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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO WILLIAMS ARTECHE,

Defendant and Appellant.

A147462

(Contra Costa County
Super. Ct. No. 5-150409-1)

Defendant Antonio Williams Arteche challenges his judgment of conviction to the extent the trial court ordered him to pay \$500 in attorney fees (Pen. Code, §987.8, subd. (b))¹ and a probation report fee of \$176 and probation supervision fees as determined by the probation department (§1203.1b). He contends there is no substantial evidence he has the ability to pay these fees and asks that they be stricken. The Attorney General agrees the fees must be reversed, but views the problem as a failure of the court to make an ability to pay determination, thus warranting remand for the court to proceed in accordance with the applicable statutes.² We reverse the fees and remand.

Section 987.8, subdivision (b), provides in pertinent part that where the defendant is represented by the public defender, 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 costs” of his representation. (§ 987.8, subd. (b).) Alternatively, the court can order the

¹ All statutory references are to the Penal Code.

² This case is appropriate for disposition by way of memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1(1), (3).

defendant to appear before a county officer “to make an inquiry into the ability of the defendant to pay.” (*Ibid.*) Section 1203.1b, in turn, provides that when a defendant is granted probation and a preplea or presentence report has been prepared, the probation officer must make a determination as to the defendant’s ability to pay all or a portion of the reasonable cost of the report and supervision. (§1203.1b, subd. (a).) The defendant is entitled to a hearing by the court as to his ability to pay unless he agrees the probation officer can make that determination (i.e., waives his right to a determination by the court). (*Ibid.*)

Here, the probation report made no mention of the attorney fees, so defendant had no notice these were at issue. The report did recommend the \$176 probation report fee and cost of probation services.

The report stated defendant was unemployed and homeless, had no assets, and was a methamphetamine addict. He had previously worked for a moving company, but lost his job when he had no means to get to work. Defendant expressed the hope he might get his job back, but the report did not discuss whether there was any realistic possibility that might occur.

At the sentencing hearing, the court made no explicit present ability to pay determination. Following imposition of the fees, defense counsel observed defendant was a “transient” and asked that the fees be “waived or deemed satisfied.” The court, having just waived the restitution fine on the basis of excess time in custody, responded: “Those I will not waive or deem satisfied.”

Defendant contends the trial court’s fee rulings reflect an implicit ability to pay determination which is unsupported by any substantial evidence. According to defendant, this means the fees should be reversed and the matter brought to a close. The Attorney General views the situation as one where the trial court did not proceed in accordance with the statutes and failed to make an ability to pay determination. Thus, the

Attorney General urges that the case be remanded for the court to proceed in accordance with the statutes.³

Given the notice problem at least for the attorney fees, the brevity of the sentencing hearing, and the lack of any indication the trial court actually considered defendant's ability to pay given the state of the record, we conclude the appropriate course in this case is a remand for a determination of defendant's present ability to pay and proceedings in accordance with sections 987.8 and 1203.1b. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1068–1069 [remanding where defendant not given notice attorney fees would be imposed and rejecting argument evidence supplied sufficient basis to assume trial court rejected prison presumption of inability to pay]; *People v. Prescott* (2013) 213 Cal.App.4th 1473, 1476 [remand appropriate where no noticed hearing for attorney fees and no ability to pay determination].)

DISPOSITION

The \$500 in attorney fees imposed under Penal Code section 987.8, subdivision (b), and the probation report fee of \$176 and probation supervision fees imposed under Penal Code section 1203.1b are reversed and the matter is remanded for further proceedings under the applicable statutes. In all other respects the judgment of conviction is affirmed.

³ The Attorney General does not suggest there was any forfeiture under *People v. McCullough* (2013) 56 Cal.4th 589, 591, 596–597, of defendant's ability to pay argument on appeal. Whether defense counsel's reference to defendant's transient status was sufficient to preserve his challenge to the fees on the ground there was no evidence at all to support them is a close question. We conclude it was sufficient, although barely so.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.

A147462, *People v. Arteche*