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

THE PEOPLE,

Plaintiff and Respondent,

v.

COREY DESHAWN RICHARDSON,

Defendant and Appellant.

A138977

(Contra Costa County  
Super. Ct. No. 51304682)

On April 30, 2013, Corey Deshawn Richardson (defendant) pled no contest to two felonies—second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) (Count 6) and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)) (Count 8)—based on his involvement in the December 2012 robbery of a Domino’s Pizza restaurant in Pittsburg.<sup>1</sup> Defendant also admitted to violating probation by committing these new crimes. After taking defendant’s plea, the trial court imposed a three-year prison sentence on Count 8 and a concurrent two-year term on Count 6.<sup>2</sup> In addition, the trial court imposed a number of fees, including a probation report fee of \$176 pursuant to section 1203.1b.

<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> We note that a clerical error appears in the abstract of judgment, as it indicates that the court imposed the three-year sentence for Count 6 and the concurrent two-year term for Count 8, rather than vice versa. Accordingly, any amended abstract of judgment prepared by the clerk of the superior court as a result of this opinion should also correct this error.

During the sentencing hearing on April 30, defendant's attorney, Mr. Banks, asked the trial court to waive any fees based on ability to pay, including the probation report fee, to which the court responded as follows:

"THE COURT: At this time, Mr. Banks, I will not be holding a hearing on the ability to pay. I am referring the matter of both defendants' ability to pay the fines and fees to Probation.

"Because they will be remaining in local custody, they will have time to meet with Probation; and if they disagree with Probation's assessment of their ability to pay, they have a right to a hearing before the Court and of course they may do that.

"MR. BANKS: So you are referring it to Probation, which is fine, but not imposing the fines at this time?

"THE COURT: Yes, I am imposing the fines and fees at this time, and Probation will determine if that's indeed appropriate. What will happen is they can convert it or I will convert it to volunteer hours based on their assessment of ability to pay."

Defendant's attorney objected to the procedure adopted by the trial court, citing the recent case of *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*) for the proposition that a person's ability to pay must be determined prior to the imposition of a fee pursuant to section 1203.1b. While it acknowledged *McCullough*, the trial court refused to follow it, citing the unusual circumstance that defendant would be in local custody for a period of time prior to his transfer to state prison and thus would have time to be evaluated for his ability to pay. Defendant's attorney reiterated his objection to the imposition of the \$176 probation report fee, but the trial court nevertheless assessed it against defendant.

Defendant's sole contention on appeal is that the probation report fee of \$176 must be stricken because it was imposed before a determination as to his ability to pay. The Attorney General concedes this point and asks in the interests of judicial economy that, rather than remanding the matter for further hearing, we simply strike the fee and direct the clerk of the superior court to correct the minutes of the sentencing hearing and to

prepare an amended abstract of judgment reflecting that fact. We agree that the fee was improperly imposed, and adopt the remedy requested by the Attorney General.

## I. DISCUSSION

Section 1203.1b sets forth the procedure to be followed before the trial court may impose a fee for preparation of a probation report. First, the trial court must order the defendant to report to the probation officer, who will make a determination of the defendant's ability to pay the fee. (§ 1203.1b, subd. (a).) After the probation officer determines the amount the defendant may be able to pay, the probation officer must inform the defendant that he or she is entitled to a hearing, during which the trial court will make a determination of the defendant's ability to pay and the payment amount. (*Ibid.*) A defendant may waive his or her right to a hearing, but this waiver must be made knowingly and intelligently. (*Ibid.*) If the defendant does not waive his or her right to a hearing, the probation officer must refer the matter back to the trial court, and the trial court "shall order the defendant to pay the reasonable costs *if it determines that the defendant has the ability to pay those costs . . . .*" (*Id.*, subd. (b), italics added; see also *id.*, subd. (b)(2) ["[a]t the hearing, *if the court determines that the defendant has the ability to pay all or part of the costs*, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability," italics added].)

In *McCullough*, the Supreme Court concluded that a defendant who was required to pay a booking fee under subdivision (a) of section 29550.2 of the Government Code "had the right to a determination of his ability to pay the booking fee before the court ordered payment." (*McCullough, supra*, 56 Cal.4th at pp. 592-593.) The Court based its decision on the plain language of the statute, which provides that " '*if the person has the ability to pay*, a judgment of conviction shall contain an order for payment of' the booking fee." (*Id.* at p. 592, italics added.) Similarly, in the present case, the plain language of section 1203.1b requires that an ability-to-pay determination be made prior to the imposition of a probation report fee. (§ 1203.1b, subs. (a) & (b); see also *People*

*v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400-1401, disapproved on another ground in *McCullough, supra*, 56 Cal.4th at p. 599 [case remanded on issue of probation supervision fees under section 1203.1b where no determination made regarding ability to pay]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068 [same] .)

## II. DISPOSITION

The case is remanded with directions for the superior court clerk to (1) correct the minutes of the April 30, 2013, sentencing hearing to reflect the fact that the \$176 probation report fee has been stricken, and (2) prepare an amended abstract of judgment striking the \$176 probation report fee and otherwise correcting the clerical errors in the abstract indentified in this opinion. The clerk is further directed to transmit copies of the amended abstract of judgment to the appropriate parties, including the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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REARDON, J.

We concur:

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RUVOLO, P. J.

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RIVERA, J.