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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.

JORDAN PUMATAIVA LYONS,

Defendant and Appellant.

A138846

(Contra Costa County
Super. Ct. No. 41759414)

On May 15, 2013, pursuant to a negotiated disposition, defendant Jordan Pumataiva Lyons waived his right to a preliminary examination; entered a plea of no contest to a count of second degree burglary; admitted that he had suffered a prior conviction; and was sentenced to a term in the county jail followed by a period of probation. This appeal involves only two incidents of that sentence.

Immediately after imposing sentence, the following occurred:

“THE COURT: . . . Following fines and fees are subject to your ability to pay and are subject to an ability to pay analysis by probation. If you disagree with their analysis, you’re entitled to a hearing before a court with representation by counsel:

“A \$40 court operations assessment;

“A \$30 criminal conviction assessment;

“A probation report preparation fee of \$176;

“And the costs of your mandatory [probation] supervision not to exceed \$75 per month. But, again, that’s subject to your ability to pay.

“MS. SABA [defense counsel]: I’m sorry, your Honor, I’m objecting. I think the

ability to pay analysis has to be done today. I don't believe Mr. Lyons has the ability to pay.

“THE COURT: No, I respectfully disagree. I'm referring the matter for an administrative analysis by probation to determine his ability to pay. If he disagrees with that analysis then he is entitled to a full hearing before this court.”

Defendant contends, and the Attorney General agrees, that imposition of the \$75 monthly probation supervision fee was error because defendant would be subject to mandatory supervision in accordance with Penal Code section 1170, subdivision (h)(5)(B)(i.) The parties further agree that this provision must be stricken, and we will so order. However, this provision does not appear on the abstract of judgment, so no amended abstract need be prepared on this account.

Defendant's second and final contention is that the probation report fee of \$176 must also be stricken because it was imposed before a determination as to his ability to pay had been made. We agree.

The governing statute is Penal Code section 1203.1b. The operative language is as follows:

“(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, 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 to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203 . . . , inclusive, whichever applies. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or

presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. 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.

“(b) When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative. . . .”

The Attorney General defends what was done by reading the statute as in effect establishing a three-step process. First, the court orders the defendant to pay certain fines and assessments. Second, the probation officer determines the defendant's ability to pay the fines and assessments imposed. Third, if the defendant wishes to challenge the probation officer's determination, he or she is entitled to a hearing and a judicial resolution of the defendant's ability to pay. This construction is untenable.

A fair reading of the statute looks first to subdivision (b), because a condition precedent to imposition of a probation report fee is the probation officer's determination that the defendant has the ability to pay. This is the obvious logic of subdivision (b)'s plain language that “The court shall order the defendant to pay the reasonable costs if it

determines that the defendant has the ability to pay those costs based on the report of the probation officer” The point is reiterated in subdivision (b)(2): “At the hearing, if the court determines that the defendant has the ability to pay. . . , the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county, in the manner which the court believes reasonable and compatible with the defendant’s financial ability.” (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070; *People v. Hall* (2002) 103 Cal.App.4th 889, 892-893.)

This was not the procedure followed here. Almost certainly due to the expedited speed of the change of plea and sentencing, the probation officer’s report makes no mention of defendant’s ability to pay any fines or assessments. The court’s imposition of the probation report fee of \$176 was therefore premature and cannot stand. (*People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1067-1068; *People v. Hall, supra*, 103 Cal.App.4th 889, 894.) The fee may be reassessed once the statutorily-mandated procedures are followed.

Ordinarily, because this fee does appear on the abstract of judgment, we would order preparation of a new abstract. However, that will not be necessary unless and until the court declines to impose a fee, or imposes a fee in a differing amount based upon a determination of defendant’s ability to pay.

The probation supervision fee of \$75 and the probation report fee of \$176 are stricken. The cause is remanded to the trial court for further proceedings in conformity with Penal Code section 1203.1b and this opinion. The judgment is affirmed in all other respects. If defendant is ordered to pay a fee pursuant to Penal Code section 1203.1b in a sum other than \$176, the clerk of the trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Richman, J.

We concur:

Kline, P.J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.