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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS LEE THOMPSON,

Defendant and Appellant.

F062185

(Super. Ct. No. F10904743)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Dale Ikeda, Judge.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., Detjen, J.

Marcus Lee Thompson appeals a judgment of conviction entered on his negotiated plea of no contest to corporal injury to a cohabitant, a misdemeanor (Pen. Code,¹ § 273.5, subd. (a)) and dissuading a witness, a felony (§ 136.1, subd. (b)(2)). The court placed Thompson on probation for three years and ordered him to serve 231 days in the county jail with credit for 186 days. The court imposed terms of probation, which included that he seek and maintain gainful employment, and ordered him to pay a presentence report fee, a probation supervision fee, and other probation costs in accordance with the county's fee schedule and the probation sliding fee schedule. On appeal, Thompson challenges the probation fees on the ground the court failed to follow the statutory requirements to find he had the ability to pay them. We affirm.

FACTS

The facts of the offenses as set forth in the probation report indicate the victim had been living with Thompson for about a year. On August 31, 2010, Thompson came home from a ride-along with the Fresno Police Department upset because the officer had told him he may have difficulty getting a job in law enforcement because of a previous domestic violence case. Thompson directed his anger at the victim. He struck her with his fists, kicked her when she fell to the floor and choked her briefly. The next morning, she left the residence while Thompson was taking a shower and called the police. The responding officer noted the victim had scratches and large dark bruises on her face, neck, arms, wrist and legs. Both of her eyes were discolored and her right eye was swollen. She had a small cut to the inside of her lower lip. While an officer was taking her statement, Thompson called the victim's cell phone and demanded that she pick him up from school. She told him she was trying to cover up her face and he replied, "I don't give a fuck about your face. Fuck you bitch."

¹ Further statutory references are to the Penal Code unless otherwise indicated.

Officers arrested Thompson at his place of employment. Later that day, Thompson called the victim 21 times from jail. Ten of the calls, all of which were recorded, were attempts to dissuade her from going forward with the case.

The probation report indicated that Thompson, age 24, was employed part time as a clerk at Smart and Final earning about \$600 a month and was attending Fresno City College. He was single, had no children and was in good health. The report recommended that Thompson pay a probation report fee of \$296 and a probation supervision fee of \$360. In his letter to the court for sentencing, Thompson stated he was “anxious to register in school again and to seek new employment.” At the sentencing hearing, when the court asked counsel if there were any additions or corrections to the report, counsel did not object to any procedural irregularity regarding the section 1203.1b fees. There was some discussion about Thompson’s ability to pay the fees imposed. The probation officer stated that Thompson would be placed on a payment plan of about \$20 to \$50 a month for those fees. Defense counsel reiterated that Thompson was worried about making payments on the fines and fees and “all the money he owes.” In light of his lack of resources, he would be asking the probation department for the minimum amount. The court responded, “All right, noted.”

DISCUSSION

Presentence Report and Probation Supervision Fee

Thompson contends the court failed to comply with the detailed procedural mechanisms required by section 1203.1b when imposing costs associated with probation. Specifically, neither the probation officer nor the court advised him of his right to a hearing on his ability to pay and, to the extent there was a hearing, there was no evidence the probation officer or the court expressly determined his ability to pay. Finally, to the extent there may be an implied finding of ability to pay, it is not supported by substantial evidence. Thompson also contends the issue may be raised on appeal absent an objection

in the trial court. The People respond that Thompson has forfeited his challenge to imposition of the fees because he did not object to the fees in the trial court. We conclude the issue was forfeited.

Section 1203.1b, subdivision (a) provides that the trial court may order a defendant to pay the cost of the presentence report and the cost of probation supervision. It directs the probation officer to determine the defendant's ability to pay all or a portion of the cost of the report and the supervision. It also directs the officer to inform the defendant he is entitled to a hearing that includes the right to counsel, in which the court must determine his ability to pay and the payment amount. Subdivision (b) of section 1203.1b states, if the defendant does not waive his right to a hearing, the probation officer must refer the matter to the court to schedule a hearing to determine the amount of payment and the manner in which the payment shall be made. Finally, section 1203.1b, subdivision (b) provides that the court shall order the defendant to pay the reasonable costs if it determines the defendant has the ability to pay those costs based on the report of the probation officer.

Section 1203.1b is a recoupment statute that reflects the legislative policy in favor of shifting costs stemming from criminal acts back to the convicted defendant and replenishing the county treasury. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1073 (*Valtakis*).

Here, the probation officer's report included information about Thompson's financial status and obligations and recommended that the court impose a \$296 presentence report fee and \$360 for probation supervision. There is no indication that the probation officer or the court expressly determined Thompson's ability to pay those amounts. Nor is there any indication that Thompson was notified of his right to a hearing on the issue or that he waived that right. However, while Thompson's trial counsel urged

the court and the probation department to impose a lenient payment schedule, he did not object to the fees or to the lack of process at the sentencing hearing.

