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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MELINDA MACKLI WILLIAMS,

Defendant and Appellant.

A132894

(Alameda County
Super. Ct. No. H44362)

Defendant Melinda Mackli Williams appeals from a judgment entered after she pleaded no contest to two counts of commercial burglary and two counts of forgery with an understanding that the court would impose a prison sentence but suspend its execution while she was on probation. On her prior appeal, we upheld the convictions but vacated the sentence and remanded for resentencing. (*People v. Williams* (Apr. 29, 2011, A128781) [nonpub. opn.] (*Williams I*), at p. 9.)¹ At the resentencing on June 3, 2011, the court did not orally pronounce sentence, aside from setting the aggregate term of imprisonment and asking the clerk to clarify Williams's custody credits. Nevertheless, the court's minute order and the abstract of judgment includes the following monetary penalties: a \$3,200 restitution fine, a \$3,200 parole restitution fine, a \$30 criminal conviction assessment, a \$30 court security fee, and a \$250 probation investigation fee.

On this appeal we agree with Williams that the court's minute order and the abstract of judgment must be corrected by striking the restitution fine, the parole

¹ We grant the parties' requests and take judicial notice of the record in *Williams I*. (See Evid. Code, §§ 452, subd. (d), 459.)

restitution fee, the criminal conviction assessment, and the probation investigation fee, and on remand we will direct the trial court to make the necessary corrections. We also conclude the judgment should be modified by vacating the \$30 court security fee and imposing a \$20 court security fee for each of Williams' four convictions for a total of \$80. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND²

On March 6, 2008, the Alameda County District Attorney filed a four-count information, charging Williams with two counts of second degree commercial burglary (Pen. Code, § 459³) and two counts of check forgery (§ 470, subd. (d)). (*Williams I, supra*, at pp. 1-2.) It was further alleged that Williams had suffered three prior convictions for petty theft with a prior (§§ 484, subd. (a), 666) and had served a prior prison term within the meaning of section 667.5, subdivision (b). (*Williams I, supra*, at p. 2.)

On May 2, 2008, at the change of plea hearing, Williams pleaded no contest to all of the charges and admitted the prior conviction allegations. (*Williams I, supra*, at p. 2.) The court indicated it would sentence Williams to an aggregate term of four years eight months in prison, with execution of the sentence suspended while she served a probationary term of five years.⁴ (*Id.*, at p. 2.) Williams was released on her own recognizance and the matter was scheduled for sentencing. (*Id.*, at p. 3.) However,

² Because this appeal is limited to sentencing issues, we set forth only those facts necessary to resolve the issues raised by Williams.

³ All further unspecified statutory references are to the Penal Code.

⁴ Contrary to People's contention, Williams's "plea did not result from a plea bargain. Instead, the indicated sentence was proposed by the court without the approval of the prosecutor, whose approval was unnecessary in view of the fact that Williams pleaded no contest to all the charges and admitted the enhancements. [Citation.] (*Williams I, supra*, at p. 6.) "As the cases involving indicated sentences make clear, the trial court retains discretion to sentence a defendant—within the bounds of the law—up until the time the sentence is actually imposed. [Citation.]" (*Id.* at p. 6.) "This is so even if the indicated sentence is offered to induce a plea. [Citation.]" (*Ibid.*) Consequently, we reject the People's argument that Williams's current appellate claims are barred because she "must abide by the terms of the [plea] agreement."

Williams absconded before sentencing and the court issued a bench warrant for her arrest. (*Ibid.*)

Nearly two years later, in March 2010, Williams was returned to custody and appeared at several court hearings before a new trial court judge. (*Williams I, supra*, at pp. 3-4 & fn. 2.) The record of those proceedings presented “a convoluted picture,” which we need not now repeat in its entirety. (*Id.* at p. 7.) In pertinent part, at the May 24, 2010, hearing, the court “revoked probation (despite the fact Williams was not *on* probation), it lifted the stay of execution on a sentence that had not yet been imposed, and on the record available to this court, there was no oral pronouncement of sentence, aside from the court stating the aggregate term of imprisonment and asking the clerk to clarify Williams’ custody credits.” (*Id.* at p. 8, fn. omitted.) Additionally, the clerk reported on the specifics of the sentence, such as the amount of the restitution fine, although no such details were stated in open court. (*Id.*, at p. 8, fn. 3.) As we concluded in our prior decision, “[u]nder the circumstances, and particularly in light of the ambiguous and unclear record of the proceedings that resulted in Williams’s sentence, we [were] compelled to remand the matter for resentencing. On remand, the trial court [was] directed to exercise its discretion in sentencing Williams and to state the reasons for its sentencing choices. [Fn. omitted.] (Pen. Code, § 1170, subd. (c).)” (*Id.*, at p. 9.)

On June 3, 2011, the trial court held a resentencing hearing. Williams and her counsel were present; no one appeared on behalf of the People. Both defense counsel and Williams addressed the court regarding the potential sentences that could be imposed at that time. After considering the arguments, the trial court stated that it was exercising its discretion to impose the aggregate four year eight month sentence that had been originally contemplated by the court. The court asked the clerk to clarify Williams’ custody credits. The court did not orally pronounce any other details of the sentence, including any fines, fees, or assessments. However the court’s minute order and the abstract of judgment issued on June 3, 2011, included a \$3,200 restitution fine, a \$3,200 parole restitution fine, a \$30 criminal conviction assessment, a \$30 court security fee, and a \$250 probation investigation fee. Williams filed a timely appeal from the judgment.

