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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID LOPEZ SANCHEZ, Defendant and Appellant.	A143475 (Napa County Super. Ct. No. CR172388)

Following defendant David Lopez Sanchez's plea of no contest to false imprisonment (Pen. Code, § 236[1]), the trial court placed him on formal probation and ordered him to pay various fines and fees. On appeal, defendant contends the imposition of an attorney fee of $250 under section 987.8 must be reversed because the trial court denied him a hearing for a determination of his present ability to pay and because there was insufficient evidence he could pay the $250 fee.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 2, 2014, the victim, defendant's girlfriend of two years, reported to police that defendant had called her at midnight and asked for a ride. She put their 10-month-old son in the car and drove to pick him up. Defendant appeared to be drunk, and he and the victim began to argue. Defendant grabbed the back of her hair, pushed her head down, and hit her in the back of the head. She told him she was going to call the

[1] Further statutory references are to the Penal Code.

police, and defendant took her cell phone and said, "You better fucking drive." The victim pulled over and asked someone to call 911. Defendant took the car keys and fled on foot.[2]

The next day, the district attorney filed a six-count criminal complaint against defendant, and the trial court appointed the public defender to represent him. Defendant received and signed a document titled "Notice of Hearing Reimbursement of Assigned Counsel (PC987.8)." The notice informed him of his rights under section 987.8[3] and provided as follows: "You must be prepared to discuss your financial situation at that time. You are not required to bring any financial records to the hearing, but you should have with you, at that time, any financial records you would like the court to see. You must complete a court form called 'Defendant's Statement of Assets—CR115.' This form will be provided to you by your lawyer or the court. [¶] A case usually ends at your last regularly scheduled court appearance, when you are granted probation or sentenced, or when the case is dismissed. Since this could happen at any court appearance, you must be prepared for this financial hearing every time you appear in court."

On September 15, 2014, the parties reached an agreement under which defendant would plead guilty or no contest to a newly added count of false imprisonment (§ 236) with a *Harvey* waiver,[4] and the prosecution would dismiss the original six counts. The court accepted defendant's plea of no contest to false imprisonment.

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[2] Because defendant entered a plea, the facts are based on the probation report.

[3] The notice stated in part: "You have been assigned a lawyer to represent you. You are not being charged a fee for this service at this time. At the end of this case, or when your assigned lawyer withdraws from this case, the court will hold a hearing to decide if you have the ability to pay Napa County for all, or a part of, the cost of this service." The notice also enumerated the rights defendant would have at the hearing to determine ability to pay, including the right to present witnesses and documentary evidence, and the right to a written statement of the court's findings. It also set forth a schedule of fees, including that for felony cases the fee "starts at $600."

[4] *People v. Harvey* (1979) 25 Cal.3d 754. A *Harvey* waiver is an agreement "permitting the sentencing judge to consider the facts relating to dismissed charges." (*People v. Barasa* (2002) 103 Cal.App.4th 287, 291, fn. 3.)

On October 24, 2014, defendant filed his "Statement of Assets" form in which he reported he made $12 per hour working 40 hours per week at Lopez Auto. He had no assets, he paid $500 per month for child support, and his existing debt consisted of court fines in excess of $20,000. The probation report similarly stated defendant worked fulltime for Lopez Auto Service but reported he was paid $10 per hour. The report recommended various fees and fines, including restitution fines, a court security fee, a booking fee, and fines related to domestic violence offenses. The report did not mention a fee for legal assistance pursuant to section 987.8.

The sentencing hearing was held the same day defendant's financial statement and the probation report were filed. Initially, defense counsel asked the court not to order a 52-week anger management class because it would be expensive, time-consuming, and not particularly effective. As part of his argument against such a long-term class, counsel told the court, "And this is a guy, he's got a full-time job."

Later in the hearing, defense counsel asked the court to reduce or waive the fees recommended in the probation report of (1) $500 pursuant to section 1203.097, subdivision (a)(5), and (2) $500 to be paid to a battered women's shelter pursuant to section 1203.097, subdivision (a)(11)(A). Counsel stated, "Mr. Sanchez earns $10 an hour. He is supporting a child. He has approximately $20,000 in court fees already." The court responded, "Sure. I understand that."

Defendant was sentenced to time served in county jail (28 days), placed on three years' formal probation, and ordered to complete counseling and parenting classes. As defense counsel requested, the trial court reduced the fines under section 1203.097, subdivisions (a)(5) and (a)(11)(A) from $500 to $250 each. The court also waived the booking fee (the probation report recommended a fee of $71) and waived the probation report fee (recommendation of $560) without prompting from defense counsel.

