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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.

JULIO HERNANDEZ,

Defendant and Appellant.

E060830

(Super.Ct.No. FWV1302633)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Stanford E.

Reichert, Judge. Affirmed in part and reversed in part with directions.

Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Julio Hernandez, is on three years of formal probation after a jury convicted him of second degree commercial burglary. (Pen. Code, § 459.) His only contentions on appeal are that it was error to order him (1) to pay \$250 for the cost of the presentence report and \$26 per month for probation supervision without a hearing on his ability to pay, and (2) to pay \$750 reimbursement for the cost of providing him appointed counsel without advising him of his right to a hearing and without conducting a hearing on his ability to pay. We affirm the portions of the judgment that defendant pay the costs of the presentence report and probation supervision because he forfeited his right to challenge them on appeal. Regarding defendant's challenge of counsel costs, we remand to the trial court to hold a noticed hearing on defendant's ability to pay.

#### **FACTS AND PROCEDURE**

On the night of August 4-5, 2013, defendant and an accomplice burglarized an automobile repair shop. They stole a barbecue grill, pressure washers, and automotive tools.

On August 7, 2013, the People filed a complaint charging defendant with second degree commercial burglary.

On February 19, 2014, a jury convicted defendant of second degree commercial burglary.

The sentencing hearing in this case is typical of hundreds that occur in California courts daily. Relevant portions are set forth *verbatim* below.<sup>1</sup> There is no indication that defendant was advised of his right to a hearing on any of the fees assessed by the court. (There is also no indication in the clerk’s transcript that he was so advised at his arraignment on the felony complaint or at his arraignment on the information.) His attorney, a deputy public defender, submitted the entire sentencing to the court without argument or comment. The only information in the probation officer’s report relating to defendant’s ability to pay fees is that he is 27 years old, has two children, has an eighth grade education, has no special training, was employed for one year at \$1,800 per month, left his employment because of his arrest, had been in custody 229 days at the time of his sentencing, and that he had a U.S. Immigration and Customs Enforcement hold.

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<sup>1</sup> “[The Court:] We’re here for [defendant]. He is in court represented by Mr. Edber. [Defendant] is in custody and being assisted by a Spanish language interpreter. We have Ms. Ploghaus here on behalf of the People. [¶] The Court has read and considered the report from Probation and is ready to proceed on the recommendation set forth therein. [¶] So let me turn to you, Mr. Edber, and inquire if there is any additional argument? [¶] Mr. Edber: No, your Honor. Submit it to the Court. [¶] The Court: Ms. Ploghaus? [¶] Ms. Ploghaus: No, I submit. [¶] The Court: Waive arraignment for judgment and sentence then? [¶] Mr. Edber: Yes, your Honor. No legal cause. [¶] The Court: Thank you. The Court needs to make some findings then. The Court finds a motor vehicle was not used in the commission of this offense. [¶] The Court finds the defendant has the present ability to pay appointed counsel fees in the amount of \$750 through Central Collections. [¶] The Court finds the defendant has the ability to pay the cost of conducting the pre-sentence investigation and preparing the report pursuant to Penal Code [section] 1203.1[, subdivision] (b) and orders the defendant to pay \$250 through Central Collections. [¶] The Court imposes the \$60 CSC fee. [¶] The Court finds the defendant has the ability to pay Probation supervision fees pursuant to Penal Code Section 1203.1[, subdivision] (b) and orders the defendant to pay \$26 per month through Central Collections.”

## CONTENTIONS OF THE PARTIES

Defendant contends that the trial court erred in ordering that he pay the cost of the presentence investigation and report and the cost of probation supervision pursuant to Penal Code section 1203.1, subdivision (b) without affording him a hearing on his ability to pay. He contends that the trial court also erred in ordering him to pay \$750 reimbursement for the cost of his appointed attorney without advising him of his right to a hearing on his ability to pay. He contends that he has not forfeited his right to either of these claims on appeal.

The People contend that defendant has forfeited his claim of error with respect to fees for the report and probation supervision by failing to raise the issue in the trial court. The People further contend that the claim of error with respect to counsel fees is similarly forfeited. The People have called to our attention a then-pending case, *People v. Aguilar* (2015) 60 Cal.4th 862, which was decided after this case was fully briefed. The People request that if this court determines there has been no forfeiture of defendant's claims, the matter be remanded to the trial court for further proceedings.

On the latter issue, the Attorney General concedes that "it may be inequitable to find forfeiture based on an attorney's failure to object to reimbursement of his own fees; the conflict of interests between the attorney's and his or her client's pecuniary interest militates against a finding of forfeiture." (Citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215-1216.)

## DISCUSSION

### *Fees for Presentence Report and Probation Supervision*

Recently, in *People v. Trujillo* (2015) 60 Cal.4th 850 (a companion case to *Aguilar*), the California Supreme Court concluded that a defendant's failure to object to orders in the trial court forfeited his challenge to them on appeal. By failing to object below, the defendant forfeited his claims with respect to Penal Code section 1203.1 fees.

### *Reimbursement for Attorney Fees*

In a footnote in *Aguilar*, the Supreme Court, citing *Viray*, said: "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." (*People v. Aguilar, supra*, 60 Cal.4th at p. 868, fn. 4, citing *People v. Viray, supra*, 134 Cal.App.4th at pp. 1216-1217.)

The facts in *Viray* were particularly compelling. Not only did trial counsel fail to object to the imposition of an order for reimbursement of fees, he affirmatively requested them. "'We're asking the Court to assess attorney's fees . . .'" (*People v. Viray, supra*, 134 Cal.App.4th at p. 1216.) But the opinion does not appear limited to its facts. "We recognize that a particular deputy public defender might, as a salaried employee, feel personally disinterested in a reimbursement order, and might even be willing to oppose it on behalf of the defendant. The same might even be true of an appointed attorney whose claim for payment, and prospects of future employment, were wholly and securely

divorced from any reimbursement order the court might make. However, the spectacle of an attorney representing a client in connection with an order requiring that client to pay for the attorney's services, however attenuated the connection may be in fact, carries the patent appearance of at least a vicarious adversity of interests." (*Ibid.*)

Here, we have no hesitation in holding that, in light of the apparent, if perhaps vicarious, conflict of interest, there was no forfeiture of defendant's right to raise the issue on appeal. The Attorney General concedes that the record is devoid of any notice or hearing with respect to defendant's ability to pay reimbursement for the cost of his attorney, and requests that we remand the matter to the trial court with instructions to give notice of, and, if requested, hold such a hearing.

While we find that the facts give rise to an inference of a conflict of interest sufficient to avoid a forfeiture of the attorney's fee issue on appeal, we do not decide the standard of proof required to establish a conflict requiring the recusal of appointed counsel by the trial court.

#### **DISPOSITION**

The imposition of the \$750 counsel fee is reversed. The matter is remanded to the superior court to provide proper notice and a hearing regarding defendant's ability to pay the costs of his defense. In all other respects, the judgment is affirmed.

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CUNNISON

J.\*

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.

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\* Retired judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.