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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LAMAR COUSHAN WILLIAMS,

Defendant and Appellant.

E053750

(Super.Ct.No. RIF126627)

OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Johnson,
Judge. Affirmed with directions.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Christopher Beesley, and Randall
D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On October 24, 2005, a felony complaint charged defendant and appellant Lamar Coushan Williams with one count of possessing cocaine base for sale under Health and Safety Code section 11351.5.

On October 25, 2005, defendant pled guilty as charged. He was sentenced to three years of formal probation. Defendant was also ordered to pay numerous fines and fees.

On July 25, 2008, the court filed an allegation that defendant violated probation for failing to pay certain fines and fees. On August 29, 2008, after defendant failed to appear in court, defendant's probation was revoked and a bench warrant was issued.

On May 26, 2011, defendant appeared in court. Defendant's probation had been transferred to Georgia and had been completed there. The People's motion to withdraw the allegation for violation of probation was granted and probation was terminated. The court ordered defendant's remaining fines and fees to be paid, and for the payment to proceed civilly.

On June 2, 2011, defendant filed a notice of appeal based on the sentence or other matters occurring after the plea.

II

STATEMENT OF FACTS

Since this matter was resolved via a guilty plea, the facts underlying the offense are not contained in the record. In pleading guilty, defendant admitted that he possessed a quantity of cocaine base for the purpose of sale.

III

ANALYSIS

Defendant's contention on appeal is that the matter must be remanded to the trial court for a hearing on defendant's ability to pay various fines and fees. For the reasons set forth below, we shall remand this case to the trial court for the sole purpose of conducting a hearing on whether defendant has the financial ability to pay the challenged fines and fees.

On October 25, 2005, defendant was placed on probation after pleading guilty to possessing cocaine base for the purpose of sale. Fines and fees totaling \$994 were imposed as follows: (1) \$110 booking fee under Government Code section 29550.2; (2) \$158 lab fee under Health and Safety Code section 11372.5; (3) \$158 drug education fee under Health and Safety Code section 11372.7; (4) \$96 attorney fee under Penal Code section 987.8, subdivision (b); (5) \$20 court security fee under Penal Code section 1465.8; (6) \$200 restitution fine under Penal Code section 1202.4, subdivision (b); and (7) \$252 probation supervision fee under Penal Code section 1203.1b.

On July 25, 2008, an allegation that defendant had violated his probation by paying none of the above listed fines and fees was filed.

Defendant appeared in court on May 26, 2011. The trial court was told that defendant's probation had been transferred to the State of Georgia, and that defendant had completed his probation there, including a payment of more than \$1,084 to the State of Georgia. A representative of the Riverside County Probation Department, however, advised the court that defendant had failed to pay any of the fees and fines as originally ordered in California.

Thereafter, the trial court withdrew the allegation and terminated probation based upon the agreement of the parties. The court advised defendant, however, that "all your fines and fees will proceed civilly."

Defense counsel requested a hearing on defendant's ability to pay for the attorney and probation fees. The court summarily rejected the request, stating that defendant "was able to pay those other fees [in Georgia] so he has the ability to pay."

In this case, defendant concedes that the fines and fees imposed under Penal Code sections 1202.4, subdivision (b), and 1465.8, and Health and Safety Code section 11372.5, are mandatory and not subject to the ability to pay determination. (*People v. Romero* (1996) 43 Cal.App.4th 440, 448; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Defendant, however, contends that the trial court erred in failing to order a hearing to determine defendant's ability to pay the remaining fines and fees, totaling \$616; and that the matter must be remanded for a hearing on that issue.

Preliminarily, the People contend that defendant “only requested a hearing with respect to his ability to pay the attorney and probation fees. Consequently, his instant claim with respect to the booking fee and drug education fee is forfeited.” We disagree.

In this case, when the trial court indicated that defendant’s fines and fees will proceed civilly, defense counsel asked: “[M]ay there be an inquiry as to his ability to pay for the attorney fees and probation fees based on ability to pay?” The court responded: “At this point it’s going to proceed civilly, so I’m not going to order that. That’s not going to be through enhanced collections.” Defense counsel then tried to request a hearing again when the court cut him off and stated, “Obviously [defendant] was able to pay those other fees [in Georgia] so he has the ability to pay. Don’t look a gift horse in the mouth.” At that point, the court and the People were put on notice that defendant wanted a hearing on his ability to pay. Moreover, with the court’s response, it would have been futile for defense counsel to request a hearing on his ability to pay on the other fees imposed. We, therefore, will discuss the case on the merits.

Defendant contends that the trial court erred in assessing the following fees without a hearing on his ability to pay: (1) \$110 booking fee under Government Code section 29550.2; (2) \$158 drug education fee under Health and Safety Code section 11372.7; (3) \$96 attorney fee under Penal Code section 987.8, subdivision (b); and (4) \$252 probation supervision fee under Penal Code section 1203.1b.

An assessment of attorney’s fees against a criminal defendant involves the taking of property, triggering constitutional concerns. Due process, therefore, requires that the

defendant be afforded notice and a hearing before such a taking occurs. (*People v. Amor* (1974) 12 Cal.3d 20, 29-30; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72.) Penal Code section 987.8 sets forth the statutory procedure for ascertaining a criminal defendant's ability to repay the county for the cost of services rendered by court-appointed counsel. It includes provisions for notice and a hearing to determine the defendant's present ability to pay such fees. (*Id.*, subd. (b).)

The failure to conduct a hearing to determine whether a defendant can pay for appointed counsel fees under Penal Code section 987.8 requires a remand for such a hearing. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069 [where trial court fails to conduct hearing on defendant's ability to pay under Penal Code section 987.8, appellate court properly remands to allow the trial court to make an informed decision].)

Moreover, Government Code section 29550.2, subdivision (a) provides for payment of fees for the cost of booking a defendant "if the person has the ability to pay." Health and Safety Code section 11372.7, subdivision (b) provides that a court "shall determine whether or not the person convicted of a violation of this chapter has the ability to pay a drug program fee."

Furthermore, Penal Code section 1203.1b, subdivision (a), provides that the probation department "shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision."

In this case, notwithstanding the above, the trial court failed to hold a hearing on defendant's ability to pay. Instead, the court simply concluded that, because defendant

paid the requisite fees to Georgia, he could therefore pay the outstanding fines and fees in Riverside County. However, there was no evidence presented as to defendant's financial status. In sum, the record in this case is completely devoid of any showing of compliance with the statutes in conducting a hearing on defendant's ability to pay.

Accordingly, we will remand the matter to the trial court to conduct a hearing on whether defendant has the financial ability to pay the challenged fines and fees.

IV

DISPOSITION

The matter is remanded to the trial court for the sole purpose of conducting a hearing on whether defendant has the financial ability to pay the challenged fines and fees. In all other respects, the judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

KING
J.