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

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
SENG HER,  
  
Defendant and Appellant.

C068002  
  
(Super. Ct. No.  
10F07201)

A jury convicted defendant Seng Her of possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a); count three.) The jury deadlocked and a mistrial was declared on counts of inflicting corporal injury on the parent of his child

(Pen. Code,<sup>1</sup> § 273.5, subd. (a); count one) and battery resulting in serious bodily injury (§ 243, subd. (d); count two). The trial court found that the conviction constituted a probation violation in case No. 08F04890, and that defendant had suffered a prior serious felony conviction. The prosecution dismissed the mistried counts in the interest of justice. Defendant was sentenced to state prison for seven years, consisting of the upper term of three years, doubled for the prior strike, plus one year in case No. 08F04890. He was awarded 172 days' custody credit and 172 days' conduct credit in this case and an aggregate 124 days' presentence credit in case No. 08F04890.<sup>2</sup>

Defendant was ordered to pay a \$200 restitution fine (§ 1202.4), a \$200 restitution fine suspended unless parole is revoked (§ 1202.45), a \$50 laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) plus \$130 in penalty assessments, a \$150 drug program fee (Health & Saf. Code, § 11372.7) plus \$130 in penalty assessments, a \$40 court security fee (§ 1465.8, subd. (a)(1)), a \$30 court facilities

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Case No. 08F04890 is not listed on defendant's notice of appeal. We have no occasion to consider whether the presentence credit award in that case is consistent with the 2010 amendment to section 2933.

assessment (Gov. Code, § 70373), a \$287.78 main jail booking fee (Gov. Code, § 29550.2), and a \$59.23 classification fee (*ibid*).

On appeal, defendant contends imposition of the booking and classification fees was reversible error because he was "financially unable to pay . . . ." We affirm.

#### FACTS

In November 2010, O.T. resided with defendant and his family at the home of defendant's brother. O.T. and defendant are the parents of a one-year-old child.

On November 1, 2010, O.T. went to a Sacramento hospital complaining of pain to her collarbone as a result of defendant picking her up and throwing her to the ground. Medical personnel and x-rays established that O.T. had a fractured left clavicle and a partially healing right clavicle.

Sacramento Police Department officers responded to the hospital and took a statement from O.T. Then they proceeded to defendant's residence and contacted him in the garage. An officer observed an approximately four-inch-long glass smoking pipe next to defendant. In his coin pocket, the officer found a baggie containing .30 grams of methamphetamine.

#### DISCUSSION

##### I

Defendant contends the jail booking and classification fees must be stricken because the trial court imposed them without

determining his present ability to pay. The claim is not properly before us.

Under Government Code section 29550.2, subdivision (a), "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 defines "actual administrative costs" as including fees for booking and classification while in jail. (Gov. Code, § 29550.2, subs. (c)(1) & (c)(7).)

Defendant argues that, since the statute is predicated on ability to pay and no evidence suggested he had such ability, the fees were improperly imposed. The Attorney General counters

that defendant had forfeited the issue by not objecting to payment of the jail fees in the trial court.

This court has previously held that, if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine—§ 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee—Gov. Code, § 29550.2].) We have applied the forfeiture rule even when the claim on appeal is that there is not sufficient evidence to support the imposition of the fine or fee. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 (*Gibson*) [restitution fine—Gov. Code, former § 13967, subd. (a)].)

However, the Sixth Appellate District has concluded that appeals challenging the imposition of fines and fees based on claims of insufficient evidence “do not require assertion in the court below to be preserved on appeal.” (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) This holding created a conflict between *Pacheco* and the cases cited above. The California Supreme Court has agreed to resolve the conflict. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, rev. granted on June 29, 2011, S192513.)

Until the California Supreme Court issues further guidance, we continue to adhere to our holding in *Gibson*, i.e., that a failure to object to a fee or fine in the trial court forfeits the issue, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*Gibson, supra*, 27 Cal.App.4th at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Id.* at p. 1468.) Not applying forfeiture principles in such cases not only encourages attorney gamesmanship, but depletes judicial resources and wastes taxpayer money. (See *Gibson*, at pp. 1468-1469.)

