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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW LEE DAVIDSON, JR.,

Defendant and Appellant.

E062633

(Super.Ct.No. RIF1301059)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired Judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity
Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Andrew Lee Davidson, Jr., pled guilty to inflicting corporal injury resulting in a traumatic condition upon a spouse or former spouse (Pen. Code, § 273.5, subd. (a); count 1)¹ and attempting to prevent or dissuade the victim, a witness, from reporting a crime (§ 136.1, subd. (b)(1); count 2). Defendant was thereafter placed on formal probation for a period of three years on various terms and conditions. He was also ordered to pay various fines and fees, including the cost of probation supervision pursuant to section 1203.1b. On appeal, defendant argues that the trial court erred as a matter of law when it ordered him to pay the costs of probation supervision as a condition of probation; and that the trial court erred in failing to make an ability to pay determination prior to ordering him to pay the costs of probation supervision. To the extent the record so reflects, we agree with the parties that the probation supervision costs cannot be made part of a condition of probation and will modify the order. We reject defendant’s remaining contention, and affirm the order as modified.

I²

PROCEDURAL BACKGROUND

On August 7, 2014, defendant signed a written plea agreement. The written plea agreement stated that defendant would plead to the “sheet” by pleading guilty to both

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

² The details of defendant’s criminal conduct are not relevant to the limited issues he raises in this appeal and we will not recount them here. Instead, we will recount only those facts that are pertinent to the issues we must resolve in this appeal.

counts and enter a “plea to [the] court.” The plea agreement did not specify any particular sentence other than to identify the maximum sentence of four years eight months. The section relating to “Fines” was left blank.

At the August 7, 2014 change of plea hearing, defendant pled guilty to both counts pursuant to the written plea agreement. The matter was thereafter continued to August 26, 2014 for sentencing. There was no reference to any fines or fees to be imposed at the change of plea hearing. The August 26, 2014 hearing was continued to determine if defendant was eligible for mental health court. Again, there was no reference to any fines or fees to be imposed.

On November 18, 2014, the mental health court denied defendant’s acceptance into its program for his failure to meet certain criteria.

On December 15, 2014, defendant and his counsel signed a “Sentencing Memorandum.” This sentencing memorandum referenced certain fines and fees defendant must pay as directed by the Enhanced Collections Division of the superior court.

The sentencing hearing was held on December 19, 2014. At that time, the court granted defendant formal probation for a period of three years on various terms and conditions and adopted the recommendations in the sentencing memorandum as amended. In relevant part, the court’s minute order of the sentencing hearing states: “Formal probation is granted for a period of 36 months under the following terms and conditions: [¶] . . . [¶] Pay the costs of probation supervision in an amount to be

determined by the Probation Department. [¶] Based on the level of supervision, the costs will range from \$591.12 to \$3744.00 (PC 1203.1b). [¶] Defendant ordered to report to Enhanced Collection Div immediately, or w/in 2 business days after release re: Ability to pay Atty Fees; Total hrs. 1[.] [¶] Court finds defendant has the ability to reimburse the county for attorney fees in the amount of \$119.50 payable through Enhanced Collectn” The sentencing memorandum is similar to the court’s minute order, but reflects that the costs of probation supervision and other fines and fees are “ADDITIONAL ORDERS OF THE COURT.” This section, however, is part of the entire sentencing memorandum and is entitled, “THE FOLLOWING TERMS AND CONDITIONS ARE ORDERED BY THE COURT.”

On December 30, 2014, defendant filed a timely notice of appeal from the denial of his suppression motion, and requested a certificate of probable cause. Defendant’s request for certificate of probable cause was denied on December 31, 2015.

On January 8, 2015, defendant filed an amended notice of appeal from “the sentence or other matters that occurred after the plea and do not affect its validity.”

II

DISCUSSION

Defendant argues that the trial court erred in imposing the costs of probation supervision as a condition of probation. He further argues the court erred in imposing the costs of probation supervision without making a finding as to his ability to pay or advising him of his right to an ability-to-pay hearing.

