

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LAQUAN LOUIS,

Defendant and Appellant.

E061141

(Super.Ct.No. FVA1101602)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed as modified.

Rex Adam Williams, 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, Senior Assistant Attorney General, Barry Carlton, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant and appellant Robert Laquan Louis guilty of corporal injury to a cohabitant under Penal Code¹ section 273.5, subdivision (a). The trial court found that defendant previously served five prior prison terms under section 667.5, subdivision (b).

The trial court sentenced defendant to state prison for the upper term of four years for the corporal injury charge and five years for the prior prison terms.

On appeal, defendant contends that the trial court erred in awarding attorney fees and in imposing a probation investigation cost assessment. The People claim that defendant forfeited his challenge of the probation investigation fee. The People also claim that defendant forfeited his attorney fees claim, but ask us to strike the attorney fees because defendant is statutorily presumed to be unable to pay these fees. For the reasons set forth below, we hereby strike the award of attorney fees and find that defendant forfeited his right to challenge his probation investigation fee.

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

II

STATEMENT OF FACTS

Defendant and Jane Doe had an ongoing relationship for several years. In 2013, they had a son together. On the night of January 3, 2014, defendant and Doe's relationship turned violent. Defendant and Doe planned to eat out. Doe drove defendant to the Fontana IHOP with their baby boy. Along the way, defendant and Doe got into an argument. When they parked at the restaurant, their argument escalated. Frightened by the commotion, their son began to cry. Doe got out of the car and went to the passenger side backseat to comfort the son. Defendant and Doe continued to argue. Eventually, defendant punched Doe in the left eye, causing a large hematoma. Doe sustained swelling above her eye.

III

ANALYSIS

A. Defendant Forfeited His Claim Regarding Probation Investigation Costs

Defendant contends that the trial court erred in assessing a \$250 fee to reimburse the probation department for its investigation costs under section 1203.1b. Defendant specifically contends that the court failed to find whether he had the ability to pay the fee. The People contend that defendant has forfeited his claim by failing to object to the trial court's imposition of the probation investigation fee. We agree.

Section 1203.1b sets forth a process that trial courts must follow before it may impose a fee for probation investigation costs. First, the court must order the defendant to

report to the probation officer, who will then determine the defendant's ability to pay. (§1203.1b, subd. (a).) After the probation officer determines the amount the defendant can pay, the probation officer must inform the defendant that he or she is entitled to a hearing, during which the court will determine the defendant's ability to pay and the payment amount. (*Ibid.*) Section 1203.1b entitles the defendant to representation by counsel during this hearing. A defendant may waive his or her right to a hearing, but he or she must do so knowingly and intelligently. (*Ibid.*) If the defendant fails to waive his or her right to the hearing, the probation officer must refer the matter back to the trial court, and the trial court will determine the defendant's ability to pay. (§1203.1b, subd. (b).)

In a recent opinion, the California Supreme Court stated as follows:

“Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate.”

(*People v. Trujillo* (2015) 60 Cal.4th 850, 858.) The court went on to state: “Our reasoning in *Scott* [*People v. Scott* (1994) 9 Cal.4th 331] applies by analogy here.

‘Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.’ (*Scott, supra*, 9 Cal.4th at p. 353.) In the context of section 1203.1b, a defendant's making or failing to make a knowing and

intelligent waiver occurs before the probation officer, off the record and outside the sentencing court's presence. Although the statute contemplates that when the defendant fails to waive a court hearing, the probation officer will refer the question of the defendant's ability to pay probation costs to the court, the defendant – or his or her counsel – is in a better position than the trial court to know whether the defendant is in fact invoking the right to a court hearing. In *Scott* the existence, per se, of procedural safeguards in the sentencing process, such as the right to counsel and to present evidence and argument, did not prevent us from holding the forfeiture rule should apply with respect to the trial court's discretionary sentencing choices. The same conclusion follows with respect to the imposition of the fees challenged here.” (*People v. Trujillo, supra*, 60 Cal.4th at p. 858, fn. omitted.)

