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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK D. DUPATY,

Defendant and Appellant.

A107395

(Contra Costa County  
Super. Ct. No. 5-032249-5)

Derrick Dupaty appeals from a conviction of second degree robbery entered upon his plea of no contest. He contends the matter must be remanded because the trial court failed to hold a hearing on his ability to pay before ordering him to pay attorney fees. We reverse and remand for further proceedings.

STATEMENT OF THE CASE<sup>1</sup>

Appellant was charged by information filed on November 18, 2003, with one count of second degree robbery (Pen. Code, s 211).<sup>2</sup> The information alleged that appellant had suffered eight prior felony convictions: four robbery convictions in March 1988, two attempted robbery convictions in March 1988, one robbery conviction in October 1988 and one robbery conviction in November 1993. These convictions were each alleged as a strike under sections 667, subdivisions (b) through (i), and 1170.12, and

<sup>1</sup> The facts underlying appellant's conviction are not relevant to the issue on appeal and therefore need not be recited in this opinion.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise indicated.

as the basis for a five-year enhancement under section 667, subdivision (a). Three one-year prior prison term enhancements were alleged under section 667.5, subdivision (b), based on the March 1988, October 1988 and November 1993 convictions. Appellant entered a plea of not guilty.

On April 26, 2004, appellant completed and signed an “Advisement of Rights, Waiver and Plea Form” and changed his plea to no contest, pursuant to a plea bargain under which he would plead no contest to one count of robbery and admit three prior convictions under section 667, subdivision (a); the remaining strike and enhancement allegations would be dismissed; and he would receive a total prison term of 17 years (two years for the robbery conviction plus a consecutive five years for each of the priors). The court accepted the plea.

Also on April 26, 2004, the court signed an order requiring appellant to report to the Contra Costa County Office of Revenue Collection (ORC) within 20 working days of the date of the order or, if in custody, of his release from jail, for an interview to determine whether he was able to pay all or part of the services of his court-appointed attorney. The amount of attorney fees specified on the order was \$350. The order stated that if appellant did not report as ordered, he would give up his right to a hearing, and the court would enter a judgment ordering him to pay for the attorney services. Appellant signed the order beneath a boldface acknowledgment that he had received the order and understood the court would enter judgment for the total costs of his attorney’s services, if he did not report as ordered.

On June 7, 2004, appellant was sentenced to the agreed-upon 17-year prison term. At the hearing, the court ordered appellant to pay victim restitution in an amount to be determined (§ 1202.4, subd. (f)) and a restitution fine of \$3,400 (§ 1202.4, subd. (b)), and imposed but suspended a parole restitution fine of \$3,400 (§ 1202.45). The abstract of judgment reflected these orders as well as an order for appellant to pay attorney fees of \$350 (§ 987.8).

Appellant filed a timely notice of appeal on August 4, 2004. The trial court granted appellant’s request for a certificate of probable cause on August 5, 2004.

## DISCUSSION

Section 987.8, subdivision (b), provides: “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, hold one such additional hearing within six months of the conclusion of the criminal proceedings. 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.”

As the statutory language requires, an order under section 987.8 may not be imposed absent notice and a hearing on ability to pay. (*People v. Flores* (2003) 30 Cal.4th 1059, 1061.) Appellant argues that because no hearing was held in the present case, the matter must be remanded. (Cf., *id.* at p. 1069.)

Respondent urges the issue has been waived because appellant failed to object at sentencing to imposition of the attorney fees order. Respondent relies upon the general rule that that issues may not be raised for the first time on appeal (citing *People v. Scott* (1994) 9 Cal.4th 331, 351-353) and specifically upon cases holding claims of failure to comply with section 987.8 waived if not raised in the trial court (citing *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396 (*Whisenand*); *People v. Phillips* (1994) 25 Cal.App.4th 62, 75 (*Phillips*)).

In *Whisenand, supra*, 32 Cal.App.4th 1383, although neither the probation report nor the sentencing hearing gave the defendant notice that the issue of attorney fees was to be addressed, the defendant’s ability to pay was the subject of a victim restitution hearing and the court determined from that hearing that the defendant could reimburse the county for the cost of attorney fees. Defense counsel did not object to the order for attorney fees and the issue was found waived. (*Id.* at pp. 1395-1396.)

In *Phillips, supra*, 25 Cal.App.4th 62, the court ordered the defendant to pay attorney fees after considering his ability to pay at the sentencing hearing. *Phillips* rejected a claim of lack of notice because the probation reported listed attorney fees as one of the issues to be considered at the sentencing hearing and defense counsel did not object at the hearing, indicating the defendant was not surprised by the court's consideration of the issue and order. (*Id.* at pp. 74-75.)

In the present case, the only notice appellant was given regarding the attorney fees issue was the court's order of referral to the ORC on the date appellant entered his plea. As described above, that order directed appellant to report to the ORC "within 20 working days from the date of the order, or, if in custody, of within 20 working days after release from jail." The order stated, "You will be interviewed to find out if you are able to pay all or part of the services of the attorney appointed by the Court to handle your case. If the Office of Revenue Collection finds that you are able to pay a certain amount, and you do not agree, you have the right to a hearing in the Court to decide what amount, if any, you must pay. [¶] If you do not go to the Office of Revenue Collection, as ordered, you waive (give up) your right to a hearing, and the Court will enter a judgment against you, ordering you to pay for the services of your attorney. The order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement in the same manner as any other judgment." The acknowledgment which appellant signed at the bottom of the order stated: "I acknowledge receipt of the above order and understand that if I do not report as ordered, the court will enter a judgment against me for the total costs of legal services of my attorney."

Unlike the situations in *Phillips* and *Whisenand*, appellant here had no reason to believe the attorney fees issue would be addressed at the sentencing hearing and the court engaged in no inquiry regarding appellant's ability to pay the fees. Appellant was affirmatively told by the referral order that his ability to pay attorney fees would be determined by the ORC after his release from custody, and that he would have a right to review of this determination by the court. Appellant was still in custody at the time of the

sentencing hearing. As his obligation to report to the ORC had not yet been triggered, he cannot be viewed as having waived his right to a hearing.

Nor can appellant's failure to object at the sentencing hearing be viewed as a waiver. Not only was appellant never informed that the attorney fees issue would be considered at the sentencing hearing, the issue was *not* in fact raised there. The attorney fees issue was not addressed by the court in its oral pronouncement of judgment. Even the minute order for the sentencing hearing lists only "Referred to ORC for Attorney Fee Costs of \$350." The first and only indication reimbursement under section 987.8 was ordered was in the abstract of judgment. Under these circumstances, the argument that appellant waived his right to contest the imposition of the attorney fees order is patently unfounded.

Respondent also argues that reversal of the attorney fees order is not required because appellant has shown no prejudice. (*People v. Smith* (2000) 81 Cal.App.4th 630, 638-639.) In *Smith*, the defendant had reason to be aware he might be held responsible for payment of attorney fees, but was not given notice specifically complying with the requirements of section 987.8. *Smith* affirmed the order because the defendant had not demonstrated prejudice: He was aware of the possibility he might be ordered to pay the fees, a hearing on the issue was held and he did not argue he lacked ability to pay or the amount ordered was erroneous. Here, appellant had no reason to expect he might be ordered to pay attorney fees without having had the opportunity to comply with the referral order and no inquiry was made into his ability to pay. Remand is required.

The order under section 987.8 is reversed and the matter remanded for proceedings in accordance with the views expressed herein. In all other respects, the judgment is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Ruvolo, J.