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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

COLBY LEVITZ,

Defendant and Appellant.

C066819

(Super. Ct. No.
10F02663)

Defendant Colby Levitz pled no contest to residential burglary and was placed on probation.

On appeal, he contends the minute order and order of probation should be corrected to (1) omit all fines and fees that are dependent upon a discretionary determination that he has the ability to pay (the booking and classification fees), (2) accurately reflect the oral pronouncement of judgment (which did not include the imposition of a monthly probation supervision fee, urinalysis fee or presentence report fee) and

the court's award of custody and conduct credits, and (3) clarify that the court facilities fee is not a condition of probation. We agree and shall direct the trial court to modify its written order accordingly.

DISCUSSION

I. Fees Not Ordered by the Court

The minute order and order of probation states that defendant must pay three fees that the trial court did not mention in its oral rendition of judgment: a \$25 urinalysis fee, a \$46/month probation supervision fee, and a \$702 presentence report fee.

Defendant contends these three fees should be stricken from the minute order. The People agree, as do we. The minute order and order of probation does not reflect the judgment pronounced orally by the trial court; to the extent it includes fees not ordered by the trial court, those fees are unauthorized and shall be ordered stricken. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385, 387-389, citing *People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

II. Jail Booking and Classification Fees

At the sentencing hearing, defendant reviewed the fines recommended in the probation report, and objected to the imposition of a jail booking fee and jail classification fee, on the grounds the probation report incorrectly identifies them as "mandatory." In fact, he argued, the imposition of these fines is not mandatory because their imposition is "subject to ability

to pay," and cited *People v. Pacheco* (2010) 187 Cal.App.4th 1392.

Following argument, the trial court ordered defendant to "pay all mandatory fines" and said, "[a]ll other discretionary fines are waived." It clarified defendant is to pay three fines identified as "mandatory" in the probation report: a \$270.17 main jail booking fee and \$51.34 main jail classification fee, both imposed pursuant to Government Code section 29550.2, and a \$30 court facilities fee, imposed pursuant to Government Code section 70373.

On appeal, defendant contends the trial court erred in imposing the Government Code section 29550.2 jail booking and classification fees on the same basis he urged below: these fees are not "mandatory," in that their imposition is contingent on a finding of a defendant's ability to pay, and the record does not support a finding of his ability to pay them.

The People respond that the jail booking and classification fees were properly assessed because the trial court made an implied finding defendant has the ability to pay them when it imposed the fees over defendant's objection.

Defendant has the more persuasive argument.

Government Code section 29550.2, subdivision (a) provides, in pertinent part, "Any person booked into a county jail pursuant to any arrest . . . is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and

booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c) *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action" (Italics added.) Subdivision (c) of the same section authorizes fees for booking and classification while in jail.

A trial court's finding of an ability to pay may be implied, and will be upheld on appeal if it is supported by substantial evidence. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 70-71; *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920-921.)

Here, the trial court made no explicit findings, stating only "[t]he Court is ordering that you pay" the Government Code section 29550.2 fees. Nor does the probation report support an implied finding of defendant's ability to pay. According to the probation report, defendant did not graduate from high school, has no further educational degree, is not employed, has not served in the military, planned to live with his mother upon his release from custody, and has no source of income. His mother reported in connection with a previous offense that defendant has been diagnosed as suffering from bipolar disorder. Thus

there is no evidence to support a finding that defendant has the ability to pay the booking and classification fees.¹

We recognize that we have the option, requested in the alternative by defendant, of remanding the case to the sentencing court for an express determination of defendant's ability to pay. Given the state of the record and in the interests of judicial economy, we decline to do so. Instead, we shall strike the fees, which is another option available to us in this situation. (See *People v. Pacheco, supra*, 187 Cal.App.4th at p. 1403.)

III. Court Facilities Fee

Defendant next contends, and the People concede, the trial court erred by imposing the court facilities fee (Gov. Code, § 70373) as a condition of his probation. We agree.

Court facilities fees are "collateral" to a defendant's crime and punishment, in that they are "not oriented toward a defendant's rehabilitation but toward raising revenue for court operations." (*People v. Kim* (2011) 193 Cal.App.4th 836, 842 (*Kim*), citing *People v. Pacheco, supra*, 187 Cal.App.4th at pp. 1402-1403.) Thus, the fee should be "separately imposed and not made a condition of probation." (*Kim, supra*, 193 Cal.App.4th at p. 842.)

¹ Defendant also argues he has no ability to pay the costs of probation supervision, or preparation of the presentence report; as we have ordered these two fees stricken because the court did not impose them, we need not address defendant's ability to pay them.

The court's written minute order and order of probation describe payment of this fee as a condition of probation. We shall direct the trial court to correct the order to reflect the separation of this court fee from the terms and conditions of probation.

IV. Credits

Defendant contends the written minute order and order of probation should be corrected to reflect the trial court's oral award of 210 days' custody credit and 104 days' conduct credit, for a total of 314 days' presentence credit. The minute order and order of probation awards custody, but no conduct, credits. The People concede the error. Because the written order must be corrected in other respects, we shall direct the trial court to include the custody and conduct credits in the corrected minute order and order of probation. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 426-427.)

DISPOSITION

The trial court is directed to correct the minute order and order of probation to conform with oral pronouncement of judgment: to strike the \$270.17 jail booking fee, \$51.34 jail classification fee, probation supervision fee of \$46/month, presentence report fee of \$702, and urinalysis fee of \$25, and to reflect 210 days' custody credit and 104 days' conduct credit. The court is further directed to correct the minute order and order of probation to reflect the court facilities fees as separate from the order of probation. As modified, the judgment is affirmed.

The trial court shall forward a certified copy of the corrected minute order and order of probation to any officer having custody of defendant.

BLEASE, J.

We concur:

RAYE, P. J.

BUTZ, J.