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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUNE MICHELLE MORELLON,

Defendant and Appellant.

H036900

(Santa Clara County

Super. Ct. No. C1081041)

1. INTRODUCTION

Responding to an anonymous tip that methamphetamine was being dealt from a motel room, two officers investigated. One of the occupants of the room, defendant June Morellon, granted the officers entry and provided identification. In the course of the ensuing conversation, defendant explained that she was out on her own recognizance (sometimes “O. R.”) due to pending drug charges. After reviewing a copy of her O. R. release, one of the officers asked, “ ‘Do you remember the [O. R.] officer going over the conditions saying that you are subject to search and seizure at any time?’ ” Though the O. R. form did not, in fact, subject defendant to search conditions, defendant replied to the question in the affirmative and consented to a search of the room, during which contraband was discovered.

Defendant filed a suppression motion, arguing that her consent was not voluntary, because it was induced by a false police claim that she was subject to search as a

condition of being released on O. R. in another case. In response, the People sought to justify the warrantless search of the motel room on the basis of consent. Defendant's motion was denied.

Defendant accepted a court offer and pleaded no contest to a charge of possessing methamphetamine for sale. (Health & Saf. Code, § 11378.) Defendant waived a referral to probation and, pursuant to the offer, defendant was placed on three years' formal probation with a number of conditions, including serving seven months in jail with total credits of 208 days. The court also ordered her to pay \$100 for attorney fees, as well as several other fines, fees, and assessments.

On appeal, defendant asserts error in the denial of her suppression motion and in ordering attorney fees without establishing her ability to pay. For the reasons stated below, we will reverse the judgment because we agree with both of defendant's contentions.

2. THE SEARCH

The following testimony was given by San Jose Police Officer James Mason at a hearing on defendant's suppression motion. Defendant did not testify.

On June 22, 2010 around 10:15 a.m., Officer Mason and his partner, Officer Mank,¹ were in full uniform and armed with weapons and tasers as they knocked on the door of a motel room in San Jose. They were investigating an anonymous tip that a male and an unknown female were dealing methamphetamine out of that room.

Officer Mason heard movement inside after the first knock, so the officers knocked again. A female later identified as Ms. Silipin opened the door. She agreed to speak with Mason. She said that she had not rented the room, but that defendant, the other woman in the room, had. As they were talking, defendant left the bathroom and approached them. Defendant first identified herself as the renter and then corrected

¹ "Mank" and "Manck" both appear in the transcript as the officer's name.

herself and said her daughter had rented the room. Mason asked to see some identification. Defendant said, “‘sure,’” and turned to walk to the interior of the room.

Officer Mason asked Ms. Silipin if she minded if they entered the room instead of standing in the hallway. Ms. Silipin said it was up to defendant. Defendant was still within earshot. She turned and nodded affirmatively. Ms. Silipin stepped aside and opened the door wider and the officers entered the room.

Defendant retrieved some identification from her purse, which was on the bed, and presented it to Officer Mason. She said that she was on her way to court that day, due to an arrest a couple of weeks earlier. When Mason asked why she had been arrested, defendant hesitated before answering that it was for paraphernalia. Defendant said she “‘was out on O. R.” and she handed Mason a booking sheet and an own recognizance sheet. He noticed that she had been booked, not only for possession of paraphernalia, but also possession of methamphetamine. Mason did not recall returning defendant’s identification to her.

Officer Mank (who did not testify) asked to see the paperwork. After reading it, he asked defendant if the O. R. officer had reviewed it with her before she signed it. Defendant hesitated and did not respond. Mank held up the sheet and “‘pointed to where there was an arrow pointing down to the search conditions.” He asked her, “‘Do you remember the officer going over the conditions saying that you are subject to search and seizure at any time?’” Defendant nodded and responded “‘Yes,’” even though, in fact, the search condition box on the O. R. form, dated June 8, 2010, was not checked. At the time, Officer Mason believed that her answer was accurate.²

² On appeal defendant asserts that Officer Mason “‘acknowledged that he noticed the search condition was not checked.” This mischaracterizes his testimony. On cross-examination, defense counsel elicited that Mason had an opportunity to look at the O. R. sheet after he first saw it on the day of the search. Mason acknowledged that when he later looked at the document, he noticed that the box related to search and seizure was not checked. On direct examination, he testified that he was unaware that defendant was not subject to a search condition until shortly before the suppression hearing.

