Filed 12/5/12 P. v. Ely CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES REGINALD ELY, Defendant and Appellant.	C069251 (Super. Ct. No. 11F01667)

Following a jury trial, defendant James Reginald Ely was convicted of sale of cocaine base. (Health & Saf. Code, § 11352, subd. (a).) The trial court sustained a prior prison term allegation (Pen. Code, § 667.5, subd. (b)) and sentenced defendant to five years in state prison.

On appeal, defendant contends that the prospective application of the Criminal Justice Realignment Act of 2011 (Realignment Act; Stats. 2011, ch. 15) violates his right to equal protection of the law, and the trial court imposed fees without determining his ability to pay. We vacate the drug program fee (Health & Saf. Code, § 11372.7), booking

fee (Gov. Code, § 29550.2), and jail classification fee (Gov. Code, § 29550.2); remand for a hearing on defendant's ability to pay those fees; and affirm the judgment as modified.

DISCUSSION

We dispense with the facts of defendant's crime, which are unnecessary to resolve this appeal.

I

Defendant was sentenced to state prison on September 16, 2011. Under the Realignment Act, felons are confined to county jail instead of state prison unless they have a current or prior serious or violent felony conviction, or are required to register as a sex offender, or are subject to the aggravated white collar crime enhancement. (Pen. Code, § 1170, subd. (h)(1)-(3).)

The Realignment Act would apply to defendant but for the date of his sentencing. "The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011." (Pen. Code, § 1170, subd. (h)(6).) Defendant contends this violates his right to equal protection of the law.

We rejected an identical contention in *People v. Lynch* (2012) 209 Cal.App.4th 353, 362. We reject defendant's contention for the reasons stated in our opinion in *Lynch*.

II

Defendant and the Attorney General agree that the trial court erred in failing to determine defendant's ability to pay certain fees.

The trial court imposed various fines and fees, including a $150 drug program fee (Health & Saf. Code, § 11372.7) with an additional $130 in penalties and assessments, a booking fee of $287.78 (Gov. Code, § 29550.2), and a $59.23 jail classification fee (Gov. Code, § 29550.2). Defense counsel asked the trial court to waive or reduce the fines and fees, and asserted that the trial court could waive the drug program, booking, and jail

classification fees. The trial court disagreed, declaring that these fees must be "imposed in every case."

The trial court was wrong. The drug program, booking, and jail classification fees are predicated on the trial court's finding that the defendant has the ability to pay them. (Health & Saf. Code, § 11372.7, subd. (b); Gov. Code, § 29550.2, subd. (a).)

Defendant asks us to vacate the fees without a remand as there was no evidence of his ability to pay them at the sentencing hearing. We disagree. When the trial court fails to make a necessary finding or applies an inappropriate standard, the preferred solution is to remand the case for a new hearing on the matter. Since the trial court applied an incorrect legal standard, we shall remand the case for the court to apply the correct standard. (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 158 [remand for new hearing under correct standard when trial court applied the wrong one].)

DISPOSITION

The drug program, booking, and jail classification fees (Health & Saf. Code, § 11372.7; Gov. Code, § 29550.2) and any related penalties or assessments are vacated and the case is remanded for a hearing on defendant's ability to pay those fees. As modified, the judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

HULL, J.