2015 IL App (1st) 133308-U

FOURTH DIVISION
October 29, 2015

No. 1-13-3308

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 10077
	)	
RICKY PRICE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The trial court did not abuse its discretion by giving defendant a longer sentence for a lesser-included offense although during pretrial plea negotiations, he was offered a shorter sentence on the more serious offense; the trial court failed to properly conduct a hearing into defendant's ability to pay the public defender fee and improperly imposed two methamphetamine-related fines against him; cause remanded with direction.

¶ 2 Following a bench trial, defendant Ricky Price was found guilty of possession of a controlled substance (heroin) and sentenced to 56 months in prison. On appeal, defendant contends that: (1) his sentence was excessive where the trial court impermissibly punished him for exercising his right to trial; (2) the court improperly assessed him a $150 public defender fee without considering his ability to pay the fee; and (3) the court improperly imposed two methamphetamine-related fines to which he was not subject. For the reasons that follow, we affirm in part, vacate in part and remand with direction.

¶ 3 The State charged defendant with possession of a controlled substance (heroin) with intent to deliver. Prior to trial, the court held an Illinois Supreme Court Rule 402 conference (eff. July 1, 2012) with defendant's trial counsel and the State to discuss a possible plea bargain. The court's memorandum of orders or "half sheet" indicates that defendant was offered a plea bargain of 48 months in prison, which he rejected.

¶ 4 Defendant subsequently filed a motion to quash his arrest and suppress the evidence therefrom, which the trial court heard contemporaneously with his trial. At trial, Officer Celio of the Chicago police department testified that at approximately 6:50 p.m. on April 18, 2013, he conducted surveillance near 600 North Cicero Avenue along with two other officers, Officers Frano and Ramos. The area was a mix of residential and commercial properties. Over the past year, Celio arrested approximately 12 individuals in that general area for narcotics crimes.

¶ 5 During surveillance, Celio observed defendant standing at 600 North Cicero Avenue, wearing a black sweatshirt, a long gray shirt and jeans. Celio witnessed, on two separate occasions, two different individuals approach defendant and engage him in a brief conversation.

Both individuals gave defendant some amount of money, and defendant gave both individuals unknown items retrieved from the bottom of his sweatshirt. Based on Celio's experience, he "believed narcotics transactions had taken place."

¶ 6 Celio radioed Frano and Ramos, and told them what he observed. Celio next saw defendant in a restaurant at 550 North Cicero Avenue. Frano and Ramos entered the restaurant and asked defendant to come outside. Celio spoke to defendant outside. From a pouch inside defendant's sweatshirt, Celio recovered nine "black tint" bags, each containing a tinfoil packet with suspect heroin.

¶ 7 On cross-examination, Celio admitted he could not hear the content of the conversations between defendant and the two individuals who approached him. He also acknowledged using binoculars to aid his observations. Although Celio could not determine the amount of money the two individuals tendered to defendant, Celio noted defendant received "green paper." Celio admitted that after radioing Frano and Ramos about the purported narcotics transactions, he lost sight of defendant for two to three minutes before seeing him in the restaurant. Celio also acknowledged that neither he, Frano nor Ramos arrested the individuals who approached defendant.

¶ 8 Officer Frano testified that he placed defendant into custody, performed a custodial search of him and recovered $374 dollars.

¶ 9 The parties stipulated that if an employee from the Illinois State Police crime lab testified, he would have stated that he tested six of the nine items recovered from defendant. The items weighed 3.2 grams and tested positive for heroin.

¶ 10 After argument on the motion to quash the arrest and suppress the evidence therefrom, the court stated that based on Celio's observations of defendant and his previous arrests in the area, the officers had probable cause to arrest defendant. The court subsequently denied the motion.

¶ 11 Defendant moved for a directed verdict, which the court also denied. Defendant chose not to testify or present any other evidence on his behalf.

¶ 12 After additional argument, the court found defendant not guilty of possession of a controlled substance with intent to deliver, but found him guilty on the lesser-included offense of possession of a controlled substance. Defendant filed a motion for a new trial, which the trial court denied.

