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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. GREGORY JOSEPH OTT, Defendant and Appellant.	A141091 (Napa County Super. Ct. No. CR166780)
In re GREGORY JOSEPH OTT, on Habeas Corpus.	A142618

Defendant Gregory Joseph Ott was sentenced to serve two years in prison after pleading no contest to possession of methamphetamine. He claims on appeal and in a related habeas corpus petition that he was denied effective assistance of counsel because of his trial attorney's failure to require the trial court to determine his ability to pay before imposing certain fees and fines. We affirm the judgment and summarily deny the writ petition.

PROCEDURAL BACKGROUND

In December 2013, Ott pleaded no contest to possession of methamphetamine (Health & Saf. Code,[1] § 11377, subd. (a)) in exchange for dismissal of an allegation that he had suffered a prior strike under California Three Strike's law. (Pen. Code, § 667,

[1]All further statutory references are to the Health and Safety Code unless otherwise specified.

subds. (b)–(i).) In January 2014, the court sentenced Ott to the middle term of two years in state prison. It also imposed various fines and fees, including a drug program fee of $615 (§ 11372.7, subd. (a)) and a $287 fine under section 11377, subdivision (c) (hereafter section 11377(c)).

Ott timely appealed. While the matter was on appeal, he filed a petition for a writ of habeas corpus claiming that he received ineffective assistance of counsel. We consolidated the writ petition with the pending appeal.

DISCUSSION

1. *Forfeiture of Challenge to Sufficiency of the Evidence*

On appeal, Ott challenges the imposition of a drug program fee and a section 11377(c) fine, which he claims were imposed without consideration of his ability to pay. Section 11372.7, subdivision (a) allows a court to impose a drug program fee when a defendant is convicted of a drug-related offense described in chapter 6 of division 10 of the Health and Safety Code. Subdivision (b) of section 11372.7 provides in pertinent part that "[t]he court shall determine whether or not the person who is convicted of a violation of this chapter has the *ability to pay* a drug program fee." (Italics added.) Similarly, in assessing a section 11377(c) fine—which a court may impose against any person convicted of a drug possession offense described in subdivision (a) of section 11377—the court must "take into consideration the defendant's *ability to pay* . . . ." (§ 11377, subd. (c), italics added.)

In *People v. McCullough* (2013) 56 Cal.4th 589, 591 (*McCullough*), our Supreme Court considered "whether a defendant who failed to object that the evidence was insufficient to support a finding of his ability to pay a booking fee [under Government Code section 29550.2, subdivision (a)] forfeited his right to challenge the fee on appeal." The booking fee must be imposed by a court "[i]f the person has the ability to pay." (Gov. Code, § 29550.2, subd. (a).) In holding that the claim was forfeited in the absence of an objection at trial, our Supreme Court distinguished claims challenging the sufficiency of the evidence to support a judgment, because in such cases the defendant necessarily objects to the sufficiency of the evidence by contesting it at trial.

(*McCullough, supra,* 56 Cal.4th at pp. 596–597.) By contrast, in the case of a defendant's ability to pay a fine or fee, the factual record remains undeveloped in the absence of an objection, thus precluding informed appellate review of what is essentially a factual determination. (*Id.* at p. 597.)

In his briefing on appeal and in his habeas petition, Ott conceded that the forfeiture rule announced in *McCullough* applied to the drug program fee and the section 11377(c) fine. In supplemental briefing, Ott withdrew the concession and claimed that the fine and fee at issue here are distinguishable from the booking fee considered by the *McCullough* court. As support for his position, he relied upon a recent decision of the Sixth District Court of Appeal, *People v. Povio* (2014) 227 Cal.App.4th 1424, review granted October 15, 2014, S220685 (*Povio*). Among other things, *Povio* questioned whether the reasoning of *McCullough* applied to certain fees and fines, including the drug program fee. (*Povio, supra,* at pp. 1433–1434.)

Since the filing of Ott's supplemental brief, the Supreme Court granted review in *Povio* pending determination of a related issue in *People v. Aguilar,* S213571, and *People v. Trujillo,* S213687. Consequently, *Povio* is no longer citable precedent. (Cal. Rules of Court, rule 8.1105(e)(1).) Moreover, the Supreme Court has subsequently decided the companion cases of *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*) and *People v. Aguilar* (2015) 60 Cal.4th 862 (*Aguilar*).

