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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN DAVID EISENBERG,

Defendant and Appellant.

B239128

(Los Angeles County
Super. Ct. No. LA068778)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph A. Brandolino, Judge. Affirmed as modified.

Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Steven David Eisenberg pleaded no contest to one count of possession of heroin (Health & Saf. Code, § 11350, subd. (a)) and one count of misdemeanor vandalism (Pen. Code, § 594, subd. (a))¹ The trial court suspended imposition of sentence and placed defendant on formal probation for three years. On appeal, Eisenberg challenges only the court's order that, in addition to other fees and fines, he pay \$268 pursuant to section 987.8 for his appointed counsel's legal fees, contending he was denied notice and a hearing to determine his ability to pay those fees. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Eisenberg was charged in an information filed September 28, 2011 with possession of heroin and misdemeanor vandalism. Eisenberg pleaded not guilty to both counts.

Defense counsel's motion for discovery of police officer personnel files was granted on December 8, 2011. Following an in camera review, however, the court found no records responsive to defense counsel's motion.

Eisenberg, represented by his appointed counsel, decided to enter an open plea to the trial court upon being given an indicated sentence of three years of formal probation. However, before Eisenberg entered his plea, his counsel explained to the court that Eisenberg feared his inability to pay all court ordered fines and fees would subsequently deter the court from reducing his felony conviction to a misdemeanor under Penal Code section 17, subdivision (b). The court replied, "For the 17(b) [sic] reduction, as always, the court makes no promises, but the defendant, understanding that the court will take into account if he's done well – I don't penalize defendants if they truly don't have the ability to pay and they don't pay any financial obligations. But what will happen will be probation will evaluate the defendant, like every defendant, based on the ability to pay and come up with a figure, if any, that they [sic] expect him to pay every month, even if it's a small amount, and as long as he makes efforts based on what they believe his ability

¹ Statutory references are to the Penal Code, unless otherwise indicated.

is, the court – I’m – you know, I don’t have a habit of penalizing the defendants for the true inability to pay, so that’s not a problem.”

Later, Eisenberg volunteered to the court, “I’ve had transportation and financial and medical problems for a long time. They’re all my life now.” And, defense counsel again asked the court if its ruling on a future motion to reduce the felony conviction to a misdemeanor would be contingent upon full payment of all fines and fees. The court answered its ruling on the motion would not be contingent on full payment of all fines and fees. “But, like I said, at the least, [Eisenberg] needs to show diligence, and when probation asks for a financial evaluation, he needs to submit his financial evaluation. If they [sic] determine there’s an ability to pay and he makes an effort to pay whatever the amount is, whether it’s \$10 a month or whatever they decide that he can afford, if any, that’s all that’s required. I make no guarantees on [granting the motion under section 17, subdivision (b)], but that’s – if he at least makes an effort based on what they [sic] determine is the ability to pay, if probation says he has the ability to pay, then so be it. Probation will make that call.”

Eisenberg then entered an open plea to the trial court. At the time he entered his plea, Eisenberg was advised of his constitutional rights and the nature and consequences of his plea, which defendant stated he understood. Thereafter, Eisenberg pleaded no contest to both counts. Defense counsel joined in the waivers of Eisenberg’s constitutional rights. The police report formed the factual basis for the plea. The court expressly found Eisenberg’s waivers and plea were voluntary, knowing and intelligent.

After accepting defendant’s plea, the trial court suspended imposition of sentence and placed Eisenberg on three years of formal probation, on condition he serve nine days in county jail, with credit for time served, and perform 30 days of community service. The court also ordered Eisenberg to pay \$864.10 in victim restitution to the City of Los Angeles. After imposing additional conditions of probation, the court ordered defendant to pay a \$240 restitution fine, a \$30 court security fee, a \$40 criminal conviction

assessment fee, a \$50 lab fee, a \$200 probation revocation fine, which was suspended, and a “\$268 attorney fee.”²

DISCUSSION

Eisenberg contends the trial court erred by ordering him to pay for his appointed counsel’s legal fees without conducting a hearing as required by section 987.8. We agree.

Section 987.8 authorizes a trial court to order a defendant to contribute to the cost of being represented by appointed counsel. Section 987.8, subdivision (b) provides that “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” of legal assistance provided through the public defender or appointed counsel. At the hearing, the defendant is entitled to be heard, to present evidence, to cross-examine adverse witnesses, and to receive a written statement of the reasons for the findings of the trial court. (*Id.* subd. (e); see *People v. Flores* (2003) 30 Cal.4th 1059, 1061.) Although the defendant’s present ability to pay may be inferred from the content and conduct of the hearing (see *People v. Phillips* (1994) 25 Cal.App.4th 62, 71), whether express or implied the finding of ability to pay must be supported by substantial evidence. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398 (*Pacheco*).

In *Pacheco*, the trial court imposed a variety of fees, including appointed counsel’s legal fees, which were statutorily conditioned on the defendant’s ability to pay them. The court made no assessment of the defendant’s ability to pay any of the fees. (*Pacheco*, *supra*, 187 Cal.App.4th at pp. 1396-1399, 1401-1402.) Although the trial court referred the matter to the county department of revenue for an assessment of the defendant’s ability to pay his appointed counsel’s legal fees, it did not condition imposition of the fees on the outcome of that determination. (*Id.* at pp. 1396, 1398.) The referral, according to the appellate court, “shed[] no light on the issue” of the defendant’s ability

² Eisenberg waived his rights to a probation revocation hearing and admitted he violated his probation in an earlier case based on this conviction. The trial court revoked and reinstated probation in that case.

to pay. (*Id.* at p. 1398.) While a county officer may inquire into a defendant's ability to pay, it is the court that must make the ultimate determination; a mere referral does not satisfy this requirement. (*Id.* at pp. 1398-1399.)

Pacheco is dispositive, in that Eisenberg similarly was not given the notice or a hearing required by the statute. The trial court ordered Eisenberg to pay \$268 in appointed counsel's legal fees during his sentencing hearing without referring to Eisenberg's ability to pay the fees, without making Eisenberg's payment contingent upon the probation department's assessment of his ability to pay, and without providing Eisenberg an opportunity to be heard on the matter. The court simply ordered Eisenberg to pay the fees without explanation and without any reference to the reasonableness of the amount.

Apart from these serious procedural defects, there was insufficient evidence to support an implied finding concerning Eisenberg's ability to pay. To the extent Eisenberg's economic status was raised at the plea hearing, the trial court was not obligated to accept his and his counsel's mere assertions of his inability to pay. However, the only relevant information in the record, found in the probation report, indicates Eisenberg was born on October 13, 1959 and was disabled by a back injury in a 1989 car accident. The other portions of the report addressing Eisenberg's education, financial status and employment state "unknown."

The \$268 at issue here, however, does not warrant the inevitable expenditure of public funds required by remand to the trial court. In the interests of judicial economy, we strike the order that Eisenberg pay \$268 in appointed counsel's legal fees.

DISPOSITION

The judgment is modified to strike the \$268 imposed as payment of appointed counsel's legal fees. As modified, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.