In reaching its conclusion, the Supreme Court noted that important constitutional rights are not at stake in this case. “Thus, unlike cases in which either statute or case law requires an affirmative showing on the record of the knowing and intelligent nature of a waiver, in this context defendant's counsel is in the best position to determine whether defendant has knowingly and intelligently waived the right to a court hearing. It follows that an appellate court is not well positioned to review this question in the first instance.” (*People v. Trujillo, supra*, 60 Cal.4th at p. 860.)

The Supreme Court, however, noted that defendant raising this issue is not wholly without recourse. The court set forth numerous methods by which a defendant can have

this issue addressed by the probation department or sentencing court. (See, *People v. Trujillo, supra*, 60 Cal.4th at pp. 860-861.)

Therefore, based on the recently published decision by the Supreme Court, we hold that defendant has forfeited his claim to challenge the trial court's imposition of probation investigation costs. (*People v. Trujillo, supra*, 60 Cal.4th 850.)

B. The Attorney Fees Should be Stricken

Defendant also contends that the trial court erred in assessing \$500 to pay for the cost of his appointed counsel. Defendant specifically complains that the court failed to provide him an ability to pay hearing, and there is no substantial evidence to justify this award.

The People again argue that defendant has forfeited his challenge to the attorney fees because he failed to object when the court imposed that fee. However, despite defendant's failure to object, the People recognize that courts are reluctant to find forfeiture in light of the unusual nature of attorney fees awards in criminal cases and because the Legislature extensively protects defendants with procedural minimums that trial courts must follow before imposing such fees. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, overruled in part on another ground in *People v. McCullough* (2013) 56 Cal.4th 589, 598-599; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1214-1216.) Also, it may be inequitable to find forfeiture based on an attorney's failure to object to his own fees; the conflict of interests between the attorney's and his or her

client's pecuniary interests militates against a finding of forfeiture. (*People v. Viray*, *supra*, 134 Cal.App.4th at pp. 1215-1216.)

In a companion case to *People v. Trujillo*, *supra*, 60 Cal.App.4th 850, the California Supreme Court in *People v. Aguilar* (2015) 60 Cal.4th 862, addressed this issue. In *People v. Aguilar*, the Supreme Court found it appropriate to apply the forfeiture rule in challenges to the award of attorney fees under section 987.8. (*Id.* at p. 867-868.) The court, however, pointed out that its opinion did not apply to appointed counsel, as in this case: “The 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. (See, e.g., *People v. Viray* (2005) 134 Cal.App.4th 1186, 1216-1217 [36 Cal.Rptr.3d 693].)” (*People v. Aguilar*, *supra*, 60 Cal.4th at p. 868, fn. 4.)

Section 987.8, subdivision (b), entitled defendant to a noticed hearing to determine his “present ability” to pay the attorney fees. (§ 987.8, subd. (b); *People v. Prescott* (2013) 213 Cal.App.4th 1473, 1476.) Although the pre-sentence probation report put defendant on notice that the probation department recommended an attorney fees award, it does not appear that he received notice that the court would conduct a hearing to determine his ability to pay the fees. Moreover, the trial court did not either expressly or impliedly find whether defendant had the ability to pay.

Ordinarily, the appropriate remedy would be to remand the matter to the trial court to hold a hearing on defendant's ability to pay. (*People v. Prescott, supra*, 213 Cal.App.4th at p. 1476.) However, there is a statutory presumption that, absent unusual circumstances, a defendant who has been sentenced to state prison cannot pay the attorney fees. (§ 987.8, subd. (g)(2)(B).) Because the sentencing court here sentenced defendant to prison, a hearing upon remand as to his ability to pay would amount to a ministerial task, given the presumption of defendant's inability to pay. Therefore, in the interest of justice and judicial economy, the People ask that we strike the attorney fees award. We agree and order the attorney fees award of \$500 be stricken.

IV

DISPOSITION

The \$500 award for attorney fees is hereby ordered stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.