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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT OROZCO FERNANDEZ,

Defendant and Appellant.

G050573

(Super. Ct. No. 12CF3180)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Paul Kleven, 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, Lynne McGinnis and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The only issue in this appeal from Albert Orozco Fernandez’s conviction for domestic battery with corporal injury and false imprisonment (Pen. Code, §§ 273.5, subd. (a), 236, 237, subd. (a))¹ is whether the trial court erred by ordering defendant to pay probation related costs. We conclude that by failing to raise this issue in the trial court, as required by a recent California Supreme Court case addressing this very issue, defendant has waived it on appeal.

I FACTS

The facts of the case are not pertinent to the issue on appeal. Suffice to say defendant was convicted of domestic battery with corporal injury (§ 273.5, subd. (a)) and false imprisonment (§§ 236, 237, subd. (a)), after an incident with his ex-girlfriend. Prior to sentencing, a probation report was prepared and considered by the court. The report recommended denying probation and imposing sentence. It further recommended “the defendant be ordered to pay a restitution fine . . . of \$2,000.00. [¶] The defendant has been notified of his right to a Financial Hearing pursuant to 1203.1b PC. The Probation Department has conducted a financial evaluation and has determined he does not have the ability to pay the costs of the Probation Report in the amount of \$2,762.17 at this time. It is, therefore, recommended the Court set a Financial Hearing to determine the defendant’s ability to pay for the costs of the Probation Report and probation supervision, if granted, once he is released from custody.”

Defendant was sentenced to serve three years of formal probation with various conditions, including incarceration in the county jail for one year. He was also ordered to pay the costs of probation or mandatory supervision and the costs of preparing

¹ Subsequent statutory references are to the Penal Code.

the probation report, pursuant to his ability to pay, under section 1203.1b. There was no objection by defense counsel.

II

DISCUSSION

Defendant claims the trial court erred by ordering him to pay “probation related costs” because the probation report reflected a determination that defendant did not have the ability to pay such costs. Despite the lack of an objection, defendant further contends he did not waive this argument.

Defendant is wrong on both counts. Section 1203.1b provides the relevant statutory framework here. It states that when a defendant is convicted and granted probation, the probation officer must make a determination with regard to the defendant’s ability to pay for some or all of the costs of the probation report and supervision. (§ 1203.1b, subd. (a).) The court is required to order the defendant to appear before the probation officer to make such an inquiry, and the probation officer must inform the defendant of the right to a hearing on this issue. Waiver of this right must be knowing and voluntary. (*Ibid.*)

If the defendant fails to waive the right to a court hearing, the probation officer must refer the matter to the court to schedule a hearing. (§ 1203.1b, subd. (b).) “The court shall order 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” (*Ibid.*)

The California Supreme Court addressed the issue of waiver in the context of probation supervision and presentence investigation fees, the same essential issue present here, in *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*).² The court held the

² In a companion case, *People v. Aguilar* (2015) 60 Cal.4th 862, the court addressed the waiver issue in the context of jail booking fees, reaching the same conclusion.

defendant had forfeited an objection to a probation fee by not objecting at sentencing. The court concluded the defendant has the burden “to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal” (*Trujillo, supra*, 60 Cal.4th at p. 858.) ““Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” [Citation.]” (*Ibid.*)

In reaching its holding, the court also noted that important constitutional rights were not at stake: “Thus, unlike 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. It follows that an appellate court is not well positioned to review this question in the first instance.” (*Trujillo, supra*, 60 Cal.4th at p. 860.) The court further stated a defendant is not without recourse, setting forth numerous methods by which a defendant can have this issue addressed by the probation department or sentencing court. (See *id.* at pp. 860-861.)

Defendant tries mightily to distinguish *Trujillo*, arguing that “the probation department in *Trujillo* . . . made no determination of the defendant’s ability to pay probation related costs,” because the defendant in that case had refused to provide any financial information. This is simply irrelevant to the question of 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.)

Defendant is also wrong about the import of the probation report’s comment about his ability to pay. As set forth in the plain language of the report, it was

only determined that defendant did not have “the ability to pay the costs of the Probation Report in the amount of \$2,762.17 *at this time.*” (Italics added.) “[A]t this time” refers to the time before defendant was sentenced to probation, and the statement was made in the context of a report that recommended denying probation and imposing a prison sentence. The next sentence of the report recommends setting a hearing to determine defendant’s ability to pay if probation is granted. The report also stated defendant had been informed of his right to such a hearing. Thus, defendant’s claim that the probation department had already reached a final (and somehow binding) determination on this issue is plainly wrong.

Defendant waived this issue by failing to raise it before the trial court, despite ample opportunity to do so. Accordingly, it is waived on appeal.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

THOMPSON, J.