In *Trujillo,* the court held that the forfeiture rule announced in *McCullough* applies to the probation supervision fee imposed under Penal Code section 1203.1b. (*Trujillo, supra,* 60 Cal.4th at pp. 853–854.) The defendant in *Trujillo* sought to distinguish the probation supervision fee from the booking fee considered in *McCullough,* arguing that the probation supervision fee may only be imposed if certain procedures are followed. (*Id.* at pp. 857–858.) The Supreme Court rejected the significance of the claimed distinction, reasoning that the burden rests on the defendant to assert noncompliance with the procedures specified by statute. (*Id.* at p. 858.) In the companion case of *Aguilar,* the court applied the forfeiture rule to the probation supervision fee as well as an order for reimbursement of fees paid to appointed trial counsel under Penal Code section 987.8.

(*Aguilar, supra,* 60 Cal.4th at p. 864.) Just as in *Trujillo,* the court rejected the attempt to distinguish *McCullough* on the ground the booking fee does not include certain procedural requirements contained in the statutes governing the fees at issue in that case. (*Aguilar, supra,* at p. 866.)

In his supplemental brief, Ott seeks to distinguish *McCullough* on the ground that, unlike the booking fee, the statute authorizing the drug program fee "includes guidelines which must be followed before that fee may be imposed . . . ." Ott further claims the statutes authorizing the drug program fee and the section 11377(c) fine contain mandatory language requiring the court to take into account the defendant's ability to pay. These attempts to distinguish *McCullough* are no different from the arguments rejected by our Supreme Court in *Trujillo* and *Aguilar.* As the court explained in *Trujillo*, if the trial court fails to follow certain mandatory procedures or guidelines contained in a statute authorizing a fine or fee, it is the defendant's burden to assert noncompliance with the required procedures. (*Trujillo, supra,* 60 Cal.4th at p. 858.) A failure to object to the court's noncompliance waives the right on appeal to challenge the imposition of the fee or fine. (*Ibid.*)

We conclude that the forfeiture rule announced in *McCullough*, as clarified in *Trujillo* and *Aguilar,* applies to the drug program fee and the section 11377(c) fine. In this case, because Ott failed to object at sentencing to the imposition of the drug program fee and the section 11377(c) fine, he forfeited his right to challenge the sufficiency of the evidence supporting their imposition.

2. *Ineffective Assistance of Counsel*

Because Ott is precluded from directly challenging the sufficiency of the evidence to support the imposition of the drug program fee and the section 11377(c) fine, he falls back on the argument that his trial counsel provided constitutionally ineffective assistance of counsel by failing to object to their imposition at the time of sentencing. For the reasons that follow, we are not persuaded that he has set forth a cognizable claim for ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of counsel, a defendant bears the burden of demonstrating both that counsel's performance fell below an objective standard of reasonableness (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.) " ' "[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there could simply be no satisfactory explanation," the claim on appeal must be rejected.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, Ott claims there could have been no tactical reason for his counsel not to object to the imposition of the drug program fee and the section 11377(c) fine. He contends the probation report revealed that he had no apparent ability to pay because he was an unemployed, 57-year old drug abuser who was living with his sister at the time he was sentenced. His only source of income was $800 per month in Social Security Disability Income (SSDI). According to Ott, these facts do not provide substantial evidence of his ability to pay the fees and fines as enhanced by other penalties and surcharges. (See *People v. Corrales* (2013) 213 Cal.App.4th 696, 702.)

The facts cited by Ott do not establish that his counsel was ineffective for failing to object. "Ability to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) The trial court may consider the defendant's ability to pay in the future. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.) Ott fails to account for potential wages in prison. Every able-bodied prisoner is required by statute to perform labor for compensation. (Pen. Code, § 2700.) Although the record indicates that Ott was receiving SSDI, it does not specify the nature of his disability. In the absence of some indication at the time of sentencing that his disability precluded him from performing any type of labor in prison, it cannot be assumed that he was incapable of earning prison wages. (See *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1377, fn. 6 [court may not assume that defendant

with claimed bad back cannot secure prison employment without evidentiary showing].) Defense counsel and the trial court may have been mindful of this potential income source at sentencing when considering Ott's ability to pay the drug program fee and section 11377(c) fine. (See *People v. Gentry, supra,* at pp. 1377–1378; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) Further, at the time of sentencing, Ott was receiving SSDI and was living with his sister. If this arrangement were to resume after his release from prison, one might expect that some portion of his SSDI would be available to pay down the outstanding balances on the fines and fees imposed by the court.

