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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.

WILLIAM EDWIN HUDSON,

Defendant and Appellant.

E055213

(Super.Ct.No. FMB900551)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez,
Judge. Affirmed with directions.

Rex Williams, 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, and Kevin Vienna, Deputy
Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant William Hudson seeks reversal of the trial court's orders that he pay an attorney fee of \$150 plus \$505 for the cost of a presentence investigative report. He argues that the trial court erred by failing to make a finding regarding his ability to pay the assessments as required by Penal Code section 987.8.^{1,2} We will remand the matter to the trial court to conduct a hearing on whether defendant has the financial ability to pay the challenged fees.

FACTS AND PROCEDURAL HISTORY

On November 2, 2010, defendant pled guilty to being a felon in possession of a firearm (§ 12021, subd. (a)(1)), and to possession of methamphetamine (Health & Saf. Code § 11377, subd. (a)). In addition to signing the plea form, defendant answered "Yes, your Honor" when the court asked if he had reviewed the case with his attorney and if he understood all its terms. He gave the same answer when the court asked if he understood that at sentencing, if probation was granted, "there will be additional terms which we will not go over today?" Near the end of the hearing, defendant asked the court if he could be released until sentencing day because "I am in the process of moving my wife and my horses." The court denied defendant's request, ordered a probation report, and set sentencing for December 15, 2010.

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

² Defendant has not numbered the pages of his opening brief as required by California Rules of Court, rule 8.928 (c)(7). We have hand-numbered them for him, beginning with the face page as page 1.

The probation report was received by the court on December 8, 2010. It showed that defendant was 62 years old, had graduated from high school and served one year in the Army Corps of Engineers, had special training as a heavy equipment operator, and had been employed by a construction company for 10 years. He had left his job because there was “no work.” Defendant told the interviewing probation officer that on the day of his arrest he and his wife had been arguing about paying the bills and other financial stresses. The rifles and shotgun police found in his house, he said, belonged to his wife. He had been buying used jeans and thought maybe the methamphetamine police found in his pocket was there when he bought them.

The report concluded with a list of recommended fees, fines, and other assessments, including an attorney’s fee of \$150 and a cost of investigation and report preparation assessment of \$505. Inexplicably, the report contained conflicting recommendations about his ability to pay the cost of the section 1203.1b presentence investigation and report. The first recommendation was for a finding that defendant *had* the ability to pay the cost; but it was followed immediately by a recommendation for a finding that he did *not* have the ability to pay the cost.

Defendant was sentenced on December 15, 2010. After reading and considering the probation report, the court granted defendant three years of supervised probation with terms and conditions. Mirroring the recommendations in the report, the court found that he had the ability to pay the recommended defense counsel fee and both had and did not have the cost of conducting the pre-sentence investigation and preparing the report. The court also found that defendant had the ability to pay a variety of other statutory fees,

costs, and fines. Pursuant to subdivision (d) of section 1203.1, the total monthly payment for all ordered amounts was set at \$50 per month. Defense counsel did not object to any of the fees or costs.³

DISCUSSION

On appeal, defendant argues separately that the court erred by (1) not granting him a hearing on his ability to pay attorney's fees, and (2) not granting him a hearing on his ability to pay the costs of the presentence investigation and report. He wants both assessments reversed. The People answer that defendant has forfeited his right to contest the fees by failing to object to them in the trial court. In the event we find that the issue has not been forfeited, the People ask us to remand the case to the trial court for an ability-to-pay hearing.

Generally, in the interests of fairness and judicial economy, only "claims of error properly raised below and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*)). In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*) the sixth appellate district found that booking fees, probation supervision fees, and court security fees are not are not forfeited by a failure to object below because they are all, in essence, a challenge to the sufficiency of the evidence to support the trial court's order. (*Ibid.*) A defendant's ability to pay may be express or

³ As the hearing opened, defense counsel requested and was granted a sidebar conference on "One very small issue." The conference was not recorded or transcribed. At the end of the sidebar, counsel said, "Thank you for that, your Honor." We cannot tell from the record whether defendant's finances were discussed during this conference.

implied, but in either case, the finding must be supported by substantial evidence.⁴

(*Pacheco*, at p. 1398.)

Defense Attorney's Fees

Section 987.8 allows a court to determine whether a defendant has any assets subject to attachment for the payment of attorney's fees, whether private counsel or the public defender. However, where a defendant's attorney asks the court to impose fees on the client for the attorney's own benefit or the benefit of his or her employer (including the public defender's office), the waiver rule does not apply. (*People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*)). Under such circumstances, the attorney's conflict of interest essentially renders the client unrepresented and a client "cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees." (*Viray*, at p. 1214.) *Viray* limited its holding to attorney fees. (*Id.* at p. 1216, fn 15.)

Defendant's attorney, a deputy public defender, did not object to the \$150 attorney's fee imposed on his client and the matter must be remanded to the trial court for a determination of defendant's ability to pay this fee.

Probation Investigation and Report Fee

Similarly, section 1203.1b provides that, depending on his or her ability to pay, a defendant may be required to pay the reasonable cost of a presentence investigation and probation report. (§1203.1b, subd. (a).) The amount of the cost and the payment

⁴ The Supreme Court has granted review on this issue in *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 23, 2011, S192513. *McCullough* disagreed with *Pacheco*'s substantial evidence waiver exception.

schedule is to be determined by the probation officer, but the defendant must be informed that he or she has the right to counsel and to a trial court hearing to contest the amount. (*Ibid.*) Any waiver of the right of such a hearing must be knowing and intelligent. (*Ibid.*) If there is substantial evidence in the record to support an inference that the defendant had the ability to pay a section 1203.1b probation-related assessment which could otherwise have been lawfully imposed, the waiver rule of *Scott* may apply. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072, 1076 (*Valtakis*.) Parties may not “stand silent as the court imposes a [modest] fee . . . and then complain for the first time on appeal that some aspect of the statutory procedure was not followed[.]” (*Valtakis*, at p. 1075.) The waiver rule applies to the People as well as to defendants. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303.)

In this case, even though there was a timely probation report giving defendant notice of all the recommended assessments, the evidence about his ability to pay them was contradictory and incomplete. Defendant appeared to have had significant assets—horses, and perhaps guns—but also appeared to have had financial difficulties. He had education and work experience, but was unemployed at the time of sentencing and there was no information about his future employment prospects. Moreover, the probation report contained contradictory recommendations regarding his ability to pay the cost of the presentence investigation and report. The report also did not say whether defendant had been advised of his right to request a court hearing to determine his ability to pay.

DISPOSITION

The matter is remanded to the trial court with instructions to hold a hearing regarding defendant's ability to pay attorney's fees and the cost of the presentence investigation and probation report.

In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.