. He was appointed a public defender. At trial, two officers testified and established that, while on patrol, they observed defendant walking in a residential neighborhood with a "bulge" in his lower back that they suspected to be a firearm. After announcing their office, defendant fled and ran up the stairs of a residence. The officers chased defendant, and, during the course of the chase, one officer observed defendant reach into his lower back and remove a handgun. Defendant shut himself inside the residence. Eventually, the officers detained defendant inside the residence and recovered the gun, a Smith and Wesson .40 caliber semiautomatic loaded with eight live rounds, from a nearby open vent.

¶ 4 The court found defendant guilty of AUUW and sentenced him to 18 months' imprisonment with one year mandatory supervised release. Following sentencing, the following colloquy ensued.

"[THE COURT]: How many times have you appeared on this?

[DEFENSE COUNSEL]: 20, Your Honor.

[THE COURT]: All right. You and [*sic*] went to trial and you filed motions; is that correct?

[DEFENSE COUNSEL]: Yes, Your Honor.

[THE COURT]: $500 would be appropriate attorney fees."

¶ 5 Defendant filed a motion to reconsider his sentence, which the court denied. This appeal followed.

¶ 6 On appeal, defendant contends, and the State concedes, that the trial court failed to comply with the hearing requirement under section 113-3.1(a) of the Code. The State also agrees with defendant that, even though defendant failed to object to the imposition of the public defender fee at his sentencing hearing, this issue is not subject to forfeiture. See *People v. Love*, 177 Ill. 2d 550, 564 (1997); see also *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 (forfeiture rule inappropriate where trial court imposed public defender reimbursement fee "without following the appropriate procedural requirements"); *People v. Williams*, 2013 IL App (2d) 120094, ¶ 13.

¶ 7 Section 113-3.1(a) of the Code provides as follows:

> "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." 725 ILCS 5/113-3.1(a) (West 2012).

¶ 8 To comply with the statute, the court must give the defendant notice that it is considering imposing the fee, and the opportunity to present evidence regarding his ability to pay. *People v. Somers*, 2013 IL 114054, ¶ 14. "The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *Id.* (citing *Love,* 177 Ill. 2d at 563). Our supreme court has repeatedly reminded the trial courts of their obligation to conduct such hearings in compliance with the statute. *Somers,* 2013 IL 114054, ¶ 18; *People v. Gutierrez,* 2012 IL 111590, ¶¶ 25-26. Whether the trial court complied with section 113-3.1(a) in imposing the fee presents a question of law, which we review *de novo.* *Gutierrez,* 2012 IL 111590, ¶ 16.

¶ 9 Here, the record shows that, following sentencing, the trial court asked the public defender how many times he had appeared in court and noted that there had been a trial and motions filed. The public defender answered that he had appeared 20 times on behalf of defendant, that he went to trial, and that he filed various motions. The court then stated, "$500 would be appropriate attorney fees." The court did not inquire into defendant's financial status or give defendant an opportunity to present evidence regarding his ability to pay. Nor does the record indicate that defendant was given notice that the trial court was considering imposing this fee. Thus, we agree with the parties that the fee was erroneously assessed without a proper hearing under section 113-3.1(a), and, accordingly, we vacate it.

¶ 10 The parties, however, do not agree on the proper relief. Defendant asserts that the trial court did not hold a hearing regarding his ability to pay the public defender reimbursement fee, so the proper remedy is to vacate the fee outright because the hearing must be held within 90 days of the final entry of judgment. Defendant cites *People v. Moore*, 2015 IL App (1st) 141451.

In *Moore,* following sentencing, the trial court asked the public defender the number of times he had appeared and imposed a $150 fee without first questioning the defendant. *Id.* at ¶ 30. The court concluded that no hearing occurred for the purposes of section 113-3.1(a), because the trial court completely failed to inquire into the defendant's financial circumstances. *Id.* at ¶ 41. Consequently, the court found that, because section 113-3.1(a) provides that the hearing shall be conducted no later than 90 days after entry of the final order of the trial court, remand for a proper hearing was not appropriate, and the fee was instead vacated outright. *Id.*

¶ 11 The State, relying on *People v. Glass*, 2017 IL App (1st) 143551, contends that the court held a hearing, albeit an insufficient one, and thus the remedy is to remand for a proper hearing. In *Glass*, after sentencing, the State inquired about the status of its motion for reimbursement of attorney's fees. *Id.* at ¶ 4. The court asked the public defender how many times he appeared, and the court, after noting the case proceeded to jury trial, imposed a $500 reimbursement fee without questioning the defendant. *Id.* This court vacated the fee and remanded to the trial court because, though the limited hearing was insufficient to comply with section 113-3.1(a), the trial court did not *completely* fail to conduct a hearing within the 90-day deadline. *Id.* at ¶ 17.

