

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR JAMES BALCACER,

Defendant and Appellant.

B234325

(Los Angeles County
Super. Ct. No. PA069301)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Cynthia L. Ulfig, Judge. Vacated and remanded in part; otherwise affirmed.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

Hector James Balcacer appeals from the judgment entered following his plea of no contest to the unlawful driving or taking of a motor vehicle (Veh. Code, § 10851) and his admissions that he previously had been found guilty of assault with a deadly weapon or force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)) within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served a prison term within the meaning of Penal Code section 667.5, subdivision (b). The trial court sentenced Balcacer to three years eight months in prison and imposed various fines and fees, including attorney fees. We affirm the judgment but vacate the order assessing attorney fees and remand the matter for a hearing on Balcacer's ability to pay such fees.

FACTUAL AND PROCEDURAL BACKGROUND

*1. Facts.*¹

At approximately 12:00 p.m. on January 12, 2011, Los Angeles Police Officer Marco Evans was working with Officers Parker and Connell in the vicinity of Ruffner Street and Rinaldi Avenue. The officers, who were on patrol in a marked car, were working as part of a “specialized . . . crime response unit. [Their] mission for that day was to be in the area [to spot or respond to] burglar[ies] from motor vehicles and . . . residences.” It had been Evans's experience that those crimes occurred frequently in that area.

As Evans and his fellow officers were driving south on Ruffner Street, a “silver/gray colored Lexus” sport utility vehicle (SUV) caught their attention. The car, which was driving north, had paper license plates and “traffic collision” damage on its right side. In general, police officers view a car with paper license plates in the same way they view a vehicle with no plates. Evans indicated that the paper plates and damage “raised [the officers'] concerns. [They wished] to verify that everything with the vehicle

¹ The facts have been taken from the transcripts of the motion to suppress evidence and the preliminary hearing.

was okay.” Accordingly, the officers made a U-turn so that they could pull in behind the Lexus. When the Lexus then turned right onto Rinaldi, the officers followed.

Evans and the other officers followed the Lexus for approximately 100 yards. Without any signal from the officers, the Lexus began to pull over to the right. At that point, the officers turned on their lights and siren and directed the driver of the Lexus to pull over. The officers stopped the SUV because it “had no [permanent] plates” and they wanted to “confirm the registration of the vehicle.”²

Evans, who was the “cover officer” and front seat passenger that day, got out of the police car and approached the Lexus. Balcacer, who was sitting in the driver’s seat, was the only person in the SUV. As Evans walked toward Balcacer, Balcacer looked to see where the officer was coming from, then placed his hands on the steering wheel. To the officer, Balcacer appeared to be “very nervous.”

Evans asked Balcacer to roll down the window. After Balcacer did so, Evans looked into the car and saw “a lot of miscellaneous bags and paperwork which . . . just didn’t match the vehicle.” The officer indicated that, “for a brand new vehicle, [he had] never seen that before.” Evans asked Balcacer if the Lexus belonged to him and Balcacer said that it did. Evans then asked Balcacer for the registration to the vehicle and Balcacer indicated that he didn’t have it because he had “just purchased the vehicle the night before with his girlfriend.” When Evans “looked in the window[,] [he] observed a car registration for a new vehicle.” At that point, Evans asked Balcacer if he was on probation or parole. When Balcacer indicated that he was on parole, Evans had him get out of the Lexus. It was then determined that Balcacer “didn’t have a license [or any other form of identification] on him” and the officers detained him.

Evans obtained the SUV’s vehicle identification number (VIN) from the front dashboard and from a sticker on the right, side window. Approximately five minutes after he ran the VIN through the Police Department’s computer system, “it came back as

² See Vehicle Code sections 5200, subdivision (a), and 5201.

a stolen vehicle out of [the] Mission Division.” Seconds later, “a broadcast came from [the] Mission Division describing the vehicle that [the officers] had [just] . . . stopped.” Evans responded, indicating that he and his fellow officers “had the vehicle . . . and [that a] suspect [was] in custody.”

