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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
PIERCE EUGENE QUESENBERRY,  
Defendant and Appellant.

A134004

(Lake County  
Super. Ct. No. CR923962)

On January 3, 2011, defendant pleaded no contest to corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).<sup>1</sup> The trial court placed him on probation and ordered him to pay fees and fines, including a \$600 restitution fine pursuant to section 1202.4, subdivision (b), and imposed, but stayed, a \$600 probation revocation fine pursuant to section 1202.44.

Subsequently, defendant violated his probation and the court sentenced defendant to the previously suspended upper term of four years for his conviction of corporal injury on a cohabitant. Among other fines, the court stated that defendant had to pay a \$600 restitution fine pursuant to section 1202.4, subdivision (b). The court orally pronounced that defendant had to pay a \$90 criminal justice administrative fee pursuant to Government Code section 29550, subdivision (c), but the minute orders from the hearing and the abstract of

<sup>1</sup> All further unspecified code sections refer to the Penal Code.

judgment set the fee at \$92. On appeal, defendant contends that the trial court improperly imposed a second restitution fine pursuant to section 1202.4, subdivision (b), and that the abstract of judgment incorrectly set the criminal justice administrative fee at \$92 rather than at \$90.

We conclude that the trial court's oral pronouncement is not clear as to whether it was imposing the original \$600 fine or incorrectly imposing a second fine pursuant to section 1202.4, subdivision (b). Accordingly, we modify the judgment to specify that the fine pursuant to section 1202.4, subdivision (b) was imposed on March 1, 2011, when defendant was placed on probation. We agree that the abstract of judgment incorrectly stated that the criminal justice administrative fee imposed was \$92 and we modify it to reflect a \$90 criminal justice administrative fee pursuant to Government Code section 29550, subdivision (c).

### **BACKGROUND**

On December 10, 2010, an information was filed, charging defendant with corporal injury on a cohabitant (§ 273.5, subd. (a)), and with resisting arrest (§ 148, subd. (a)(1)). The facts of the underlying crime are not relevant to the issues on appeal and are therefore not set forth.

On January 31, 2011, defendant pleaded no contest to corporal injury on a cohabitant (§ 273.5, subd. (a)). On March 1, 2011, the trial court sentenced defendant to four years in prison and placed him on probation for three years. Among other fees imposed, the court ordered a restitution fine of \$600 pursuant to section 1202.4, subdivision (b), and an additional restitution fine of \$600, which the court stayed unless defendant's probation was revoked pursuant to section 1202.44.

On August 16, 2011, the probation department filed a report that defendant had violated his probation. On September 13, 2011, defendant admitted that he violated the terms of his probation. The court found that there was a factual basis

for the plea and that there was a knowing, intelligent, and voluntary waiver of rights and admission of the charge.

On October 12, 2011, the trial court sentenced defendant to the previously suspended upper term of four years for his conviction of corporal injury on a cohabitant. The court imposed various fees, and at the hearing it stated that defendant must pay a \$90 criminal justice administration fee pursuant to Government Code section 29550, subdivision (c). The minute order, however, stated that the fee was \$92. The court lifted the stay on the previously imposed \$600 probation revocation fine (§ 1202.44). The court then imposed, but stayed, a \$600 parole revocation fine pursuant to section 1202.45.

With regard to the \$600 restitution fine pursuant to section 1202.4, subdivision (b), the trial court remarked that it had reviewed the probation report. As originally written, the probation report read: “It is further recommended that the defendant pay a restitution fine in the sum of \$800 pursuant to . . . section 1202.4[, subdivision] (b). [¶] It is further recommended that the defendant pay an additional restitution fine in the sum of \$800.00 to be stayed unless the defendant’s parole is revoked pursuant to . . . section 1202.45.” The probation report contained lines through the two places where \$800 was mentioned and replaced with the handwritten \$600 in both places.

At the sentencing hearing, the court stated: “Turning to the supplemental probation report at page six starting at line 13, the—this report really didn’t help me a whole lot in terms of the financial obligations, I had to jump back and forth to the original probation order. But it is ordered that the defendant pay a restitution fine in the sum of \$600 pursuant to . . . section 1202.4[, subdivision] (b).” The probation officer stated that he did not increase the fines. The court responded, “Okay.”

