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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LISA ANN HERNANDEZ, Defendant and Appellant.	H029033 (Santa Clara County Super.Ct.No. CC271229)

Defendant Lisa Ann Hernandez appeals from the judgment entered following her admission of a probation violation. She asserts that the trial court erred in imposing probation supervision fees without the statutorily required hearing or any evidence of her ability to pay the fees. (Pen. Code, § 1203.1b.)[1]

BACKGROUND

On February 7, 2003, defendant was placed on formal probation for three years and imposition of sentence was suspended following her plea of no contest to a charge of unlawfully taking a vehicle. (Veh. Code, § 10851, subd. (a).) Various probation conditions were imposed, including 12 days in county jail (with credit for time served).

[1] All further statutory references are to the Penal Code unless otherwise specified.

Defendant was ordered to pay a criminal justice administration fee of $140.50 and a probation supervision fee of $42 per month.

On May 22, 2003, the Santa Clara County Probation Department filed a petition for modification of probation alleging that defendant failed to report to the probation department as ordered, and failed to provide proof of employment or schooling. It was further alleged that defendant had failed to appear for a hearing on a deferred entry of judgment in another case. Probation was summarily revoked and a bench warrant issued for defendant's arrest.

Nearly two years later, on April 28, 2005, defendant was served with the bench warrant in this case and in another case. At a probation revocation hearing on May 5, 2005, defendant admitted being in violation of her probation. The trial court reinstated probation with additional conditions that defendant serve 120 days in county jail, with credit for time served and eligibility for work furlough and "RCP 1 only," but no early release. The trial court also ordered defendant to make payments of $75 per month, as probation supervision fees, starting September 15, 2005.[2]

Defendant timely appeals.

DISCUSSION

Section 1203.1b[3] specifically authorizes a court to order payment of certain costs incurred for probation supervision, preparation of preplea or presentence investigations

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[2] Although the trial court did not specify what the fees were, the memoranda from the probation department concerning the initial recommendation of probation and the probation violation recommendation indicate the fees are for probation supervision.

[3] Section 1203.1b provides in relevant part: "(a) 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

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and reports on the defendant's amenability to probation. The section further requires the probation officer, or authorized representative, to conduct a hearing on costs to be imposed and the defendant's ability to pay. A separate evidentiary hearing and determination by the court is required unless the defendant makes a knowing and intelligent waiver of that hearing after notice from the probation officer.

Defendant contends the trial court erred in ordering her to pay probation costs without following the requirements of section 1203.1b. Specifically, she argues the trial court erred in failing to notify her of her right to a hearing on her ability to pay additional probation fees, failing to hold a hearing to determine whether she was able to pay additional fees, and imposing additional payment requirements without sufficient evidence of her ability to pay.

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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 pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203, and of processing a jurisdictional transfer pursuant to Section 1203.9 or of processing a request for interstate compact supervision pursuant to Sections 11175 to 11179, inclusive, whichever applies. 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."

At the probation revocation hearing, after defendant admitted violating probation, the court stated: "Violation of probation is admitted. Probation is reinstated. The defendant is sentenced to 120 days in county jail. She'll be eligible for work furlough and RCP 1 only. No early release programs. Payments will be set at $75 a month." The reporter's transcript continues: "THE DEFENDANT: What is that? When? [¶] THE COURT: . . . I'm going to set a date. [¶] [Deputy District Attorney]: She'll be out in about two and a half months, your Honor, mid July. [¶] THE COURT: How about payments starting September 15th. That will give you 45 days after you get out of jail to get back on your feet start making the payments. [¶] [Defense Counsel]: Your Honor, I'm going to object to the payments. The payments are covering sums that are not condition of probation, they're coverings things like attorneys fees and probation supervision fees. These are not conditions of probation. I think the Court ought not to set a payment schedule that relates to civil debt owed, it does not have anything to do with her criminal case. I will object. [¶] THE COURT: Thank you. [¶] [Deputy District Attorney]: Your Honor, when does the defendant start making the payments, please? [¶] THE COURT: September 15th. The other terms and conditions of probation apply."

In the case of *People v. Hall* (2002) 103 Cal.App.4th 889, 892-893, the court summarized the process required in order for the trial court to impose probation supervision fees: "Penal Code section 1203.1b, subdivision (a) requires the probation officer to determine a defendant's ability to pay all, or a portion of the reasonable costs of probation supervision and probation report preparation. The statute also requires the probation officer to inform the defendant he has a right to have the court determine his ability to pay and the payment amount. The defendant may waive the right to such a determination only by a knowing and intelligent waiver. (Pen. Code, § 1203.1b, subd. (a).) Absent such a waiver, a court must conduct an evidentiary hearing. If the court determines the defendant is able to pay all or part of the costs, the court is required to set the amount of the payment and order the defendant to pay that amount to the

county in a manner that is reasonable and compatible with the defendant's financial ability. (Pen. Code, § 1203.1b, subd. (b).) The statute also provides for additional hearings during the period of probation to review the defendant's ability to pay the probation costs. (Pen. Code, § 1203.1b, subd. (c).)"

