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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN DAVID COMBS,

Defendant and Appellant.

C067989

(Super. Ct. No.
CM033707)

On January 28, 2011, defendant John David Combs assaulted his live-in girlfriend after accusing her of infidelity. He choked her with both hands, slapped her approximately 15 times, hard enough for her to "see stars," and tried to cover her nose and mouth in an attempt to smother her. Defendant had an active no contact domestic violence restraining order with respect to his girlfriend.

Defendant pled guilty to corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a))¹ and disobeying a domestic relations order (§ 273.6, subd. (b)).

The trial court sentenced defendant to four years in state prison, and imposed an \$800 restitution fine (§ 1202.4, subd. (b)), suspended an \$800 parole revocation fine (§ 1202.45), a \$420 reimbursement for attorney fees (§ 987.8), a \$40 court security fee (§ 1465.8), and a \$30 conviction assessment (Gov. Code, § 70373).

Defendant contends the order of reimbursement for the attorney fees and the restitution fine are unauthorized because the trial court did not determine whether he had the ability to pay. We affirm.

DISCUSSION

I

Defendant's primary contention relates to the procedure for ordering reimbursement of attorney fees, which is governed by section 987.8.

Section 987.8 provides that a court may order defendant to pay the cost of court-appointed counsel after a hearing to determine if defendant has the ability to pay. "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,

¹ Further undesignated statutory references are to the Penal Code.

. . . 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." (§ 987.8, subd. (b).)

In considering defendant's ability to pay, the court shall consider defendant's present financial condition and his reasonably discernable future financial position for a period of no more than six months from the date of the hearing. (§ 987.8, subd. (g)(2).) "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).) This provision has been construed 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.)

The trial court imposed the reimbursement order "subject to ability to pay should [defense counsel] request such a hearing." Counsel did not request a hearing, and there is no evidence in the record supporting an inference that defendant has the ability to pay the amount ordered.

The right to appellate review of a nonjurisdictional sentencing issue not raised in the trial court is forfeited. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) This rule of forfeiture has been repeatedly applied to the challenge of a fine or fee on appeal, including claims of insufficiency of evidence. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis*

(2003) 105 Cal.App.4th 1066, 1069-1072; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

Citing *People v. Viray* (2005) 134 Cal.App.4th 1186, defendant asserts that defense counsel's failure to ask for a hearing on defendant's ability to pay the reimbursement order does not forfeit his contention on appeal. In *Viray*, the Court of Appeal was confronted with a similar claim and held that a forfeiture cannot "properly be predicated on the failure of [defense counsel] to challenge an order concerning his own fees," given the "patent conflict of interest." (*Id.* at p. 1215, italics omitted.) Defendant asks us to follow *Viray* and consider his claim notwithstanding his failure to raise it below.

We are not persuaded by *Viray*. As a practical matter, the reimbursement fee does not go to defense counsel but to the county in which he is prosecuted (§ 987.8, subd. (e)); counsel will be paid whether or not defendant pays the fee.² Also, we are also unwilling to presume defense counsel would be so willing to sacrifice the client's best interests and thereby

² Indeed, a system where defense counsel's pay is even partially derived from fines levied on convicted defendants would violate a defendant's due process and Sixth Amendment rights. (See *Tumey v. Ohio* (1927) 273 U.S. 510, 531 [71 L.Ed. 749, 758] [giving judge pecuniary interest in conviction violates defendant's due process rights]; *Wood v. Georgia* (1981) 450 U.S. 261, 271 [67 L.Ed.2d 220, 230] [Sixth Amendment right to representation free of conflicts of interest].)

violate the rules of professional conduct. (See Rules Prof. Conduct, rules 3-110 [duty to act competently], 3-310 [avoid interests adverse to client].) We are confident that counsel will represent a defendant's interests regarding reimbursement fees.

Since there is no valid reason to disregard the failure to raise the contention in the trial court, it is forfeited on appeal.

II

Defendant asks us to vacate the \$800 restitution fine imposed by the trial court and remand for hearings on defendant's ability to pay, since the trial court imposed an amount over the \$200 statutory minimum without determining defendant's ability to pay.

Under subdivision (d) of section 1202.4, a defendant's ability to pay remains a relevant factor in setting a restitution fine in excess of the statutory minimum (here, \$200). However, subdivision (d), in pertinent part, also says, "Express findings by the court as to the factors bearing on the amount of the fine shall not be required." Nor need the record contain substantial evidence showing defendant's ability to pay the fine. Former subdivision (d) of section 1202.4 also provided: "A defendant shall bear the burden of demonstrating lack of his or her ability to pay." (Stats. 2010, ch. 351, § 9.)

As discussed in part I, *ante*, contentions regarding a defendant's ability to pay a fine or fee are forfeited on appeal

if the they are not raised in the trial court. Defendant's failure to contest his ability to pay the fine forfeits his contention on appeal.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.