Officer Mason asked defendant if there was anything in the room that he should know about. She indicated there was not and, as she had a court date, she would not have anything illegal in the room. Then she said, “You can look. I don’t have anything.”

Officer Mason looked through the room and bathroom. In the bathroom he found a flat, circular canister with powder in it. When he opened it he saw a heavy white residue indicative of methamphetamine. Mason walked into the room holding the container and asked the women where “the rest of the stuff” was. Both denied knowing about the canister or anything else in the room. After Mason said he would get a drug-sniffing dog, Ms. Silipan directed his attention to a broken methamphetamine pipe, a straw, and a hypodermic needle, which she claimed to own.

Officer Mason asked defendant if there was anything else in the room, telling her that, if she cooperated, he would attempt to help her in any way he could. Since there were many items in the room, he said he was not interested in spending hours looking through everything. Officer Mank and Ms. Silipan stepped outside to talk. Then, from the refrigerator, defendant retrieved a 7-Up can that had been turned into a “hide can.” When Mason removed the top, he found a plastic bag containing two to three grams of what appeared to his trained eye to be methamphetamine.

Throughout their encounter, defendant was holding a cell phone that kept buzzing or ringing. Officer Mason asked her if he could set it aside, and she gave it to him. After he opened the 7-Up can, he saw a text message on her phone. He found a digital scale inside her purse.

3. VALIDITY OF THE SEARCH

On appeal defendant asserts that a number of circumstances rendered her consent to search the motel room involuntary, including that the officers were armed and in uniform, one officer falsely asserted that she was subject to search as a condition of being released on her own recognizance, and her identification and paperwork were not returned to her. The Attorney General responds that the consent was voluntary, although defendant mistakenly believed that she was subject to a search condition, and that the other circumstances were not coercive as a matter of law.

In the trial court, when the People rely on consent to justify a warrantless search, they must establish not only that consent was in fact given, but that it was given freely and voluntarily. “A consent to a search is invalid if not freely and voluntarily given. (*Florida v. Royer* (1983) 460 U.S. 491, 497 (*Royer*)). [¶] The voluntariness of consent is a question of fact to be determined from the totality of circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227 (*Schneckloth*); [citation].) If the validity of a consent is challenged, the prosecution must prove it was freely and voluntarily given—i.e., ‘that it was [not] coerced by threats or force, or granted only in submission to a claim of lawful authority.’ (*Schneckloth, supra*, at p. 233; see *Royer, supra*, 460 U.S. 491, 497.)” (*People v. Boyer* (2006) 38 Cal.4th 412, 445-446 (*Boyer*)).

In reviewing a suppression motion on appeal, “[w]e must accept factual inferences in favor of the trial court’s ruling. [Citation.] If there is conflicting testimony, we must accept the trial court’s resolution of disputed facts and inferences, its evaluations of credibility, and the version of events most favorable to the People, to the extent the record supports them.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.) “We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The burden of establishing voluntary consent “cannot be discharged by showing no more than acquiescence to a claim of lawful authority. [Fn. omitted.] A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. [Fn. omitted.]” (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548-549 (*Bumper*)). “When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.” (*Id.* at p. 550.)

Defendant relies on *Bumper*, where the county sheriff, accompanied by two deputies and an investigator, went to a woman’s house and told her, “I have a search

warrant to search your house.’” (*Bumper, supra*, 391 U.S. 543, 546.) The woman responded, “‘Go ahead.’” (*Ibid.*) The United States Supreme Court rejected the People’s reliance on the woman’s consent to justify the search.