¶ 12 We acknowledge a split of authority regarding what constitutes a hearing under section 113-3.1, and, therefore, what the appropriate remedy is when the court fails to comply with the requirements of that section. See, *e.g*, *Moore*, 2015 IL App (1st) 141451, ¶¶ 40-41; *Glass*, 2017 IL App (1st) 143551, ¶ 17; *People v. Adams*, 2016 IL App (1st) 141135, ¶¶ 25-26; *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 21. This issue is currently pending before our supreme court. See *People v. Hardman*, 2016 IL App (1st) 140913-U, *appeal allowed*, No. 121453 (filed January 25, 2017).

¶ 13 Having considered the relevant authority, we respectfully disagree with the court's decision in *Moore* that no hearing occurred when the court, after sentencing the defendant, asks questions of the public defender but does not inquire about the defendant's ability to pay. In *People v. Somers*, 2013 IL 114054, ¶ 15, the supreme court explained that where "some sort of hearing" occurred, though it was insufficient, the case must be remanded for a proper hearing under section 113-3.1(a). The fee must be vacated outright only where there was no hearing whatsoever. See *Gutierrez,* 2012 IL 111590, ¶ 24 (no hearing, as public defender fee was imposed *sua sponte* by court clerk, not judge); *People v. Daniels,* 2015 IL App (2d) 130517, ¶ 29 (no section 113-3.1(a) hearing, as trial court only held sentencing hearing and later imposed fee; at sentencing hearing, "the trial court made absolutely no reference to the public defender or to its intent to impose the fee. Instead, the fee was imposed at some time after the hearing, by written order.").

¶ 14 Earlier decisions have held that the trial court's limited questioning of the public defender was sufficient to constitute a hearing, albeit an insufficient one, and remanded the matter for a proper hearing under section 113-3.1(a). See *Glass*, 2017 IL App (1st) 143551, ¶ 17; *Rankin*, 2015 IL App (1st) 133409, ¶ 21; *Williams*, 2013 IL App (2d) 120094, ¶ 20. Likewise, as the facts in this case mirror those in both *Glass* and *Rankin*, we find that the trial court's limited inquiry of the public defender was sufficient to constitute "some sort of hearing" within the meaning of *Somers*. Accordingly, in addition to vacating the $500 public defender reimbursement fee, we remand this matter for a proper hearing pursuant to section 113-3.1(a).

¶ 15 For the foregoing reasons, we affirm in part the judgment of the circuit court of Cook County, vacate defendant's public defender reimbursement fee of $500, and remand to the circuit court for the sole purpose of conducting a hearing pursuant to section 113-3.1(a) of the Code.

¶ 16 Affirmed in part, vacated in part, and remanded with instructions.

¶ 17 JUSTICE GORDON, specially concurring.

¶ 18 I agree with the majority decision but I must write separately concerning how a reviewing court decides an issue when the complaining party fails to object or place the issue in a posttrial motion. In 2005, our Illinois Supreme Court in *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005), and later in 2007 in *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), instructed that, when an issue has not been properly preserved and is subject to forfeiture, the issue may be reviewed under the plain-error doctrine, which provides a narrow exception to the general rule of procedural default. "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill. 2d at 187). That exception is codified in Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967).

¶ 19 Our supreme court instructed in *People v. Lewis*, 234 Ill. 2d 32 (2009), that when a trial court fails to follow a statute that provides a process for determining a fine, plain-error review is appropriate. However, in 1997 in *People v. Love*, 177 Ill. 2d 550, 564 (1997), our supreme court

found in a case concerning the defendant's ability to pay a public defender's fee that the failure to conduct a hearing is not subject to forfeiture. It has also found that constitutional issues are not subject to forfeiture. *People v. Cregan*, 2014 IL 113600, ¶ 16. As a traditionalist, I have always looked at the law of preserving an issue for review under the doctrine set forth in *Piatkowski* because it makes a lot of legal sense.

¶ 20 In the case at bar, there was no issue of plain error because the majority and the issues framed by the parties followed *Love* and found that the failure to conduct an adequate hearing was not a forfeiture. One could argue that the Illinois Supreme Court's decision in *Love* is distinguishable because, in that case, no hearing whatsoever was held before the trial court that imposed a public-defender fee during sentencing (*Love*, 177 Ill. 2d at 564), where in the case at bar, a hearing was held, albeit an insufficient one. However, many appellate court cases still refuse to find forfeiture, citing *Love*. *People v. Carreon*, 2011 IL App (2d) 100391; *People v. Williams*, 2013 IL App (2d) 120094. However, I still believe that the proper legal process is to follow *Piatkowski* and the plain-error rule until the Illinois Supreme Court instructs us that forfeiture rule is inapplicable to all cases concerning failure to have adequate hearings as well as having no hearing at all in improperly-assessed public defender's fee cases. I follow a case I authored on this issue, *People v. Blackburn*, 2017 IL App (1st) 151755, a Rule 23 decision where the parties framed the issue as one of forfeiture and this panel found plain error.