

REGISTRATION AND TESTING ORDERS
&
ATTORNEYS FEES ORDERS
Materials & Presentation by Cheryl Anderson, CCAP Staff Attorney

I. REGISTRATION AND TESTING ORDERS

A. Statutorily Unauthorized

The statute should always be consulted to see if the order is justified - i.e., does the offense trigger the disability?

For example, where there is insufficient evidence of a transmission of bodily fluids in violation of Penal Code section 288, an order that the defendant undergo AIDs testing may be unauthorized. (*People v. Butler* (2003) 31 Cal.4th 1119, 1127-1129.)

B. Constitutional Challenges

Registration orders are challenged less often on Eighth Amendment grounds since the orders have been found non-punitive. (*In re Alva* (2004) 33 Cal.4th 254 [sex offender registration non-punitive].) However, registration orders not imposed on all similarly situated individuals are sometimes challenged as a violation of Equal Protection. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1192-1193 [court held a defendant who pled guilty to oral copulation with a 16-year-old (Pen. Code, § 288a, subd. (b)(1)) was denied equal protection because Penal Code section 290 mandates sex offender registration for conviction of the offense, whereas the court has discretion to impose the registration requirement when a person is convicted of unlawful sexual intercourse with a minor (Pen. Code, § 261.5) under the same circumstances].)

C. Recent Cases

Case Name: *Good v. Superior Court*, **District:** 1, **Div.:** 1, **Case #:** A117317

Citation: 158 Cal.App.4th 1494

Held: Proposition 69 requires misdemeanants who must register as sex offenders to provide DNA samples regardless of whether their conviction occurred before or after the passage of Proposition 69. Mr. Good was convicted of indecent exposure in 1996, and was required to annually register as a sex offender under Penal Code section 290. At the time of his conviction, he was not required to provide a DNA sample. In 2004, Proposition 69 changed the law to mandate that all persons required to register as sex offenders submit DNA samples. In 2005, Good was sent a letter directing him to report to the police department to provide a sample. He petitioned the appellate court for a writ of prohibition. The appellate court denied the writ. The electorate intended misdemeanor sex offenders to submit DNA samples regardless of the date of their misdemeanor conviction.

Case Name: *In re Crockett*, **District:** 1, **Div.:** 2, **Case #:** A117772

Citation: 159 Cal.App.4th 751

Held: California court had no authority to require sex offender registration of a juvenile adjudicated in Texas. A Texas juvenile court placed Crockett, a minor, on probation following conviction of a sex offense, and required him to register as a sex offender in Lake County, California where he was to reside with his mother. Crockett applied for probation supervision in California and agreed to live up to the conditions of probation as fixed by both states, and acknowledged notification of his registration requirement. He subsequently failed to register as a sex offender in Lake County, and subsequently in Mendocino County, where he moved. Lake County filed a complaint alleging failure to register, which was dismissed because the court concluded he was not required to register. Mendocino County revoked his probation for failing to register and sentenced Crockett to state prison. Crockett filed a petition for writ of habeas corpus in Mendocino, arguing that his failure to register as a sex offender did not constitute a violation of section 290. The petition was denied. He filed a petition to the appellate court, arguing that the trial court lacked jurisdiction to convict him of failing to register. The appellate court agreed, granted the petition, and vacated the judgment. In re Derrick B. held that section 290's registration requirement applied only in adult cases. As a juvenile adjudicated and placed on probation in Texas, Crockett was not required to register as a sex offender in California. California courts had no authority to require registration based on the Texas court order, and the Mendocino County court lacked jurisdiction to convict him of failure to register as a juvenile sex offender in California.

II. ATTORNEYS FEES ORDERS

A. Inadequate Notice of Hearing or Inadequate Hearing

Pursuant to Penal Code section 987.8, subdivision (b), "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 court appointed counsel]." (Emphasis added.)

The failure to object to a fee order on the grounds of lack of notice or an inadequate hearing forfeits challenges on those grounds. (See *People v. Klockman* (1997) 59 Cal.App.4th 621, 628; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1395-1396; *People v. Phillips* (1994) 25 Cal.App.4th 62; but see *People v. Vilray* (2005) 134 Cal.App.4th 1186, 1216 ["We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning his own fees."].)

B. Insufficient Evidence

1. Present Ability to Pay

A determination that a defendant has the present ability to pay is a prerequisite for entry of an attorney's fees order. (Pen. Code, § 987.8, subd. (e).) While such a determination may be implied, the order cannot be upheld on review unless it is

supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

Persons committed to state prison are presumed unable to pay attorneys fees (Pen. Code, §987.8, subd. (g)(2)(B)).

2. Costs

In *People v. Vilray*, *supra*, 134 Cal.App.4th 1186, the Court of Appeal reversed an order for attorneys fees which was entirely unsupported by evidence that the amount requested by the public defender represented the actual costs to the county of the services provided to defendant.

A sufficiency of evidence challenge is forfeited only by failing to file a timely notice of appeal. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *People v. Butler* (2003) 31 Cal.4th 1119, 1126, quoting *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17 ["Generally, points not urged in the trial court cannot be raised on appeal. ... The contention that a judgment is not supported by substantial evidence, however, is an obvious exception"].)

C. Probation Condition

Reimbursement of attorneys fees may not be imposed as a condition of probation. (*People v. Faatiliga* (1992) 10 Cal.App.4th 1276 [Sixth Dist.], overruled in part by *People v. Flores* (2003) 30 Cal.4th 1059; *People v. Johnson* (1972) 27 Cal.App.3d 781.)