The Attorney General relies on *In re Jeremy G.* (1998) 65 Cal.App.4th 553 (*Jeremy G.*), where the People successfully appealed from the grant of a suppression motion. In that case, a detective searched a 16-year-old minor’s residence after the detective asked the minor if he was “‘searchable’” and the minor responded “‘Yes. For weapons,’” though he was not, in fact, subject to such a condition. (*Id.* at p. 555.) The Third District Court of Appeal stated that the good faith exception to the exclusionary rule was not implicated. “This case is not so sophisticated. There was no prior improper act by the government which led to the search. No government official told Officer Butterfield that the minor was subject to search for weapons. That information came directly from the minor. The fact the minor was in error is immaterial. The question here is not whether the minor had a searchable condition attached to his release; rather the question is whether Officer Butterfield was reasonable in relying on the minor’s statement that he had such a condition.” (*Id.* at p. 556.) The court found that it was reasonable for the detective to rely on the minor’s statement, as it was in the nature of a statement against penal interest. (*Ibid.*)

Though *Jeremy G.* cited no supporting authority, other cases have considered whether a search can be justified by an officer’s reasonable mistake of fact. *People v. Tellez* (1982) 128 Cal.App.3d 876 (*Tellez*) stated: “California courts have recognized that a reasonable mistake of fact, entertained in good faith by arresting officers, will authorize a search or arrest, even if the facts subsequently prove to be mistaken. As the California Supreme Court pointed out in *People v. Hill* (1968) 69 Cal.2d 550, 553-554, at footnote 4, an arrest is valid if an officer has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. (Pen. Code, § 836, subd. 3d.) In *Hill*, the police had probable cause to arrest Hill, but mistakenly arrested Miller. The court found that the officers honestly and reasonably believed that the man arrested was Hill; such reasonable belief validated the

arrest.” (*Tellez, supra*, 128 Cal.App.3d at p. 880.)³ *Tellez* found reasonable a search based on a factual mistake, when both the defendant and his parole officer told the searching officers that he was on parole and subject to search, though in fact his parole had ended 46 days earlier. (*Ibid.*)⁴

On the other hand, this court has recently held that a police officer’s pure mistake of law cannot provide an objectively reasonable basis for a seizure. (*People v. Reyes* (2011) 196 Cal.App.4th 856, 863.) And, in *People v. Ramirez* (1983) 34 Cal.3d 541 (*Ramirez*), the California Supreme Court identified some circumstances in which a police officer’s good faith reliance on erroneous information will not justify an arrest. The court held “that an arrest based solely on a recalled warrant is made without probable cause. The fruits of a search incident to such an arrest must, then, be suppressed. Although in this case the arresting officer no doubt acted in good faith reliance on the information communicated to him through ‘official channels,’ law enforcement officials are collectively responsible for keeping those channels free of outdated, incomplete, and inaccurate warrant information. That the police now rely on elaborate computerized data processing systems to catalogue and dispatch incriminating information enhances rather than diminishes that responsibility.” (*Id.* at p. 552.) The court declined “to validate an arrest made on the basis of data which a law enforcement agency knew or should have known were in error because of inadequate or negligent record-keeping. The test, under

³ Although *Tellez* did not mention it, the United States Supreme Court affirmed *Hill*, holding that “sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time.” (*Hill v. California* (1971) 401 U.S. 797, 804.)

⁴ *People v. Washington* (1982) 131 Cal.App.3d 434 followed *Tellez* under the unusual circumstances that a search was conducted by the defendant’s probation officer and police officers pursuant to an existing probation condition that was subsequently terminated nunc pro tunc prior to the search. (*Id.* at p. 439.)

these circumstances, is not merely the good faith of the individual officer in the field, but the good faith of law enforcement agencies of which he is a part.” (*Ibid.*)

We consider *Jeremy G.* to be distinguishable in two crucial respects. In that case the officer asked the minor a neutral question, whether he was subject to a search condition. Without having the minor’s probation conditions in hand on paper, the officer was justified in relying on the minor’s recollection of them. In our case, the officer asked defendant, “Do you remember the [O. R.] officer going over the conditions saying that you are subject to search and seizure at any time?” At the time the officer had the printed conditions of defendant’s O. R. release in hand and he was pointing to them after having reviewed them.

