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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUDY R. MORENO,

Defendant and Appellant.

D059609

(Super. Ct. No. SCS245521)

APPEAL from an order of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

Rudy Moreno pleaded guilty to committing an act of domestic violence. (Pen. Code,¹ § 273.5, subd. (a).) The trial court suspended imposition of sentence and placed him on formal probation for three years subject to various conditions. The court imposed specified fines and fees, including a \$400 domestic violence fund fee under section 1203.097.

¹ All statutory references are to the Penal Code unless otherwise stated.

On appeal, Moreno contends the order requiring him to pay the domestic violence fund fee is invalid because the court failed to determine his ability to pay the fee and any such finding is not supported by substantial evidence. We conclude Moreno forfeited the issue on appeal by failing to object on the ground he was unable to pay the fee. Accordingly, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Because the issues on appeal address only Moreno's ability to pay the fee imposed under section 1203.097, we need not discuss the facts relating to his conviction.

Moreno pleaded guilty to willfully and unlawfully inflicting corporal injury resulting in a traumatic condition on Elena Flores, with whom he was formerly cohabitating. (§ 273.5, subd. (a).) He made his plea in exchange for dismissal of two remaining counts and allegations with a waiver under *People v. Harvey* (1979) 25 Cal.3d 754. The court suspended imposition of sentence and placed Moreno on formal probation for three years on the condition he serve 365 days in custody. Among other probation conditions, the court imposed various fines and fees totaling \$1,624, including a \$400 domestic violence fund fee under section 1203.097.

At sentencing, defense counsel requested that Moreno be given credit for time served: "And we are asking, if possible, [that] the court stay his fine payment until after he has completed [the Domestic Violence Recovery Program (DVRP)] because he is going to have trouble paying for that. [¶] With that, we'll submit" The court then inquired whether Moreno understood and agreed to comply with his probation conditions:

"The Court: Mr. Moreno, did you go over the probation conditions with your lawyer?

"[Moreno]: Yes, ma'am.

"The Court: If I make them the order of the court, do you understand what you are required to do?

"[Moreno]: Yes, ma'am.

"The Court: Do you agree to comply with those conditions?

"[Moreno]: Yes, I do."

The court said it would "order the fines and fees in Paragraph 2, reserving jurisdiction over restitution payable at the rate of \$25 or more a month beginning 60 days after [Moreno] complete[d] [his] DVRP program." The order granting probation specifies that all fines and/or restitution are to be paid at the combined rate of \$25 to \$50 per month, with payments starting 60 days after release from custody.

The probation report indicates that Moreno was homeless, unemployed, received \$1,000 a month from unemployment benefits, owed \$80 a month in child support obligations, had a history of drug use, and last completed ninth grade. Additionally, during a video conference interview, Moreno "expressed concerns regarding the mandated 52-week domestic violence program and indicated he would not be able to afford the treatment."

DISCUSSION

Moreno contends his challenge to imposition of the domestic violence fund fee has been preserved for appeal. He asserts defense counsel fairly apprised the court at sentencing of his problems paying his fines, thus sufficiently preserving the issue of whether he was able to pay the fee. Alternatively, Moreno asserts that a challenge to the trial court's finding of ability to pay requires no objection in the trial court because it challenges the sufficiency of the evidence. Resolution of these contentions requires us to interpret section 1203.097 and also consider the state of the record reflecting Moreno's response, if any, to the court's imposition of the fee. Interpretation of section 1203.097 presents a question of law that we review de novo. (*People v. Frausto* (2009) 180 Cal.App.4th 890, 897.) Because there are no undisputed facts involved, we likewise address the second inquiry into Moreno's response as a question of law.

Section 1203.097, subdivision (a)(5) provides that terms of probation for a crime of domestic violence "*shall* include . . . [a] minimum payment by the defendant of four hundred dollars (\$400) to be disbursed as specified in this paragraph. If, after a hearing in court on the record, the court finds that the defendant does *not* have the ability to pay, the court may reduce or waive this fee." (Italics added.) We interpret this statutory language to mean that imposition of the fee is mandatory unless the defendant makes a showing of his inability to pay. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749.) The defendant has the burden of timely raising the issue. (*Ibid.*) If the Legislature intended to require the court to make a determination of the defendant's ability to pay before its order, the Legislature could have used language such as "provided the court

makes a determination" or "subject to the court's determination." (*Ibid.*) This language was not used. Additionally, defendants are the most knowledgeable persons regarding their ability to pay, so it should be their duty to affirmatively argue against the application of the fee and show why it should not be imposed. (*Id.* at pp. 749-750.)

Here, defense counsel requested that the court "stay" Moreno's fee payment until he completed DVRP. She did not argue that her client was unable to pay the fee at all, request a hearing on his ability to pay, or attempt to present evidence relevant to his ability to pay the fee. Defense counsel merely asked for more time to pay the fee. Because Moreno is the most knowledgeable person regarding his ability to pay the domestic violence fund fee, he should have affirmatively argued against its imposition based on a showing of his inability to pay it. Because Moreno did not affirmatively make that showing, imposition of the fee is mandatory.