The court confirmed that defendant understood and accepted the probation conditions. The court clerk then asked, "Public defender fees?" After checking the fee schedule, the court stated, "Six hundred dollars attorney's fees. Given Mr. Lopez's

income I will order him to pay $250 of the $600." At this point, the hearing came to a close.

DISCUSSION

Under section 987.8, "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" of court-appointed legal assistance. (§ 987.8, subd. (b).) "If 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." (*Id.*, subd. (e).)

Defendant contends the order that he pay a fee for legal services must be reversed, first, because the trial court did not comply with the hearing requirement of section 987.8 and, second, because there was insufficient evidence that he had the ability to pay the fee. The Attorney General responds that defendant forfeited his challenge to the fee order. She further argues there was sufficient evidence defendant was able to pay $250 for legal assistance. We agree defendant has forfeited his contentions. We also conclude there was sufficient evidence to support the trial court's implicit finding of ability to pay the $250 fee.

Forfeiture

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880; see *People v. Trujillo* (2015) 60 Cal.4th 850, 856 (*Trujillo*).) The forfeiture rule has been applied to claims of sentencing error where the sentence, "though otherwise permitted by law, [is alleged to have been] imposed in a procedurally or factually flawed manner." (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).) Our Supreme Court has explained, "[T]he requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advance[s] the goals of proper development of the record and judicial economy." (*People v. McCullough* (2013) 56 Cal.4th 589, 599 (*McCullough*).)

In *People v. Aguilar* (2015) 60 Cal.4th 862, 864 (*Aguilar*), the California Supreme Court specifically held the forfeiture rule applies to challenges to fees under section 987.8 that are imposed at sentencing. At the sentencing hearing in *Aguilar*, the trial court ordered the defendant to pay an attorney fee under section 987.8, and he did not object. A probation report had recommended various fines and fees, but did not mention an attorney fee under section 987.8. (*Id*. at p. 865.) On appeal, the defendant challenged imposition of the fee and argued the forfeiture rule should not apply, relying "on the specification . . . of certain procedural requirements" in section 987.8. (*Id.* at p. 866.) Rejecting this argument, the Supreme Court held the forfeiture rule applied to appellate challenges to fees imposed under section 987.8. In reaching its conclusion, the court cited its companion case, *Trujillo*, *supra*, 60 Cal.4th 850. (*Aguilar*, *supra*, at p. 866.)

In *Trujillo*, the defendant challenged on appeal the imposition of fees for probation services under section 1203.1b although she had not objected to the fees or asserted an inability to pay them with the lower court.[5] (*Trujillo*, *supra*, 60 Cal.4th at pp. 853–854.) The appellate court reversed the order for payment of these fees and remanded with directions to the trial court to follow the procedure prescribed by section 1203.1b. The Supreme Court, however, reversed the appellate court's judgment, concluding the defendant's challenge to the fee order was forfeited. (*Id*. at p. 854.)

The court observed that it previously had applied the forfeiture rule in the sentencing context. In particular, both objections to probation conditions and claims of

[5] Section 1203.1b, like section 987.8, provides certain procedural requirements before a court may impose a fee. For example, the probation officer is required (1) to make a determination of the defendant's ability to pay the fee for probation services, and (2) to inform the defendant of his or her right to a court hearing on the issue. (§ 1203.1b, subd. (a).) At the hearing on the ability-to-pay determination, the defendant has the right to be heard, to present witness and documentary evidence, and to confront adverse witnesses. (*Id*., subd. (b)(1).) The requirement that the probation officer inform the defendant of the right to a hearing is similar to the defendant's right to "notice and a hearing" under section 987.8, subdivision (b). The procedural rights afforded at the hearing on ability to pay are identical under sections 1203.1b, subdivision (b)(1) and 987.8, subdivision (e).

error in the trial court's exercise of its sentencing discretion are forfeited if not raised in the lower court. (*Trujillo*, *supra*, 60 Cal.4th at p. 856, citing *People v. Welch* (1993) 5 Cal.4th 228 and *Scott*, *supra*, 9 Cal.4th 331.) And the court recently held a defendant's failure to contest a booking fee at the time it is imposed results in forfeiture of any challenge to the fee on appeal. (*Trujillo*, at p. 857, citing *McCullough*, *supra*, 56 Cal.4th 589.)

The defendant in *Trujillo* argued the forfeiture rule should not apply to probation fees because the authorizing statute (§ 1203.1b) included express procedural requirements absent from the statute authorizing booking fees. The court disagreed. "Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate." (*Trujillo*, *supra*, 60 Cal.4th at p. 858.) The court explained that routine sentencing errors could easily be prevented and corrected if called to the trial court's attention. (*Ibid*.)

