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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDWIN LEE VALENTINE, Defendant and Appellant.	F062271 (Super. Ct. No. F10905914) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Gregory Marshall, 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, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Pursuant to a plea agreement, appellant entered pleas of no contest to one count of child endangerment (Pen. Code, § 273a, subd. (a); Count 1),[1] one count of cultivation of marijuana (Health & Saf. Code, § 11358; Count 3), and one count of possession of marijuana for sale (Health & Saf. Code, § 11359; Count 4), and admitted the truth of allegations that he had two prior convictions for robbery (§§ 211, 667, subds. (b) - (i), 1170.12, subds. (a) - (d)). The court struck appellant's two prior convictions and sentenced him to a prison term of six years. He was ordered to pay various fines and fees, including a section 1203.1b probation report preparation fee of $296. That fee is the subject of this appeal.

Appellant contends that he was entitled to a hearing on his ability to pay the section 1203.1b probation report preparation fee, that he did not receive such a hearing, and that therefore the imposition of the section 1203.1b fee was erroneous. Respondent concedes that imposition of the fee was error.

DISCUSSION

The fee at issue is authorized by subdivision (a) of section 1203.1b. That statute states in pertinent part:

> "(a) … The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.
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> "(b) When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order

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[1] All further statutory references are to the Penal Code unless indicated otherwise.

> 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. The following shall apply to a hearing conducted pursuant to this subdivision:
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> "(1) At the hearing, the defendant shall be entitled to have, but shall not be limited to, the opportunity to be heard in person, to present witnesses and other documentary evidence, and to confront and cross-examine adverse witnesses, and to disclosure of the evidence against the defendant, and a written statement of the findings of the court or the probation officer, or his or her authorized representative.
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> "(2) At 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.
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> "(3) At the hearing, in making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution.
>
> "(4) When the court determines that the defendant's ability to pay is different from the determination of the probation officer, the court shall state on the record the reason for its order." (§ 1203.1b, subds. (a), (b).)

At appellant's sentencing hearing, when the court imposed the probation report preparation fee and other fines and fees, his attorney stated: "I would ask if it is possible for the Court can [*sic*] stay any fees -- any fines, he is indigent. He is going to prison." The court responded:

> "You know, pretty much it would take an act of God to suspend fees. It is pretty strict, and most people I deal with that go to prison, just accept the reality that they have got to pay the fines and fees. I don't see Mr. Valentine as any different. The request is denied."

There is a split of authority as to whether a defendant can challenge on appeal the assessment of a section 1203.1b fee when no objection to the fee has been raised in the trial court. (Compare *People v. Pacheco* (2010) 187 Cal.App.4th 1392 [Sixth District - no waiver or forfeiture on appeal of whether section 1203.1b fee was properly imposed]

with *People v. Valtakis* (2003) 105 Cal.App.4th 1066 [First District - issue of noncompliance with statutory procedures while imposing section 1203.1b fee waived for purposes of appeal when no objection raised in the trial court].) In the case presently before us, however, the People concede that appellant's objection to the fee was sufficient to preserve the issue.

The statute requires the trial court to make a determination of a defendant's "ability to pay." (§ 1203.1b, subds. (a), (b), (b)(2), (b)(3) and (b)(4).) As respondent concedes, none was made here. If a defendant chooses to waive his or her right to a determination by the court of his or her ability to pay, that right must be waived "by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).) As respondent concedes, the record on appeal shows no such knowing and intelligent waiver by appellant of his right to a hearing on the issue of "the defendant's ability to pay and the payment amount." (*Ibid.*) The superior court's imposition of the fee was therefore erroneous.

Respondent asserts that it would prefer in this case to have the section 1203.1b fee stricken rather than expend the resources necessary to hold the section 1203.1b, subdivision (b) hearing. We will therefore direct the superior court to amend the judgment by striking the section 1203.1b fee of $296.

DISPOSITION

The judgment is reversed only as to the $296 probation report preparation fee imposed under the purported authority of section 1203.1b. In all other respects, the judgment is affirmed. The matter is remanded to the superior court. That court shall amend the judgment by striking the section 1203.1b fee, and shall enter the judgment as so amended. Appellant has no right to be present.