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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLE LENEA PARSON,

Defendant and Appellant.

B222714

(Los Angeles County
Super. Ct. No. BA360886)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Craig Richman, Judge. Reversed in part, affirmed in part, and remanded with directions.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Nicole Lenea Parson appeals from a judgment entered upon her conviction on a negotiated plea of no contest to child stealing (Pen. Code, § 278).¹ Imposition of sentence was suspended, and the trial court placed appellant on three years probation. As conditions of probation, among others, the trial court imposed a restitution fine in the amount of \$200 pursuant to section 1202.4, subdivision (b), a probation revocation fine in the amount of \$200 pursuant to section 1202.44, a \$30 court security fee pursuant to section 1465.8, subdivision (a)(1), a \$30 court facilities fee pursuant to Government Code section 70373, and \$110 attorney fees pursuant to section 987.8. Appellant contends that the attorney reimbursement fee was improperly imposed without notice and hearing on her present ability to pay, as required by section 987.8, and (2) the attorney fees, court security fee and facilities fee were improperly imposed as conditions of probation.

We modify the conditions of probation, reverse the attorney fees award and otherwise affirm.

FACTUAL BACKGROUND²

Appellant's one-year-old child was a dependent of the juvenile court. During a monitored visitation on August 19, 2009, appellant tried to leave with her child. She battered two employees of the Department of Children and Family Services when they tried to stop her. Later that same day, appellant dropped the child off unharmed at the Department of Children and Family Services.

DISCUSSION

I. Propriety of attorney fees order

A. Background

Appellant was convicted of one count of child stealing, for which she was placed on three years probation. As conditions of probation, the trial court ordered that she pay

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

² Because there was no preliminary hearing or trial, we provide only a truncated statement of facts taken from the probation report.

\$110 in attorney fees pursuant to section 987.8. There was no hearing conducted regarding appellant's ability to pay those fees.

B. Contention

Appellant contends that the trial court erred in imposing as a condition of probation a \$110 attorney fees order pursuant to section 987.8 and that that order must be stricken. She argues that an attorney fees order pursuant to that section cannot be made a condition of probation, and the fees were assessed without providing appellant with notice and a hearing on her present ability to pay them. As a consequence, there is insufficient evidence to support any determination that appellant had the ability to pay \$110.

The People concede that the attorney fees order may not be made a condition of probation and that appellant never received notice or a hearing on her ability to pay it. However, the People argue that the attorney fees order should not be stricken, but that this matter should be remanded so a proper hearing can be held.

We agree with the People.

C. Attorney fees restitution

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." (Italics added.)

"'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”].) (§ 987.8, subd. (g)(2)(A) & (B).)

“‘[P]roceedings to assess attorney’s fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.’ [Citations.] The due process requirements of section 987.8(f) mandate that prior to the appointment of counsel the defendant receive “‘notice reasonably calculated, under all the circumstances’” to apprise him of the potential of his liability for the costs of legal representation and of the possible effects of an order to pay such costs. [Citations.]” (*People v. Smith* (2000) 81 Cal.App.4th 630, 637 (*Smith*).)

No notice of a section 987.8 hearing was given to appellant, and no section 987.8 hearing was conducted to determine appellant’s ability to pay the attorney fees. Consequently, the procedural requirements necessary to comport with due process and section 987.8 were not satisfied. The attorney fees award can therefore not stand.

Furthermore, because the right to counsel is guaranteed under the California Constitution, imposing reimbursement as a condition of probation is absolutely prohibited. (*People v. Flores* (2003) 30 Cal.4th 1059, 1066–1067, fn. 5; *People v. Johnson* (1972) 27 Cal.App.3d 781, 783.)