Even if section 1203.097 requires courts to determine a defendant's ability to pay as a condition precedent to imposition of the fee, Moreno forfeited this claim by failing to object at sentencing. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) As a general rule, to preserve a challenge to a fee or fine on appeal, a defendant must object in the trial court. (*Ibid*; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) A defendant's objection is sufficient as long as it "fairly apprises the trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d 284, 290.) The purpose of the forfeiture doctrine is to bring errors to the trial court's attention so the court can correct or avoid the errors. (*Gibson*, at p. 1468.) This rule prohibiting defendants from contesting their ability to pay a fee for the first time on appeal "is founded on considerations of

fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law." (*Ibid.*) Allowing a defendant to later challenge the domestic violence fund fee on appeal in the absence of an objection in the trial court "results in the undue consumption of scarce judicial resources and an unjustifiable expenditure of taxpayer monies." (*Id.* at p. 1469.)

Here, defense counsel's request that the court stay Moreno's fee payment until he completes DVRP did not fairly apprise the court that Moreno did not have the ability to pay the fee at all. Defense counsel should have affirmatively argued against the imposition of the fee, not merely asked for more time to pay. Therefore, we conclude Moreno did not properly object to the fee in the trial court and has forfeited his right to contest the fee on appeal.

We reject Moreno's alternative contention that a challenge to the trial court's finding of ability to pay requires no objection in the trial court. Moreno relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392, in which the appellate court concluded that claims based on insufficient evidence to support a determination of a defendant's ability to pay court-appointed attorney reimbursement fees (§ 987.8), a criminal justice administration or booking fee (Gov. Code, §§ 29550, subd. (c), 29550.2), and a probation fee (Pen. Code, § 1203.1, subd. (b)) cannot be forfeited because such claims do not require a challenge in the trial court to be preserved on appeal. (*Pacheco*, 187

Cal.App.4th at p. 1397.²) *Pacheco* in turn relies on two cases, *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) and *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*). (*Pacheco*, at p. 1397.)

In *Viray*, *supra*, 134 Cal.App.4th at page 1215, the court concluded the forfeiture rule did not apply when a trial attorney failed to challenge an order concerning reimbursement of his own fees under section 987.8. The court explained that unless the defendant has secured a new, independent attorney when such an order is made, the defendant is "effectively *unrepresented* at that time, and cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees." (*Id.* at p. 1214.) Because the attorney abandoned his client to pursue his employer's interests, the court stated it would be "absurd to rely on the conduct of the attorney to impose a procedural forfeiture upon the client." (*Id.* at p. 1216.) However, the court noted this analysis does not apply where the defendant engages independent counsel before reimbursement is ordered; usual forfeiture principles govern such a case. (*Id.* at p. 1216, fn. 15.)

In *Lopez*, *supra*, 129 Cal.App.4th at pages 1536-1537, the court ordered the defendant, who was sentenced to prison, to pay attorney fees not to exceed \$1,000. Under section 987.8, subdivision (g)(2)(B), when assessing a defendant's ability to reimburse attorney costs, "[i]n no event shall the court consider a period of more than six

² The California Supreme Court in *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 is addressing the question of whether a defendant forfeited a claim of inability to pay a Government Code section 29550.2 jail booking fee after failing to object to imposition of the fee at his sentencing hearing.

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." The court construed this provision to require an express finding of unusual circumstances before the trial court orders a state prisoner to reimburse his or her attorney. (*Lopez*, at p. 1537.)

Here, unlike *Viray*, Moreno's attorney did not operate under a conflict of interest, and thus the usual forfeiture principles apply. Unlike *Lopez*, there is no statutory requirement that the court find "unusual circumstances" before imposing the domestic violence fund fee. Additionally, *Pacheco* ignores numerous cases holding that evidentiary challenges to fees are forfeited when first raised on appeal.³ Instead, relying on *Viray* and *Lopez*, the court in *Pacheco* stated, "we have already held that such claims do not require assertion in the court below to be preserved on appeal" and the People "offer[] nothing to convince us otherwise." (*People v. Pacheco*, *supra*, 187 Cal.App.4th at p. 1397.) We disagree with the application of *Pacheco* and its underlying reasoning to Moreno's contentions concerning the domestic violence fund fee.

³ See, e.g., *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine under Penal Code section 1202.5, subdivision (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee under Government Code section 29550.2]; *People v. Gibson*, *supra*, 27 Cal.App.4th at page 1467 [restitution fine under former Government Code section 13967, subdivision (a)].

For the foregoing reasons, we conclude Moreno has not preserved the right to challenge the domestic violence fund fee on appeal.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.