Accordingly, we conclude that defendant's failure to raise the issue of his ability to pay the main jail classification and booking fees in the trial court precludes review for the first time on appeal.

## II

Anticipating our conclusion, defendant claims his trial counsel's failure to object to the booking and classification fees constitutes ineffective assistance. We disagree.

“ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citation.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]” [Citation.]” (*People v. Avena* (1996) 13 Cal.4th 394, 418; fn. omitted.)

“ “[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 simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]” (*People*

*v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; see *People v. Lucero* (2000) 23 Cal.4th 692, 728-729.)

In this case defendant's trial counsel was not asked for, and did not provide, any explanation for his failure to object to the fees. Defendant claims "the evidence in the record supports the fact that [he] did not have the ability to pay," thus, "[t]here is no rational excuse" for the failure to object. In his view, the fees should be stricken or the fee portion of the sentence reversed and remanded to the trial court.

The Attorney General counters that (1) the trial court impliedly found that defendant had the ability to pay, (2) the implied finding is supported by the record, and (3) any deficient performance by defendant's trial counsel could not have been prejudicial. The Attorney General has the better argument.

At a pretrial hearing on reduction of bail, trial counsel represented that defendant "has a significant heart problem and does not feel he can get the treatment that he needs for his heart condition if he's in custody. Specifically he's looking to get a heart transplant. [¶] He's [sic] doesn't have a job. He's disabled because of the heart issue."

The prosecutor countered that she was "skeptical of his heart situation given the fact that he's on methamphetamine and has methamphetamine in his pocket when he's contacted by police

in this case." The prosecutor evidently reasoned that defendant's use of methamphetamine could seriously aggravate his claimed heart condition; thus, the use implied that the condition did not exist. The bail reduction motion was denied.

At trial, O.T. testified that defendant had "[c]ongestive heart failure." Defendant's trial counsel represented that he had a "congenital heart defect . . . ." The arresting police officer testified that, after defendant disclosed his heart condition, his blood pressure measured high at the jail so he was taken to a hospital that nevertheless cleared him to be housed in jail. No medical records were introduced to substantiate the claimed heart condition.

Defendant told the probation officer that he suffers from congestive heart failure, he takes medication for the heart condition, and he is seeking supplemental security income due to his condition.

The credibility of defendant's statements to the probation officer is doubtful for several reasons: first, he could not remember the name of his claimed medication; second, he denied "consuming alcohol or taking any type of drugs" even though his conviction is for possessing methamphetamine; third, his heart condition evidently did not prevent him from (1) performing "work project" during his probation, (2) lifting his girlfriend and throwing her onto the ground, or (3) receiving medical

clearance for the jail; and fourth, as the prosecutor noted at the bail hearing, the claimed condition did not dissuade defendant from using methamphetamine.

The probation report showed that defendant was 27 years old, had dropped out of school in the 10th grade, and had no work history. Despite the lack of employment, he managed to obtain unknown quantities of methamphetamine and to pay \$210 to the Department of Revenue Recovery.

Under all of these circumstances, the trial court was entitled to infer that defendant's lack of employment history "was not due to functional causes but was the product of defendant's choice of lifestyle." (*People v. Staley* (1992) 10 Cal.App.4th 782, 786.) Even with his chosen lifestyle, defendant had made a substantial payment towards his financial obligations and no evidence negated the possibility of future payments. Thus, the record supports an implied finding that defendant had the ability to pay. (*Ibid.*)

Defendant's trial counsel could have believed that, especially in light of defendant's payment history, an objection to the jail fees would be unsuccessful. Thus, there could have been a satisfactory explanation for the failure to object to the fees. Defendant must pursue his ineffective assistance claim in habeas corpus proceedings. (*People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.