¶ 13 At defendant's sentencing hearing, the State sought to add an additional conviction of defendant's to his presentence investigation report. An "FBI sheet" indicated that in 2010, defendant was convicted of possession of a controlled substance (heroin) with intent to deliver in Wisconsin, for which he received a sentence of one year in prison. The court granted the State's request. The State argued that defendant was "not a stranger to the criminal justice system even in his juvenile years" and recounted his various other drug convictions. The State sought an extended-term sentence of 60 months in prison. Defense counsel argued that defendant's instant crime was not a "crime[] of violence," he lived with his parents and he was "looking to turn his life around." Defense counsel sought probation, but if the court believed prison time was appropriate, defense counsel requested a sentence close to the minimum allowable. Defendant briefly stated that he was "ready to get back home with [his] family." The court sentenced

defendant to 56 months in prison, noting it was "extend[ing] the term." The court also imposed fines, fees and costs totaling $1,304.

¶ 14 The State then requested a hearing on its petition for reimbursement of the fee incurred for appointing defendant the public defender. The following colloquy occurred:

> "THE COURT: [Defense counsel], how many times have you appeared on this case?
>
> [Defense counsel]: Five.
>
> THE COURT: You have gone to trial on this?
>
> [Defense counsel]: Correct.
>
> THE COURT: Post trial motions. All right. $150 is appropriate. All right."

Defendant filed a motion to reconsider his sentence, which did not include any argument related to the fee for the appointment of the public defender. The court denied defendant's motion. This appeal followed.

¶ 15 On appeal, defendant contends that his 56-month sentence was excessive. Specifically, he argues that the trial court improperly punished him for exercising his right to a trial where he was originally offered a sentence of 48 months during pretrial plea negotiations, he was convicted of a lesser-included offense and the court heard no additional aggravating evidence.

¶ 16 Trial courts are given broad discretionary powers when determining the proper sentence to give a defendant. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Where a sentence is within the statutory range, it may not be reversed absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). However, in sentencing a defendant, the trial court may not punish a

defendant for exercising his constitutional right to a trial by imposing a harsher sentence. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). If it is evident from the record that the court's sentence "was imposed, at least in part, because [the] defendant had refused to plead guilty, but instead availed himself of his right to trial, the sentence will be set aside." *People v. Latto*, 304 Ill. App. 3d 791, 804 (1999). A disparity between the sentence given after trial and the one offered to the defendant before trial does not without more support the inference that the harsher sentence was punishment for exercising his right to trial. *People v. Carroll*, 260 Ill. App. 3d 319, 348 (1992). Rather, there must be a "clear showing" in the record that the harsher sentence was a result of a trial demand. *Id.* at 349. A clear showing occurs when a trial court makes explicit remarks concerning the harsher sentence (*id.* citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962); *People v. Young*, 20 Ill. App. 3d 891, 893 (1974)), or where the actual sentence is "outrageously higher" than the one offered during plea negotiations. *Carroll*, 260 Ill. App. 3d at 349 citing *People v. Dennis*, 28 Ill. App. 3d 74, 78 (1975).

¶ 17 In the present case, the trial court found defendant guilty of the lesser-included offense of possession of a controlled substance, a Class 4 felony. See 720 ILCS 570/402(c) (West 2012). The court sentenced him to an extended-term sentence of 56 months in prison, well within the applicable sentencing range. See 730 ILCS 5/5-4.5-45(a) (West 2012). Additionally, a thorough review of the record reveals no clear showing that the trial court imposed a harsher sentence on defendant because he exercised his right to trial. First, the court made no explicit remarks that his sentence was the result of defendant exercising his right to trial. See *Carroll*, 260 Ill. App. 3d at 349. Second, defendant's sentence was not outrageously higher than the one he would have

received had he pled guilty – only eight months longer. See *id.* We cannot infer the court imposed a harsher sentence on defendant for exercising his right to trial simply because of this disparity. See *Carroll*, 260 Ill. App. 3d at 349. Moreover, the record indicates the court became aware of an additional drug conviction of defendant's during sentencing, of which it was previously unaware. Accordingly, the trial court did not abuse its discretion when sentencing defendant to 56 months in prison for possession of a controlled substance.