In *Aguilar*, the Supreme Court also noted that, in respect to both probation fees and attorney fees, "a defendant who fails to object in the trial court to an order to pay probation costs or attorney fees is not wholly without recourse." (*Aguilar*, *supra*, 60 Cal.4th at p. 868.) Under section 987.8, subdivision (h), " '[a]t any time during the pendency of the judgment [ordering payment of attorney fees], a defendant against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant's ability to pay the judgment.' " (*Aguilar*, *supra*, at p. 868.) " 'Although the sentencing hearing is, in general, the proper time for a defendant to assert all available procedural and factual contentions relating to the trial court's sentencing choices, in an appropriate case a defendant's discovery of trial counsel's failure to properly advise the defendant, before the sentencing hearing, of the [defendant's procedural rights in] . . . a court hearing on ability to pay [legal] costs may constitute a change of circumstances supporting a postsentencing request for such a hearing.' " (*Ibid*.)

Turning to our case, defendant raises two claims of error: (1) the trial court erred in denying him the hearing prescribed by section 987.8 for a determination of his present ability to pay, and (2) the trial court erred in imposing the attorney fee without sufficient evidence he could pay. However, he did not object on either of these grounds with the trial court. He did not request a separate hearing to determine his present ability to pay any fee order in compliance with section 987.8; nor did he object to the attorney fee based on inability to pay. Under *Aguilar*, *supra*, 60 Cal.4th 862, and *Trujillo*, *supra*, 60 Cal.4th 850, these claims are forfeited.

Defendant's attempts to distinguish *Aguilar* are unavailing. First, he argues *Aguilar* is distinguishable because the probation report in this matter made no recommendation concerning attorney fees. But there is no suggestion in *Aguilar* that the probation report in that case mentioned attorney fees either. (See *Aguilar*, *supra*, 60 Cal.4th at pp. 865, 868.)

Second, defendant argues the trial court never advised him of his right to try to convince his probation officer that he could not pay the fees. This argument is based on the following observation by the court in *Aguilar*: "To apply the forfeiture rule in the present case is especially appropriate because, under the procedures contemplated by sections 987.8 and 1203.1b, [the] defendant had two opportunities to object to the fees the court imposed, and availed himself of neither. Defendant, of course, could have objected when the court, at sentencing, announced the fees it was imposing, which largely tracked those recommended in the presentence investigation report. *Furthermore*, the court advised defendant *he would have the opportunity to assert inability to pay in subsequent proceedings before the probation officer*." (*Aguilar*, *supra*, 60 Cal.4th at pp. 867–868, italics added.) However, as the Attorney General notes, the fact the particular defendant in *Aguilar* was given a second opportunity to object to the fee order with a probation officer was not a basis for the court's general holding that the forfeiture rule applies to fees under section 987.8. Here, less than two months before the sentencing hearing, defendant was given a written notice of his rights under section 987.8 that specifically informed him it was likely his financial situation would be considered at

sentencing. Later, he completed and filed a "Statement of Assets," an additional reminder that the issue of his ability to pay fees and fines would be addressed at the sentencing hearing. It is not inappropriate to apply the forfeiture rule under these circumstances.

Third, defendant argues "there was no clear evidence that his employment situation was sufficiently stable to make it likely he could satisfy a $250 fee reimbursement order any time in the near future." In *Aguilar*, the court observed: "[A]lthough the [probation] report indicates defendant claimed to possess no significant assets (or debts) and his residence was held in the victim's name, at sentencing *he emphasized his uninterrupted employment history*, a stance seemingly at odds with an appellate claim of inability to pay the fees." (*Aguilar*, *supra*, 60 Cal.4th at p. 868, fn. omitted, italics added.) Again, this fact was not a basis for the *Aguilar* court's holding. Further, defense counsel in the present case emphasized at the sentencing hearing that defendant had a full-time job in arguing against a time-consuming 52-week anger management class. These facts do not appear to be meaningfully distinguishable from the facts of *Aguilar*.

Defendant claims the trial court "effectively deprived [him] of any opportunity for objecting to its attorney fee reimbursement order." We disagree. The transcript shows the hearing ended after the court imposed the fee, but there is no indication that defense counsel was prevented from raising an objection. For example, there is no suggestion that defense counsel was cut off by the court.

Defendant next claims he was denied his statutory rights to be heard, to present evidence, and to receive written findings supporting the court's order. (He does not claim he was denied notice.) However, he did not object on these grounds in the lower court. Had defendant objected or simply requested to present evidence and requested a written decision pursuant to his rights under section 987.8, the court could have provided him these procedural rights. (See *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395 ["If a timely objection had been made, the trial court could have allowed further testimony on ability to pay under Penal Code section 987.8, could have allowed time to

submit legal briefs on the issue, or could have scheduled further hearings to allow further preparation time"].) This in turn would have served "the goals of proper development of the record and judicial economy." (*McCullough*, *supra*, 56 Cal.4th at p. 599.) As the court reasoned in *Trujillo* (in the context of probation fees), "to place the burden on the defendant to assert noncompliance with [the authorizing statute] in the trial court as a prerequisite to challenging the imposition of . . . costs on appeal is appropriate." (*Trujillo*, *supra*, 60 Cal.4th at p. 858.)