Though ostensibly stated as a question, the officer’s question was not neutral, but leading. “A ‘leading question’ is a question that suggests to the witness the answer that the examining party desires.” (Evid. Code, § 764.) The officer’s question suggested to defendant as a matter of fact that her paperwork reflected that she was subject to a search condition, and the officer wanted to know only if she remembered being so advised. Under these circumstances, we regard the officer’s question as equivalent to an assertion that the officer was holding a search warrant in his hand. This claim of authority connoted that defendant had no right to withhold consent to a search.

It is not important whether defendant’s recollection was accurate or inaccurate. If accurate, then her O. R. officer had misadvised her that she was subject to a search condition, and the situation is equivalent to the misinformation in *Ramirez* that was injected into official channels initially by law enforcement officials and not defendant. If inaccurate, then it was strongly suggested to her by Officer Mank’s misreading of the paperwork in his hand. Under either scenario, an officer essentially informed defendant that she had to submit to a search whether or not she consented. It was not reasonable for the officers to rely on defendant’s recollection when one of them had the actual paperwork in hand. By the same token, the officers would not be required to rely on her assertion that she was not subject to a search condition if the paperwork in hand showed otherwise.

Mann v. Superior Court (1970) 3 Cal.3d 1, 8, explained: “Not ‘all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police.’ (*Wong Sun v. United States* [(1963)] 371 U.S. 471, 488.) Rather, the appropriate test is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”” (*Wong Sun v. United States, supra*, 371 U.S. at p. 488; [citations].) [¶] The defendant’s consent may constitute such a sufficiently distinguishable means if it is not induced by compulsion, intimidation, oppressive circumstances, or other similar factors inherent in the situation which make that consent less than an act of free will.”

Boyer, supra, 38 Cal.4th 412, 448, stated: “Relevant factors in this ‘attenuation’ analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. (*Brown v. Illinois* (1975) 422 U.S. 590, 603-604.)”

The Attorney General asserts that defendant did not submit to the officer’s claim of authority. Instead, after “Officer Mason asked, ‘if there was anything in the room that I need to know about?’ [defendant] said no, spontaneously adding, ‘you can look. I don’t have anything.’” The Attorney General omits that defendant sought to justify her denial by saying that she would not have anything illegal in the room on a court date.

Officer Mason’s question followed immediately after defendant’s mistaken acknowledgement that she was subject to a search condition. Under these circumstances, we see no room for a reasonable factual inference that defendant’s search invitation was spontaneous and voluntary and that it was mere coincidence that she willingly invited the officers to search after one of them effectively informed her that she was subject to a search condition. Instead, we conclude as a matter of law that defendant’s consent was involuntary and that the trial court should have granted her suppression motion.

4. THE ORDER TO PAY ATTORNEY FEES OF \$100

On appeal defendant challenges the trial court's implicit finding that she was able to pay her attorney, a deputy public defender, \$100 in fees. Defendant does not question the trial court's implicit determinations that she was able to pay a probation supervision fee of \$75 per month or a \$150 drug program fee.

A. Sentencing

At sentencing, the trial court ordered defendant to pay a minimum \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)),⁵ a 10 percent administrative fee (§ 1202.4, subd. (l)), a \$200 suspended probation revocation fine (§ 1202.44), a \$50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5), a \$150 drug program fee (Health & Saf. Code, § 11372.7),⁶ a \$30 court security fee (§ 1465.8), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$129.75 criminal justice administration fee to the City of San Jose (Gov. Code, § 29550.1), and a probation supervision fee of \$75 per month (§ 1203.1b).⁷

⁵ Unspecified section references are to the Penal Code.

⁶ Health and Safety Code section 11372.7 provides in part: “(b) The court shall determine whether or not the person who is convicted of a violation of this chapter has the ability to pay a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person’s financial ability. In its determination of whether a person has the ability to pay, the court shall take into account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution.”

⁷ Section 1203.1b provides in part: “(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, [as well as the costs of other probation services]. The reasonable cost of these services and of probation supervision or

(Continued)

A printed waived referral probation memorandum had recommended most of these fines and fees, though the criminal lab analysis fee and the drug program fee appear in handwriting on the memo, and the printed memo suggested a probation supervision fee not to exceed \$110 per month. As to attorney fees, the memo stated: “if appropriate.”

