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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.  
TRACY MARGARET ALCANTRA,  
Defendant and Appellant.

A128974

(Sonoma County  
Super. Ct. No. SCR526995)

Defendant pleaded no contest to 13 felony counts, admitted three prior convictions, and admitted four out-on-bail enhancements. The trial court struck her prior Three Strikes conviction under Penal Code section 1385,<sup>1</sup> and sentenced her to a total prison term of eight years and four months. The court also ordered payment of her appointed attorney's fees in the amount of \$2,000. On appeal, defendant challenges the order to pay \$2,000 for the cost of her appointed counsel. She asserts that she did not receive notice that such an order might be made, the court did not follow the requirements of section 987.8 in imposing the order, and the evidence was not sufficient to demonstrate that she had the ability to pay those fees. The People agree that the court's order was in error. Accordingly, we strike the order requiring defendant to pay \$2,000 for the cost of counsel.

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<sup>1</sup> All unspecified code sections refer to the Penal Code.

## **BACKGROUND**

On April 2, 2010, an amended second consolidated information charged defendant with 28 counts, two of them misdemeanors, including passing a forged check, second degree burglary, conspiracy, passing a fictitious check, grand theft, attempted grand theft, possession of methamphetamine, transporting methamphetamine, passing an unfinished check, possession of a counterfeit driver's license, theft from an elderly and dependent adult, receiving stolen property, and putting into circulation a check to circulate as money.<sup>2</sup> The information also alleged numerous prior felony convictions.

Defendant pleaded no contest to 13 felony counts, admitted three prior convictions, and admitted four out-on-bail enhancements. The probation officer prepared a report that recommended a sentence of eight years and four months in prison. The report also recommended the imposition of certain fees and fines, but did not recommend that the court impose a fee for the cost of counsel.

On May 12, 2010, the trial court struck defendant's prior Three Strikes conviction under section 1385, and sentenced defendant to a total prison term of eight years and four months. In addition, among other fees and fines, the court ordered defendant to pay \$2,000, the cost of defendant's appointed counsel, to be collected by the California Department of Corrections and Rehabilitation.

Defendant filed a timely notice of appeal.

## **DISCUSSION**

Defendant contends that the court erred when it ordered her to pay the \$2,000 fee of her appointed counsel. She maintains that she never received notice that such an order might be made, the court did not comply with the requirements of section 987.8 in imposing the order, and the evidence did not sufficiently demonstrate that she had the ability to pay those fees.

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<sup>2</sup> We do not set forth the facts underlying the charges as they are not relevant to the issue raised on appeal.

Section 987.8 provides as follows: “(b) 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 . . . , 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. . . .

“(c) In any case . . . in which the defendant, at the conclusion of the case, appears to have sufficient assets to repay, without undue hardship, all or a portion of the cost of the legal assistance provided to him or her, . . . the court shall make a determination of the defendant’s ability to pay as provided in subdivision (b), and may, in its discretion, make other orders as provided in that subdivision.

“[¶] . . . [¶]

“(f) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement against the property of the defendant in the same manner as any other money judgment.

“(g) As used in this section:

“[¶] . . . [¶]

“(2) ‘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. 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.

“(C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing.

“(D) Any other factor or factors which may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.”

In the present case, the record does not establish that defendant received the proper notice or that the trial court conducted a hearing on defendant’s ability to pay attorney fees. Defendant did not object, but the court in *People v. Viray* (2005) 134 Cal.App.4th 1186 explained that the doctrine of forfeiture is inappropriate where the trial attorney would have to lodge an objection concerning a client’s ability to pay the attorney’s own fees. (*Id.* at p. 1214.) Furthermore, defendant did not have to object in the present case because one of her challenges to the order was based on insufficient evidence. (*Id.* at p. 1217 [no objection in the trial court is necessary when objection to the order is based on the insufficiency of the evidence]; see also *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [same].)

The People agree that the record on appeal does not indicate that defendant receive notice of a potential assessment for attorney fees. The People also concur that the record also does not show that the court made any finding on defendant’s ability to pay or that an unusual circumstance exists.

Our review of the record establishes that the lower court did not comply with section 987.8 and insufficient evidence supports the lower court’s order. Defendant is currently serving her sentence of eight years and four months and has been ordered to pay \$949.39 in restitution to the victim, \$810 for court security fees, and \$8,000 pursuant to section 1202.4. Accordingly, we agree with defendant that the record indicates that she cannot pay the \$2,000 attorney fees

and, therefore, in the interest of judicial economy, we will strike the order for payment of attorney fees rather than remand the matter to the trial court for a hearing on her ability to pay. Indeed, the People also recommend that we strike the order to pay \$2,000 in attorney fees.

**DISPOSITION**

The order to pay \$2,000 in attorney fees is stricken and the judgment is otherwise affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.