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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON DWAYNE PINKNEY,

Defendant and Appellant.

C067536

(Super. Ct. No. 09F01334)

Convicted by a jury of unlawfully possessing firearms and ammunition as a felon and placed on probation, defendant Aaron Dwayne Pinkney challenges only certain fees and assessments imposed by the trial court at sentencing. We modify the judgment, remand the matter for correction of the sentencing minute order, and affirm as modified.

FACTUAL AND PROCEDURAL BACKGROUND¹

An information charged defendant with two counts of possession of ammunition by a convicted felon (counts one & two; Pen. Code, former § 12316, subd. (b)(1)), possession of oxycodone (count three; Health & Saf. Code, § 11350), possession of morphine (count four; Health & Saf. Code, § 11350), and four counts of possession of a firearm by a convicted felon (counts five-eight; Pen. Code, § 12021, subd. (a)(1)).

Before jury trial began, counts three and four were dismissed on motion of the People, and counts five through eight were renumbered as counts three through six.

The jury acquitted defendant on count three and convicted him on counts one, two, four, five and six.

The trial court placed defendant on five years' formal probation, including 300 days in county jail (with 12 days' credit for time served). The court orally imposed fees and fines including a court security fee of \$200 (Pen. Code, § 1465.8), a court facility fee of \$150 (Gov. Code, § 70373), a main jail booking fee of \$270.17 (Gov. Code, § 29550.2), and a main jail classification fee of \$51.34 (Gov. Code, § 29550.2).²

Without explaining the discrepancy, the sentencing minute order/order of probation gives the booking fee as \$287.78 and the classification fee as \$59.23. It also states that the court security fee is "a court ordered fee[,] not a condition of probation," which the trial court did not expressly state at sentencing.

¹ A summary of the facts underlying the charges of which defendant was convicted is unnecessary for purposes of this appeal.

² The trial court did not recite the statutory basis of these fees, which appears only in the sentencing minute order/order of probation. It is well settled that the court must recite the statutory basis of every fee and fine imposed in its oral pronouncement of sentence. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200-1201.)

DISCUSSION

I. Fees Imposed as Conditions of Probation

Defendant contends the trial court erred in imposing the court security fee and the court facility fee as conditions of probation, because case law has held that these fees may not be imposed as probation conditions, but must be imposed as separate orders. He requests that this court modify the judgment accordingly.

The Attorney General responds that the trial court did not impose the fees as conditions of probation, but agrees that if we find otherwise, the remedy proposed by defendant is appropriate.

Defendant has the better argument. We shall modify the judgment.

“[Penal Code] [s]ection 1465.8, subdivision (a)(1), requires the court to impose a fee on every conviction ‘[t]o ensure and maintain adequate funding for court security.’ Government Code section 70373, subdivision (a)(1) requires the court to impose an assessment on every felony conviction ‘[t]o ensure and maintain adequate funding for court facilities.’ Neither the fee nor the assessment . . . is subject to automatic penalty assessments. ([Pen. Code,] § 1465.8, subd. (b); Gov. Code, § 70373, subd. (b).) Neither statute provides for . . . imposing the fee or assessment as a probation condition.”³ (*People v. Kim* (2011) 193 Cal.App.4th 836, 842, fn. omitted (*Kim*).

Because these fees are “ ‘collateral’ to a defendant’s crime and punishment” and “not oriented toward a defendant’s rehabilitation but toward raising revenue for court operations” (*Kim, supra*, 193 Cal.App.4th at p. 842), they should be separately imposed, not made conditions of probation (*id.* at pp. 842-843).

³ In contrast, the Legislature has expressly stated that payment of the booking and classification fees authorized under Government Code section 29550.2 shall be ordered as conditions of probation. (Gov. Code, § 29550.2, subd. (a).)

Since the imposition of these fees as probation conditions is “unauthorized as a matter of law and correctable without reference to factual findings,” a defendant may challenge such an order for the first time on appeal. (*Kim, supra*, 193 Cal.App.4th at p. 842.)

