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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re EUGENE S., a Person Coming Under
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE S.,

Defendant and Appellant.

A133768

(San Francisco County
Super. Ct. No. JW11-6368)

This appeal comes before us following defendant's admission of the offenses of carrying a concealed weapon (Pen. Code, former § 12025) and misdemeanor vandalism (Pen. Code, § 594), charged in two separate delinquency petitions (Welf. & Inst. Code, § 602, subd. (a)).¹ The sole contention presented by defendant is that a \$10 DNA penalty assessment imposed against him must be stricken. We agree and modify the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY²

At the conclusion of the dispositional hearing the juvenile court declared defendant a ward of the court, placed him on probation, and committed him to the Log Cabin Ranch. Among other conditions the court ordered defendant to provide a DNA sample, pay a state restitution fine of \$100, and an administrative fee of \$10. Although

¹ Pursuant to a negotiated disposition, the remaining charges against defendant were dismissed.

² The facts pertinent to the offenses admitted by defendant are of no consequence to this appeal, and will not be recited here.

the court’s oral pronouncement of judgment did not include a DNA penalty assessment in any form, according to the order of probation and the dispositional finding defendant was ordered to pay a “DNA fee of \$10.”

DISCUSSION

Defendant argues that the DNA penalty assessment is unauthorized where, as here, a restitution fine was imposed by the juvenile court. The Attorney General concedes that the DNA penalty assessment reflected in the dispositional finding and probation order cannot stand, and we agree.

Two statutes authorize imposition of DNA penalties. Government Code section 76104.6, subdivision (a), initially adopted as Proposition 69 at the November 2, 2004 General Election and later amended, requires courts to impose “an additional penalty” of one dollar for every \$10 or part of \$10 “upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” Government Code section 76104.7 provides an additional “state-only” DNA penalty of \$3 for every \$10 or part of \$10 “upon every fine, penalty or forfeiture” imposed and collected by the courts for all criminal offenses. Also, by its terms, the Government Code section 76104.7 DNA penalty assessment may only be imposed “in addition to” the Government Code section 76104.6 fine.³ (See Gov. Code, § 76104.7; *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396.)

The record before us in this case manifests considerable confusion and inaccuracy. The juvenile court’s oral pronouncement of disposition is explicit and limited to “a state restitution fine of \$100, and an administrative fee of \$10.” The dispositional finding and probation order do not correctly reflect the court’s pronouncement, however. The dispositional order specifies a state restitution fine of \$110, an administrative fee of \$11, and DNA fee of \$10. The probation order provides yet another disposition of *victim*

³ Government Code section 76104.7, subdivision (a), provides in pertinent part: “Except as otherwise provided in this section, *in addition to the penalty levied pursuant to Section 76104.6*, there shall be levied an additional state-only penalty of three dollars (\$3) for every ten dollars (\$10), . . . in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.”

restitution of \$100, state restitution of \$10, a DNA fee of \$10, and no recitation of an administrative fee. We admit to bewilderment.

We must clarify the ambiguity by adhering to the oral rendition of judgment, which controls over any discrepancy with the ministerial minutes or the abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750–751.) The written dispositions must be modified to reflect the disposition orally imposed by the court. (*People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402.)

In any event, a DNA penalty assessment is not authorized by the governing statutes in this case. The trial court did not impose an assessment under Government Code section 76104.6. Consequently, an assessment under Government Code section 76104.7 cannot be imposed. Also, there was no fine, penalty, or forfeiture imposed that supported a DNA penalty assessment under either Government Code section 76104.6 or Government Code section 76104.7. Finally, by its express terms, the statute authorizing the DNA penalty assessment does not apply to any restitution fine or the administrative fee. (Gov. Code, § 76104.7, subd. (c)(1); *People v. Valencia* (2008) 166 Cal.App.4th 1392, 1396.)

The Attorney General requests that we remand the case to the juvenile court to order restitution to the victim of defendant’s vandalism offense. The contention is made that victim restitution is mandatory, and a disposition without “such an award is invalid.”

We decline to remand the case with the directive proposed by the Attorney General. The prosecution did not seek nor did the juvenile court consider victim restitution. No evidence on the amount of damages or defendant’s ability to pay was presented.

Welfare and Institutions Code “[s]ection 730.6[,] . . . the general restitution statute applicable in proceedings brought under [Welfare and Institutions Code] section 602[,] . . . provides that when a minor is ‘found to be a person described in [Welfare and Institutions Code] Section 602’ the court must order restitution to the victim or victims

unless the court finds a ‘compelling and extraordinary reason’ not to do so. ([Welf. & Inst. Code,] § 730.6, subds. (a)(2) & (h).) Inability to pay ‘shall not be considered a compelling or extraordinary reason’ not to order restitution. ([Welf. & Inst. Code,] § 730.6, subd. (h).) [Welfare and Institutions Code] [s]ection 742.16, on the other hand, requires the court to find that the minor or the minor’s estate has the ability to pay before ordering restitution in graffiti and vandalism cases. [¶] [Welfare and Institutions Code] [s]ection 742.16 is part of the Graffiti Removal and Damage Recovery Program enacted by the Legislature in 1994. (Stats. 1994, ch. 909, § 11, p. 4603 et seq.) Among other things, it requires minors who have committed acts of vandalism and other malicious mischief to repair or pay for the damage they cause. Subdivision (b) of [Welfare and Institutions Code] section 742.16 applies when a public entity repairs or replaces property damaged by the minor. It provides, ‘If a minor is found to be a person described in [Welfare and Institutions Code] Section 602 by reason of the commission of an act prohibited by [Penal Code] Section 594 [among others], and the graffiti or other material inscribed by the minor has been removed, or the property defaced by the minor has been repaired or replaced by a public entity . . . the court shall determine the total cost incurred by the public entity for said removal, repair, or replacement . . . [and] shall order the minor or the minor’s estate to pay those costs to the probation officer of the county *to the extent the court determines that the minor or the minor’s estate have [sic] the ability to do so.*’ (Italics added.) [Welfare and Institutions Code] [s]ection 742.16 contains other provisions relating to the minor’s obligation to repair, replace, or clean up damaged property. Each subdivision authorizing the court to order monetary restitution requires the court to first find that the minor or his estate has the ability to pay. (See [Welf. & Inst. Code,] § 742.16, subds. (a)–(c).)’ (*G.C. v. Superior Court* (2010) 183 Cal.App.4th 371, 376.) Without any evidence in the record of the amount of damages inflicted by defendant’s vandalism or the family’s ability to pay, we conclude that a remand for renewed litigation of the issue of victim restitution is inappropriate and unwarranted.

DISPOSITION

The judgment is modified to strike the \$10 DNA penalty assessment, and reflect a state restitution fine of \$100 and an administrative fee of \$10. As so modified, the judgment is affirmed. The juvenile court is directed to prepare a corrected dispositional findings order that reflects the modification, and to forward it to the Department of Corrections and Rehabilitation, Division of Juvenile Justice.

Dondero, J.

We concur:

Marchiano, P. J.

Margulies, J.