

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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
THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

LYNDA MARIE RICCA,

Defendant and Appellant.

C070862

(Super. Ct. No. CM033767)

Defendant Lynda Marie Ricca appeals the sentence imposed following her no contest pleas. Specifically, she appeals the order that she pay for the preparation of a presentence report and probation supervision fees. Defendant contends there is not substantial evidence she had the ability to pay these fees. We affirm.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY¹

Defendant was charged with possession of a deadly weapon, possession of methamphetamine, and cruelty to a child by inflicting injury. Pursuant to a negotiated

¹ Because of the nature of the claims on appeal, the substantive facts and procedural history underlying the conviction are not recounted.

plea, she pled no contest to possession of nunchaku and cruelty to a child, and the possession of methamphetamine charge was dismissed with a *Harvey*² waiver.

Defendant met with the probation department in order to prepare a presentence investigation report. During that interview, she informed probation she had been self-employed for five years and her salary varied. She reported that she had rental property with current tenants. She was also interested in finishing taxidermy classes so she could open her own taxidermy shop. Defendant said she was willing to comply with the terms and conditions of probation, which included a financial obligations page delineating both the \$736 presentence investigation report and a fee of \$164 per month for probation supervision for 48 months.

The probation officer noted, “As a result of the instant offense, the defendant will have numerous fines and fees to pay. The defendant is able-bodied with marketable skills; therefore, she should be capable of complying with the financial consequences of her conviction.” The probation officer also concluded defendant had the ability to pay the fees and comply with the terms and conditions of probation based on her age, education, health, mental faculties, employment history and family background.

Defendant was granted probation, conditioned on her serving 30 days in county jail, and attending treatment programs for child abusers and substance abusers. She was ordered to pay various fines and fees, including \$736 for the preparation of the presentence report and \$164 per month as a probation supervision fee for 48 months. At sentencing, the court recited the financial terms and conditions of probation, including the presentence report and probation supervision costs, and defendant did not object. The court then asked counsel for the public defender fees. Counsel advised the court that defendant was currently unemployed and asked the court to find she had no ability to pay

² *People v. Harvey* (1979) 25 Cal.3d 754.

the fees. The court found defendant did not have the ability to pay only as to attorney fees.

DISCUSSION

Penal Code section 1203.1b “specifically authorizes the recoupment of certain costs incurred for probation and the preparation of . . . presentence investigations and reports on the defendant’s amenability to probation” and “requires determinations of amount and ability to pay, first by the probation officer, and, unless the defendant makes a ‘knowing and intelligent waiver’ after notice of the right from the probation officer, a separate evidentiary hearing and determination of those questions by the court.” (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070, fn. omitted.) Here, when the court ordered defendant to pay the cost of the preparation of the probation report, she did not object or claim lack of compliance with the procedural requirements prior to imposition of the same. Thus, she has forfeited “any procedural irregularities in the trial court’s order.” (*People v. Robinson* (2002) 104 Cal.App.4th 902, 906; see *Valtakis*, at pp. 1071-1076.)

Anticipating this conclusion, defendant also claims counsel was ineffective for failing to object to the imposition of these fees. “ ‘ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because h[er] ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citation.] Second, [s]he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” ’ [Citation.]” (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.) In this case, we need not determine whether counsel’s performance was deficient because we can dispose

of defendant's ineffectiveness claim on the ground of lack of prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674, 699].)

Defendant makes no argument as to how any error was prejudicial. Nor does defendant "identify anything in the record indicating the trial court breached its duty to consider h[er] ability to pay; as the trial court was not obligated to make express findings concerning h[er] ability to pay, the absence of any findings does not demonstrate it failed to consider this factor." (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) In fact, we presume to the contrary, that the trial court considered ability to pay. (Evid. Code, § 664; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) Accordingly, we cannot find any prejudice in counsel's failure to raise the issue.

Moreover, under Penal Code section 1203.1b "[t]he term 'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the preplea or presentence report, . . . and probation supervision." In making this determination, the trial court is to consider, among other things, the defendant's present financial position, reasonably discernible financial position over the subsequent year, including the likelihood that the defendant will obtain employment within that one-year period and "[a]ny other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (Pen. Code, § 1203.1b, subd. (e)(1-4).)

Defendant claims "[t]here is simply no evidence from which the court could conclude that [defendant] had the ability to pay any portion whatsoever of the probation costs assessed." This is not so. Defendant relies solely on the fact that defendant claimed she was not employed at the time of the hearing. But, a finding of ability to pay under this statute "does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) Defendant had sufficient assets available to her that she was able to have significant quantities of drugs and weapons in her possession at the time of her arrest. There is evidence she had been self-employed for

five years and had rental properties with current tenants. She had additional employment prospects, in that she was looking forward to completing taxidermy classes and starting a business. She was able-bodied and had marketable skills. She was not sentenced to prison, but granted probation. This is sufficient evidence to support the finding that defendant had the ability to pay the presentence investigation and probation supervision costs.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.