Forfeiture

There is a split of authority as to whether an appellant can challenge an order to pay probation fees if he failed to object in the trial court. In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*), which Thompson cites, the Sixth District held that a defendant who failed to object to the imposition of a probation supervision fee in the trial court did not forfeit the issue on appeal because the challenge was to the sufficiency of the evidence to support a determination the defendant had the ability to pay the fee. In contrast, in *Valtakis, supra*, 105 Cal.App.4th at p. 1072, which the People cite, the First District held that Supreme Court precedent compelled the conclusion that a defendant's failure to object in the trial court to noncompliance with statutory procedures while imposing a probation fee under section 1203.1b waived the error for purposes of appeal. A similar issue is before the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [whether failure to object to imposition of a jail booking fee forfeited a sufficiency of the evidence of ability to pay claim on appeal].) We find the reasoning of *Valtakis* persuasive.

Under the forfeiture rules of *People v. Welch* (1993) 5 Cal.4th 228 and *People v. Scott* (1994) 9 Cal.4th 331, 353, only sentencing claims properly raised by the parties in the trial court are reviewable on appeal. Claims regarding sentences, which, although otherwise permitted by law, were imposed in a procedurally or factually flawed manner, are deemed forfeited on appeal if they were not raised in the trial court. (*People v. Scott, supra*, 9 Cal.4th at p. 353.)

Thompson contends the forfeiture rules do not apply because he is challenging insufficient process under section 1203.1b. He relies on *Pacheco, supra*, 187 Cal.App.4th 1392, where the court struck a monthly probation fee and other fines and

fees on the basis of insufficient evidence of ability to pay, despite no objection at trial. The *Pacheco* court based its holding on two of its earlier opinions where it held that claims based on the insufficiency of the evidence to support an attorney fees reimbursement order do not require an objection in the trial court to be raised on appeal. (*People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) and *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*).

In *Viray*, the court found an exception to the forfeiture rule for a challenge to an attorney fee award under section 987.8, subdivision (b) based on the defendant's right to effective assistance of counsel. The court concluded that an appellate forfeiture should not be predicated on a trial attorney's failure to challenge an order that the defendant pay the attorney's own fees. (*Viray, supra*, 134 Cal.App.4th at p. 1215.)

In *Lopez*, the attorney fees provision at issue provided that a defendant sentenced to prison shall be determined not to have the financial ability to reimburse the costs of his defense unless the court finds unusual circumstances. The trial court had ordered the defendant to pay \$1,000 in attorney fees. He did not object then but, on appeal, contended there was no evidence to support the implied finding of his ability to pay. (*Lopez, supra*, 129 Cal.App.4th at p. 1536.) The court held that the defendant's objection to the sufficiency of the evidence to support the implied finding could be made for the first time on appeal. It then construed the provision, section 987.8, subdivision (g)(2)(B), to require an express finding of unusual circumstances before the court could order a prisoner to reimburse his attorney. (*Lopez*, at p. 1537.) The court noted that, because it was reversing *Lopez's* convictions, the trial court would have an opportunity to reconsider the attorney fee award. (*Ibid.*)

Viray and *Lopez* are too legally and factually narrow to support the broad exception to the general forfeiture rule for challenges to fines and fees imposed at sentencing that *Pacheco* adopted. Virtually any challenge to a fee imposed without an

objection at a sentencing hearing can be framed as a sufficiency of the evidence issue on appeal, which would render cognizable issues addressed most effectively and economically in the trial court. (See, e.g., *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1469 [fairness to the sentencing court, fairness to the opposing party, and the needs for an orderly and efficient administration of law and judicial economy compel the conclusion that an appellant's failure to object in the trial court to the imposition of a restitution fine constitutes a waiver of the right to complain thereof on appeal].) Moreover, *Pacheco* did not discuss or distinguish the California Supreme Court authority on the forfeiture rule for sentencing errors, which undermines its persuasiveness. (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.)

In Thompson's case, the court could lawfully impose a probation report fee and a probation supervision fee without an express ability to pay finding. Thompson's claim is that the fee was imposed in a procedurally flawed manner because of lack of notice, a hearing, and an express finding. As such, his claims fall squarely within the rule that claims regarding sentences, which were imposed in a procedurally or factually flawed manner, are deemed forfeited on appeal if they were not raised in the trial court. (*People v. Scott, supra*, 9 Cal.4th at p. 353; *Valtakis, supra*, 105 Cal.App.4th at p. 1072.)

Precedent compels the conclusion that Thompson's failure to object at sentencing to noncompliance with the probation fees procedures under section 1203.1b forfeited the claim on appeal.

DISPOSITION

The judgment is affirmed.