D. Remedy

The parties agree that the attorney fees award cannot stand and cannot be a condition of probation. The only question in dispute is the appropriate remedy. Appellant contends that under the facts presented, the order must simply be stricken. She concedes that ordinarily remand for a hearing is the proper remedy for a reversal of an attorney fees order. (See *People v. Flores, supra*, 30 Cal.4th at p. 1069; *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1081.) However, she argues that her mental condition and her failure “to make a payment towards her court fees from another case,” are unusual circumstances that “establish[] that she could not reasonably have an ability to pay the attorney fees” The People, on the other hand, contend that the matter must be

remanded for an appropriate hearing. The People argue that “there was no reference whatsoever in the record to issues such as appellant’s ‘financial position, [her] earning ability, or [her] expenses.’” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399 (*Pacheco*)). Thus, this matter should be remanded for a hearing under section 987.8. The People are correct.

Section 987.8, subdivision (g)(2)(B) provides that “[u]nless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.” The statute requires that the determination of the defendant’s ability to pay is determined at the time of sentencing. (§ 987.8, subd. (g)(2).) Appellant was not immediately incarcerated after the attorney fees order, but was freed from custody. Hence, the presumption contained in section 987.8, subdivision (g)(2) that a person sentenced to state prison lacks financial capacity to pay attorney fees is inapplicable. There was no evidence of what appellant was doing after her release, what her financial condition was, or what assets she might have to satisfy any attorney fees order. This record warrants remand for a hearing. We therefore reverse the attorney fees order and remand this matter for hearing to make a determination consistent with due process and section 987.8.

II. Court security fee and criminal conviction fee as conditions off probation

A. Background

The trial court imposed a \$30 court security fee pursuant to section 1465.8, subdivision (a)(1) and a \$30 court facilities fee pursuant to Government Code section 70373 as conditions of appellant’s probation.

B. Contentions

Appellant contends that the trial court erred in imposing the criminal conviction and court security fees as conditions of probation. She argues that imposition of these fees as conditions of probation is unauthorized because they “are collateral to appellant’s crime and as such, may not be made a condition of probation.”

The People agree with appellant, as do we.

C. Analysis

Pacheco concluded that the court security fee cannot be assessed as a condition of probation. It stated: “The imposition of the court security fee as a condition of probation was unauthorized because like probation costs, this fee is collateral to Pacheco’s crimes and punishment and as such, its payment may not be made a condition of probation. [Citations.] Certain fines such as those relating to restitution, for example, may by statute be imposed as conditions of probation, but the court security fee is not one of them. [Citations.] One reason for the distinction between fines that may be imposed as probation conditions and those that may not is that probation ‘should be oriented towards rehabilitation of the defendant and not toward the financing of the machinery of criminal justice.’ [Citations.] An equally compelling reason for the distinction is that a defendant may be imprisoned for violating a probation condition, but not for violating an order to pay costs and fees. [Citation.] The nonpunitive purpose of the court security fee squarely places it among those fines and fees that are collateral to the crime and the consequent punishment for its commission.” (*Pacheco, supra*, 187 Cal.App.4th at p. 1402.) *People v. Kim* (2011) 193 Cal.App.4th 836, 843 similarly held that the court facility assessment under Government Code section 70373 could not be made a condition of probation. We agree with this analysis.

An order directing payment of collateral costs like the court security fee and court facilities assessment is thus not enforceable as a probation condition but instead only as a separate money judgment in a civil action, and the order should thus be imposed as a separate order entered at judgment. Because the order directing payment of the court security fee as a condition of probation was erroneous, we will modify the judgment to delete it as a probation condition and clarify that it is instead a separate order. (*People v. Flores* (2008) 169 Cal.App.4th 568, 578.)

DISPOSITION

The attorney fees order is reversed. The \$30 court security fee and \$30 court facility assessment fees are modified to delete them as conditions of probation and to make them separate orders. On remand, the trial court is directed to conduct a new attorney fees hearing on proper notice consistent with section 987.8 and this decision. The attorney fees ordered, if any, made after that hearing cannot be made a condition of probation. The judgment is otherwise affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