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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.
MICHAEL KENNETH
THROCKMORTON,
Defendant and Appellant.

A145574
(Humboldt County
Super. Ct. No. CR1201282)

Defendant Michael Kenneth Throckmorton appeals an order issued pursuant to Penal Code section 987.8 requiring him to reimburse his public defender \$2,500 in costs associated with his legal representation.¹ The order is unsupported by substantial evidence he is able to pay these fees and therefore we reverse it.

BACKGROUND

On March 26, 2015, a jury convicted defendant of one felony count of corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a)), arising from a violent physical assault three years earlier, in March 2012, on his former girlfriend with whom he had been living and together operating a marijuana growing business.

During trial, defendant testified that at the time he was arrested and served with a restraining order the day after his offense, he had approximately \$65,000 or \$70,000 in savings from the marijuana business in the bank and another \$30,000 in cash at her house. He testified he was never able to retrieve any of his possessions from her house

¹ All further statutory references are to the Penal Code.

because of the restraining order, however, that she never returned his possessions to him, and that she “stole” his money.

By the time of sentencing proceedings three years after defendant’s arrest, his financial picture had deteriorated. According to the April 24, 2015 probation report, defendant had become transient, and was working as a traveling musician living out of his car and motels. According to a financial disclosure form defendant signed under penalty of perjury on April 21, 2015, which was provided to the trial court as an attachment to the probation report, the car itself was worth between \$2,000 and \$3,000. Defendant reported no income, and no other assets, including no cash in the bank. The probation report did not recommend that defendant be required to reimburse any costs of his defense.

The sentencing hearing took place two months later, on June 19, 2015. By that point, defendant had been offered a job working in a restaurant in Virginia where his mother lives, and had found a stable home. He asked the court to grant him probation to enable him to move there under court supervision, but the trial court denied probation and sentenced him to three years in state prison.

Over defendant’s objection, the trial court also ordered defendant to pay \$2,500 in legal fees. The court raised that issue at the sentencing hearing while announcing various “tentative rulings,” among them that “I would tentatively order that [defendant] reimburse the county for attorney’s fee in the amount of \$2,500 which is dramatically less than the actual number of hours that would be expended through two trials and the other related items at \$65 an hour.” Following arguments by counsel on the principal contested question whether defendant would be granted probation, the trial court announced that its tentative rulings would constitute the court’s judgment and sentence. The prosecutor then inquired whether that also meant “the tentative rulings on the fines are now actual” rulings too, whereupon the following colloquy ensued:

“[DEFENSE COUNSEL]: Oh actually—.

“THE COURT: Everything that I said is now my judgment.

“THE DEFENDANT: What does that mean?

“([Defense counsel] spoke with the defendant.)

“[DEFENSE COUNSEL]: Your honor, I don’t believe he has the ability to pay for any attorney’s fee or booking fee. He has no income. So, I don’t think the court has the basis to impose those without finding that he does have the ability to pay.

“THE COURT: What I based those on, and, really, they’re much lower than I considered, particularly with respect to the attorney’s fee. I don’t know how many hours your office would have.

“One thing I certainly considered, among other things, is his testimony during trial. He testified that he certainly has a very skilled position that’s very marketable, growing illegal marijuana commercially. He testified about the money that he made doing that on a very regular basis, and it’s [*sic*] was a very substantial amount of money.

“THE DEFENDANT: I haven’t done that in three years, sir.

“THE COURT: My turn, sir.

“THE DEFENDANT: Sorry.

“THE COURT: And he is not going to be in the Department of Corrections for a great deal of time. He can certainly set up payment and make payments on that; but those financial obligations, based on what I heard during the trial, are well within reason, so.

“[¶] Thank you.”

This timely appeal followed.

DISCUSSION

On appeal, defendant contends the order to pay attorney fees is not supported by substantial evidence that he is able to pay the fees and, alternatively, that he was denied an opportunity to be heard and present evidence on the issue of his inability to pay, in violation of both the procedural protections of section 987.8 (see *id.*, subd. (e)) and due process. We agree with his substantial evidence contention and therefore do not address the procedural point.

Section 987.8 authorizes a trial court, on a discretionary basis, to order a criminal defendant who has received legal representation at public expense to reimburse some or all of the county’s costs. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1213.) As we

have previously observed, however, “[t]he specific language of section 987.8 expressly requires a finding of *present ability* to pay for defense costs.” (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 350.) In pertinent part, the statute provides as follows: “In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, 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. [¶] . . . [¶] 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.” (§ 987.8, subs. (b), (e), italics added.)

Subdivision (g)(2) defines the phrase, “ability to pay.” (§ 987.8, subd. (g)(2).) It means “the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her,” and includes but is not limited to the defendant’s “present financial position,” the defendant’s “reasonably discernible future financial position,” “[t]he likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing,” and “[a]ny other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (*Ibid.*)

The statute includes two express limitations on consideration of a defendant’s future financial position. One is a six-month time limitation. (See § 987.8, subd. (g)(2)(B) [“In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position”].) The other, as relevant here, is a state prison sentence. The statute provides that, “*Unless the court finds unusual circumstances*, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.” (*Ibid.*, italics added.). In other words, section 987.8 creates a presumption that is conclusive unless there is a finding of “unusual circumstances,” that a defendant serving a state

prison term has no future ability to reimburse defense costs. (See *People v. Polk*, 190 Cal.App.4th 1183, 1211, fn. 29 (*Polk*.)

