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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN NELSON,

Defendant and Appellant.

C069514

(Super. Ct. No.  
11F04485)

Defendant Juan Nelson pleaded no contest to felony vandalism (Pen. Code, § 594; statutory references that follow are to the Penal Code unless otherwise indicated) and admitted a strike allegation for a prior criminal threats (§ 422) conviction (§§ 667, subds. (a)-(i), 1170.12, 1192.7, subd. (c)). The trial court sentenced defendant to a stipulated two-year eight-month state prison term, imposed various fines and fees, and awarded 174 days of presentence credit (116 actual and 58 conduct).

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 there was insufficient evidence to support a finding that he could pay the booking and classification fees (Gov. Code, § 29550.2). We affirm the judgment.

## DISCUSSION

We need not set forth the facts of defendant's crime because they are not relevant to the issues he raised on appeal.

### I

#### *Conduct Credits*

Defendant committed his crime on June 20, 2011. He was sentenced on October 14, 2011.

The trial court sentenced defendant under the September 28, 2010, revision of the presentence credit law. Under that version, a defendant with a current or prior serious or violent felony conviction was entitled to two days of conduct credit for every four days of presentence custody. (Former §§ 2933, 4019.) Defendant admitted to a strike allegation based on a prior conviction for criminal threats, a serious felony. (§ 1192.7, subd. (c)(38).)

The Realignment Act amended the law, entitling defendants to two days of conduct credits for every two days of presentence custody. (§ 4019, subds. (b), (c), (f).) The award of credits is not reduced by a defendant's prior conviction for a serious

or violent felony. This provision applies prospectively to defendants serving presentence incarceration for crimes committed on or after October 1, 2011. (§ 4019, subd. (h).)

Defendant argues that the prospective application of the conduct credit provisions of the Realignment Act violates his right to equal protection under the law. This claim was rejected by the California Supreme Court in a case after the conclusion of briefing. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9.) Applying *Lara*, we reject defendant's claim.

## II

### *Ability to Pay*

Defendant contends there is insufficient evidence to support a finding that he was able to pay the booking and classification fees (Gov. Code, § 29550.2).

The trial court imposed a \$287.78 booking fee and a \$59.23 classification fee. The fees are predicated upon the trial court finding that defendant has the ability to pay them. (Gov. Code, § 29550.2, subd. (a).) The trial court made no finding regarding defendant's ability to pay.

Defendant did not object to the fees. In *People v. Scott* (1994) 9 Cal.4th 331, 353, the California Supreme Court held that "the waiver doctrine . . . appl[ies] to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." Thus, this court has consistently held that an objection must be made in the trial court to fines based on the defendant's ability to pay or any claim of error on this basis is forfeited for purposes of

appeal. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 (*Gibson*).)

Citing *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), defendant argues that his claim of insufficient evidence is not subject to forfeiture. In *Pacheco*, the Sixth District Court of Appeal held that challenge to the sufficiency of the evidence of defendant's ability to pay various fees was not subject to forfeiture. (*Id.* at p. 1397.) We have taken a contrary position regarding these substantial evidence claims (*Gibson, supra*, 27 Cal.App.4th at p. 1469) and this issue is presently before the California Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.)

We are not persuaded by *Pacheco*. Applying our decisions in *Gibson, Crittle*, and *Hodges*, we find that defendant's failure to object to the fees forfeits his contention on appeal.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.