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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

A136722

ESTEBAN DIAZ ORTIZ,

**(Alameda County
Super. Ct. No. H50336)**

Defendant and Appellant.

_____ /
Appellant Esteban DiazOrtiz pleaded no contest to numerous felonies and the court sentenced him to state prison. It also ordered appellant to pay various fines and fees, including a \$250 probation investigation fee pursuant to Penal Code section 1203.1b.¹

On appeal, appellant contends the probation investigation fee must be reversed because there was insufficient evidence he had the ability to pay it. We affirm. We conclude appellant forfeited his claim regarding his inability to pay the probation investigation fee by failing to object to the imposition of the fee in the trial court.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant pleaded no contest to seven counts of forcible sodomy (§ 286, subd. (c)(2)), one count of committing a lewd act on a person under 14 (§ 288, subd. (b)(1)), one count of oral copulation on a person under 14 and 10 years younger than appellant (§ 288a, subd. (c)(1)), and three counts of sodomy on a person under 14 and 10 years younger than appellant (§ 286, subd. (c)(1)). As part of the plea agreement, the parties stipulated the court would sentence appellant to state prison for 99 years. The probation report recommended, among other things, that the court order appellant to “pay a Probation Investigation Fee of \$250.00 pursuant to Section 1203.1b.”

The court denied appellant’s motion to withdraw his plea and sentenced him to the stipulated prison term. It also imposed various fines and fees, including the \$250 section 1203.1b probation investigation fee. Appellant did not object to the imposition of any of the fines or fees, nor did he seek a hearing before the probation officer as allowed by statute. (See § 1203.1b, subd. (a).)

Appellant timely appealed.

DISCUSSION

Appellant’s sole claim on appeal is the probation investigation fee imposed pursuant to section 1203.1b must be reversed because there is no evidence he has the ability to pay the fee. Section 1203.1b subdivision (a), provides in pertinent part: “In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report . . . the probation officer, or his or her authorized representative, . . . shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report pursuant . . . of conducting any presentence investigation and preparing any presentence report made pursuant . . . and of processing a jurisdictional transfer pursuant . . . or of processing a request for interstate compact supervision. . . . The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The

probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." Section 1203.1b also defines "ability to pay." (See § 1203.1b, subd. (e).)

The People contend appellant forfeited the issue by failing to object to the imposition of the probation investigation fee in the court below. We agree. *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 (*Valtakis*) is instructive. There, a division of this court concluded "failure to object in the trial court to statutory error in the imposition of a probation fee under section 1203.1b waives the matter for purposes of appeal." (*Valtakis*, at p. 1072.) As the court explained, "[t]o allow a defendant and his counsel to stand silently by as the court imposes a \$250 fee, as here, and then contest this for the first time on an appeal that drains the public fisc of many thousands of dollars in court and appointed counsel costs, would be hideously counterproductive. It would also be completely unnecessary, for the Legislature has provided mechanisms in section 1203.1b for adjusting fees and reevaluating ability to pay *without an appeal* anytime during the probationary period (§ 1203.1b, subd. (c)) or the pendency of any judgment [citation]." (*Valtakis*, at p 1076.)

Other courts have reached similar conclusions. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [defendant forfeited claim regarding his inability to pay one of two crime prevention fines because he "did not raise the issue in the trial court"]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1469 (*Gibson*) [claim of inability to pay restitution fine waived by failure to object below].) As the *Gibson* court explained, "[a]s a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a

defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal.” (*Gibson*, at p 1076.)

Appellant relies on a single case, *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), to support his argument that the probation investigation fee must be reversed. In *Pacheco*, the appellate court struck a probation investigation fee where there was “no evidence in the record that anyone . . . made a determination of [defendant’s] ability to pay the \$64 per month . . . fee” and where “the statutory procedure provided at section 1203.1b for a determination of [defendant’s] ability to pay probation related costs was not followed.” (*Id.* at p. 1401.) The *Pacheco* court held the defendant’s challenge to the probation investigation fee was not forfeited because it was “based on the insufficiency of the evidence[,]” which “do[es] not require assertion in the court below to be preserved on appeal.” (*Id.* at p. 1397.)

The California Supreme Court has disapproved *Pacheco*. (*People v. McCullough* (Apr. 22, 2013) 2013 Cal. LEXIS 3330 (S192513) (*McCullough*).)² In *McCullough*, our high court held the defendant forfeited his claim regarding his inability to pay a jail booking fee imposed pursuant to Government Code section 29550.2 by failing to object in the trial court. As the *McCullough* court explained, a “[d]efendant may not ‘transform . . . a factual claim into a legal one by asserting the record’s deficiency as a legal error.’ [Citation.] By ‘failing to object on the basis of his [ability] to pay,’ defendant forfeits both his claim of factual error and the dependent claim challenging ‘the adequacy of the record on that point.’ [Citation.]” (*McCullough*, at p. __.) The court continued, “a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the

² Appellant’s opening brief did not address the forfeiture issue and did not mention that review was pending in *McCullough* when he filed his opening brief. The issue was raised by respondent; appellant did not file a reply brief. The California Supreme Court issued its decision in *McCullough* after briefing was completed in this case.

booking fee on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it.” (*Id.* at p. __.)

The same rationale applies here. Appellant presents a claim of sufficiency of the evidence to support the probation investigation fee, an issue that cannot be resolved without examining the facts presented below. Appellant was aware the court might impose the probation investigation fee because the probation report recommended the court order him to pay it. Appellant not only failed to object to the probation investigation fee, he asserted no claim of financial infirmity, and made no request for a hearing on his ability to pay any of the fines or fees. His claim of error regarding the imposition of the probation investigation fee could have been readily corrected or avoided — and more appropriately reviewed on appeal — had appellant interposed a timely objection in the trial court. In the interest of ensuring the fair and orderly administration of justice, we conclude appellant forfeited his challenge to the imposition of the probation investigation fee imposed pursuant to section 1203.1b.

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.