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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNA MARIE TRUJILLO,

Defendant and Appellant.

H038316

(Santa Clara County

Super. Ct. No. C1199870)

This matter has been transferred here from the Supreme Court (S213687), for further proceedings consistent with its opinion in *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*.) In our earlier opinion in this case we reversed the judgment (order of probation) and remanded the matter with directions to the trial court to follow the statutory procedure in Penal Code section 1203.1b¹ before imposing probation-related costs.

We will reissue our opinion with the exception of defendant's challenge to the imposition of probation-related costs.²

The parties have not elected to file supplemental briefs. (Cal. Rules of Court, rules 8.528(f), 8.200(b).) We hereby vacate our previous decision.

¹ All unspecified section references are to the Penal Code.

² In essence, our discussion of the other issues raised by defendant is identical to our previous opinion in this case. We are not reconsidering the issues given that the Supreme Court's decision in *Trujillo, supra*, 60 Cal.4th 850 does not affect them. We discuss them only because we are vacating our earlier opinion.

A jury found Donna Trujillo (defendant) guilty of one count of receiving, concealing, selling, or withholding stolen property (§ 496). The court suspended imposition of sentence and placed defendant on probation on various terms and conditions. Relevant to the issues here, the court ordered that defendant pay a \$240 restitution fund fine plus a 10 percent administrative fee (§ 1202.4), a probation revocation fine in the same amount (§ 1202.44), which the court imposed but stayed, a \$129.75 criminal justice administration fee (booking fee) payable to the City of San Jose (Gov. Code, § 29550.1), a \$40 court operations assessment (§ 1465.8), a \$30 criminal conviction assessment fee (Gov. Code, § 70373), a presentence investigation fee not to exceed \$300 (§ 1203.1b, subd. (a)), and a probation supervision fee not to exceed \$110 per month (§ 1203.1b, subd. (a)).

Defendant filed a timely notice of appeal. On appeal, on various grounds, defendant challenges the orders to pay several of the fines and fees that the court imposed.³ For reasons that we shall explain, we order that the sentencing minutes be modified to reflect imposition of a \$200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of \$200. (§ 1202.44) However, defendant has forfeited any challenge to the imposition of the presentence investigation fee, the probation supervision fee, and the booking fee.

Given the issues, we do not recount the substantive facts and procedural history underlying defendant's conviction.

³ Defendant asserts that in ordering her to pay a court operations assessment (§ 1465.8), a criminal conviction assessment (Gov. Code, § 70373), the presentence investigation fee, and the probation supervision fees, the court made these fees conditions of her probation (§ 1203.1b, subd. (a).)

Discussion

Presentence Investigation Fee and Probation Supervision Fee

At defendant's sentencing hearing the court ordered that defendant pay a presentence investigation fee and a monthly probation supervision fee. (§ 1203.1b, subd. (a).)

The probation officer recommended that the court impose a presentence investigation fee not to exceed \$300 and a probation supervision fee not to exceed \$110 per month. The probation officer made no recommendation on defendant's ability to pay either fee.

At the time of appellant's sentencing hearing, section 1203.1b, subdivision (a) provided as relevant here, "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 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, of conducting any preplea investigation and preparing any preplea report, of conducting any presentence investigation and preparing any presentence report The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative,

shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. 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." (Stats. 2009, ch. 606, § 6) "[A]lthough section 1203.1b permits a separate hearing on a defendant's ability to pay probation costs, the statute does not prohibit a sentencing court from conducting the hearing as part of the sentencing process." (*People v. Phillips* (1994) 25 Cal.App.4th 62, 70, superseded by statute on other grounds as noted in *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1073-1074.)

Defendant claimed that in her case the court failed to determine her ability to pay the probation-related costs, and there was insufficient evidence to support an implied finding that she did have such ability. Defendant did not object to the fees below, but asserted that due to the nature of the claim—insufficiency of the evidence— she did not need so to do to preserve this issue for review.

Relying on a case from this court, *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), we 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. (*Id.* at p. 1397.) In *Pacheco*, the defendant appealed the imposition of a probation supervision fee, which he argued was imposed without a determination of his ability to pay. (*Id.* at p. 1400.) With respect to this probation-related cost we struck the probation supervision fee imposed under section 1203.1b because we found there was "no evidence in the record that anyone, whether the probation officer or the court, made a determination of [defendant's] ability to pay the \$64 per month probation supervision fee." (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.) Further, we did not find that there was "any evidence that probation advised [the defendant] of his right to have the court

make this determination or that he waived this right.” (*Ibid.*) Thus, we concluded “that the statutory procedure provided at section 1203.1b for a determination of [defendant’s] ability to pay probation related costs was not followed. Moreover, these costs, which are collectible as civil judgments,” could not be made a condition of probation. (*Ibid.*) “For all these reasons,” we concluded the “\$64 monthly probation supervision fee [could] not stand.” (*Ibid.*)

In this case, similarly, we concluded that there was nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of defendant’s ability to pay* the probation supervision fee or cost of preparing the presentence investigation report. In other words, there was nothing in the record to support the conclusion that the court or the probation officer complied with the procedural safeguards. Accordingly, we remanded the matter to the trial court with directions to follow the statutory procedure in section 1203.1b before imposing probation-related costs.