¶ 18 Nevertheless, defendant relies on *Dennis*, 28 Ill. App. 3d 74, to support his argument that absent any reasoning in the record to explain the court's imposition of a harsher sentence, we "can only infer that the sentence was imposed as punishment for [defendant's] decision to exercise his right to a trial." In *Dennis*, a defendant was offered a sentence between two and six years in prison in exchange for a guilty plea to armed robbery, which he rejected. *Id.* at 76. After a jury found the defendant guilty, the trial court sentenced him to between 40 and 80 years in prison. *Id.* Because of the "extremely harsh sentence," the reviewing court could "only conclude that the sentence of 40 to 80 years was imposed as punishment for his decision to reject the State's offer and chose instead a jury trial." *Id.* at 78. However, in so concluding, the court explicitly noted its holding was limited:

> "[W]e wish to make it clear that our holding that petitioner suffered a constitutional deprivation which must be remedied is limited to the facts of the instant case, namely, a sentence imposed following a jury trial approximately 20 times greater than that offered during plea negotiations. We do not intend it to erode the well established principle that a mere disparity between the sentence offered during plea

> bargaining and that ultimately imposed, of itself, does not warrant the use of our power to reduce a term of imprisonment imposed by the trial court." *Id.*

Unlike the "extremely harsh sentence" in *Dennis* (*id.*), in the present case, defendant's sentence was only eight months longer than the original plea offer. Accordingly, we find defendant's reliance on *Dennis* misplaced.

¶ 19 We also reject defendant's additional argument that the trial court did not "gather[] a greater appreciation of the nature and extent of [defendant's] crime." For support of this proposition, defendant cites *People v. Peterson*, 311 Ill. App. 3d 38, 53 (1999). However, in *Peterson*, the court also noted that trial courts may impose harsher sentences after trial than the one offered during plea negotiations where the trial court "obtain[s] greater sentencing information after trial than what was available at the time of a guilty plea." *Id.* Here, the record clearly indicates that the court learned of an additional conviction from Wisconsin of defendant during sentencing. Accordingly, the court obtained a greater appreciation of the nature and extent of defendant's criminal history, which it could use to enhance defendant's sentence. See 730 ILCS 5/5-5-3.2(a)(3) (West 2012) (stating a defendant's "history of prior delinquency or criminal activity" is a proper aggravating factor in sentencing).

¶ 20 Finally, although defendant argues that the trial court "offered [him] a four-year sentence for Class 1 possession with intent following a Rule 402 conference," we find this assertion unsupported by the record.

¶ 21 Defendant next contends that the trial court improperly assessed him a $150 public defender fee without considering his ability to pay the fee. The State responds, arguing defendant

forfeited this argument by not objecting at trial or raising the issue in a posttrial motion. We disagree. See *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 11 ("Although defendant did not raise this issue in the trial court, where a trial court imposes [the public defender fee] without following the appropriate procedural requirements, application of the forfeiture rule is inappropriate."); see also *People v. Williams*, 2013 IL App (2d) 120094, ¶ 13. Therefore, because defendant alleges noncompliance with the procedural requirements for imposing the fee, defendant has not forfeited review of this contention, and we will address the merits. On the merits, the State argues the court complied with the procedural requirements to impose the fee.

¶ 22 Under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code), 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 the amount of the payment," in which "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." *Id.*

¶ 23 To satisfy the statutory requirements, the trial court cannot "simply impose the fee in a perfunctory manner." *People v. Somers*, 2013 IL 114054, ¶ 14. Rather, the court must provide the defendant with notice that the fee is under consideration and further, it must allow the defendant "the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances." *Id.* Notice is required so that the defendant can prepare evidence

regarding his ability to pay the reimbursement costs. *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 11. Notice will be proper if the court alerts the defendant in open court before the hearing of (1) its intention to conduct a hearing, (2) the consequences of the hearing and (3) that the defendant will have the opportunity to present evidence and be heard on the issue. *People v. Johnson*, 297 Ill. App. 3d 163, 165 (1998). The hearing is mandatory (*Williams*, 2013 IL App (2d) 120094, ¶ 13), and it "must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay." *Somers*, 2013 IL 114054, ¶ 14. The court also "must consider, among other evidence, the defendant's financial affidavit." *Id.* citing 725 ILCS 5/113-3.1(a) (West 2012). Whether or not the trial court properly conducted the hearing on the public defender fee presents a question of law, which we review *de novo*. *Williams*, 2013 IL App (2d) 120094, ¶ 13.

¶ 24 We find *Somers* instructive in our analysis where a trial court, on its own, imposed a $200 public defender fee. *Somers*, 2013 IL 114054, ¶ 3. Before ordering the defendant to pay the fee, the court asked the defendant three questions related to his ability to pay the fee: "whether [defendant] 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." *Id.* ¶¶ 4, 15. Our supreme court held "it is clear, as the State concedes, that the trial court's few questions to defendant about his employment status were insufficient to satisfy the statute." *Id.* ¶ 14.

