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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)

A jury found Donna Trujillo (appellant) guilty of one count of receiving, concealing, selling, or withholding stolen property (Pen. Code, § 496). The court suspended imposition of sentence and placed appellant on probation on various terms and conditions. Relevant to the issues in this appeal, the court ordered that appellant pay a \$240 restitution fund fine plus a 10 percent administrative fee (§ 1202.4),¹ 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)).

¹ All unspecified section references are to the Penal Code.

Appellant filed a timely notice of appeal. On appeal, appellant challenges the orders to pay several of the fines and fees that the court imposed on various grounds, which we shall outline later. For reasons that follow, 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, as we shall explain, we are required to remand this case to the superior court.

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

Discussion

Presentence Investigation Fee and Probation Supervision Fee

As noted at appellant's sentencing hearing the court ordered that appellant 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 appellant's ability to pay either fee.

Section 1203.1b, subdivision (a) provides 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." "[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.)

Appellant claims that in her case the court failed to determine her ability to pay the probation related costs, and there is insufficient evidence to support an implied finding that she does have such ability. Appellant did not object to the fees below, but asserts 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.

Respondent argues that appellant has forfeited this issue on appeal because she failed to object below. Respondent concedes that previously this court held in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), that claims based on insufficiency of the evidence to support an order for probation related costs, similar to the argument appellant makes here, do not need to be raised in the trial court to preserve the issue on

appeal. (*Id.* at p. 1397.) Other appellate courts have disagreed. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072 [claim regarding insufficient evidence to support probation supervision fee forfeited on appeal].) However, during the pendency of this appeal, in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), the California Supreme Court disapproved of our holding in *Pacheco* that challenges to the sufficiency of the evidence to support an ability to pay finding may be raised for the first time on appeal. (*McCullough, supra*, 56 Cal.4th at p. 599.)

In *McCullough*, the Supreme Court granted review to determine whether a defendant who failed to object that the evidence was insufficient to support a finding of his ability to pay a booking fee (Gov. Code, § 29550.2) when the court imposed it forfeited his right to challenge the fee on appeal. (*McCullough, supra*, 56 Cal.4th at p. 591.)

The *McCullough* court distinguished "between an alleged factual error that had necessarily not been addressed below or developed in the record because the defendant failed to object, and a claimed legal error, which 'can be resolved without reference to the particular sentencing record developed in the trial court.' [Citation.]" (*McCullough, supra*, at p. 594.) The Supreme Court observed, "we may review an asserted legal error in sentencing for the first time on appeal where we would not review an asserted factual error." (*Ibid.*) "In the case of an asserted legal error, [a]ppellate courts are willing to intervene in the first instance because such error is "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.]" (*Ibid.*)

The *McCullough* court concluded that a defendant's ability to pay a booking fee does not present a question of law. The court stated that a "[d]efendant may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as legal error.' [Citation.] By 'failing to object on the basis of his [ability] to pay,' [a] defendant forfeits both his [or her] claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.' [Citations.]" (*McCullough, supra*, at p. 597.)

Finally, the Supreme Court noted that in *People v. Scott* (1994) 9 Cal.4th 331, the court had already determined "that the requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advanced the goals of proper development of the record and judicial economy." (*McCullough, supra*, 56 Cal.4th at p. 599.) Accordingly, the court concluded, "[g]iven that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture apply equally" the *McCullough* court saw "no reason to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal 'should apply to a finding of' ability to pay a booking fee" (*Ibid.*) The *McCullough* court explicitly disapproved of this court's decision in *Pacheco* insofar as it held to the contrary. (*Ibid.*)

Nonetheless, in part, the *McCullough* court distinguished the booking fees statutes from other fees statutes, including the statute dealing with probation related costs such as the one at issue here—section 1203.1b. The *McCullough* court noted that in contrast to the booking fees statutes, these statutes have procedural safeguards, which indicated to the *McCullough* court that the Legislature considered the financial burden of the booking fee to be de minimus. (*McCullough, supra*, at pp. 598-599.) The *McCullough* court concluded that since the Legislature "interposed no procedural safeguards or guidelines" for imposition of a booking fee the "rationale for forfeiture is particularly strong." (*Id.* at p. 599.)