At the conclusion of sentencing, the following colloquy occurred.

“[The court]: So, Ms. Morellon, do you admit that you are able to pay reasonable attorney’s fees in the amount of \$150 in this case?”

“The defendant: Can I make payments on that?”

“The court: How about a hundred dollars?”

“The defendant: Well, I have no income now.

“The court: Is payment an option for attorney fees?”

“The probation officer: I would assume it would be lumped into the D. O. R., and it would be set up through them.

“The court: Do you agree that a hundred dollars would be reasonable?”

“The defendant: Yeah.

“The court: Okay. A hundred dollars attorney’s fees. And then you can make arrangements with D. O. R. This is something new we are assessing.”

a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. . . . The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant’s ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

B. The Statutory Scheme

Section 987.8 provides in pertinent part: “(b) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. . . . The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.

“[¶] . . . [¶]

“(e) At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights:

“(1) The right to be heard in person.

“(2) The right to present witnesses and other documentary evidence.

“(3) The right to confront and cross-examine adverse witnesses.

“(4) The right to have the evidence against him or her disclosed to him or her.

“(5) The right to a written statement of the findings of the court.

“If the court determines that the defendant has the present ability to pay all or a part of the cost, the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county in the manner in which the court believes reasonable and compatible with the defendant’s financial ability. . . . The order to pay all or a part of the costs may be enforced in the manner provided for enforcement of money judgments generally but may not be enforced by contempt.

“[¶] . . . [¶]

“(g) As used in this section:

“[¶] . . . [¶]

“(2) ‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following:

“(A) The defendant’s present financial position.

“(B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. . . .

“(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

“(D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.”⁸

Section 1203.1f states: “If practicable, the court shall consolidate the ability to pay determination hearings authorized by this code into one proceeding, and the determination of ability to pay made at the consolidated hearing may be used for all purposes.”

Among the information to be included in a probation officer’s presentence investigation report is: “(11) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant’s ability to pay, and a recommendation whether any

⁸ Government Code section 27712 similarly provides in part: “(a) In any case in which a party is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the proceedings, or upon the withdrawal of the public defender or private counsel, after a hearing on the matter, the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance. Such determination of ability to pay shall only be made after a hearing conducted according to the provisions of Section 987.8 of the Penal Code; except that, in any court where a county financial evaluation officer is available, the court shall order the party to appear before the county financial evaluation officer, who shall make an inquiry into the party’s ability to pay this cost as well as other court-related costs.”

restitution order should become a judgment under section 1203(j) if unpaid.” (Cal. Rules of Court, rule 4.411.5.)

C. Defendant Did Not Forfeit This Contention

The Attorney General contends that defendant should have objected in the trial court to the imposition of \$100 attorney fees without a judicial determination of her ability to pay, relying on *People v. Crittle* (2007) 154 Cal.4th 368, 371 (\$10 crime prevention fine under § 1202.5), *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 (\$156 booking fee under Gov. Code, § 29550.2), and *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1469 (\$2,200 restitution fine under former Gov. Code, § 13967), all decisions of the Third District, and *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750 (\$100 sex offender fine under § 290.3), a Fifth District decision.

Defendant responds that the insufficiency of the evidence to support a payment order can be first asserted on appeal, relying on this court’s decision in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), involving orders for a criminal defendant to pay \$100 in attorney fees, \$64 monthly for probation supervision, and \$259.50 for a criminal justice administration fee.⁹ *Pacheco* followed this court’s prior authority, explaining, “We have already held that such claims do not require assertion in the court below to be preserved on appeal. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 (*Viray*) [challenge to order to reimburse attorney fees based on insufficiency of evidence may be first asserted on appeal]; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 [challenge to conditional order to pay attorney fees ‘if appropriate’ with no referral for ability to pay determination may be raised for first time on appeal].)” (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.)

⁹ In *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513, which criticized *Pacheco*, the California Supreme Court is currently considering whether a defendant had forfeited an appellate objection to imposition of a jail booking fee under Government Code section 29550.2.