The People agree that the costs of probation supervision cannot be made a condition of probation; but, the remedy is “not to strike the costs imposed but simply recast them as an order of the court.” Believing defendant agreed to pay the costs of probation supervision as part of his guilty plea, the People further argue that the appeal must be dismissed because he failed to obtain a certificate of probable cause. The People also respond that defendant forfeited his ability-to-pay argument for failing to object below.

Before a defendant may appeal a conviction based on a guilty plea, the defendant must obtain a certificate of probable cause from the trial court. (§ 1237.5.) A defendant need not obtain a certificate of probable cause, however, if the defendant’s appeal is based on the denial of a motion to suppress evidence under section 1538.5, or on grounds that arose postplea and do not affect the plea’s validity. (Cal. Rules of Court, rule 8.304(b)(4); *People v. Johnson* (2009) 47 Cal.4th 668, 676-677 (*Johnson*).)

As sentencing occurs postplea, a defendant does not need a certificate of probable cause to raise a sentencing claim on appeal unless the claim attacks the plea’s validity. (*Johnson, supra*, 47 Cal.4th at p. 678; *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) An attack on the plea’s validity occurs when the sentencing claim involves “an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement.” (*Johnson*, at p. 678.) It does not occur when the sentencing claim involves an aspect of sentence the plea agreement left open for resolution by the trial court’s exercise of its normal sentencing discretion. (*People v. Buttram* (2003) 30 Cal.4th 773, 785.)

Consequently, “when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was ‘part of [the] plea bargain.’ [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself.” (*Id.* at p. 786)

In this case, the record is clear that defendant did not receive notice through the guilty plea form he signed that, as a consequence of his plea, he could be obligated to pay certain fines, fees, or the costs of probation supervision. In addition, the parties did not discuss this consequence or the probation supervision costs during the plea colloquy, and they did not agree to specific or recommended fines or fees in exchange for defendant’s guilty plea. In fact, the parties did not enter a plea agreement at all. Rather, defendant entered a plea to the court. He pleaded guilty to both counts to the trial court’s indication it would consider granting defendant probation. The imposition of the probation supervision costs, therefore, was left to the trial court’s discretion. (See *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [a restitution fine is set at the trial court’s discretion when it is not mentioned in a plea agreement or during the plea colloquy].) As defendant’s sentencing claims do not involve matters to which he agreed as an integral part of a plea agreement, his claims do not attack the plea’s validity and he was not required to obtain a certificate of probable cause to raise them.

Next, we agree with the parties that probation supervision costs cannot be part of probationary terms and conditions. A defendant who is granted probation may be ordered to pay the reasonable costs of probation, but the payment of such collateral costs

cannot be made a condition of probation. (§ 1203.1, subd. (b); *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321.) “These costs are collectible as civil judgments; neither contempt nor revocation of probation may be utilized as a remedy for failure to pay. (Pen. Code, § 1203.1b, subd. (d).)”³ (*People v. Washington* (2002) 100 Cal.App.4th 590, 592; see *Brown v. Superior Court*, at p. 322 [An order that a probationer pay the collateral costs of probation is enforceable only as a separate money judgment in a civil action.]; *People v. Hart* (1998) 65 Cal.App.4th 902, 907 (*Hart*) [same].) Thus, it is well established that the trial court may not require, as a condition of probation, payment of the cost of preparation of the probation report or the costs incurred in probation supervision. (*Hart*, at p. 907.) Any order for payment of probation costs should be imposed as a separate order. (*People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1068.)

This record is not clear as to whether payment of a probation supervision fee was ordered as a condition of probation. At the time of sentencing, the trial court noted defendant had already reviewed, signed and accepted the terms outlined in the sentencing memorandum. The sentencing memorandum includes the probation supervision fee. The December 19, 2014 minute order of the sentencing hearing does not clarify whether payment of probation supervision costs in an amount to be determined by the probation department is one of defendant’s probation conditions. To the extent that the record can

³ Section 1203.1b, subdivision (d), provides in pertinent part, “Execution may be issued on the order issued pursuant to this section in the same manner as a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt.”

be interpreted as stating that defendant's probation is conditioned upon payment of a probation supervision fee, the trial court erred. (*People v. Flores* (2003) 30 Cal.4th 1059, 1067, fn. 5; *Hart, supra*, 65 Cal.App.4th at pp. 906-907.)

