

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.111.5.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANGEL HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B235289
(Super. Ct. No. 2008044775)
(Ventura County)

ON REMAND

This case is before us on remand after the California Supreme Court granted review and transferred the matter with directions to vacate our decision and reconsider the cause in light of *People v. McCullough* (2013) 56 Cal.4th 589. (Cal. Rules of Court, rule 8.528(d).) In an unpublished opinion, we struck a \$1,524 presentence investigation fee because there was insufficient evidence to support the finding that appellant had the financial ability to pay the fee. (Pen. Code, § 1203.1b. subs. (b) & (e).)¹ We vacate our decision and affirm the judgment on the ground appellant forfeited the issue by not objecting to the imposition of the presentence investigation fee. (*People v. McCullough, supra*, 56 Cal.4th at p. 597-599; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072.)

Appellant was convicted by plea of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), making terrorist threats (§ 422), three counts of resisting an executive

¹ All statutory references are to the Penal Code unless otherwise stated.

officer (§ 69), obstructing an officer (§ 148, subd. (a)) and vandalism (§ 594, subd. (b)(2)(A)), and admitted two prior strike convictions (§§ 667, subds. (c) - (e); 1170.12, subds. (a) – (c)) and a prior serious felony conviction enhancement (§ 667, subd. (a)(1)). The guilty plea was based on a preliminary hearing transcript and probation report reflecting that appellant got into a fight with a roommate (Martin Delgado), threatened to kill Delgado and his brother, threatened to kill the officer responding to the 911 call, and resisted three officers.

At the sentencing hearing, the trial court read and considered the probation report and statement-in-mitigation letters, and sentenced appellant to 18 years 4 months state prison. Appellant was ordered to pay victim restitution, \$1,200 restitution fines, \$1,391.64 to the Victim Compensation & Government Claims Board (§ 1202.4), and a \$1,524 presentence investigation fee (§ 1203.1b). The trial court asked defense counsel: "[I]s there anything else you want to put on the record?" Counsel replied, "No. Thank you very much"

Presentence Investigation Fee

The \$1,524 presentence investigation fee is based on section 1203.1b which authorizes the recoupment of certain costs incurred for the preparation of presentence investigations and reports on the defendant's amenability to probation. (See *People v. Valtakis, supra*, 105 Cal.App.4th at p. 1070.) Section 1203.1b, subdivision (b) provides in pertinent part: "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 based on the report of the probation officer, or his or her authorized representative."

Appellant argues that the trial court failed to find that he had the ability to pay the fee and there is insufficient evidence to support such a finding. The Attorney General contends, and we agree, that appellant forfeited the issue by not objecting at sentencing. (*People v. Valtakis, supra*, 105 Cal.App.4th at pp. 1071-1072 [§ 1201.1b probation fee].) In *People v. McCullough, supra*, 56 Cal.4th 589, our Supreme Court recently held that defendant's failure to object to the imposition of a jail booking fee (Gov. Code, § 29550.2) forfeited the claim that defendant lacked the ability to pay the fee. The court concluded that

defendant's financial ability to pay the fee was a question of fact, not law. (*Id.*, at p. 597.) "Defendant 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.' [Citations.] . . . [B]ecause a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*People v. McCullough, supra*, 56 Cal.4th at p. 592.)

The same rationale applies to presentence investigation fees. Before sentencing, appellant was on notice that the trial court might impose a \$1,524 presentence investigation fee because the probation report recommended that appellant pay the fee. (See § 1203, subd. (b)(2)(E) [defendant and counsel must be provided copy of probation report before sentencing]; *People v. Scott* (1994) 9 Cal.4th 331, 350-351.) On the advice of counsel, appellant declined to speak to the probation officer who prepared the report and was granted two continuances.

The trial court sentenced appellant to state prison and ordered appellant to pay the fees and fines set forth in the probation report. Appellant did not object, request a hearing on his ability to pay the fees and fines, or argue that he lacked the ability to pay the \$1,524 presentence investigation fee. Where there is no objection, a challenge to the fee based on the deprivation of a section 1203.1b hearing is forfeited. (*People v. Valtakis, supra*, 105 Cal.App.4th at p.p. 1071-1072; *People v. Robinson* (2002) 104 Cal.App.4th 902, 906 [procedural irregularities waived by not objecting to imposition of probation report fee].)

Appellant argues that the fee was imposed without express findings, resulting in an unauthorized sentence. A sentence is "unauthorized" where it could not be lawfully imposed under any circumstance in a particular case. (*People v. Scott, supra*, 9 Cal.4th at p. 354.) "That is not the case here, for a [presentence investigation] fee *could* have been lawfully imposed had an ability to pay appeared, a clearly fact-bound determination. . . The

unauthorized-sentence exception does not apply. [Citation.]" (*People v. Valtakis, supra*, 105 Cal.App.4th at p. 1072.)

Appellant asserts that a sentencing court may not incorporate by reference recommended fees and fines in a probation report without stating, at pronouncement of judgment, the basis for its sentencing choices. The trial court ordered that the "terms and conditions" (i.e., the fees and fines) set forth in the probation report be included in the sentence and asked counsel if there was anything else to put on the record.

Appellant did not object, thus waiving any claim that the trial court failed to articulate its reasons for imposing the \$1,524 presentence investigation fee (*People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Scott, supra*, 9 Cal.4th at p. 353). "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*People v. Scott, supra*, 9 Cal.4th at p. 354.) Having forfeited the issue, appellant is barred from claiming that the trial court erred in imposing the \$1,524 presentence investigation fee. (*People v. McCullough, supra*, 56 Cal.4th at pp. 597-599; *People v. Valtakis, supra*, 105 Cal.App.4th at pp. 1071-1072)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David M. Hirsch, Judge
Superior Court County of Ventura

California Appellate Project, under appointment by the Court of Appeal,
Jonathan B. Steiner, Executive Director and Richard B. Lennon, Staff Attorney, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M.
Daniels, Supervising Deputy Attorney General, Allison H. Chung, Deputy Attorney
General, for Plaintiff and Respondent.