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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.

CHRISTOPHER J. BYNUM,

Defendant and Appellant.

A141542

(Lake County
Super. Ct. Nos. CR932186, CR933979)

Defendant Christopher J. Bynum appeals from two judgments of convictions for possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and possessing methamphetamine for sale (Health & Safe. Code, § 11378), plus an admission to a related sentence enhancement (Pen. Code, § 12022.1). At sentencing, the court imposed an aggregate term of four years in county jail and certain financial penalties, but did not impose a restitution fine under Penal Code section 1202.4, subdivision (b) (§ 1202.4(b)). Nevertheless, the court’s minute orders of the sentencing hearing reflect the imposition of a section 1202.4(b) restitution fine of \$1,120 in each case, for a total of \$2,240. On appeal, defendant argues the clerk had no authority to include a section 1202.4(b) restitution fine in the minute orders because the trial judge did not orally impose the restitution fine at sentencing. He asks us to remand the matter to allow the trial court to set the amount of the section 1202.4(b) restitution fines. The Attorney General argues defendant forfeited the claim he asserts on appeal, and in all events, the judgment should be affirmed because the trial court adopted the restitution fines as recommended in the probation report and defendant was on notice that the court might impose the

recommended restitution fines at sentencing. We conclude defendant has not forfeited his right to challenge the clerk's inclusion of a section 1202.4(b) restitution fine in the minute orders. We also conclude the clerk was not authorized to include a section 1202.4(b) restitution fine in the minute orders and the appropriate remedy in this case is to strike from the court's March 17, 2014 minute orders the section 1202.4(b) restitution fine and remand the matter to the trial court with a direction to consider whether to impose section 1202.4(b) restitution fines.

FACTUAL AND PROCEDURAL BACKGROUND

As part of an agreement to resolve two informations, defendant pleaded no contest to one count of possessing methamphetamine on April 16, 2013 (Health & Saf. Code, § 11377, subd. (a)) and one count of possessing methamphetamine for sale on October 30, 2013 (Health & Safe. Code, § 11378). As to a related bail sentence enhancement allegation (Pen. Code, § 12022.1), the court took judicial notice that at the time defendant possessed methamphetamine for sale he had been released from custody on his own recognizance on the earlier charge of possession of methamphetamine. The court incorporated into the record as if set forth in full defendant's plea agreement, which included his admission to the bail sentence enhancement allegation.

Before sentencing, the probation department filed two identical probation reports (one as to each information), noting, in pertinent part: "The following is recommended: [¶] The defendant will pay a criminal laboratory analysis fee in the sum of \$100.00, (\$50.00, per case) plus a penalty assessment of \$310.00, (\$155.00 per case) pursuant to Section 11372.5 of the California Health and Safety Code. [¶] The defendant will pay a drug program fee of \$300.00, (\$150.00) per case, plus a penalty assessment fee of \$930.00 (\$465.00 per case), pursuant to Section 11372.7 of the California Health and Safety Code. [¶] . . . [¶] The defendant shall pay a Criminal Conviction assessment of \$60.00, (\$30.00 per case) pursuant to Government Code Section 70373. [¶] The defendant will pay a restitution fine in the sum of \$1,120.00, pursuant to Penal Code Section 1202.4(b). [¶] The defendant will pay a Court Operations assessment of \$80.00, (\$40.00 per case) pursuant to Penal Code Section 1465.8. [¶] The defendant will pay a

Criminal Justice Administrative Fee of \$90.00 pursuant to Government Code Section 29550(c).”

At the beginning of the sentencing hearing held on March 17, 2014, the trial judge commented he had read and considered “the probation report,” and the parties’ counsel stipulated the probation report could be received as evidence at the hearing. After argument by counsel, the trial judge imposed sentence. He found that although defendant was not requesting a probationary term, probation would be denied because of defendant’s numerous prior convictions and prior poor performance on probation. The trial judge then set forth his reasons for imposing an aggregate term of four years to be served in county jail. He also imposed certain financial penalties as follows: “The defendant is ordered to pay a criminal laboratory analysis fee of \$100, that’s \$50 per case, plus penalty assessment of 310, 155 per case, under . . . Section 11372.5 of the Health and Safety Code [¶] What about the drug program fee? On the drug program fee the Court is required to . . . only impose it if there’s an ability to pay. I’m looking at page 11.^[1] Well, he has an income or had an income of \$600 a month. I find he has no ability to pay the drug program fee, so I’m not imposing it. That’s at Health and Safety Code Section 11372.7. [¶] . . . Pay a criminal conviction assessment of \$60, \$30 per case, under Government Code Section 70373. [¶] A restitution fine under Penal Code Section 1202.4(b). Court operation assessment of \$80, 40 per case, Penal Code Section 1465.8. Criminal justice administrative fee of \$90, Government Code 29550 (c).” In the March 17, 2014, sentencing minute order prepared for each case, the clerk reported under the title “**Financial Obligations**,” “Restitution Fine of \$1,120.00 is imposed per PC 1202.4(b). [¶] Lab Fee of \$50.00 plus a penalty assessment of \$155.00 is imposed per HS 11372.5 in each case. [¶] Court Operation Assessment of: \$40.00 is imposed per PC 1465.8, in each case. [¶] Criminal Justice Administrative Fee of \$90.00 is imposed per

