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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DONNA MARIE TRUJILLO,** **Defendant and Appellant.**

Case No. S213687

Sixth Appellate District, Case No. H038316
Santa Clara County Superior Court, Case No.
Linda R. Clark, Judge

REPLY BRIEF ON THE MERITS

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I. APPELLANT'S FAILURE TO OBJECT TO THE IMPOSITION OF PROBATION FEES AND THE TO COURT'S FAILURE TO HOLD A SEPARATE ABILITY TO PAY HEARING UNDER PENAL CODE SECTION 1203.1B FORFEITED THE CLAIM ON APPEAL

Appellant claims the absence of a formal hearing on her ability to pay fees is a clear and correctable error of law, which is reviewable on appeal without objection. She also claims the requirement of a knowing and intelligent waiver added by a 1995 amendment to Penal Code section 1203.1b[1] exempts her claim of error from forfeiture.[2] If accepted, her arguments would convert *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*) into a freestanding exception to a general rule preserving challenges to fees and fines from appellate forfeiture.

Appellant's submissions fail because *McCullough* articulated a broad rule under which claims of sentencing error are forfeited on the same basis as claims of trial error. *McCullough* held that the trial court's failure to hold a hearing on a defendant's ability to pay a fine or fee involves a sentencing error that implicates discretionary considerations like those attending fact- and procedurally-based claims of error at trial. Such claims are not subject to simple correction on appellate review, nor is the trial court's act unauthorized in the sense that the fine or fee could never be imposed lawfully.

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[1] All further statutory references are to this code unless otherwise indicated.

[2] In 1995, the Legislature added the following sentence to section 1203.1b, subdivision (a): "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, 1995, ch. 36 (AB 594), § 1.)

Likewise, the Legislature's amendment of section 1203.1b created a trial-type procedural right. Claims that a sentence are imposed in a procedurally defective manner are subject to forfeiture just as claims of procedural error at trial are subject to forfeiture. The Court of Appeal erred in refusing to affirm the fees imposed in this case.

A. The Trial Court's Failure to Hold a Hearing on Ability to Pay Involves a Fact-Based Claim Not Reachable for Lack of a Timely Objection Below.

1. *McCullough* does not provide a general exemption for procedural sentencing claims relative to fines and fees.

In *McCullough*, this Court accepted that the recoupment statute at issue (Gov. Code, § 29550.2) gave the defendant the right to a determination by the trial court of his ability to pay the fee. (*McCullough*, *supra*, 56 Cal.4th at p. 592.) However, the Court recognized that a right, whether constitutional or otherwise, can be forfeited on appeal by the failure to assert it in the trial court below. (*Id.* at p. 593 ["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"], quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 880; see also *People v. Welch* (1993) 5 Cal.4th 228, 233-235 [defendant must generally object to probation conditions, imposed as an act of discretion, to preserve issue for appeal].)

The Court in *McCullough* found the appellate forfeiture rule was not automatic. Each of the decisions the Court cited involved statutory schemes in which a specific legislative intent existed not to apply appellate forfeiture rules. (*McCullough*, *supra*, 56 Cal.4th at p. 593, citing *People v. Williams* (1999) 21 Cal.4th 335, 344 [declining to adopt a forfeiture rule for failure to plead the statute of limitations because it would run counter to the Legislature's intent]; *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 Pen. Code, § 987.8, without substantially complying with procedural safeguards enumerated in that section]; *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [delegation of parent-child visitation].)

McCullough's holding makes clear that the Legislature's provision of a procedural right, such as the right to a determination of ability to pay, cannot be bootstrapped into an exemption from the appellate forfeiture rule. Otherwise, claims asserting the denial of procedural rights in connection with sentencing would be generally reviewable on appeal without the need for a timely and specific objection in the trial court.

2. 3. A trial court's failure to hold a hearing on ability to pay does not result in an unauthorized sentence reachable on appeal without objection below.

In this case, the trial court held no hearing on ability to pay under section 1203.1b, nor did it take an express waiver from the defendant. Appellant neither objected nor claimed she had an inability to pay. Her failure to object, combined with the court's imposition of the recoupment fee, creates a factual inference of appellant's ability to pay. (See *People v. Phillips* (1994) 25 Cal.App.4th 62, 69-70.)

