

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN JON HARJO,

Defendant and Appellant.

G049234

(Super. Ct. Nos. 12WM045626 &
13WF2862)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, A. Natasha Cortina and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

THE COURT:*

Defendant Justin Jon Harjo appeals the trial court's order of September 24, 2013, requiring him to pay the costs of mandatory supervision according to his ability to pay. He argues that this order was erroneously imposed and should be stricken. The Attorney General concedes the issue, and we agree. Such costs are not authorized for those persons under mandatory supervision pursuant to Penal Code section 1170, subdivision (h).¹

I

Facts and Proceedings²

In May 2012, defendant was charged by complaint with battery in case No. 12WM04562. In January 2013, he pled guilty to the battery charge, and the trial court suspended imposition of sentence and granted him three years probation.

In September 2013, another complaint was filed against defendant charging him with passing a fictitious instrument in case No. 13WF2862, and his probation was revoked. On September 24, 2013, pursuant to a negotiated plea agreement, defendant pled guilty to the charge of passing a fictitious instrument. The court imposed a divided or split lower term sentence of 16 months, consisting of six months in jail and 10 months of mandatory supervision pursuant to section 1170, subdivision (h)(5). The court also ordered him to pay the costs of mandatory supervision, depending on his ability to pay, pursuant to section 1203.1b.

* Before Rylaarsdam, Acting P.J., Bedsworth, J., and Aronson, J.

¹ All subsequent references are to the Penal Code unless otherwise noted.

² The record does not provide any facts underlying defendant's crimes. In any case, the underlying facts are not pertinent to the issue on appeal because this matter solely involves a legal question.

II

Discussion

Defendant contends, and we agree, that the trial court erroneously ordered him to pay the costs of mandatory supervision pursuant to section 1203.1b.³ The trial court's order was unauthorized because the language of section 1170, subdivision (h)(5)(B)(i)⁴ does not authorize the imposition of probation supervision fees.

Recent case law supports this conclusion. *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1418 and *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 763-767 have both concluded that the mandatory supervision statute does not authorize imposition of a probation supervision fee because it does not fall within the "terms, conditions, and procedures generally applicable to persons placed on probation" under section 1170, subdivision (h).

In reaching their conclusions, both courts relied upon the following factors:

(1) The Legislature did not make section 1203.1b expressly applicable to mandatory supervision under section 1170, subdivision (h)(5)(B)(i); (2) The Legislature in other contexts had expressly made certain probation related provisions, such as those involving the imposition of fines under section 1202.45, applicable to sentences under section 1170,

³ Section 1203.1b, subdivision (a) provides in relevant part: "In any case in which a defendant is . . . granted probation or 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 a conditional sentence."

⁴ Section 1170, subdivision (h)(5)(B)(i). This section provides in relevant part that a trial court may commit a defendant to county jail and suspend execution of a concluding portion of the applicable term "during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court."

subdivision (h); and, (3) even if mandatory supervision were treated the same as probation, an order to pay the costs of supervision under section 1203.1b, is not considered a term or condition of probation, and is thus collateral to the granting of probation, such that an order to pay the costs of probation do not fall with the “terms, conditions, and procedures generally applicable to persons placed on probation” under section 1170, subdivision (h). (*People v. Ghebretensae, supra*, 222 Cal.App.4th at pp. 764-766; *People v. Fandinola, supra*, 221 Cal.App.4th at pp. 1422-1423.)

In all other respects, the judgment is affirmed.

III

Disposition

The court’s order of September 24, 2013, directing defendant to pay the costs of mandatory supervision depending on his ability to pay is hereby stricken. As so modified, the judgment is affirmed. The clerk of the superior court is directed to correct the minutes, amend the abstract of judgment, and to forward a certified copy of the amended abstract to the Orange County Jail.