

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIE THOMAS,

Defendant and Appellant.

A129933

(Alameda County

Super. Ct. No. C158950)

ORDER MODIFYING OPINION;
NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on May 16, 2012, be modified as follows:

1. On page 11, line 4, the text in parentheses reading “(§ 187, subd. (a))” is modified to “(Pen. Code, § 187, subd. (a))” with the addition of footnote number 4 inside the close parentheses.

Footnote number 4 adds the following footnote, which will require renumbering of all subsequent footnotes: “All subsequent undesignated statutory references are to the Penal Code.”

2. On page 22, line four, the parenthetical citation “(*People v. Middleton* (1997) 52 Cal.App.4th 19, 34.)” is modified to “(*People v. Middleton* (1997) 52 Cal.App.4th 19, 34, disapproved on another point in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752–753, fn. 3.)”

3. At the end of the Discussion section on page 25 and before the Disposition section on page 26, insert the following:

The Probation Fee

Section 1203.1b authorizes the recovery of costs incurred in preparing probation reports. In short, the defendant can be required to pay the cost of preparing the report, provided that cost is not excessive. (§ 1203.1b, subd. (a).) So long as the defendant does not waive his right, the trial court must determine the defendant's ability to pay and afford the defendant a hearing. (§1203.1b, subd. (b).) Here, the trial court imposed several fees on Thomas, including a \$200 probation report fee. Thomas argues that because there is insufficient evidence that he has the ability to pay it, it should be stricken.

However, Thomas did not object to the imposition of this fee at sentencing. The issue, then, is whether Thomas's failure to object forfeits his claim on appeal, in accordance with the general rules of forfeiture. (See *People v. Welch* (1993) 5 Cal.4th 228, 232–237.) Thomas argues that because he is challenging the sufficiency of the evidence rather than a discretionary sentencing choice, his claim should not be deemed forfeited.

But the insufficient evidence exception to the forfeiture rule that Thomas relies upon does not generally apply in a sentencing context. The failure of a sentencing court to properly make or articulate its discretionary sentencing choices may not be raised for the first time on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) The forfeiture rule applies and will bar a challenge to the evidentiary basis for court-imposed fees unless first raised in the trial court. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075; see also *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469 [considerations of fairness and orderly and efficient administration of the law warrant application of the forfeiture doctrine to bar substantial evidence challenge to the amount of a restitution fine].) Thomas forfeited his right to challenge the probation report fee by his failure to object to it in the trial court. He presents no argument that convinces us to depart from the application of the forfeiture doctrine.

There is no change in the judgment.

Dated: June 13, 2012

McGuiness, P.J.