When he ran the vehicle identification number through the computer, Evans was given the name of the registered owner of the Lexus. Evans’s partner was able to contact the registered owner, Javier Arrezola, Sr., by cell phone. Arrezola, accompanied by his daughter, Maria,³ and another individual, came to the location where the officers had detained Balcacer. Arrezola said that Balcacer had been at his home the previous day, but that he “had no relationship with him.” Arrezola indicated that at no time had he given Balcacer permission to drive the Lexus.

Evans wished to confirm that Balcacer was on parole so the officer ran his name through the computer in the police car, then contacted the parole office. Within a few moments, Evans was able to verify that Balcacer was a parolee.

Dean Watts is a detective with the Los Angeles Police Department who was assigned to “Mission Auto Detectives.” He was the investigating officer in Balcacer’s case and, on January 12, 2011, the detective interviewed Maria Arrezola at the Mission Station. During the interview, Maria indicated that her father had purchased the Lexus on the night of the 11th. He brought the car home and, after the family had inspected it, Maria had left the key to the vehicle in her brother’s room. That evening, her brother had been entertaining a guest, Hector Balcacer. The following morning, Maria’s sister-in-law informed her that both the Lexus and Balcacer were gone.

2. Procedural history.

Following a preliminary hearing, an amended information was filed on May 4, 2011 in which Balcacer was charged in count 1 with the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)) and in count 2 with receiving stolen property, a

³ We refer to Maria by her first name not out of any disrespect, but for the sake of clarity.

motor vehicle (Pen. Code, § 496d, subd. (a)). It was further alleged with regard to counts 1 and 2 that Balcacer had suffered a prior conviction for a serious or violent felony, assault with a deadly weapon or by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had suffered five prior convictions for which he served prison terms within the meaning of Penal Code section 667.5, subdivision (b).

On June 1, 2011, Balcacer filed a motion to suppress evidence pursuant to Penal Code section 1538.5. He wished to suppress “[a]ll observations made by [o]fficers subsequent to [the] unlawful stop,” “[a]ll statements” he made “subsequent to [the] unlawful stop” and “a black Lexus remote key” found subsequent to the unlawful stop. After the parties presented evidence and made their arguments, the trial court denied the motion. In doing so, the trial court stated: “In this particular case, the defendant is stopped in a vehicle with paper plates, registration sticker in the window, but [there is] no vehicle registration yet[.] [T]here’s traffic collision damage to the vehicle. . . . I think [that] would heighten the officer’s awareness of the possibility that the . . . particular vehicle had . . . recently been involved in a collision or that the parties may have been injured in light of the fact that it did have paper plates and a new sticker. [¶] The motion therefore would be denied. The court does find it was a good stop by the officers.”

At proceedings held on June 21, 2011, Balcacer indicated that he would enter a plea of guilty or no contest to the charge alleged in count 1, the unlawful driving or taking of a vehicle, admit the alleged strike and admit one prior conviction for which he had served a prison term. In exchange, the trial court agreed to sentence him to the low term of 16 months for count 1, double the term to two years eight months pursuant to the Three Strikes law and impose a consecutive term of one year for a prior conviction for which he served a prison term. In total, Balcacer was to be sentenced to three years eight months in prison.

After waiving his right to a trial, his right to confront and cross-examine the witnesses against him, his right to subpoena witnesses and present a defense and his right

to remain silent, Balcacer pleaded no contest to the unlawful driving or taking of a vehicle, admitted the Three Strikes prior and admitted having previously been convicted of a crime for which he served a prison term. The trial court dismissed all remaining charges and allegations and sentenced Balcacer to the agreed-upon term of three years eight months in prison. Balcacer was awarded presentence custody credit for 161 days actually served and 80 days of good time/work time, for a total of 241 days. The court then imposed an \$800 restitution fine (Pen. Code, § 1202.4, subd. (b)), a stayed \$800 parole revocation restitution fine (Pen. Code, § 1202.45), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$40 court security fee (Pen. Code, § 1465.8, subd. (a)) and attorney fees in the amount of \$400 (Pen. Code, § 987.8). A restitution hearing was set for July 13, 2011 to determine the amount of damages Balcacer owed the victim.