We need not contrast and compare the statutory schemes involved in the forfeiture cases cited by the Attorney General. None of them involved section 987.8, which establishes as prerequisites to an order to pay a certain amount for attorney fees both a court hearing and a finding that the defendant is able to pay that amount.

The Attorney General asserts that *Pacheco* was incorrectly decided. We adhere to *Pacheco* and its predecessors. It is unrealistic to expect a deputy public defender to object to a judicial award of his or her fees to his or her employer. Under these circumstances, due to this inherent conflict of interest, a criminal defendant is effectively unrepresented when this issue arises, and ordinary rules of forfeiture should not be applied. (*Viray, supra*, 134 Cal.App.4th 1186, 1215-1216.) Moreover, insufficiency of the evidence to support a finding is not a contention that is subject to forfeiture. (*Id.* at p. 1217; *People v. Lopez, supra*, 129 Cal.App.4th at p. 1537.)

In this case, moreover, defendant effectively did raise the issue without her attorney's assistance, saying that she had no income and inquiring about an opportunity to make payments. Her eventual acquiescence that \$100 was "reasonable," in response to an ambiguous question by the court, cannot be understood as a waiver of her prior claim of no income.

D. The Order Lacks Evidentiary Support

The Attorney General relies on defendant's "Yeah," in response to the court's question of whether \$100 "is reasonable" not only as a waiver of her appellate claim, but also as supplying evidence of her ability to pay this amount.

In this case, the waived referral memorandum recommended a number of fines, fees, and assessments, but did not include any information concerning defendant's ability to pay any fees, such as her employment history, sources of income, bank accounts, or other assets. The trial court apparently tried to obviate the need for an ability to pay hearing by obtaining defendant's agreement that she had the ability to pay \$150 in attorney fees. Defendant, however, balked, stating she had no current income and inquired about making payment. After learning from the probation officer that "D. O. R." would accept payments, the court obtained defendant's assent to the

proposition that fees of \$100 “is reasonable.” It is questionable whether defendant was agreeing in the abstract that \$100 for an attorney was reasonable or in particular that she could afford such a payment.

We recognize that a \$100 order may be regarded as a token, and certainly not the full value of the services of the deputy public defender. We also recognize that it is important, when possible, for counties to replenish their treasuries from the pockets of those who have directly benefited from county services. (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.) But we also recognize that \$100 may be a significant sum to a person without assets or income, especially when, like defendant, the court is concurrently requiring payment of other fines, fees, and assessments totaling \$684.75.¹⁰ Due process attaches to the government’s deprivation of property regardless of its monetary value.

By seeking an agreement from defendant regarding her ability to pay, the trial court was not only attempting to fill an evidentiary gap, but also to avoid the need for an evidentiary hearing in which defendant would have the right to present witnesses and other documentary evidence, to confront and cross-examine adverse witnesses, to have evidence disclosed, and to a written statement of the court’s findings. (§ 987.8, subd. (e).) We do not question that there may be occasions when a criminal defendant is willing and able to pay attorney fees where a proper stipulation by the defendant will suffice as a substitute for a fuller evidentiary exposition at a contested hearing on the topic of the defendant’s ability to pay. In this case, however, we do not regard defendant’s grudging assent to an equivocal question, prefaced as it was by her claim of no current income, as substantial evidence that she was able to pay \$100 for attorney fees

¹⁰ Although the trial court did not mention penalty assessments at sentencing, the minute order includes penalty assessments of an additional \$600 attaching to the lab and drug program fees.

as well as the other \$684.75 of fines, fees, and assessments, not including penalty assessments, simultaneously imposed by the trial court.¹¹

5. DISPOSITION

The judgment is reversed. The order to pay \$100 in attorney fees is stricken. The trial court is directed to enter an order granting defendant's suppression motion.

WALSH, J.*

WE CONCUR:

PREMO, ACTING P.J.

MIHARA, J.

¹¹ Because we are reversing the judgment on other grounds, we need not consider whether to remand the case for an inquiry into defendant's ability to pay attorney fees. Such an award is made "upon conclusion of the criminal proceedings in the trial court" (§ 987.8, subd. (b)), and we cannot be sure that our decision will conclude these proceedings.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.