¹ In each probation department report, at page 11, the probation department officer indicated defendant’s financial status.

GC29550(c). [¶] Criminal Conviction Assessment of \$30.00, per GC70[3]73, in each case.”

DISCUSSION

On appeal defendant argues, and we agree, that the minute orders from the sentencing hearing of March 17, 2014, inaccurately reflect that the trial judge imposed section 1202.4(b) restitution fines in both cases. (*People v. Zackery* (2007) 147 Cal.App.4th 380 (*Zackery*)). As explained by the court in *Zackery*: “ ‘With certain exceptions not applicable here [citations] judgment and sentence in felony cases may be imposed only in the presence of the accused.’ [Citation.] Thus, [Penal Code] section 1193 provides in pertinent part, ‘Judgment upon persons convicted of commission of crime shall be pronounced as follows: [¶] (a) If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless [certain exceptions apply]’ ([Pen. Code,] § 1193.) [¶] ‘ ‘Rendition of judgment is an oral pronouncement. [Citation.]’ ’ [¶] ‘A judgment includes a fine. A restitution fine is a fine.’ ” (*Zackery, supra*, at pp. 386-387.) “The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order [Citation.] [Instead,] the clerk’s minutes must accurately reflect what occurred at the hearing.” (*Id.* at pp. 387-388.) Thus, in this case, the minute orders of the March 17, 2014 sentencing hearing must be amended by striking the references to a \$1,120 restitution fine pursuant to section 1202.4(b).

In her responsive brief, the Attorney General does not address the merits of defendant’s appellate claim or the applicability of *Zackery, supra*, 147 Cal.App.4th 380. She presses only one argument, that defendant’s claim is forfeited by his failure to raise the issue at the sentencing proceeding. We disagree. Unlike the factual situations in the cases cited by the Attorney General, we are not here concerned with a challenge to a trial court’s imposition of a specific sum imposed as either a restitution fine (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469), or victim restitution (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218). Here, we

are concerned with a court's minute orders that *inaccurately* reflect that the trial judge imposed restitution fines during the sentencing proceeding.

We also see no merit to the Attorney General's argument that we may affirm because the record shows the trial court adopted the restitution fines recommended in the probation report and defendant was on notice that the court might impose the recommended restitution fines. Section 1202.4(b) provides the trial court must impose a restitution fine "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." Here, it appears the trial court intended to rule on whether to impose a section 1202.4(b) restitution fine, but did not do so. During its pronouncement of sentence the court sequentially referred to the financial penalties as they appeared in the probation report, and only mentioned "[a] restitution fine under Penal Code Section 1202.4(b)," without specifying any amount or stating its reasons for not imposing the fine. The court did not otherwise state it was imposing a specific financial penalty because it was recommended in the probation department report. And, indeed, in one instance the court struck the probation department's recommended sum for the drug program fee after finding that defendant did not have the ability to pay it. Thus, the record calls into question whether the court would have imposed section 1202.4(b) restitution fines and in what amounts. Because we cannot ascertain with any certainty how the court intended to rule, we shall grant plaintiff's request to remand with a direction to the trial court to hold a hearing to determine whether to impose section 1202.4(b) restitution fines. We express no opinion on how the court should exercise its discretionary authority on remand.

DISPOSITION

The matter is remanded to the trial court with directions to (1) amend its minute orders of the March 17, 2014 sentencing hearing by striking the references to a \$1,120 restitution fine pursuant to Penal Code section 1202.4, subdivision (b); and (2) hold a hearing to determine whether to impose restitution fines pursuant to Penal Code section 1202.4, subdivision (b). In all other respects, the judgments are affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.