Finally, *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), cited by defendant, is distinguishable. In *Viray*, near the end of the defendant's sentencing hearing, "defense counsel, who had been largely silent, stated, 'We're asking the Court to assess attorney's fees' " and referred to a written request for $9,200 in fees. The trial court ordered the defendant to reimburse the county the requested amount of $9,200. (*Id.* at pp. 1193–1194.) On appeal, the defendant argued there was insufficient evidence to show she was able to pay the fees and the fee order was excessive and unsupported by evidence of the actual cost to the county. The Court of Appeal agreed with both arguments. (*Id.* at p. 1214.)

As a preliminary matter, the court in *Viray* concluded the arguments were not forfeited, despite the defendant's failure to object at sentencing: "We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning his own fees. It seems obvious to us that when a defendant's attorney stands before the court *asking for an order taking money from the client and giving it to the attorney's employer*, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel's omissions to the client." (*Viray*, *supra*, 134 Cal.App.4th at p. 1215, italics added.) The court recognized "that a particular deputy public defender might, as a salaried employee, feel personally disinterested in a reimbursement order, and might even be willing to oppose it on behalf of the defendant." (*Id.* at p. 1216.) But, in the circumstances of *Viray*, "it went beyond mere appearance; it was defense counsel himself—the very person who was supposedly protecting defendant's rights in the matter—who brought the

fee request to the court's attention, saying '*We're* asking the Court to assess attorney's fees' and '*We're* asking—the amount we're asking is $9,200 in attorneys fees.' " (*Ibid*.) Thus, the court concluded that defense "[c]ounsel was at that moment clearly representing his employer, whose interests were flatly contrary to defendant's. To all appearances, counsel had abandoned his erstwhile client to pursue the pecuniary interests of his boss." (*Ibid*.)

Here, we do not see the conflict apparent in *Viray*, where defense counsel himself asked for the attorney fee order. (134 Cal.App.4th at p. 1193.) In the matter before us, it was the court clerk, not defense counsel, who reminded the court about the fee for legal assistance, and the court relied on a fee schedule, not a request from defense counsel, to set the fee. Further, as the Attorney General points out that, as a practical matter, the $250 reimbursement fee does not go to defense counsel but to Napa County. (§ 987.8, subd. (e).) We also note that the fee amount of $250, in contrast to the $9,200 fee in *Viray*, is de minimis in the context of the public defender's salary obligations.[6]

Ability to Pay

For the reasons discussed, defendant has forfeited his challenges to the order that he pay $250 under section 987.8. Furthermore, even if we assume defendant preserved the issue of ability to pay the attorney fee based on defense counsel's request that the trial court reduce or waive other fees, we conclude there was sufficient evidence to support the court's implied finding that defendant was able to pay $250.

A trial court's finding that a defendant has the present ability to pay a fee under section 987.8 may be express or implied and must be supported by substantial evidence. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400, disapproved on another ground

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[6] In *Aguilar*, the court expressly did not address the issue of defense counsel's possible conflict of interest regarding orders to pay attorney fees. "This case does not present, and we therefore do not address, the question whether a challenge to an order for payment of the cost of the services of appointed counsel is forfeited when the failure to raise the challenge at sentencing may be attributable to a conflict of interest on trial counsel's part. (See, e.g., [*Viray, supra,*] 134 Cal.App.4th [at pp.] 1216–1217.)" (*Aguilar, supra*, 60 Cal.4th at p. 868, fn. 4.)

by *McCullough*, *supra*, 56 Cal.4th at p. 599 and *Trujillo, supra*, 60 Cal.4th at p. 858, fn. 5.)

Here, the trial court stated, "Given Mr. Lopez's income I will order him to pay $250 of the $600." Thus, the court considered defendant's income and implicitly determined he was able to pay only $250 of the $600 fee for legal services. The record included defendant's declaration that he had a full-time job and was paid $12 per hour. He was sentenced to probation and was not required to serve any additional time in county jail. Even taking into account his existing child support and other obligations, this was sufficient evidence to sustain the court's finding that defendant had the present ability to pay the $250 fee under section 987.8. Should defendant's financial circumstances change, he is free to "petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to [his] ability to pay the judgment." (§ 987.8, subd. (h).)

DISPOSITION

The judgment is affirmed.

Miller, J.

We concur:

Kline, P.J.

Stewart, J.

A143475, *People v. Sanchez*