On June 21, 2011, Balcacer filed a timely notice of appeal based on the denial of his motion to suppress evidence and “matters after entry of [his] plea.”

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed September 2, 2011, the clerk of this court advised Balcacer to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. Balcacer filed a supplemental brief on September 19, 2011 in which he asserted: (1) the police officers unlawfully stopped him while he was driving the Lexus, then lied about their reasons for doing so; and (2) the trial court erred when it awarded attorney fees without determining whether he had the ability to pay such fees.

With regard to his first contention, Balcacer is correct in his assertion that “[o]rdinary traffic stops are treated as investigatory detentions for which the officer must be able to articulate specific facts justifying the suspicion that a crime is being committed.” (*In re Raymond C.* (2008) 45 Cal.4th 303, 307, citing *People v. Wells* (2006) 38 Cal.4th 1078, 1082-1083.) However, Balcacer is incorrect in his assertion that such facts did not exist here. In Balcacer’s case, the officers observed a new vehicle with

paper plates and “traffic collision” damage on its right side. As the vehicle had no permanent plates, the officers wished to “confirm [its] registration” and, due to the “collision” damage on the side of the car, they appropriately wanted to determine whether “everything with the vehicle was okay.” These are specific, articulable facts which justified the traffic stop.

Whether the officers were being truthful when they testified is not a question for us to decide. “ ‘ “Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge . . . to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.” ’ ” (*People v. Smith* (2005) 37 Cal.4th 733, 738-739; see *People v. Roa* (2009) 171 Cal.App.4th 1175, 1179-1180.) Here, the reasons given by the officers for the traffic stop were both reasonable and credible.

Balcacer’s second contention, that the trial court erred when it assessed attorney fees without first holding a hearing to determine his ability to pay such fees, is well taken.⁴ Initially, because this claim is “based on the insufficiency of the evidence to support the order,” it need not have been first asserted in the trial court to be preserved for purposes of appeal. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397; see *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215-1217; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) Accordingly, we consider Balcacer’s claim on the merits.

Penal Code section 987.8, subdivision (b) provides in relevant part that “[i]n 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 . . . 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.” (Italics added;

⁴ On December 2, 2011, this court sent a letter to the parties asking them to address, in view of Penal Code section 987.8, whether the trial court erred when it assessed \$400 in attorney fees without first holding a hearing to determine whether Balcacer had the ability to pay such fees. Balcacer’s counsel responded in a letter brief filed December 7, 2011. The People filed no reply.

see *People v. Viray*, *supra*, 134 Cal.App.4th at p. 1214; *People v. Lopez*, *supra*, 129 Cal.App.4th at p. 1537.) Moreover, section 987.8, subdivision (g)(2)(B) presumes that those sentenced to prison are unable to pay. It reads: “Unless 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.”

Here, no hearing was held and there is no evidence upon which the assessment of attorney fees could have been based. (Cf. *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1392 [evidence at a restitution hearing showing the defendant was currently employed with an income of \$640 per month was properly considered to show he could pay the attorney fees assessed under Penal Code section 987.8].) Under these circumstances, the order imposing attorney fees will be vacated and the matter will be remanded to the trial court for a hearing to determine whether Balcacer has the ability to pay the \$400 assessed for attorney fees.

DISPOSITION

The judgment is affirmed. The order imposing \$400 in attorney fees is vacated and the matter is remanded for a hearing pursuant to Penal Code section 987.8 to determine whether Balcacer has the ability to pay the fees.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.