DISCUSSION

Preliminary, we reject the People’s contention that Williams has forfeited her right to challenge the inclusion of the monetary penalties in the court’s minute order and the abstract of judgment filed on June 3, 2011. Concededly, the same monetary penalties were included in the original abstract of judgment, and Williams could have challenged their inclusion in her earlier appeal. However, “[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*)). Thus, even if Williams had mentioned the error in her prior appeal, we would have had no reason to address it. Because we were vacating the sentence and remanding the matter for resentencing, we would reasonably presume that any such errors would be corrected by the trial court at resentencing. Nor do we see any merit to the People’s additional argument that “[t]he case was not remanded to redo the fees.” In our prior decision, we repeatedly stated that the case was being remanded for resentencing. (*Williams I, supra*, at pp. 1, 9.) By vacating the sentence and remanding for the trial court “to exercise its discretion in sentencing Williams and to state the reasons for its sentencing choices” (*Id.*, at p. 9), we expected the trial court to orally pronounce judgment on all sentencing issues, including the amounts of any fines, fees, and assessments. Because the trial court had not previously orally pronounced judgment as to any monetary penalties, no such aspects of the sentence remained in effect after remand, as the People suggest.

As to Williams’ substantive arguments, it is undisputed that when the trial court orally pronounced its resentence, it did not impose a \$3,200 restitution fine, a \$3,200 parole restitution fine, a \$30 criminal conviction assessment, a \$30 court security fee, or a \$250 probation investigation fee. Consequently, we agree with Williams that those sentence components are not part of the judgment,⁵ and should not have been added to

⁵ The oral pronouncement constitutes the rendition of the judgment. (*People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2.)

the court's minute order and the abstract of judgment. (See *Mitchell, supra*, 26 Cal.4th at p. 185.)

We also agree with Williams that as to the restitution fine, the parole restitution fine, and the probation investigation fee, the proper remedy is to direct the trial court to correct its minute order and the abstract of judgment by striking those monetary penalties without remanding the matter for a hearing in Williams's presence. In addressing the remedy for a court's omission of the restitution and parole restitution fines from its judgment, our Supreme Court has held that "appellate courts may not correct these errors if the trial court failed to state a reason for its failure to impose [the fines], and the People failed to object [in the trial court]. [Citation.]" (*People v. Smith* (2001) 24 Cal.4th 849, 851; see *People v. Tillman* (2000) 22 Cal.4th 300, 303 (*Tillman*) [Supreme Court barred the Court of Appeal from correcting judgment by adding minimum restitution and parole restitution fines omitted from the court's judgment].) For similar reasons, we also conclude that the People's failure to object to the probation investigation fee requires striking that fee without remanding the matter for a hearing in Williams's presence. Like the imposition of a restitution fine, the imposition of a probation investigation fee (§ 1203.1b) concerns "a discretionary sentencing choice," which must be challenged in the trial court. (*Tillman, supra*, 22 Cal.4th at p. 303.) Here, the People ask us to remand the matter to allow the trial court to comply with the due process requirements of section 1203.1b, by either taking "a knowing and intelligent waiver of a hearing from" Williams, or conducting "a hearing and determine [her] ability to pay" the probation investigation fee. (See *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321). However, the People's failure to object in the trial court to the omission of the probation investigation fee from the judgment precludes them "from obtaining the relief they seek on appeal." (*Tillman, supra*, 22 Cal.App.4th at p. 302.)

Unlike the previously mentioned fines and fee, under the circumstances in this case the trial court was required to orally impose any applicable criminal conviction assessments (Gov. Code, § 70373) and court security fees (§ 1465.8). (See *People v.*

Woods (2010) 191 Cal.App.4th 269, 272-273; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) However, we agree with Williams that the trial court should be directed to correct its minute order and the abstract of judgment by striking the criminal conviction assessment. That assessment does not apply in this case because Williams's 2008 convictions by pleas were rendered before the January 2009 effective date of Government Code section 70373 authorizing the assessment. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.) Additionally, we agree with Williams that at the time of her 2008 convictions the court security fee required to be imposed was \$20, and not \$30 as reflected in the court's minute order and the abstract of judgment. (See Stats. 2007, ch. 302, § 18; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) However, the court's minute order and the abstract of judgment reflect the imposition of only one court security fee. "The trial court should have imposed one \$20 court security fee for *each* of [Williams's] four convictions, for a total of \$80. [Citations.]" (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372; see *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-867.) Accordingly, we will modify the judgment by vacating the \$30 court security fee and imposing a \$20 security fee for each of the four convictions, for a total of \$80. (See *People v. Moreno* (2003) 108 Cal.App.4th 1, 11 ["[a]n invalid or unauthorized sentence 'is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement' ".])

DISPOSITION

The judgment is modified by vacating the \$30 court security fee and imposing a \$20 court security fee for each of the four convictions, for a total of \$80. As so modified, the judgment is affirmed. The trial court is directed to prepare both a corrected sentencing minute order and a corrected abstract of judgment (1) deleting the \$3,200 restitution fine, the \$3,200 parole restitution fine, the \$30 criminal conviction assessment, the \$30 court security fee, and the \$250 probation investigation fee; and (2) imposing a \$20 court security fee for each of the four convictions, for a total of \$80. The trial court

shall forward a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.