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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GENE JAMES HANKES,

Defendant and Appellant.

A126022

(Napa County
Super. Ct. No. CR-137726)

Defendant Gene James Hankes appeals the trial court's order that he pay a presentence report fee of \$560. He claims the fee is improper because the court did not make a finding of his ability to pay, as required by Penal Code section 1203.1b. We agree and reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The underlying facts may be summarized briefly, as they are not germane to the issues on appeal. On October 14, 2007, defendant was driving a vehicle when an accident occurred, injuring his passengers. Defendant was arrested and transported to a hospital, where a blood test revealed a 0.12 percent blood-alcohol level.

On February 6, 2008, an amended information was filed charging defendant with one felony count of DUI, with priors and bodily injury to multiple victims (Veh. Code, §§ 23153, subd. (a), 23558, 23566), one felony count of driving with a 0.08 percent blood-alcohol level, with priors and bodily injury to multiple victims (Veh. Code, § 23153, subd. (b), 23558, 23566), and two misdemeanor counts of driving with a suspended or revoked license (Veh. Code, §§ 14601.2, subd. (a), 14601.5, subd. (a)). The

information includes the allegation that defendant personally inflicted great bodily injury. (Pen. Code, § 12022.7, subd. (a).)

On June 25, 2009, defendant entered a negotiated plea of no contest to all counts and admitted all allegations, pursuant to an indicated sentence by the trial court of no more than four years in state prison, with the possibility of probation, and the striking of the great bodily injury enhancement or the staying of its punishment.

At the sentencing hearing on August 7, 2009, the trial court denied probation and sentenced defendant to two years in state prison on the felony counts, plus a consecutive one-year term on one of the Vehicle Code section 23558 enhancements for causing injury to multiple persons. The punishment on the Penal Code section 12022.7 enhancement was stayed and the misdemeanor counts were dismissed. The court ordered him to pay a \$200 restitution fine (Pen. Code, § 1202.4), an additional \$200 suspended restitution fine (Pen. Code, § 1202.45), restitution to one of the victims in the amount of \$21,800, a \$3,900 DUI fine, a \$60 court security fee, and a criminal conviction assessment fine of \$30. The court also ordered him to pay a presentence report fee of \$560. This appeal followed.

DISCUSSION

Defendant claims the trial court's order directing him to pay the \$560 presentence report fee is erroneous because it was made without a finding of his ability to pay. His claim has merit.

At the sentencing hearing, defendant's counsel promptly objected to the presentence report fee on the ground that the fee requires a finding of a defendant's ability to pay. Counsel further argued that, in light of his prison sentence, defendant did not have the ability to pay. The court asked if defendant had filled out a statement of assets and the attorney responded: "He has not filled it out, your Honor. I can advise the court that other than his employment, he has no assets, and this [case] has ended that employment. I can have him fill one out if the court wishes." Defendant then requested a stay of sentencing, which was denied. At the conclusion of the hearing, the court waived the public defender fees "due to the length of prison sentence, and the fact that I

don't believe you have the assets to do so, to pay the attorney fees." The court did not specifically rule on defendant's objection to the presentence report fee of \$560. Nor did the court ask him to fill out a statement of assets. However, the abstract of judgment states that the fee was imposed.

Penal Code section 1203.1b, subdivision (a), as relevant here, provides: "In any case in which a defendant is convicted of an offense and is the subject of any . . . presentence investigation and report, . . . the probation officer, . . . , 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 conducting any presentence investigation and preparing any presentence report 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*." (Italics added.)

We first note the probation officer's report does not indicate that the officer made a specific determination of defendant's ability to pay the cost of the presentence report. Additionally, there is no indication in the record that the officer ever told defendant he was entitled to a hearing. The record also does not show defendant made a knowing and intelligent waiver of his right to a determination by the court of his ability to pay. Indeed, defendant's counsel specifically contested the fee, noting that defendant was entitled to a hearing on his ability to pay. Further, while the court concluded he was unable to pay the public defender's fees, it did not make any finding with respect to the presentence report fee. Because the procedures set forth in Penal Code section 1203.1b were not followed in the present case, we conclude imposition of the fee is erroneous.

The Attorney General contends that the probation officer and the trial court implicitly found defendant did have the ability to pay. Our review of the record on appeal reveals nothing to support this contention. The probation report does state that defendant had been employed at a rate of \$41.95 per hour during the previous three

months. There is no indication, however, as to how many hours defendant worked per week. Additionally, the report states that defendant's income was the sole source of financial support for his wife and their five minor children, suggesting he would have retained little in the way of savings. While the Attorney General notes defendant made a \$50,000 bail, had attempted to retain private counsel, and stated that he " 'had some assets, not a lot, and a lot of those assets belong to [his] children,' " none of these facts were cited by the probation officer or the court in connection with the presentence report fee. Further, the court's order with respect to the public defender's fees suggests that the court would have determined he did not have the ability to pay the presentence report fee had a proper hearing been held. This conclusion is all the more reasonable in light of the \$21,800 victim restitution payment that he was ordered to make. In sum, we see no evidence that a determination was made of defendant's ability to pay the \$560 fee, even after his counsel brought the issue to the court's attention.

The question remains whether to remand for a determination of defendant's ability to pay before the challenged fee may be re-imposed, or to simply strike the fee. Based on considerations of judicial economy and a record that suggests that defendant does not have the ability to pay, we elect to strike the fees. (*People v. Walker* (1991) 54 Cal.3d 1013, 1029 [judicial economy warranted modifying judgment on review to reduce restitution fine to statutory minimum rather than remand for determination of appropriate amount of fine]; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)

DISPOSITION

We direct the trial court to strike the \$560 presentence report fee, and to forward a corrected copy of the abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.