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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PHILLIP NESBITT,

Defendant and Appellant.

B232936

(Los Angeles County  
Super. Ct. No. GA065151)

APPEAL from an order of the Superior Court of the County of Los Angeles,  
Michael D. Carter, Judge. Reversed with instructions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr.,  
Supervising Deputy Attorney General, Margaret E. Maxwell, Deputy Attorney General,  
for Plaintiff and Respondent.

## **INTRODUCTION**

In our opinion in his prior appeal, we remanded the matter with instructions to the trial court to hold a hearing regarding defendant and appellant Michael Nesbitt's (defendant) ability to pay attorney fees. On remand, the trial court held a hearing, was informed by defendant's counsel that defendant had no financial ability to pay attorney fees, but nevertheless entered an order requiring defendant to pay \$900 in attorney fees from any future earnings while in prison.

On appeal, defendant contends that because there was insufficient evidence to support the trial court's implicit finding that he would have the future financial ability to pay \$900 in attorney fees, the attorney fees order should be reversed. The Attorney General concedes that the evidence was insufficient to support the order to pay attorney fees and requests that we strike the attorney fees order.

Based on our review of the record concerning the attorney fees order, we hold that there was insufficient evidence before the trial court to support the issuance of that order. We therefore reverse and strike the attorney fees order and instruct the trial court not to hold any further hearings concerning the attorney fees issue.

## **PROCEDURAL BACKGROUND**

On December 22, 2010, we issued an opinion in defendant's prior appeal, case number B218373, in which we remanded the matter to the trial court for resentencing and a hearing on defendant's ability to pay attorney fees. The remittitur issued on April 26, 2011, and on May 11, 2011, the trial court held a hearing at which it resentenced defendant. Following resentencing, the trial court considered the issue of defendant's ability pay attorney fees, at which time the following exchange occurred between the court and counsel: "The Court: Counsel, I'm not exactly sure what the appellate court was looking for with regard to the restitution—excuse me—the attorneys fees. [¶] Do we have any additional information as to the defendant's ability to pay? [¶]"

[Defendant's Counsel]: Your Honor, I did a brief inquiry with [defendant] when I went to visit him in county jail over a week ago. My understanding is he doesn't have any assets. I believe he's—I didn't ask him how much he makes in prison. ¶ He reports that he doesn't make anything. Sometimes they do make some money if they work, but I'm not aware of any kind of ability to pay attorneys fees, your Honor. ¶ The Court: People. ¶ [Prosecutor]: Submitted. ¶ The Court: All right. What are the attorneys fees? ¶ The Clerk: \$8,640.06. ¶ The Court: The Court is going to impose \$900 of attorneys fees and that is to be paid out of any future earnings that the defendant may receive in state prison." The minute order from the hearing and the abstract of judgment both reflect the \$900 attorney fee award.

## DISCUSSION

### A. Legal Principles

Penal Code section 987.8, which authorizes the trial court to hold a hearing to determine a defendant's ability to pay all or a portion of the costs of appointed counsel, provides in pertinent part: "(b) 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, or upon the withdrawal of the public defender or appointed private counsel, 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. ¶ (g) As used in this section: ¶ (2) 'Ability to pay' 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 shall include, but not be limited to, all of the following: ¶ (A) The defendant's present financial position. ¶ (B) The

defendant's reasonably discernible future financial position. 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. 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. ¶¶ (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. ¶¶ (D) Any 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."

"The court's finding of the defendant's present ability to pay need not be express, but may be implied through the content and conduct of the hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71 [30 Cal.Rptr.2d 321].) But any finding of ability to pay must be supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347 [244 Cal.Rptr. 814]; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920 [111 Cal.Rptr. 826].)" (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398.)

Although Penal Code section 987.8 "ordinarily may not require an express finding of ability to pay (cf. *People v. Phillips*[, *supra*,] 25 Cal.App.4th [at p.] 76 . . . ), it contains a presumption that those sentenced to prison are unable to pay. '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.' (§ 987.8, subd. (g)(2)(B).) We construe this part of the statute to require an express finding of unusual circumstances before ordering a state prisoner to reimburse his or her attorney." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.)

## **B. Analysis**

At the ability to pay hearing in this case, the trial court did not make any express findings, and thus no express finding of the requisite unusual circumstances. Moreover, the only information before the trial court on the ability to pay issue was the representation of defendant's counsel that defendant had no assets and did not "make

anything,” a representation that suggested defendant was not working while incarcerated. Thus, there was no evidentiary basis for the trial court’s implicit finding that defendant would have the ability to pay \$900 in attorney fees from “future earnings that . . . defendant may receive in state prison.” Because the trial court’s attorney fees order was not supported by substantial evidence, it must be reversed and stricken.

### **DISPOSITION**

The trial court’s order requiring defendant to pay \$900 in attorney fees is reversed and stricken, and the trial court is instructed not to hold any further hearings concerning the attorney fees issue.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.