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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE WADE FINKENKELLER,

Defendant and Appellant.

C069893

(Super. Ct. No. CM034937)

On appeal, defendant contends that (1) the prospective application of the conduct credit provisions of the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, ch. 15, § 482) violates his right to equal protection of the law and (2) the presentence investigation report fee must be stricken because there was insufficient evidence of his ability to pay the fee and the trial court applied the incorrect standard in making that determination. We reject the first contention based on the California Supreme Court's decision in *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*). As to the second contention, we conclude the trial court applied the incorrect standard and remand

for a new hearing on the fee using the correct standard. We affirm the judgment as modified.

BACKGROUND¹

Defendant Jesse Wade Finkenkiller committed his crimes in the instant case on June 18, 2011. Defendant pled guilty to corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a))² and criminal threats (§ 422), and admitted a prior prison term enhancement (§ 667.5, subd. (b)). He was sentenced on November 8, 2011. The trial court sentenced defendant to five years and eight months in state prison and awarded 133 days of presentence credit (89 actual and 44 conduct).

Under the law in effect at the time of sentencing, 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 § 4019.) Defendant's conviction for criminal threats is a serious felony. (§ 1192.7, subd. (c)(38).)

DISCUSSION

I

Prospective Application of Section 4019

The Realignment Act amended section 4019, entitling defendants to two days of conduct credit for every two days of presentence custody. (§ 4019, subs. (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).)

¹ Given the nature of the issues on appeal, only the facts and procedural history relevant to our disposition are recounted.

² Undesignated statutory references are to the Penal Code.

Defendant argues that the prospective application of section 4019 violates equal protection principles. This argument was rejected by the California Supreme Court in *Lara*. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.)

In *Lara*, the Supreme Court explained its rejection of defendant's equal protection argument as follows: "As we there [*People v. Brown* (2012) 54 Cal.4th 314, 328-330] explained, "[t]he obvious purpose" of a law increasing conduct credits "is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison." [Citation.] "[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application." (*Brown*, at p. 329, quoting *In re Strick* (1983) 148 Cal.App.3d 906, 913.) Accordingly, prisoners who serve their pretrial detention before such a law's effective date, and those who serve their detention thereafter, are not similarly situated with respect to the law's purpose. (*Brown*, at pp. 328-329.)" (*Lara, supra*, 54 Cal.4th at pp. 900, 906, fn. 9.)

Accordingly, defendant is not entitled to the additional accrual of conduct credits under the October 1, 2011, amendment to section 4019.

II

Presentence Investigation Report Fee

Defendant contends the \$736 presentence investigation report fee (§ 1203.1b) must be vacated because there is insufficient evidence of his ability to pay and the trial court applied the incorrect standard.

A.

Probation Report Recommendation and Trial Court's Ruling

As stated in the probation report, defendant was 55 years old at the time of sentencing. He had carpal tunnel syndrome, neck problems, degenerative disks in his

back, and had suffered three heart attacks. He was taking several drugs to treat his heart condition and an enlarged prostate.

Defendant graduated from high school in the Youth Authority. The probation report listed his job skills as “Maintenance, ‘jack of all trades.’” Defendant’s extensive criminal record included three infractions, twenty-four misdemeanors, and nine felonies. He was last employed in 1999 at the Butte County landfill, and his longest term of employment was from 1978 to 1979 at USA Gas.

Defendant admitted to daily use of methamphetamine, which he financed through drug sales. He listed his income at \$380 a month with the same amount for monthly expenses. He had no assets.

The probation report recommended a \$2,000 restitution fine (§ 1202.4), a suspended parole revocation fine (§ 1202.45) of the same amount, a \$720 section 672 fine, an \$80 court security fee (§ 1465.8), a \$60 conviction assessment fee (Gov. Code, § 70373), and a \$736 presentence investigation report fee. The report determined “defendant is able-bodied with marketable job skills; therefore, he should be capable of complying with the financial consequences of his conviction.”

