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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO MOTA GARCIA,

Defendant and Appellant.

H040096

(Santa Clara County

Super. Ct. No. C1354927)

I. INTRODUCTION

Defendant Gustavo Mota Garcia was granted felony probation with gang conditions after entering a no contest plea to the felony charge of carrying a loaded handgun with the intent to commit a felony (Pen. Code § 25800, subd. (a))¹ and admitting that he did so for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)).

On appeal he challenges only the trial court's imposition of probation supervision fees of \$55 monthly, contending "the court did not follow the statutory procedure mandated by section 1203.1b and ... there is insufficient evidence of his ability to pay those fees." He contends these arguments are available on appeal although he made no objection in the trial court. However, they have been foreclosed by the recent decision in *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*), which concluded it is appropriate "to

¹ Unspecified section references are to the Penal Code.

place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal ...” (*Trujillo* at p. 858.) The parties to this appeal recognized the issues were pending in *Trujillo*. As they have now been decided against defendant, we must affirm the judgment after concluding his contentions have been forfeited.

II. TRIAL COURT PROCEEDINGS

In July 2013, defendant accepted the court’s indicated sentence of felony probation with gang conditions and eight months in jail and entered a no contest plea to a felony charge of carrying a loaded handgun with the intent to commit a felony (count 2; § 25800, subd. (a)) and another charge of carrying a loaded handgun in a vehicle of which defendant was not the registered owner (count 1; § 25400, subd. (a)(1)). The court reduced count 1 to a misdemeanor under section 17. Defendant admitted that count 2 was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(A).)² The eight-page plea form initialed and signed by defendant included a section listing 13 different fines, fees, assessments, and penalties, some mandatory, others optional, including: “I may also be required to pay ... a probation supervision fee (up to \$110 per month)”

The “waived referral” probation report recommended suspending imposition of sentence and granting defendant probation for three years on a number of different conditions. It also recommended, not as a probation condition, “A Probation Supervision Fee not to exceed \$110.00 per month be imposed pursuant to section 1203.1b of the Penal Code.” The typed number \$110.00 is crossed out and a handwritten “58.00” appears above the deletion.

² The facts underlying these convictions do not appear in the record on appeal.

At the sentencing hearing in August 2013, the prosecutor asked for two additional gang conditions, to which defendant made objections. The court suspended imposition of sentence and placed defendant on formal probation with conditions including the challenged gang conditions. Among other things, the court stated, “Probation supervision fees of 55 dollars per month is imposed pursuant to 1203.1(b) of the Penal Code.” Defendant accepted the terms and conditions of probation without objection apart from some discussion about how he could arrange to pick up his siblings from school in light of a condition prohibiting his presence on a school campus.

III. ANALYSIS

A defendant who does not agree to pay a monthly amount for his or her supervision on probation is entitled to a judicial determination after a hearing of what amount, if any, the defendant is able to pay. (§ 1203.1b.)

In *Trujillo, supra*, 60 Cal.4th 850, the California Supreme Court recently expanded the scope of forfeiture announced in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*). *McCullough* had concluded “a defendant who fails to contest the booking fee when the court imposes it [under Government Code section 295502, subdivision (a)] forfeits the right to challenge it on appeal.” (*McCullough* at p. 591.) The court reasoned in part that “the rationale for forfeiture is particularly strong” because “the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition.” (*Id.* at p. 599.) The court reached its conclusion about the forfeitability of booking fees by contrasting them with fees and costs under other statutes that “provide procedural requirements or guidelines for the ability-to-pay determination. Certain fee payment statutes require defendants to be apprised of their right to a hearing on ability to pay and afford them other procedural safeguards. (See, e.g., Pen. Code, §§ 987.8, 1203.1b [payment of cost of probation supervision].)” (*McCullough* at p. 598.) In reaching its conclusion, the court disapproved of this court’s conclusion in *People v. Pacheco* (2010) 187 Cal.App.4th

1392 that imposition of a booking fee could be challenged for the first time on appeal. (*McCullough* at p. 599.)

In *Trujillo*, the court considered section 1203.1b and concluded that the forfeiture rule applies “[n]otwithstanding the statute’s procedural requirements” (*Trujillo* at p. 858.) “In the context of section 1203.1b, a defendant’s making or failing to make a knowing and intelligent waiver occurs before the probation officer, off the record and outside the sentencing court’s presence.” (*Trujillo* at p. 858.) “[T]he legislative scheme contemplates that the probation officer’s advisements and defendant’s waiver of the right to a hearing will take place off the record, in the probation department. (§ 1203.1b, subd. (a).) 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 the 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* at p. 860.)

We note, as did the court in *Trujillo*, that appellate forfeiture of the issue of ability to pay probation-related fees does not leave a defendant wholly without recourse. (*Trujillo* at p. 860.) The statute authorizes the trial court to hold additional hearings to review a defendant’s ability to pay (§ 1203.1b, subd. (c)) and authorizes the probationer to petition the probation officer and the court for such a review (*id.* at subd. (f)). (*Trujillo* at pp. 860-861.)

We are bound by *Trujillo* to conclude that defendant has forfeited his claims of the trial court’s noncompliance with section 1203.1b and the insufficiency of evidence of his ability to pay the probation supervision fee.

IV. DISPOSITION

The judgment is affirmed.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.