¶ 25 In the present case, the following is the entirety of trial court's discussion regarding its imposition of the public defender fee:

"[assistant State's Attorney]: Judge, at this time we are seeking hearing on the petition for reimbursement of Public Defender's, attorney fees.

THE COURT: [Defense counsel], how many times have you appeared on this case?

[Defense counsel]: Five.

THE COURT: You have gone to trial on this?

[Defense counsel]: Correct.

THE COURT: Post trial motions. All right. $150 is appropriate. All right."

¶ 26 We find the court's hearing on the public defender fee was insufficient. The only line of inquiry the trial court made was into the value of defense counsel's services. However, much more investigation is required. See *Somers*, 2013 IL 114054, ¶ 14. The trial court must inquire into defendant's financial background and his ability to pay the fee. *Id.* The court simply imposed the fee in a "perfunctory manner" contrary to the instructions in *Somers*. *Id.* If three narrow questions posed to a defendant about his prospective employment was considered an insufficient hearing (see *id.*), certainly the present case is an example of an even more deficient hearing because the court failed to ask any questions of defendant. Additionally, the court never mentioned defendant's financial affidavit – an express requirement of consideration in section 113-3.1(a). See 725 ILCS 5/113-3.1(a) (West 2012). Moreover, the court failed to properly give notice to defendant by informing him in open court of its intention to hold a hearing, the consequences that could result from the hearing and that he would have the opportunity to present financial evidence on his behalf. See *Johnson*, 297 Ill. App. 3d at 165. Therefore, we

conclude the court failed to properly comply with section 113-3.1(a) of the Code (725 ILCS 5/113-3.1(a) (West 2012)).

¶ 27 Nevertheless, the State argues that during the trial court's hearing on the fee, defense counsel actively participated, did not object to the imposition of the fee and generally "failed to take advantage of the opportunity to be heard." We reject these arguments. The burden falls on the State and the trial court to "see that a proper record is made to support the reimbursement order." *People v. Atwood*, 193 Ill. App. 3d 580, 592 (1990). Here, very clearly, both the State and trial court failed to meet this burden. Moreover, defendant cannot be said to have "failed to take advantage of the opportunity to be heard," when the court did not give him proper notice of the fee's consideration.

¶ 28 Because we have determined the court failed to conduct a proper hearing on the public defender fee, we must determine the proper remedy. The State argues, only in the alternative, that if the court failed to properly comply with section 113-3.1(a), the correct remedy is a remand back to the trial court for a proper hearing. Defendant counters, arguing his fee should be vacated outright because the court did not have a " 'hearing' within the meaning of [section 113-3.1(a)]."

¶ 29 A hearing is broadly defined as "a 'judicial session, usu[ally] open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying.' " *Williams*, 2013 IL App (2d) 120094, ¶ 20 quoting Black's Law Dictionary 788 (9th ed. 2009). Therefore, the trial court did conduct a hearing, albeit an insufficient one, because the brief questioning of defense counsel occurred during a judicial session open to the public, where the purpose was to decide the issue of the public defender fee. *Id.*

¶ 30 Accordingly, because the trial court held a hearing, we vacate defendant's $150 public defender fee and remand the cause to the trial court for a complete hearing on defendant's ability to pay the public defender fee. See *Somers*, 2013 IL 114054, ¶¶ 17-20; *Williams*, 2013 IL App (2d) 120094, ¶¶ 24-25.

¶ 31 Finally, defendant contends, and the State concedes, that the trial court improperly assessed against him a $100 fine (730 ILCS 5/5-9-1.1-5(b) (West 2012)) and a $25 fine (730 ILCS 5/5-9-1.1-5(c) (West 2012)), both related to crimes involving methamphetamine. We agree. Defendant was not convicted of any methamphetamine crime, and therefore, the court improperly assessed these fines totaling $150. Accordingly, these fees must be vacated.

¶ 32 For the reasons stated above, we affirm the sentence of the circuit court of Cook County, vacate the two methamphetamine-related fines and remand to the circuit court for a proper hearing on the public defender fee.

¶ 33 Affirmed in part; vacated in part; and remanded with direction.