This situation is, if anything, the opposite of a situation involving clear and easily correctable legal error. It is highly similar to *People v. Scott* (1994) 9 Cal.4th 331, 354, where a defendant who failed to object below could not challenge on appeal the court's failure to make or articulate its discretionary sentencing choices. The articulation of a sentence choice is a discretionary act, rather than one where the chosen sentence cannot be imposed at all on the defendant, thereby excusing the need for an objection to preserve the claim for appeal. (*Ibid.* [noting that appellate review of unauthorized sentences is a "narrow exception" to the

broad general rule requiring an objection in the trial court]; see also *McCullough*, *supra*, at p. 597 [distinguishing ability to pay finding from probable cause determination because "[v]irtually anything in the record could support the ability to pay a fee"].)

By contrast, this Court in *Sheena K.*, *supra*, 40 Cal.4th 875, reached the merits of the question whether a juvenile probation condition was vague and overbroad because the constitutional issue presented a pure question of law, rather than a discretionary sentencing choice like the reasonableness of the condition, which is decided on the facts of the particular case. (See *Welch*, *supra*, 5 Cal.4th at pp. 232-235 [holding reasonableness of probation conditions to be question of the lower court's discretion].)

The lower court is "in a considerably better position" than is an appellate tribunal to evaluate such discretionary matters. (*Sheena K.*, *supra*, 40 Cal.4th at p. 880; see also *People v. Stowell* (2003) 31 Cal.4th 1107, 1114-1117 [finding claim related to HIV testing forfeited but noting that statute does not necessarily fit within analytical template of appellate forfeiture because testing is not punishment].) Conversely, an appellate tribunal is much better suited to determining questions of probable cause, particularly where the record supports a claim that probable cause could not have been found as a matter of law. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1126 [record failed to support lower court's order for HIV testing because there was no showing of probable cause that bodily fluids were exchanged during offense]; but see *McCullough*, *supra*, 56 Cal.4th at p. 593, [distinguishing *Butler* on its "unique" facts].)

In the present context, the question for purposes of forfeiture is whether the trial court *could* have lawfully imposed the fee if the defendant had the ability to pay, as opposed to whether it could *not* have imposed the fee under *any* circumstances. This is the difference between factual claims, only reachable if preserved by objection below, and legal claims, for which

no objection is needed. The Court in *McCullough* acknowledged it was able to review pure legal errors that are "clear and correctable." (*Id.* at p. 594.) On the other hand, a defendant's ability to pay a booking fee did not "present a question of law in the same manner as does a finding of probable cause," nor can a defendant "'transform . . . a factual claim into a legal one by asserting the record's deficiency as a legal error.'" (*Id.* at p. 597, quoting *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690.) "By 'failing to object on the basis of his [ability] to pay,' defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.'" (*McCullough, supra*, at p. 597.) Thus, as in *Welch* (probation conditions) and *Scott* (sentencing choices), forfeiture applied because the substance of the claim went to the trial court's discretion even though characterized as legal error. (*Ibid.*, citing *People v. Scott, supra*, 9 Cal.4th at pp. 354-355; *People v. Welch, supra*, 5 Cal.4th at p. 236; see *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [finding issue forfeited where question was not whether imposition of the fee was "unauthorized" but whether the "probation fee *could* have been lawfully imposed had an ability to pay appeared"] .)

This same principle applies here, notwithstanding differences in procedural mechanisms of fees or fines involved in *McCullough* and similar cases. (See, e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim of error in imposing maximum restitution fund fine forfeited by failure to object]; *People v. Gamache* (2010) 48 Cal.4th 347, 409 [inability to pay maximum restitution fund fine forfeited]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [finding purported inability to pay restitution fund fine exceeding the minimum statutory amount not an unauthorized sentence, and thus, subject to appellate forfeiture rule].) Because the determination of ability to pay is a factual determination, a challenge by the defendant to that determination is subject to the appellate forfeiture rule. (*McCullough,*

supra, 56 Cal.4th at p. 597; compare *People v. Tillman* (2000) 22 Cal.4th 300, 302 [prosecution's failure to object to omission of restitution fund fine forfeits issue on appeal because amount of fine is a factual question] with *People v. Smith* (2001) 21 Cal.4th 849, 853 [erroneous imposition of matching parole revocation fine (§ 1202.45) reachable on appeal because there is only a single correct answer].)