An attorney does not provide deficient performance by failing to make an objection that counsel determines would be futile or unmeritorious. (See *People v. Price* (1991) 1 Cal.4th 324, 387.) Because defense counsel in this case may have reasonably determined the court would find that his client had the ability to pay the drug program fee and the section 11377(c) fine, the record on appeal does not support a claim that defense counsel's performance was deficient. Further, on this record, there is no reasonable probability that Ott would have secured a more favorable outcome if his counsel had objected to the imposition of the fees and fines. Accordingly, we reject his ineffective assistance claim raised on direct appeal.

3. *Habeas Petition*

While the appeal was pending, Ott filed a petition for a writ of habeas corpus claiming ineffective assistance of counsel on the ground that his counsel was ineffective for failing to object to the imposition of the drug program fee and the section 11377(c) fine. In an effort to establish both that his trial counsel provided deficient performance and that he was prejudiced by the deficiency, Ott's habeas petition includes two pieces of evidence outside of the record on appeal—a declaration by Ott and a declaration by his appointed counsel on appeal. As we explain, the evidence offered by Ott does not change our conclusion concerning his ineffective assistance claim.

When an appellate court receives a petition for a writ of habeas corpus, it must first determine whether the petition's factual allegations, if taken as true, entitle the

petitioner to relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474–475.) "If no prima facie case for relief is stated, the court will summarily deny the petition." (*Id.* at p. 475.)

Ott states in the declaration accompanying his habeas petition that he is currently incarcerated at San Quentin and that his only source of income before being sent to prison was approximately $800 per month in SSDI benefits. He further declares that he was not been able to earn prison wages because there are "0 pay jobs," and he states that "ADA Appliaces [sic] for left leg to correct shorter leg denied . . . ."

Insofar as Ott's declaration states that his only source of income before being incarcerated was SSDI benefits, it provides no more information than is contained in the probation report. Without some indication of his actual expenses, including whether he was required to pay rent while living with his sister, we have no way to know whether he would be able to use some portion of his SSDI benefits toward paying the fines and fees imposed by the court.

Moreover, to the extent Ott claims he is currently unable to secure employment while in prison, that fact—even if true—is not relevant to what was known to his trial counsel *at the time of sentencing*, which is the crucial time for purposes of assessing counsel's performance. As the United States Supreme Court instructed in *Strickland v. Washington, supra,* 466 U.S. at page 690, we evaluate attorney performance based upon counsel's perspective at the time counsel was required to act. We do not measure performance in hindsight. Here, at the time the court imposed various fines and fees, it would have been entirely reasonable for trial counsel to expect that Ott would have been able to secure some form of employment in prison. Counsel cannot be faulted for being unaware of facts that did not arise until after Ott was incarcerated.

In the declaration submitted by Ott's appointed counsel on appeal, the attorney states that he wrote to Ott's trial counsel asking "for any tactical explanation" why trial counsel did not object to the imposition of the challenged fine and fee. The declaration further reflects that Ott's appointed counsel on appeal had not received any response to the letter as of the time the declaration was prepared. Ott presents this evidence for the

purpose of establishing that trial counsel was asked for an explanation for his actions and declined to provide any.

Trial counsel's failure to respond to appellate counsel's letter does not establish that trial counsel had no tactical reason for his actions. As an initial matter, there is no confirmation that trial counsel even received the letter. Further, the *lack of evidence* does not establish *facts* entitling Ott to prevail on a claim for habeas relief. While trial counsel has an ongoing duty to assist a client—even if that means exposing counsel's own failings—we cannot simply assume that the lack of a response means that counsel had no reason for declining to object.

In sum, just as he did on direct appeal, Ott has failed to establish that he was prejudiced by his counsel's allegedly deficient performance. Nothing in the habeas petition causes us to conclude that there is a reasonable probability that, but for counsel's failure to object at the time of sentencing, the trial court would have found that Ott lacked the ability to pay the drug program fee and the section 11377(c) fine.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.