The abstract of judgment stated that defendant was to pay \$600 pursuant to section 1202.4, subdivision (b), and \$600 pursuant to section 1202.44, which was currently due because probation was revoked. It also provided that defendant was

to pay \$600 pursuant to section 1202.45, which was suspended unless parole was revoked. Among other fines, the abstract of judgment set forth that a criminal justice administrative fee of \$92 was being imposed.

Defendant filed a timely notice of appeal.

## **DISCUSSION**

### **I. Restitution Pursuant to Section 12024, Subdivision (b)**

Defendant objects to the trial court's order that he pay a \$600 restitution fine pursuant to section 1202.4, subdivision (b). He maintains that the trial court improperly ordered a second fine under this statute.

Defendant did not challenge the imposition of the fine in the trial court. However, a challenge to an unauthorized sentence—one that could not lawfully be imposed under any circumstances in the particular case—is not forfeited by failing to raise it in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Section 1202.4, subdivision (b), states in relevant part: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” Subdivision (m) of section 1202.4, provides: “In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied.”

Both defendant and the People agree that the trial court imposed a \$600 restitution fine pursuant to section 1202.4, subdivision (b), when it originally placed defendant on probation and suspended imposition of sentence. They also concur that “a trial court has no statutory authority to order a second restitution fine upon revocation of probation, because a restitution fine imposed as a condition of probation remained in force despite revocation of probation.” (*People v. Arata* (2004) 118 Cal.App.4th 195, 201-202; see also *People v.*

*Chambers* (1998) 65 Cal.App.4th 819, 820-823; *People v. Urke* (2011) 197 Cal.App.4th 766, 779.) If a second fine is improperly imposed, the remedy is to strike the second fine. (*Arata*, at p. 202.) However, the People assert that the trial court did not impose a second unauthorized fine.

Defendant argues that the trial court imposed a second unauthorized fine pursuant to section 1202.4, subdivision (b), and even though the abstract of judgment correctly sets forth only one fine under this statute, the judgment must be modified. In *People v. Urke, supra*, 197 Cal.App.4th 766, the trial court incorrectly stated that a second fine was being imposed at the revocation of probation hearing but the abstract of judgment correctly set forth only one restitution fine. (*Id.* at p. 779.) The appellate court in *Urke* noted that “the oral pronouncement always prevails over the abstract of judgment” and therefore the judgment had to be modified. (*Ibid.*)

The People counter that the facts in *People v. Urke* are distinguishable because, here, the record disclosed that the trial court was not imposing two separate restitution fines under section 1202.4, subdivision (b). The trial court engaged in an interchange with the probation officer, and the People argue that this interchange indicated that the court was attempting to make sure that the amount of the fine was \$600 rather than \$800, as originally written.

We, however, conclude that the record is ambiguous. The amount of the fine imposed on March 1, 2011, when defendant received probation was identical to the fine stated at the hearing on October 12, 2011, following the revocation of defendant’s probation. At the latter hearing on October 12, 2011, the trial court orally pronounced “that the defendant [must] pay a restitution fine in the sum of \$600 pursuant to . . . section 1202.4[, subdivision] (b).” This pronouncement is unclear as to whether the court was noting that the original fine survived or whether it was imposing a new fine. The abstract of judgment correctly reflected only one restitution fee pursuant to section 1202.4, subdivision (b), but did not

specify that this fee was imposed when probation was granted and not when defendant was sentenced to prison.

Under the circumstances, we conclude the appropriate disposition is to modify the judgment to specify that the restitution fine pursuant to section 1202.4, subdivision (b) was imposed on March 1, 2011.

## **II. *Criminal Justice Administrative Fee***

Defendant argues that that the trial court stated at the hearing on October 12, 2011, that defendant should pay a \$90 criminal justice administrative fee pursuant to Government Code section 29550, subdivision (c). The minute orders from the hearing and the abstract of judgment, however, set the fee at \$92. Defendant argues that the abstract must be corrected to reflect the correct fee of \$90.

“The record of the oral pronouncement of the court controls over the clerk’s minute order.” (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.) The People agree that the abstract of judgment and minute orders should be corrected to reflect the trial court’s oral pronouncement.

## **DISPOSITION**

The judgment is modified to specify that the \$600 restitution fine pursuant to section 1202.4, subdivision (b) was imposed by the trial court on March 1, 2011. The trial court is ordered to modify the minute orders and abstract of judgment to reflect a \$90 criminal justice administrative fee pursuant to Government Code section 29550, subdivision (c), and to forward a copy of the

amended abstract to the Department of Corrections. The judgment, as modified, is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.