Defendant's claim that forfeiture does not apply because the statute in this case has a procedural right not explicitly found in the statute in *McCullough* parallels the Court of Appeal's error below. Defendant bootstraps the existence of a procedural right into an exception to appellate forfeiture by ordaining the right as important enough for the Legislature to include the right in a statute. The error in her argument is much the same as the Court of Appeal's in making forfeiture depend on whether dollar amounts or implementing procedures of the statute are "less de minimis" than they were under the statute discussed in *McCullough*. *McCullough* did not rule fee and fine statutes in or out of the forfeiture doctrine on either of these bases. (*McCullough*, *supra*, 56 Cal.4th at pp. 597-599.)

McCullough does not unplug forfeiture from its rationale by guesstimating the relative complexity of the scheme or by assigning a relative value to a procedural right in the scheme. The decision in *McCullough* clearly indicates appropriate analogue is to trial error: "[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 evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it." (56 Cal.4th at p. 597 [discussing *People v. Simon* (2001) 25 Cal.4th 1082, 1086].) That our statute has an added procedural right not explicitly found in the statute at issue in *McCullough* is irrelevant.

B. The Amendment to Section 1203.1b Adding a Requirement of a Knowing And Intelligent Waiver Creates a Procedural Trial Right, Not an Exemption from Appellate Forfeiture

Appellant asserts that the 1995 amendment to section 1203.1b, which provided for the trial court to take a knowing and intelligent waiver of the right to a hearing on ability to pay, is a legislative dispensation of the necessity of an objection to raise her claim of error. As argued, the existence of a procedural right cannot be bootstrapped into a legislative exemption. As discussed below, nothing in the statutory language or legislative history shows that the Legislature abrogated forfeiture rules on appeal.

1. *Valtakis* correctly determined that the amendment to section 1203.1b applied only at trial.

In *People v. Valtakis*, *supra*, 105 Cal.App.4th 1066, the appellate court confronted the issue presented here: whether a trial court's failure to hold a hearing on ability to pay under section 1203.1b was reachable on appeal without objection below. Initially, the court found the defendant's claim did not raise a legal error, but a factual one. (*Id.* at p. 1072.)

The court further rejected the defendant's argument that the Legislature intended to exempt section 1203.1b from the usual rules of appellate review by requiring a knowing and intelligent waiver of the right to an ability to pay determination. The court found that, standing on its own, the statutory language was "arguably ambiguous enough to allow [the defendant's] interpretation," but that it led to absurd results conflicting with the important public policy of "conserve[ing] the public fisc." (See *id.* at p. 1073, citing *People v. Phillips* (1994) 25 Cal.App.4th 62, 69-70.) The court noted that the recoupment statute was designed to allocate the financial burden of criminal behavior to those who have been granted the privilege of probation. (*Valtakis*, *supra*, at p. 1073 ["'[The] recoupment statutes reflect

a strong legislative policy in favor of shifting the costs stemming from criminal acts back to the convicted defendant' and 'replenishing a county treasury from the pockets of those who have directly benefitted from county expenditure,'" quoting *Phillips*, *supra*, at p. 69].) Requiring a defendant to object in the trial court where a factual determination can be most easily and effectively addressed rather than wait until an appeal entailing added court and appointed counsel-related costs is entirely consistent with the "overarching cost conservation policy of that section." (*Id.* at p. 1076; see also *People v. Flores*, *supra*, 31 Cal.4th at p. 1063.)