The appropriate remedy, however, is not to strike the order to pay the probation supervision fee. Instead, the imposition of this fee as a condition of probation may simply be modified to be treated as "an order entered at judgment" and to be "enforced as permitted in the relevant statutes." (*Hart, supra*, 65 Cal.App.4th at p. 907; see *People v. Hall, supra*, 103 Cal.App.4th at p. 892 ["We simply deem the requirement [to pay probation costs] an order, not a condition [of probation], and proceed to consider other aspects of the court's order"].) We will thus direct that the order to pay this fee be construed as an order entered at judgment. In *Hart*, the error was corrected simply by directing that "the order granting probation must be modified to delete the order to pay costs of probation from the conditions of probation, making it simply an order entered at judgment. As such, the order may be enforced as permitted in the relevant statutes." (*Hart*, at p. 907.) We shall direct the same modification to the order of probation in this case.

Defendant, however, argues the trial court's order imposing the probation supervision fee should be vacated, and the matter should be remanded, because the court failed to determine his ability to pay or advise him of his right to a hearing as required by

section 1203.1b.⁴ The People respond defendant forfeited this issue for failing to raise it below.

Defendant did not object to the fee below, but asserts that the challenge is not forfeited, relying on *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), disapproved on other grounds by *People v. McCullough* (2013) 56 Cal.4th 589, 599 (*McCullough*). In *Pacheco*, the appellate court held that claims based on insufficiency of the evidence to support an order for probation related costs do not need to be raised in the trial court to preserve the issue on appeal.⁵ (*Id.* at p. 1397.)

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880; see *People v. Trujillo* (2015) 60 Cal.4th 850, 856 (*Trujillo*)). The forfeiture rule has been applied to claims of sentencing

⁴ 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, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation, 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] conditional sentence . . . of conducting any preplea investigation and preparing any preplea report”

⁵ In *McCullough, supra*, 56 Cal.4th 589, the California Supreme Court held that a defendant who fails to challenge the sufficiency of the evidence of his ability to pay a booking fee at the time it is imposed forfeits his or her right to challenge the fee on appeal. (*Id.* at p. 591.) The *McCullough* court disapproved of *Pacheco* to the extent it held contrary. (*Id.* at p. 599.)

error where the sentence, “though otherwise permitted by law, [is alleged to have been] imposed in a procedurally or factually flawed manner.” (*People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*)). Our Supreme Court has explained, “[T]he requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advance[s] the goals of proper development of the record and judicial economy.” (*McCullough, supra*, 56 Cal.4th at p. 599.)

In *People v. Aguilar* (2015) 60 Cal.4th 862, 864 (*Aguilar*), the California Supreme Court specifically held the forfeiture rule applies to challenges to fees under section 987.8 that are imposed at sentencing. At the sentencing hearing in *Aguilar*, the trial court ordered the defendant to pay an attorney fee under section 987.8, and he did not object. A probation report had recommended various fines and fees, but did not mention an attorney fee under section 987.8. (*Id.* at p. 865.) On appeal, the defendant challenged imposition of the fee and argued the forfeiture rule should not apply, relying “on the specification . . . of certain procedural requirements” in section 987.8. (*Id.* at p. 866.) Rejecting this argument, the Supreme Court held the forfeiture rule applied to appellate challenges to fees imposed under section 987.8. In reaching its conclusion, the court cited its companion case, *Trujillo, supra*, 60 Cal.4th 850. (*Aguilar, supra*, at p. 866.)

In *Trujillo*, the defendant challenged on appeal the imposition of fees for probation services under section 1203.1b although she had not objected to the fees or asserted an inability to pay them with the lower court. (*Trujillo, supra*, 60 Cal.4th at pp. 853-854.) The appellate court reversed the order for payment of these fees and remanded with

directions to the trial court to follow the procedure prescribed by section 1203.1b. The Supreme Court, however, reversed the appellate court's judgment, concluding the defendant's challenge to the fee order was forfeited. (*Id.* at p. 854.)

