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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO JUAREZ,

Defendant and Appellant.

A133911

(Contra Costa County
Super. Ct. Nos. 5-101416-6,
5-101486-9)

Defendant was placed on probation after his conviction of multiple crimes. He urges this court to strike an award of attorney fees ordered pursuant to Penal Code section 987.8,¹ because it was imposed without the requisite showing that he was able to pay. We conclude that although the trial court did not err in imposing the fee, its written order should be modified to clarify its contingent nature. We otherwise affirm.

I.

FACTUAL AND PROCEDURAL
BACKGROUND

Because the issue presented does not turn on the facts of the underlying offenses, we simply note that defendant was convicted in case No. 5-101416-6 of two counts of second degree robbery (§§ 211, 212.5, subd. (c)—counts 1, 2), with a true finding on a criminal street gang enhancement as to each count (§ 186.22, subd. (b)(1)(C)); and one count of street terrorism (§ 186.22, subd. (a)—count 3). Defendant was convicted in a

¹ All statutory references are to the Penal Code unless otherwise indicated.

separate case (No. 5-101486-9) of one count of receiving stolen property (§ 496, subd. (a)). Defendant was represented by appointed counsel throughout both proceedings.

At a sentencing hearing on October 28, 2011 that addressed both cases, the trial court suspended imposition of sentence and placed defendant on four years' probation, subject to various terms and conditions. Defendant also was ordered to pay a public defender fee (§ 987.8) in the amount of \$500, to which no objection was made below but which is challenged on appeal.² The court further explained that the fee was "subject to [a] determination by the Court Collections Unit of your [defendant's] ability to pay. If you dispute that determination, you can have a hearing on that issue before the Court."

The written order regarding the legal assistance fees, which appears to be a preprinted form, stated that defendant was ordered to report to the county probation collection unit within 20 working days or, if in custody, within 20 working days after his release from jail. The order also stated that a county officer would interview defendant "to determine if you are able to pay all or part of the services of the attorney appointed by the Court to handle your case. If the Probation Collection Unit finds that you are able to pay a certain amount, and you do not agree, you have the right to a hearing in this Court to decide what amount, if any, you must pay." The order further informed defendant that he had a right at the hearing to be heard in person, to present witnesses and other documentary evidence, to confront and cross-examine adverse witnesses, and to have the evidence against him disclosed to him. Finally, the order stated that if defendant did not appear at the probation collection unit as ordered, he waived his right to a hearing, and the court would enter a judgment against him ordering him to pay for his attorney's services. Defendant's name is handwritten on the order acknowledging its receipt and stating that he understood its terms, including the term that *if* he did not report as ordered, the court would *thereafter* enter judgment against him for the costs of legal services. The

² The fee was not a condition of probation. (*People v. Flores* (2003) 30 Cal.4th 1059, 1067 & fn. 5 [imposing reimbursement of attorney fees as condition of probation prohibited in California].)

felony order of probation stated that defendant was ordered to pay “Attorney’s Fees \$500-.”

Defendant timely appealed in both cases.

II. DISCUSSION

Defendant’s sole argument on appeal is that the \$500 attorney fees fine imposed pursuant to section 987.8 should be stricken, because it was imposed without a hearing to determine whether he had an ability to pay the fine. “Section 987.8 establishes the means for a county to recover some or all of the costs of defense expended on behalf of an indigent criminal defendant. [Citation.] Under subdivisions (b) and (c) of the statute, an order of reimbursement can be made only if the court concludes, after notice and an evidentiary hearing, that the defendant has ‘the present ability . . . to pay all or a portion’ of the defense costs. [Citations.]” (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1205.) Section 987.8, subdivision (b) provides in relevant party that in “any case in which a defendant is provided legal assistance, . . . upon conclusion of the criminal proceedings in the trial court, . . . the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.” Further, “[i]f the defendant, after having been ordered to appear before a county officer, has been given proper notice and fails to appear before a county officer within 20 working days, the county officer shall recommend to the court that the full cost of the legal assistance shall be ordered to be paid by the defendant.” (§ 987.8, subd. (d).) Finally, “[i]f the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability.” (§ 987.8, subd. (e)(5).)

Defendant first contends that he did not waive his challenge to the attorney fees fine by failing to object to it below. (E.g., *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [no forfeiture of objection to attorney fees order, § 987.8, because claim based on insufficiency of evidence, which is never waived].) The issue of whether a defendant's failure to object waives his claim that he is unable to pay a fee is currently before our Supreme Court, which is reviewing an opinion that disagreed with *Pacheco's* conclusion that the issue is not waived. (*People v. McCullough* (2011) 193 Cal.App.4th 864, 871, review granted, June 29, 2011, S192513 [imposition of jail booking fee, Gov. Code, § 29550.2].) We need not reach the issue of waiver, however, because we conclude that defendant's objection to the attorney fees order is premature.

Defendant is correct that section 987.8 requires a determination, either express or implied and supported by substantial evidence, regarding a defendant's ability to pay attorney fees. (*People v. Flores, supra*, 30 Cal.4th at p. 1061; *People v. Pacheco, supra*, 187 Cal.App.4th at pp. 1397-1398.) Here, however, the trial court did not unconditionally order that defendant pay attorney fees. Instead, the trial court ordered that the fee was subject to a determination of defendant's ability to pay, and the written attorney fees order following the sentencing hearing likewise informed defendant that he was entitled to a hearing to decide what amount he must pay if he disagreed with the probation collection unit's determination that he was able to pay.

We agree with respondent that the procedure adopted by the trial court complies with section 987.8. There is nothing in the statute that requires the court to give notice and hold a hearing regarding a defendant's ability to pay before assessing a dollar amount for the services of appointed counsel. Instead, the statute allows the court to have the designated county agency first determine whether the defendant is able to pay the assessed amount, and provides that the defendant shall have the right to challenge the county agency's determination before the court if he or she disagrees with it. (§ 987.8, subd. (d).) The trial court's attorney fees order, including defendant's written acknowledgment, complies with section 987.8.

We therefore conclude that defendant’s challenge to the attorney fees order is premature, as the trial court has not yet decided whether defendant has the ability to pay, or even ordered that he must unconditionally pay attorney fees. “A controversy is not deemed ripe for adjudication unless it arises from a genuine present clash of interests and the operative facts are sufficiently definite to permit a particularistic determination rather than a broad pronouncement rooted in abstractions.” (*O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1451.) The content of the trial court’s order and the posture of this case would require us to speculate about unpredictable future events—namely, the ultimate decision regarding attorney fees—in order to evaluate defendant’s claim. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1585; *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1217.) Only if and when an impermissible order to pay attorney fees without the requisite hearing and finding of ability to pay occurs, will an error and harm to defendant occur. Until then, his challenge is not yet ripe. (*People v. Murrison* (2002) 101 Cal.App.4th 349, 363.)

However, the felony order of probation does not reflect the contingent nature of the trial court’s order, taking the entire record into account, including the reporter’s transcript and the standard, preprinted order. In order to be consistent with the trial court’s oral pronouncement and separate attorney fees order, the felony order of probation should properly state that defendant was referred to the probation collection unit for a determination of his ability to pay attorney fees, and that the court assessed those fees at \$500. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-188 [correction of unraised clerical error].)

III.

DISPOSITION

The trial court's order is affirmed, with the modification noted in the preceding paragraph.

Baskin, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.