The court also found "no reason to think that the antiwaiver language was designed to abrogate the rules of *Welch* [] and *Scott* []." (*Id.* at p. 1075.) Legislation cannot be presumed to have intended to "overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." (*Ibid.*, quoting *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.) The Legislature was well aware of the rules in *Scott* and *Welch*, and their progeny, and there was nothing in the language of the statute that spoke to appellate review. Instead, it involved a legislative response to trial practice: a defendant's acquiescence to an informal hearing in conjunction with sentencing could no longer be passive; it now required the defendant's active agreement upon a knowing and intelligent waiver. (*Id.* at p. 1075.)

Appellant contends *Valtakis* was incorrectly decided because it construed Penal Code section 1203.1b to "conform to the policies underlying the forfeiture doctrine." Appellant contends that the court misconstrued otherwise "plain and unambiguous" statutory language to reach an "absurd result." (Answer Brief at 23-24.) But as the *Valtakis* court noted, the 1995 amending language—when viewed in isolation—was susceptible to more than one reasonable interpretation. (See *Valtakis*, *supra*, at p. 1073.) Thus, the rules governing statutory interpretation were

appropriately applied. (*Ibid.*) And the results—upholding the long-established and well-understood appellate forfeiture rule and preserving the public fisc, which was the point of the recoupment statutes in the first place—can hardly be termed absurd. Were appellant's reasoning accepted, the costs of a hearing in the trial court alone would be replaced by both the costs on appeal and the costs in the trial court incurred when the appellate procedure remanded the case back for further proceedings.

Appellant also faults the *Valtakis* court for deeming this Court's opinions in *Scott* and *Welch* to be "long established principles." (Answer Brief at 24.) But this Court readily put to rest appellant's complaints in *McCullough*, noting that while the forfeiture bar to sentencing matters "is of recent vintage," *Welch* and *Scott* simply "brought the forfeiture rule for alleged sentencing errors into line with other claims of trial court error, rather than placing such claims outside the general rules regarding forfeiture." (*McCullough*, *supra*, 56 Cal.4th at p. 594.)

Appellant contends *Valtakis* is correct only in its alternative holding that any error was harmless. (Answer Brief at 24-25.) To the contrary, the harmless error holding demonstrates why the court in *Valtakis* correctly found a forfeiture. The claim there (and here) does not involve a "clear and correctable" error of law. The imposition of a legally unauthorized sentence cannot be harmless error, because it could not be imposed at all. If an unauthorized sentence were involved, there would be no facts on which to find the absence of prejudice.

Appellant suggests, as an alternative, that the Court in *McCullough* did not intend to overrule *People v. Pacheco* (2010) 187 Cal.App.4th 1392 in its entirety and that the Court's reference to the opinion in *People v. Viray* (2005) 134 Cal.App.4th 1186 suggests that this Court left some portion of *Pacheco* standing. (Answer Brief at 21.) We disagree. First, the court did not cite *Viray* for its position on forfeiture, but to show how an

objection was not required to preserve claims relating to sufficiency of evidence. (*McCullough*, *supra*, at p. 599 fn. 2.) The Court expressly rejected the notion that the ability to pay a fine or fee was a question of evidentiary sufficiency when it disapproved *Pacheco*. Moreover, *Viray* did not concern forfeiture in a dispute over the defendant's ability to pay, but in relation to compensation of defense counsel. (*Viray*, *supra*, at pp. 1215-1216 ["We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*"].)

2. The forfeiture rule applies to this case.

Appellant refused to speak with the probation officer at the time of sentencing. She made no objection to, nor even mention of, ability to pay during the sentencing hearing itself. Her counsel was aware of the probation report. Consistent with *McCullough*, *Sheena K.*, *Scott*, *Welch* and their progeny, the failure to object to the discretionary amount of the fees without a hearing on ability to pay, is subject to the forfeiture rule.

The case is no different from a situation in which the court fails to set forth its reasons for a particular sentence Because the question of ability to pay is factual in nature, and there is no evidence the Legislature intended otherwise, the forfeiture rule under *McCullough* applies. Appellant's failure to object below forfeits the claim on appeal.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: March 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3,125 words.

Dated: March 3, 2014

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Donna Marie Trujillo**
No.: **H038316**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 3, 2014, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 3, 2014, at San Francisco, California.

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