The Attorney General, relying on *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068, 1072 (*Valtakis*), first argues that defendant has waived her claims of error because her failure to object at sentencing to the trial court's noncompliance with the probation fee procedures of section 1203.1b waives the claim on appeal. The Attorney General further maintains that the objection actually raised by defendant's attorney concerned only the fact of the imposition of the fees as a probation condition.

Defendant responds that her attorney's objection, although not specifying the lack of a hearing or of sufficient evidence of her ability to pay the increased fees, adequately preserved her claim for review. She further asserts that her claim of insufficient evidence to support the trial court's imposition of fees may be raised on appeal even if there was no objection below. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126-1128 [challenges to HIV testing order could be addressed on appeal because a claim of insufficient evidence is an exception to the rule that points not raised in the trial court cannot be raised on appeal].) Defendant points to the fact that the decision to require reimbursement of probation fees under the statute is not a discretionary sentencing choice (see *People v. Scott* (1994) 9 Cal.4th 331, 353), and that a finding of an ability to pay is a prerequisite to such an order. (§ 1203.1b, subds. (a), (e).)

Moreover, the case of *Valtakis* is distinguishable, according to defendant, because there the defendant's claims of error were mainly procedural without a separate claim that the evidence was insufficient to uphold the order. (*Valtakis, supra,* 105 Cal.App.4th 1066.) Defendant also points to a recent case from this court, *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537, in which we concluded that the lack of sufficient evidence to support the defendant's ability to pay defense attorney fees pursuant to section 987.8 is

a claim that can be raised for the first time on appeal. Section 987.8 is a statute which authorizes a court to order a defendant to pay all or part of the cost of appointed counsel only after the trial court determines that the defendant has an ability to pay such costs. (See also *People v. Hall, supra,* 103 Cal.App.4th at pp. 891-893; *People v. Adams* (1990) 224 Cal.App.3d 705, 713.)

In any event, we consider the objection raised below to encompass defendant's claims on appeal.

We begin by noting that an order for probation fees could not be a valid condition of probation. (*People v. Hall, supra,* 103 Cal.App.4th at p. 894; *People v. Hart* (1998) 65 Cal.App.4th 902, 907.)

Turning to the merits of defendant's claim, we find nothing in the record reflecting that defendant was advised of her statutory right to a hearing. There is no indication defendant waived her rights to a court hearing and judicial determination of her ability to pay the fees. We have no record of a hearing or submission of evidence. Similarly, the brief record before us contains only a memorandum from the probation department reflecting defendant's violations and noting proposed conditions and fines. There is no probation report or other document containing information about defendant's financial status. Thus, the record contains no evidence in support of the probation fees imposed, and the trial court erred by failing to conduct a hearing or make any determination of defendant's ability to pay the fees. (See *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068 [People conceded trial court erred in failing to conduct a hearing on ability to pay probation fees, case remanded]; *People v. Hall, supra,* 103 Cal.App.4th 889 [trial court erred by failing to conduct evidentiary hearing as to defendant's ability to pay probation costs and further erred by converting the costs to community service, case remanded]; *People v. Adams, supra,* 224 Cal.App.3d 705 [trial court error in ordering defendant to reimburse probation costs without first holding a hearing, order vacated].)

The Attorney General argues that defendant's statements that she was now married and no longer homeless show that she is more financially secure and thus any error in not holding a hearing was not prejudicial. We hesitate to impute any financial ability to pay fees of $75 a month on the basis of such vague statements.

Section 1203.1b requires a hearing and judicial determination of a defendant's ability to pay probation supervision fees. There was no hearing or determination in this case. Therefore, we must strike that part of the probation order requiring defendant to pay $75 per month. (See *People v. Adams*, *supra*, 224 Cal.App.3d at p. 714.) Of course, the statute permits additional hearings during the probationary period to review the defendant's financial ability to pay the amount of fees. (See § 1203.1b, subd. (c); *People v. Adams*, *supra*, 224 Cal.App.4th at p. 714.)

DISPOSITION

The order for reimbursement of probation fees is stricken. In all other respects, the judgment is affirmed.

Duffy, J.

WE CONCUR:

Premo, Acting, P.J.

Bamattre-Manoukian, J.