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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON ADAM LOPEZ, Defendant and Appellant.	E048020 (Super.Ct.Nos. FMB800122 & FMB800294) OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed as modified.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, and Elizabeth S. Voorhies, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Jason Adam Lopez pleaded guilty to two felony charges in one case, and admitted a violation of probation in another case. He appeals two sentencing matters: the stay of a sentence for receiving stolen property, and the order to

pay $150 to reimburse defense attorney costs. The People concede the error as to both matters. We therefore modify the judgment and affirm as modified.

FACTS AND PROCEDURAL HISTORY

In March 2008, defendant was charged with one count of burglary, one count of receiving stolen property, and one count of possession of a controlled substance. Defendant pleaded guilty to all three charges and was placed on probation.

In September 2008, a new information was filed charging defendant with two counts of aggravated assault, and alleging defendant had a strike prior. In March 2009, defendant pleaded guilty to both new counts and admitted the strike prior. In the new case, the trial court sentenced defendant to the aggravated term of three years on the first aggravated assault charge, and a consecutive term of one year on count 2. This four-year term was doubled because of the strike prior. Among other sentencing provisions, the trial court ordered defendant to pay $150 for attorney fees, pursuant to Penal Code section 987.8.[1]

The court also found defendant in violation of probation in the earlier case. The court imposed sentence in the earlier case, consisting of the aggravated term of six years for the burglary, three years on the receiving stolen property count, and three years on the drug offense, all to run concurrently to the sentence in defendant's new case.

Defendant filed timely notices of appeal in each case.

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

ANALYSIS

I. The Trial Court Erred in Sentencing Defendant on Both the Burglary and the Receiving Stolen Property Counts

The trial court sentenced defendant to concurrent prison terms for the burglary charged in count 1 of the earlier case, and for the charge in count 2 of receiving stolen property. In March 2008, a homeowner called sheriff's deputies and notified them of a break-in. Guitars, jewelry and other items had been taken from the home. Deputies tracked a distinctive shoeprint from the scene to a house nearby. Defendant was inside, where deputies also found the items of stolen property, as well as the shoes. The charge of receiving stolen property was thus based entirely on the same theft that formed the basis for the burglary charge.

Under section 654, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." With respect to the offenses of burglary and receiving stolen property, where the charge of receiving stolen property is based upon the same theft of property underlying the burglary charge, both offenses are committed with a single intent and objective, and punishment for the lesser offense must be stayed under section 654. (*People v. Allen* (1999) 21 Cal.4th 846, 864-865; *People v. Landis* (1996) 51 Cal.App.4th 1247, 1253-1254.)

By letter brief, the People concede the error, and agree that the prison sentence imposed for the count of receiving stolen property should be stayed.

II. The Order to Pay $150 for Attorney Fees Should Be Stricken

In sentencing defendant in the more recent case, the trial court ordered that defendant should pay $150 toward the costs of his public attorney. Defendant argues that the court erred in imposing the order without giving notice of a hearing or making a determination as to defendant's ability to pay.

An assessment of attorney fees against a criminal defendant involves a taking of property. Due process requires that the defendant thus be given notice and a hearing before a taking occurs. (*People v. Amor* (1974) 12 Cal.3d 20, 29-30; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72.) Section 987.8 addresses the due process concerns by providing a procedure for ascertaining a criminal defendant's ability to pay for his or her court appointed attorney. That is, the court may set an amount of reimbursement only after notice and a hearing, and a determination of the defendant's "present ability . . . to pay all or a portion of the cost" of the publicly appointed counsel. (§ 987.8, subd. (b).)

"'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," including the defendant's present financial circumstances, and the defendant's reasonably discernible ability to obtain employment within six months of the hearing. (§ 987.8, subd. (g)(2).) That is, the prospect of incarceration longer than six months will generally impair a defendant's ability to pay.

Again, the People concede the issue: "In this case, there is no evidence in the record to suggest that the trial court complied with the procedural provisions of section 987.8. Further, while the determination of a defendant's ability to pay may be implied

(*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347), the challenged attorney fee order does not appear to be supported by substantial evidence (*ibid*), as [defendant] was found to be unable to pay any portion of the cost of court-appointed attorney's fees when he was granted probation [in the earlier case], and in the current case he was sentenced to an 8-year term in state prison."

Accordingly, in the interest of judicial economy, the People do not request a remand for further proceedings, but acquiesce to defendant's request to strike the attorney fee order.

DISPOSITION

The sentence is modified to stay the imposition of the prison term under count two of the earlier case (case No. FMB80122) for receiving stolen property. The sentence is further modified to strike the order that defendant pay $150 in reimbursement of the costs of his publicly appointed attorney. The abstract of judgment is ordered corrected to reflect these changes, and we order that a copy of the amended abstract of judgment be forwarded to the Department of Corrections and Rehabilitation. As so corrected and modified, the judgment is affirmed.

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/s/ McKINSTER
Acting P. J.

We concur:

/s/ RICHLI
J.

/s/ MILLER
J.