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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.

JIMMY NERI HERNANDEZ,

Defendant and Appellant.

E059726

(Super.Ct.No. FVA1301179)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M.

Christianson, Judge. Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jimmy Neri Hernandez is on probation after pleading guilty to committing corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd.

(a))¹ for hitting his girlfriend with a tire iron or jack. Defendant challenges only the court's order that he pay a \$250 appointed counsel fee. As discussed below, we follow *People v. Aguilar* (2015) 60 Cal.4th 862 (*Aguilar*) and find that defendant forfeited the right to raise this issue on appeal by failing to address it in the trial court.

FACTS AND PROCEDURE

On July 5, 2013, defendant and his girlfriend of seven years got into an argument and physical fight in a parked car when she told him she wanted to end their relationship. After the two exited the car, defendant took a car jack or tire iron from the trunk of the car and began to swing it around. The woman put up her arms in a defensive move. Defendant struck the woman on the right arm, with the weapon causing a two-inch laceration.

On July 8, 2013, the People filed a felony complaint alleging defendant committed corporal injury on a spouse or cohabitant and assault with a deadly weapon (§ 245, subd. (a)(1)).

On August 13, 2013, defendant pled guilty to the corporal injury charge.

On September 11, 2013, the trial court granted probation on condition defendant serve 365 days in jail. Defendant was also ordered to pay a number of fines, assessments and fees, including a \$250 appointed counsel fee.

This appeal followed.

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

DISCUSSION

Defendant's sole argument on appeal is that the trial court erred when it ordered him to pay the \$250 appointed counsel fee without holding a hearing or making a finding that he has the ability to pay the fee, and that the order is not supported by substantial evidence. The People respond that defendant forfeited the right to raise this issue on appeal because he did not object to the fee at the sentencing hearing.

The California Supreme Court recently addressed the forfeiture issue in *Aguilar*. In *Aguilar*, the trial court had imposed an appointed counsel fee of \$500 and a presentence investigation report fee of \$176. (*Aguilar, supra*, 60 Cal.4th at p. 865.) The defendant argued that the trial court exceeded its discretion because it failed to make a finding regarding the defendant's ability to pay. (*Ibid.*) As to the presentence investigation report fee, the Supreme Court, as in the companion case of *People v. Trujillo* (2015) 60 Cal.4th 850, rejected the defendant's argument and held that a "defendant's failure to challenge the fees in the trial court precludes him from doing so on appeal." (*Id.* at p. 864.)

The *Aguilar* court declined to address the issue of forfeiture in the context of appointed counsel fees where counsel may have a conflict of interest: "This case does not present, and we therefore do not address, the question whether a challenge to an order for payment of the cost of the services of appointed counsel is forfeited when the failure to raise the challenge at sentencing may be attributable to a conflict of interest on trial counsel's part." (*Aguilar, supra*, 60 Cal.4th at p. 868, fn. 4.)

In this case, however, the issue of a conflict of interest is not supported by the record. Defendant was represented by a public defender who receives a salary that is not dependent on defendant paying it. The reimbursement fee does not go to defense counsel but to the county in which defendant is prosecuted. (§ 987.8, subd. (e).) The Rules of Professional Conduct also require that defense counsel act competently and avoid interests adverse to the client. (Rules Prof. Conduct, rule 3-110.) If there were grounds to do so defense counsel would have objected to the appointed counsel fee at sentencing. The failure to object forfeited the issue on appeal.

DISPOSITION

The judgment is affirmed.

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GAUT
_____ J.*

We concur:

RAMIREZ
_____ P. J.

MILLER
_____ J.

* Retired Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.