Here, there is no substantial evidence defendant had the “ability to pay” \$2,500 in legal fees.² “In calculating ability to pay, ‘the court [must] consider what resources the defendant has available and which of those resources can support the required payment,’ including both the defendant’s likely income and his or her assets.” (*Polk, supra*, 190 Cal.App.4th at pp. 1205–1206.)

Starting first with defendant’s “present financial position,” (§ 987.8, subd. (g)(2)(A)), the undisputed evidence is that his one and only asset was his car, worth somewhere between \$2,000 and \$3,000. The People argue this property was sufficient to cover the fee order (which arguably it was, at least in part) and its forced sale would not cause extreme hardship, but there is decidedly no substantial evidence in the record to support that assertion. As explained in the very authority the People cite, section 987.8 wasn’t intended to force the sale of any asset sufficient to repay defense costs: “A trial court could determine, for example, that forced sale of a personal residence would bring extreme hardship on a defendant’s dependents. Alternatively, if the attached property supports an income-producing asset, such as a personal business, seizure of the real property to satisfy a defense cost obligation could compromise the defendant’s livelihood and jeopardize his or her rehabilitation. There is no indication in subdivision (a) the Legislature intended the real property of a defendant to be sold *without regard to the impact of the seizure on the defendant’s family, life, or livelihood, the nature of the asset, or the defendant’s other personal and financial circumstances.*” (*Polk, supra*, 190 Cal.App.4th at p.1211, italics added). Discussing the concept of indigence in the civil context, the Supreme Court has said that a litigant is not required to “contribute the last dollar he has or can acquire to be considered indigent,” nor “deny himself necessities of life.” (*Earls v. Superior Court of San Louis Obispo County* (1971) 6 Cal.3d 109, 117.)

² The parties agree that appellate review of a defendant’s ability to pay is governed by the substantial evidence standard. (See *People v. Nilsen, supra*, 199 Cal.App.3d at p. 351.)

We think that principle applies equally here. Defendant argues, and we agree, that forcing a sale of the vehicle that he uses in his profession as a traveling musician, and often as shelter, would cause extreme hardship in a manner not authorized by section 987.8. Hence, that sole, relatively insubstantial asset is not substantial evidence of defendant's ability to pay \$2,500 in legal fees.

The People also argue "the court could infer that [defendant] had considerable cash and the record is devoid of evidence that the cash was expended before he was ordered to pay attorney's fees," but this argument fails for two reasons. One, it's premised on defendant's trial testimony about his assets and earnings three years earlier, which is not substantial evidence of defendant's *current* financial position at the time of sentencing; and on this point, we agree with defendant that it would be speculative to infer that a criminal defendant rendered homeless, largely jobless and transient by the time of sentencing would not have exhausted his savings in three years' time. And second, the People's position is defied by the record. Contrary to the People's suggestion defendant "failed to provide actual evidence" that he had depleted his savings, the financial disclosure form defendant signed under penalty of perjury two months before the sentencing hearing, attached to the probation report, reveals he had no present income *and no cash savings*. In short, there is no substantial evidence defendant could pay these fees given his present financial means.

Defendant's future financial prospects were no better, and merit only brief discussion. The trial court did not make the required finding of unusual circumstances to overcome the statutory presumption that defendant, sentenced to state prison, had no future ability to pay these fees. (See *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537 ["We construe this part of the statute to require an express finding of unusual circumstances . . ."].) Nor do the People even defend the trial court's ruling on the ground of defendant's future financial ability. And while authority cited by defendant authorizes a remand when a trial court fails to make a finding of unusual circumstances (*Id.* at p. 1537), neither party has requested a remand nor is there any basis for ordering one here. Neither party has argued defendant's circumstances present "unusual

circumstances,” and our review of the record has revealed no conceivable basis for such a finding.

In sum, because there is no substantial evidence defendant has the present ability to reimburse \$2,500 in defense costs, the order cannot stand.³

DISPOSITION

The order requiring defendant to reimburse \$2,500 in defense costs is reversed.

³ The People argue this contention was forfeited by defendant’s failure to object below. We disagree. The above-quoted colloquy at the conclusion of the sentencing hearing, *ante*, reflects that after the court imposed the fee defense counsel objected that defendant was unable to pay it. In addition, when the trial court explained the basis for its ruling, defendant personally tried to interject too but the trial court cut him off. These efforts sufficed to preserve a challenge to the ruling on appeal. (See *People v. Aguilar* (2015) 60 Cal.4th 862, 867–868 [to preserve claim of section 987.8 error, defendant “could have objected when the court, at sentencing, announced the fees it was imposing, which largely tracked those recommended in the presentence investigation report”].)

The People nonetheless assert defendant never objected to the trial court’s consideration of his “future” financial ability to pay, but that misstates the record. Defendant expressly tried to apprise the court that his past earnings shed no light on his future earning potential (“I haven’t done that in three years, sir”). At any rate, defense counsel expressly objected that “I don’t believe he has the ability to pay for any attorney’s fee,” and as discussed, the definition of “ability to pay” encompasses both the defendant’s “present financial position,” and the defendant’s “reasonably discernible future financial position.” (§ 987.8, subs.(g)(2)(A) & (B).) We agree with defendant that the People’s purported distinction “attempts to split a non-existent hair.”

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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