Here, the probation report recommended all of its proposed fees and fines, including the court security fee and the court facility fee, as terms and conditions of probation. After the trial court orally imposed probation, it stated it would impose “the recommended conditions other than the maximum term.” The court then ordered that defendant submit to search and seizure without a warrant, ordered that defendant not own or possess any deadly or dangerous weapons, and reminded defendant he had to obey all laws, including the prohibition against felons possessing firearms or ammunition. The court then imposed all the recommended fees and fines, without saying any of the fees were not conditions of probation. Then the court ordered defendant not to own or possess firearms or ammunition. The court concluded by stating, “The Court will impose the general terms and conditions that are set out in the probation order as -- or probation report as one through seven. The Court is imposing all of those.” Then the court asked, “And, Mr. Pinkney, the question is do you understand and accept the terms and conditions of this probation?”

We conclude that the record demonstrates the court imposed the court security fee and the court facility fee as probation conditions. This was error.

It is immaterial that the minute order/order of probation calls the court security fee “a court ordered fee[,] not a condition of probation.”⁴ “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), which “may not add to or modify the judgment it

⁴ The order makes no such comment as to the court facility fee.

purports to digest or summarize” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*) [abstract of judgment]).

The Attorney General contends that the trial court did not expressly indicate that the fees were imposed as conditions of probation and asks us to apply the presumption “that the trial court followed applicable law in performing its duty.” (Cf. Evid. Code, § 664; *People v. Burnett* (2004) 116 Cal.App.4th 257, 261.) But this presumption applies only if not rebutted by the record. Here, unlike in *Burnett*, where the record was silent on the point in dispute (*Burnett, supra*, at pp. 261-262), the trial court’s oral sentencing statement rebuts the presumption of Evidence Code section 664 by showing that the court intended to impose the fees at issue as conditions of probation.

The written minute order/order of probation must be modified to reflect that both the court security fee and the court facility fee are imposed as separate orders, not as probation conditions. (Cf. *Kim, supra*, 193 Cal.App.4th at pp. 847-848.)

II. Jail Booking and Classification Administrative Costs

Citing *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1400, 1404, defendant contends the trial court erred by imposing the jail booking fee and the jail classification fee without making a determination of the actual administrative costs incurred for booking and classifying an arrestee. The Attorney General responds that the contention is forfeited because defendant did not object to this asserted sentencing error in the trial court. We agree with the Attorney General.

Noting that the issue of whether a defendant forfeits a contention of insufficient evidence of ability to pay such fees by failing to raise that contention in the trial court is presently under review by the California Supreme Court (*People v. McCullough* (2011) 193 Cal.App.4th 864, S192513, rev. granted June 29, 2011), we believe that the line of cases finding forfeiture is correctly decided. Accordingly, we apply the reasoning from

that line of cases here and conclude that defendant has forfeited the contention that the trial court did not determine the actual administrative costs because he did not raise the issue below. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072; *People v. Robinson* (2002) 104 Cal.App.4th 902, 905-906; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.)⁵

III. Amount of Jail Booking and Classification Fees

As noted above, there is a discrepancy between the oral sentencing order and the written minute order/order of probation as to the amounts of the jail booking fee and jail classification fee. The court orally imposed a jail booking fee of \$270.17 and a jail classification fee of \$51.34, but the minute order reflects a jail booking fee of \$287.78 and a jail classification fee of \$59.23. The parties agree that this discrepancy must be corrected by remanding the matter to the trial court with directions to prepare a new minute order that conforms to the oral order. We shall do so. (See *Mitchell, supra*, 26 Cal.4th at p. 185.)

DISPOSITION

This matter is remanded to the trial court with directions to prepare a corrected sentencing minute order/order of probation reflecting that the court security fee and the court facility fee were imposed as separate orders, not as conditions of probation, and showing the jail booking fee as \$270.17 and the jail classification fee as \$51.34. Further,

⁵ We also note that the issue raised by defendant is presently on review by our high court as well. In *People v. Almanza* (2012) 207 Cal.App.4th 269, S204410, review granted September 26, 2012, Division Two of the Court of Appeal for the Fourth Appellate District disagreed with *Pacheco* to the extent that it can be interpreted as requiring an evidentiary hearing on the actual administrative costs. The court held that such costs could be determined by taking judicial notice of the Board of Supervisors' minutes and the recommendation for approval of the fee.

the court is directed to transmit a copy of the corrected sentencing minute order/order of probation to the probation department.

As so modified, the judgment is affirmed.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.