The California Supreme Court granted the People’s petition for review. (*Trujillo, supra*, 60 Cal.4th at p. 854.) The Supreme Court addressed the question of whether the forfeiture rule of *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*),⁴ applies in the context of an order that a defendant pay probation supervision and presentence investigation fees imposed under section 1203.1b. (*Trujillo, supra*, at pp. 853-854.) The *Trujillo* court concluded that the defendant bears 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*, at p. 858; *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [defendant’s failure to challenge the fee in the trial court precludes him from

⁴ In *McCullough, supra*, 56 Cal.4th at p. 591, the Supreme Court held that a defendant forfeits an appellate challenge to the sufficiency of the evidence supporting a jail booking fee imposed under Government Code section 29550.2, if the fee is not first challenged in the trial court.

doing so on appeal].) We are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we conclude that defendant's claim is forfeited.

Defendant contends that certain fines and fees that the court imposed were made conditions of probation. Assuming for the sake of argument that defendant has not forfeited a challenge to these fines and fees, she is incorrect that the court made these fines and assessments conditions of her probation. The record supports the conclusion that these fees and assessments were *not* made conditions of probation.

Restitution Fund Fine

At the sentencing hearing, the court indicated that it was imposing a restitution fund fine of \$200 with a 10 percent administrative fee under section 1202.4. The probation officer interrupted the court to point out that the minimum fine was \$240. The court then acknowledged that it was now \$240 and stated that the court would impose "the minimum under 1202.4." The court addressed defendant as follows: "The Court [is] required to impose a minimum fine, and I'm in fact giving you the minimum fine." The sentencing minutes indicate that the court imposed a \$240 fine plus a 10 percent administrative fee.

Defendant asserts that the court's order was erroneous because she committed her offense on January 25, 2011, at which time the minimum fine was \$200.

Effective January 1, 2012, the minimum restitution fine in section 1202.4, subdivision (b)(1), increased from \$200 to \$240. (Stats. 2011, ch. 358, § 1.) The trial court in this case imposed a \$240 fine, although the minimum restitution fine was \$200 at the time defendant committed her offense. (Stats. 2010, ch. 351, § 9, eff. Sept. 27, 2010.)

The prohibition against ex post facto laws applies to restitution fines. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248; *People v. Souza* (2012) 54 Cal.4th 90, 143 [it is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other

constitutional provisions].) Nevertheless, the rule of forfeiture is applicable to ex post facto claims (see *People v. White* (1997) 55 Cal.App.4th 914, 917), particularly where any error could easily have been corrected if the issue had been raised at the sentencing hearing.

On the other hand, given that the record shows a commitment by the court to impose the minimum fine, and in order to avoid an ineffective assistance of counsel challenge, we will order that the court modify the sentencing minutes to reflect the imposition of a \$200 restitution fund fine plus a 10 percent administrative fee and a probation revocation fine of \$200. (§ 1202.44 [the court shall impose a probation revocation fine in the same amount as that imposed pursuant to sec. 1202.4, subd. (b)].) Although section 1202.4, subdivision (l) allows the court to impose a fee “to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid,” there is no such provision in section 1202.44.

Booking Fee

Defendant challenges the order that she pay a criminal justice administration fee or booking fee of \$129.75 to the City of San Jose on the ground that there is insufficient evidence that she has the ability to pay the fee. Defendant did not object when the court ordered that she pay the booking fee, which the court imposed pursuant to Government Code section 29550.1.⁵

⁵ We note in passing that Government Code section 29550.1 does not contain an explicit or implicit ability-to-pay finding. Defendant’s challenge to the booking fee raises the initial question of whether equal protection principles require Government Code section 29550.1 to be interpreted as including an ability-to-pay requirement. The forfeiture doctrine has been applied to unpreserved equal protection claims. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) As the *McCullough* court observed, “ ‘ ‘ ‘a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’ ” ’ [Citation.] ‘Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling (continued)

Defendant has forfeited this claim by failing to challenge imposition of the booking fee. As noted *ante*, the California Supreme Court has ruled that “a defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits [a] challenge to the propriety of venue by not timely challenging it.” (*McCullough, supra*, 56 Cal.4th at p. 598.) The *McCullough* court held that “because a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*Id.* at p. 597.) Again, we are bound by this determination. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455.)

Accordingly, since defendant raised no objection to the booking fee when it was imposed, her challenge to the fee is forfeited.

Disposition

The court is ordered to correct the sentencing minutes to reflect imposition of a \$200 restitution fund fine (§ 1202.4) plus a 10 percent administrative penalty and a probation revocation fine of \$200 (§ 1202.44). As so modified, the judgment (order of probation) is affirmed.

of the trial court in that court has forfeited his or her right to raise the claim on appeal.’ [Citation.] ‘ “The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]” ’ [Citation.] Additionally, ‘[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.’ [Citation.]” (*McCullough, supra*, 56 Cal.4th at p. 593.)

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.