

2014 IL App (1st) 123255-U

FIFTH DIVISION
MAY 9, 2014

No. 1-12-3255

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
TYRAN SIMMONS,)	No. 12 CR 3768
)	
Defendant-Appellant.)	The Honorable
)	Maura Slattery Boyle,
)	Judge Presiding.
)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court assessed a \$300 public defender fee after a hearing but failed to elicit specific evidence concerning defendant's ability to pay that fee, the appellate court vacated the fee and remanded for a new hearing on defendant's ability to pay even though defendant failed to object in the trial court.

¶ 2 Following a bench trial, defendant Tyran Simmons was convicted of possession of a controlled substance, was sentenced to a three-year prison term, and was ordered to reimburse Cook County \$300 for the services of the public defender. On appeal, defendant contends that the \$300 public defender fee should be vacated because there was no evidence of his ability to pay it. He alternatively contends that a new hearing should be held.

¶ 3 In an affidavit of assets and liabilities, defendant stated on oath that he lacked adequate assets to retain counsel, was requesting court-appointed counsel, had no assets and no liabilities, was single, and had one child. The court appointed the public defender to represent defendant.

¶ 4 The police recovered \$118 in cash from defendant's person, which was returned to him. After the trial, the court revoked defendant's bond, which an order dated May 21, 2012, reflected was \$25,000.

¶ 5 On August 3, 2012, the State filed a motion to determine whether defendant should reimburse the county for the cost of the court-appointed defense counsel.

¶ 6 The September 27, 2012, presentence investigative report (PSI) disclosed that defendant was born in 1991, was unemployed, and had a tenth grade education and a history of alcohol and marijuana use. He was single and had one 10-month old child. He had four prior convictions. Defendant reported that he had "only done temporary jobs, no regular employment." The probation officer who prepared the PSI observed that defendant had done side jobs through a

temporary agency. Defendant denied that he had a disability or any serious illness. He was not under the care of a doctor and was not taking medication. He said that he completed boot camp in 2010, and a 90-day inpatient program. He said that he was supported completely by his mother, that he had no monthly income and no monthly expenses, that he had no debt and no outstanding restitution, owned no property or assets, and had not filed for bankruptcy.

¶ 7 During the sentencing proceeding, the assistant public defender argued in mitigation that defendant "was working several temporary jobs. Most recently working at a grocery store for the last few months before this arrest."

¶ 8 Defendant was sworn in and testified in response to questioning by the court that his signature was on the affidavit of assets and liabilities, and that he filled out the affidavit indicating his current state or what his assets and liabilities were. The court observed that the public defender had been previously appointed, and the court assessed a \$300 attorney fee. The court also entered a written order requiring defendant to pay \$300 as reimbursement to Cook County for representation by the public defender. The written order reflected that the public defender had been appointed to represent defendant following a finding of indigency. According to the order, the court had considered defendant's financial circumstances, including but not limited to the time the public defender spent representing him, the nature of the service that was provided, the statutory limit in section 113-3.1 of the Code of Criminal Procedure (Code), whether defendant posted bond, and whether a third party posted bond money. The order disclosed that defendant had received notice of the motion and that a hearing had been held in accordance with section 113-3.1 of the Code. Finally, the order required defendant to remit cash

payment. In a separate order, the court assessed defendant \$1,075 in various fines, fees, and costs.

¶ 9 On appeal, defendant contends that the \$300 public defender fee should be vacated because his financial affidavit indicated no income or assets. He alternatively contends that a new hearing should be held on the motion for reimbursement because the court considered only the affidavit and there was no evidence of his ability to pay, how the \$300 amount was assessed, or the cost of the representation. He asserts that he was unemployed at the time and had no "foreseeable ability" to pay the \$300 because there was insufficient information about his prior employment and about his prospects for future employment, and the trial court failed to ask questions that would have elicited further information. He argues that the reimbursement order should be reversed or, in the alternative, that the cause should be remanded for a new hearing concerning his ability to pay. He maintains that the alleged error was not waived or forfeited because the trial court failed to conduct a sufficient hearing, and plain error principles apply.

¶ 10 Section 113-3.1 of the Code provides for reimbursement to the county or the state for court-appointed counsel. 725 ILCS 5/113-3.1 (West 2012). Section 113-3.1 states that, in a hearing to determine payment, the court shall consider the defendant's financial affidavit "and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1 (West 2012). Thus, the statute requires a hearing into the defendant's financial resources. *People v. Hubner*, 2013 IL App (4th), 120137, ¶ 39. The hearing is not required to be lengthy or complex, but must not be perfunctory and must provide the defendant with notice that the trial court is contemplating assessing a reimbursement

fee pursuant to section 113-3.1, and must provide the defendant with an opportunity to present evidence concerning his ability to pay. *Id.*; *People v. Somers*, 2013 IL 114054, ¶¶ 13-14, 17, 20. The hearing is required even where a cash bail bond was posted for the defendant. *People v. Love*, 177 Ill. 2d 550, 560-64 (1997). The court must consider the defendant's financial affidavit, and must focus on the costs of representation, and the defendant's financial circumstances and foreseeable ability to pay. *Somers*, 2013 IL 114054, ¶ 14. A hearing is required even where the defendant posted a cash bond. *People v. Hanna*, 296 Ill. App. 3d 116, 125 (1998). The Illinois Supreme Court strongly expressed its "disappointment" that defendants are still being denied proper hearings for reimbursement of public defender fees. See *People v. Gutierrez*, 2012 IL 111590, ¶ 25 (especially criticizing circuit court clerks for assessing such fees without a court hearing).

¶ 11 In *Somers*, 2013 IL 114054, ¶ 4, a proper hearing under section 113-3.1 was not held where the trial court asked the defendant whether he thought that he could get a job upon his release from incarceration, whether he would use income from the job to pay his fines and costs, and whether there was any physical reason why he could not work.

¶ 12 Here, the court conducted a more perfunctory proceeding than was held in *Somers*. The court failed to elicit specific information about defendant's ability to pay the \$300. For example, there was no evidence concerning defendant's earnings from his temporary jobs, including his most recent job at a grocery store. Nor did the court allow defendant to present evidence concerning his inability to pay. Under the circumstances, the court failed to comply with the

requirements of section 113-3.1. The remedy is to vacate the order and remand for a proper hearing. *People v. Collins*, 2013 IL App (2d), 110915, ¶ 25.

¶ 13 Finally, the State contends that defendant waived or forfeited the issue. We disagree. Forfeiture is not appropriate where the trial court assesses a public defender fee without following the procedural requirements. *People v. Carreon*, 2011 IL App (2d), 100391, ¶ 11; see also *Hanna*, 296 Ill. App. 3d at 126 (rejecting the State's argument that the defendant waived objection to the reimbursement order). Here, the trial court ordered defendant to pay the public defender fee in a perfunctory manner without determining his ability to pay it, and therefore the order must be vacated even though defendant failed to object. See *Love*, 177 Ill. 2d at 564-65.

¶ 14 The order imposing a \$300 public defender fee is vacated and the cause is remanded for a proper hearing in accordance with section 113-3.1 concerning defendant's ability to pay.

¶ 15 Vacated and remanded.