The trial court struck the section 672 fine and imposed the other fines and fees recommended in the probation report. After defense counsel objected on the grounds that defendant’s age and health made him unlikely to pay, the trial court reduced the restitution and suspended parole revocation fines to \$200 each. Regarding the remaining fines and fees, the trial court said it was “not finding that there’s the extraordinary circumstance that would allow the court to stay those fines in light of the conduct that was described in the probation report. Several instances there describe conduct by [defendant] showing his physical ability to some degree that would render him able to work to pay the remainder of the fines and fees.”

We review the trial court's finding that defendant was able to pay the fee for substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347; *People v. Kozden* (1974) 36 Cal.App.3d 918, 920.)

B.

Statutory Criteria for Determining Ability to Pay

Section 1203.1b, subdivision (a), provides that in any case in which a defendant has been convicted and a presentence investigation report is prepared, the probation officer shall make a determination of defendant's ability to pay all or some of the reasonable costs of preparing that report. The statute requires the probation officer to inform the defendant he or she has a right to have the court determine his or her ability to pay and the payment amount. The defendant may waive the right to such a determination only by a knowing and intelligent waiver. (§ 1203.1b, subd. (a).) Absent such a waiver, the trial court must conduct an evidentiary hearing to determine if the defendant has the ability to pay and the manner of any such payments. (§ 1203.1b, subd. (b); *People v. Hall* (2002) 103 Cal.App.4th 889, 892-893.)

Subdivision (e) of section 1203.1b sets forth the relevant criteria in determining a defendant's "ability to pay": the defendant's present financial position; his or her reasonably discernible future financial position (limited to a one-year perspective); the likelihood of the defendant's obtaining employment within a year; and any other factors that may bear on the defendant's financial capability to reimburse the county for costs.

C.

Standard for Determining Ability to Pay

We conclude the trial court applied the incorrect standard in finding defendant could pay the fee. Section 1203.1b predicates the presentence investigation report fee on a finding by the trial court "that the defendant has the ability to pay those costs." (§ 1203.1b, subd. (b).) Here, the trial court found there were no "extraordinary

circumstances” that defendant could not pay the fee. This standard is not found in the statute.

The Attorney General argues the trial court applied the correct standard because section 1203.1b is intended to apply a “liberal assessment” of a defendant’s ability to pay. The argument is derived from a comparison between section 1203.1b and the ability to pay provision in section 987.8, the cost of counsel. The Attorney General points out that section 987.8 contains a presumption that a defendant sentenced to prison is not capable of paying the fee (§ 987.8, subd. (g)(2)(B)), while section 1203.1b contains no such presumption. Also, section 987.8 gives a six-month time frame to consider defendant’s future financial position (§ 987, subd. (g)(2)(A)), as opposed to the one-year time frame in section 1203.1b. (§ 1203.1b, subd. (e)(2).) Based on these differences, the Attorney General concludes the Legislature intends a more liberal definition of ability to pay for section 1203.1b, which is consistent with the trial court’s ruling.

The Attorney General’s argument, while creative, is unpersuasive. Section 1203.1b does not contain language limiting a finding that the defendant cannot pay the fee to exceptional circumstances, and we are unwilling to read such language into the statute. Section 1203.1b means what the Legislature said -- a trial court does not presume the defendant can pay, but instead determines his or her ability to pay under the criteria set forth in the statute.

Since the trial court applied an incorrect standard, we remand the case for the trial court to apply the correct standard. (See, e.g., *People v. Knoller* (2007) 41 Cal.4th 139, 158 [remand for trial court’s reconsideration of motion for new trial under correct standard].) Based on our resolution of this issue, we decline to review the sufficiency of the evidence challenge until the trial court has applied the correct standard to determine defendant’s ability to pay.

DISPOSITION

The presentence investigation report fee under Penal Code section 1203.1b is vacated and the matter is remanded to the trial court for a new hearing on defendant's ability to pay the fee. As modified, the judgment is affirmed.

_____ HOCH _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ MAURO _____, J.