The court observed that it previously had applied the forfeiture rule in the sentencing context. In particular, both objections to probation conditions and claims of error in the trial court's exercise of its sentencing discretion are forfeited if not raised in the lower court. (*Trujillo, supra*, 60 Cal.4th at p. 856, citing *People v. Welch* (1993) 5 Cal.4th 228 and *Scott, supra*, 9 Cal.4th 331.) And the court recently held a defendant's failure to contest a booking fee at the time it is imposed results in forfeiture of any challenge to the fee on appeal. (*Trujillo*, at p. 857, citing *McCullough, supra*, 56 Cal.4th 591.)

The defendant in *Trujillo* argued the forfeiture rule should not apply to probation fees because the authorizing statute (§ 1203.1b) included express procedural requirements absent from the statute authorizing booking fees. The court disagreed. "Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate." (*Trujillo, supra*, 60 Cal.4th at p. 858.) The court explained that routine sentencing errors could easily be prevented and corrected if called to the trial court's attention. (*Ibid.*) "[U]nlike cases in which either statute or case law requires an affirmative showing on the record of the knowing and intelligent nature of a waiver, in this context defendant's

counsel is in the best position to determine whether defendant has knowingly and intelligently waived the right to a court hearing [on the issue of his or her ability to pay the fee]. It follows that an appellate court is not well positioned to review this question in the first instance.” (*Id.* at p. 860.)

In *Trujillo*, the Supreme Court also noted that, section 1203.1b authorizes the trial court to hold additional hearings to review a defendant’s ability to pay fees, and also allows a probationer to petition the probation officer and the court for such review. (§ 1203.1b, subds. (c) & (f).) “The sentencing court as well as the probation officer thus retains jurisdiction to address ability to pay issues throughout the probationary period.” (*Trujillo, supra*, 60 Cal.4th at p. 861.) If the defendant’s trial attorney was negligent in failing to advise him of the right to a hearing on the ability to pay, such facts “may constitute a change of circumstances supporting a postsentencing request for such a hearing.” (*Ibid.*)

Likewise, in *Aguilar*, the Supreme Court noted that, in respect to both probation fees and attorney fees, “a defendant who fails to object in the trial court to an order to pay probation costs or attorney fees is not wholly without recourse.” (*Aguilar, supra*, 60 Cal.4th at p. 868.) Under section 987.8, subdivision (h), “ ‘[a]t any time during the pendency of the judgment [ordering payment of attorney fees], a defendant against whom a judgment has been rendered may petition the rendering court to modify or vacate its previous judgment on the grounds of a change in circumstances with regard to the defendant’s ability to pay the judgment.’ ” (*Aguilar, supra*, at p. 868.)

Turning to our case, defendant argues the trial court erred as a matter of law in imposing the probation supervision fee without making any finding of his ability to pay and without notice to defendant of his right to an evidentiary hearing prescribed by section 1203.1b. However, he did not object on either of these grounds with the trial court. He did not request a separate hearing to determine his present ability to pay any fee order in compliance with section 1203.1b; nor did he object to the probation supervision fee based on inability to pay. Defendant was represented by counsel, who presumably was aware of the procedural requirements set forth in section 1203.1b. Indeed, at the sentencing hearing, defendant's counsel informed the court that defendant contested the restitution order and requested a restitution hearing. However, neither defendant nor his counsel objected to the probation-related fees "or the process, or lack thereof, by which [defendant] was ordered to pay them; nor does the record contain any indication defendant later raised the question of [his] ability to pay in the probation department or the sentencing court." (*Trujillo, supra*, 60 Cal.4th at p. 859.) Under *Aguilar, supra*, 60 Cal.4th 862, and *Trujillo, supra*, 60 Cal.4th 850, defendant's ability-to-pay claims are forfeited.

Defendant's attempts to distinguish *Trujillo*, arguing the error presented in this case is "legal," is unavailing. The question simply is whether the issue must be raised in the trial court in order to preserve it for appeal, and as *Trujillo* held quite unreservedly, the answer is yes. "No reason appears why defendant should be permitted to appeal the

sentencing court's imposition of such fees after having thus tacitly assented below.”
(*Trujillo, supra*, 60 Cal.4th at p. 859.)

III

DISPOSITION

The order requiring defendant to pay the costs of probation supervision as a condition of probation is modified to delete the requirement that defendant pay the costs as a condition of probation. However, the order that defendant pay such costs is affirmed as an order entered as a part of the judgment. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.