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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.

KESHAWN HUFF,

Defendant and Appellant.

B288433

(Los Angeles County
Super. Ct. No. TA143865)

APPEAL from a judgment of the Superior Court of Los Angeles County, Julian C. Recana, Judge. Affirmed and remanded.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Lindsay Boyd, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Keshawn Huff was convicted of pandering by encouraging (Pen. Code § 266i, subd. (a)(2)), an offense for which probation is prohibited by section 1203.065, subdivision (a). The trial court sentenced Huff to three years in prison and ordered him to pay attorney fees. Huff contends that (1) section 1203.065, subdivision (a)'s prohibition of probation for pandering as applied to him constitutes cruel and/or unusual punishment, and (2) the trial court erred in ordering payment of attorney fees without determining Huff's ability to pay. We affirm the sentence, vacate the order to pay attorney fees, and remand for the trial court to conduct a noticed evidentiary hearing to determine Huff's ability to pay prior to imposing attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Huff was charged with pandering by encouraging after being arrested in an undercover human trafficking investigation. Huff pleaded not guilty and was tried by a jury.

Prosecution's Evidence

As part of an undercover investigation, Deputy Sheriff Sinuhe Villegas created a decoy profile on a website called "plentyoffish.com," using two photographs of his partner Deputy Vanessa Dingillo. Villegas used the username "Latina304" and listed "renegade entrepreneur" under "profession" because "304" is slang for "prostitute" and "renegade" is a term that identifies a prostitute who is not under the control of a pimp.

Huff, under the username Scrappydoo71, began to correspond by private message with Latina304. Villegas responded as Latina304 in a matter that caused Huff to understand that Latina304 was a prostitute; he began to

persuade her to work for him as her pimp. In messages that followed, Huff used terms that demonstrated his knowledge of the street slang and terminology used in the sex trade industry.

Huff then asked Latina304 for her phone number. The messages that followed concerned the number of acts of prostitution that would be required, and how much money Latina304 would earn. Latina304 ultimately sent a message indicating she was willing to work with Huff. Villegas then gave Huff a phone number to a decoy cell phone that Dingillo was using.

After Huff sent additional messages to the decoy cell phone, Dingillo and Huff agreed to meet in person at a coffee shop. They spoke on the phone about 10 minutes before Huff arrived at the meeting place. When Huff arrived, Dingillo recognized Huff's voice from the prior phone call, and Huff was arrested. Huff was carrying the phone he had been using to send text messages to Dingillo. His phone listed the decoy cell phone number as "Latina." The prosecution searched Huff's phone and found photographs often seen on commercial sex websites and photos of bundles of cash, which are often used by pimps to show that they can make a lot of money.

Defense's Evidence

Huff denied trying to be a pimp and claimed he had messaged Latina304 seeking female companionship after he and his wife separated. He demonstrated that there was nothing on his cell phone to show that he was previously a pimp. Huff's wife vouched for his honesty, and a longtime friend testified he was honest and reliable. Huff presented evidence that he was a productive member of society, having worked as a security guard for three years.

Trial Proceedings

A jury convicted Huff of pandering by encouraging, and the trial court sentenced him to the minimum sentence of three years in state prison. The trial court noted the probation department's recommendation of a three-year probation sentence and stated it would have given serious consideration to a three-year probation sentence if Penal Code section 1203.065, subdivision (d)(1) had not precluded probation for this crime.¹ The trial court also ordered Huff to pay \$3,049 in attorney fees without a determination of his ability to pay, as the probation report listed his financial status as "unknown."

DISCUSSION

I. The Three-Year Prison Sentence Is Not Unconstitutional Cruel or Unusual Punishment

Pandering, as provided by section 266i, is punishable by a term of three, four, or six years in state prison. Section 1203.065, subdivision (a) states that probation is unavailable to a defendant convicted of pandering. Established law provides that the absolute ban on probation for pandering is not cruel or unusual punishment in the abstract. (*People v. McNulty* (1988) 202 Cal.App.3d 624, 635; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 856-857; *People v. Almodovar* (1987) 190 Cal.App.3d 732, 742, 746.) However, Huff argues that the prohibition of probation as applied to him is unconstitutional as cruel and/or unusual punishment under the Eighth Amendment to the United States Constitution, and article 1, section 17, of the California Constitution.

¹ All further statutory references are to the Penal Code.

When deciding if a punishment in question is cruel or unusual as applied to the offender, courts determine whether the punishment is “grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*People v. McNulty*, *supra*, 202 Cal.App.3d at p. 633.) A punishment is cruel or unusual if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424, superseded by statute on other grounds as stated in *People v. West* (1999) 70 Cal.App.4th 248, 256.) In compliance with the doctrine of separation of powers, a court cannot “lightly encroach upon matters within the domain of the Legislature.” (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) The court must uphold statutes “unless they are clearly and unmistakably shown to be unconstitutional.” (*Lynch*, at pp. 414-415.)

Huff contends that sentencing him to three years in state prison rather than granting probation is grossly disproportionate to his individual culpability. Huff argues that he was not a pimp and only appeared to be a pimp as a ruse to get Dingillo to talk to him because he sought female companionship after his separation with his wife. He points out that he had no criminal record and no history of alcohol or substance abuse. Huff claims that there was no violence or threat of violence and that there was no victim of the crime because Latina304 was merely a sheriff pretending to be a prostitute. Huff argues that these circumstances lessen his culpability and support the probation officer’s recommendation of a three-year probation sentence.

Despite Huff’s claims of lowered culpability, the three-year prison sentence does not rise to the level of clear and

unmistakably unconstitutional cruel or unusual punishment. The jury rejected Huff's defense that he only pretended to be a pimp for female companionship. By convicting Huff, the jury affirmatively concluded that Huff had the requisite intent to pander. The Legislature has demonstrated its belief that pandering and pimping are "so dangerous to society as to justify a three-year minimum penalty to deter its practice." (*People v. McNulty*, *supra*, 202 Cal.App.3d at p. 633.) While Huff does not have a prior criminal history and the crime did not involve force or violence, the punishment is not so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch*, *supra*, 8 Cal.3d at p. 424.)

II. The Trial Court Erred in Failing to Determine Huff's Ability to Pay Attorney Fees

Section 987.8 provides that a county may recover some or all of the costs of defense expended on behalf of an indigent criminal defendant only if the court concludes, after notice and an evidentiary hearing, that the defendant has the "present ability ... to pay all or a portion" of the defense costs. (§ 987.8, subds. (b), (c), (e); *People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1420.) The trial court ordered Huff to pay attorney fees without first holding a noticed evidentiary hearing and determining his ability to pay. Huff contends, respondent concedes, and we agree, that this was erroneous. Thus, we vacate the order to pay attorney fees and remand for the trial court to hold a hearing to determine Huff's ability to pay prior to imposing attorney fees. (See *People v. Prescott* (2013) 213 Cal.App.4th 1473, 1476 ["since the trial court failed to consider Prescott's ability to pay as required by section 987.8, we remand the matter for a new hearing"].)

DISPOSITION

We affirm the judgment, vacate the order to pay attorney fees, and remand for the trial court to conduct a noticed evidentiary hearing to determine Huff's ability to pay prior to imposing attorney fees.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.