As outlined *ante* section 1203.1b sets forth a procedure that must be followed before a trial court may impose fees for the cost of supervised probation or for the preparation of the probation report. We reiterate that the statute requires that a court must first order a defendant report to the probation officer, who will then make a determination of a defendant's ability to pay. (§ 1203.1b, subd. (a).) The court must then inform the defendant of his or her right to a hearing, during which the court will make a determination of defendant's ability to pay. (*Ibid.*) A defendant may waive his or her

right to this hearing, but this waiver must be made knowingly and intelligently. (*Ibid.*) If a defendant does not waive his or her right to a hearing, the matter will be remanded to the trial court that will then determine defendant's ability to pay. (*Ibid.*)

Notably, in *Pacheco, supra*, 187 Cal.App.4th 1392, the defendant not only appealed the imposition of a booking fee but also 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.*) As can be seen, imposition of the probation related costs in *Pacheco* was erroneous regardless of whether substantial evidence supported an ability to pay.

The same is true in this case. Even if we were to conclude that under *McCullough* appellant's sufficiency of the evidence argument as to probation related costs is forfeited, there is nothing in the record to support the conclusion that anyone, whether the probation officer or the court, *made a determination of appellant's ability to pay* the probation supervision fee or cost of preparing the presentence investigation report. In other words, there is nothing in the record to support the conclusion that the court or the

probation officer complied with the procedural safeguards.² We reject respondent's assertion that the court implicitly found that appellant had the ability to pay when the court granted probation and ordered appellant to seek and maintain gainful employment. Respondent's position ignores the statutory language of section 1203.1b; and the condition alone reveals nothing about appellant's current financial position, her earning ability, or her expenses, all of which should be considered in determining appellant's ability to pay probation related costs. (§ 1203.1b, subd. (e) (1)-(4) [ability to pay includes a consideration of a defendant's present financial position, future financial position, likelihood the defendant can obtain employment within a one year period and any other factor or factors that may bear upon the defendant's financial ability to reimburse the county for costs].)

The statutory procedure provided at section 1203.1b for a determination of appellant's ability to pay probation related costs was not followed in this case. Accordingly, we must remand this matter to the trial court. (See *People v. Flores* (2003) 30 Cal.4th 1059, 1063 [assuming for the purposes of review that remand is the proper remedy when a court orders a defendant to pay attorney fees under section 987.8 without substantially complying with procedural safeguards enumerated in that section].)

Fees as Conditions of Probation

Appellant asserts that in ordering her to pay a court operations assessment, a criminal conviction assessment, the presentence investigation fee and the probation supervision fees, the court made these fees conditions of her probation. Appellant contends that we must either modify the judgment to delete the court facilities assessment and the criminal conviction assessment and clarify that imposition of these two

² We note that the court referred appellant to the "Department of Revenue . . . for completion of a payment plan for the fines and fees" that the court intended to impose, but there was no requirement that the plan be worked out depending on appellant's ability to pay.

assessments are separate orders. Or remand the matter to the trial court to make findings regarding her ability to pay the costs of probation and to clarify that any orders to pay fees and assessments are not conditions of probation.

Appellant 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. Following recitation of a number of standard probation conditions, the court announced that it was going to impose the foregoing fees and assessments. The probation officer's report, which the court considered, explicitly stated that these fees and assessments were "not conditions of probation." Further, the minute order from the sentencing hearing does not list the fees and assessments as conditions of probation. More importantly, the court did not expressly condition successful completion of probation upon payment of the fees and assessments.

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 appellant 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.

Appellant 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 appellant 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 section 1202.4, subdivision (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

Appellant 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. Appellant did not object when the court ordered that she pay the booking fee, which the court imposed pursuant to Government Code section 29550.1.³

³ We note in passing that Government Code section 29550.1 does not contain an explicit or implicit ability to pay finding. Appellant's challenge to the booking fee raises the initial question of whether equal protection principles require Government Code

Appellant has forfeited this claim by failing to challenge imposition of the booking fee. As noted *ante*, during the pendency of this appeal, the California Supreme Court 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.) We are bound by this determination. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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

Disposition

The judgment (order of probation) is reversed and the matter is remanded with directions to the trial court to follow the statutory procedure in section 1203.1b before imposing probation related costs. The court is ordered to correct the sentencing minutes

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 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.)

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).

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.