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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOBY DONELL CUSHMAN,

Defendant and Appellant.

C069939

(Super. Ct. Nos. NCR81786,
NCR81802)

On appeal, defendant Jacoby Donell Cushman contends that (1) the prospective application 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 trial court did not determine defendant's ability to pay various fines and fees or specify the statutory basis for each fine, fee, and assessment. Following the California Supreme Court's recent decision in *People v. Lara* (2012) 54 Cal.4th 896 at page 906, footnote 9 (*Lara*), we reject defendant's equal protection contention. With respect to the fines and fees imposed upon defendant, we remand for a new hearing on fines and fees to allow the trial court to determine ability to pay and to itemize all fines, fees, and assessments. In all other respects, we affirm the judgment.

BACKGROUND¹

Defendant committed his offenses on April 27, 2011, and May 18, 2011, by entering an occupied building with the intent to commit larceny and entering an inhabited dwelling with the intent to commit larceny.

Defendant pled guilty to first degree burglary (Pen. Code, § 459)² in case No. NCR81786 and second degree burglary in case No. NCR81802. He was sentenced on November 7, 2011. The trial court imposed a stipulated sentence of four years and eight months in state prison and awarded 259 days of presentence credit (173 actual and 86 conduct).

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's conviction for first degree burglary is a serious felony. (§ 1192.7, subd. (c)(18).)

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 the prospective application of section 4019 violates his right to equal protection under the law. 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 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*, at p. 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

Fines and Fees

Defendant contends the case must be remanded for the trial court to determine if defendant had the ability to pay the theft related offense fine (§ 1202.5), whether extraordinary and compelling reasons existed that justify waiving the restitution and parole revocation fines (§§ 1202.4, 1202.45), and to itemize the various fines, fees, and assessments. We agree.

The probation report proposed identical fines, fees, and assessments for both cases, listed as follows: (1) a \$400 restitution fine and a stayed parole revocation fine of the same amount; (2) a theft-related offense fine of \$36, consisting of a \$10 base fine, a \$2 court surcharge (Gov. Code, § 70373, subd. (a)), a \$5 court facilities construction fund assessment (Gov. Code, § 70372, subd. (a)), a \$10 state penalty assessment (§ 1464), a \$7

county penalty assessment (Gov. Code, § 76000), and two \$1 DNA charges (Gov. Code, §§ 76104.6, 76104.7); (3) a \$35 conviction assessment (Gov. Code, § 70373); and (4) a \$40 security fee (§ 1465.8).

At the sentencing hearing, the trial court asked defense counsel: “Waive the breakdown of the fines and fees on the Abstract?” Defense counsel agreed to the waiver. The minute order does not identify any fines, fees, or assessments, but the abstract lists \$400 restitution and parole revocation fines imposed in case Nos. NCR81786 and NCR81802, \$36 theft-related offense fines in each case with no breakdown of the assessments, an \$80 court security fee, and a \$70 criminal conviction assessment.

We conclude defendant’s waiver of the fines and fees does not satisfy the trial court’s obligation to identify each fine and fee at sentencing and specify the statutory bases for all fines, fees, and assessments imposed upon defendant. Here, the trial court mentioned fines and fees generally, but did not specify the type or amount of the fines and fees to be imposed upon defendant. The trial court’s single reference to fines and fees did not incorporate the probation report by reference. The minute order did not identify any fines, fees, or assessments. The abstract of judgment does not include a breakdown of the theft-related offense fines of \$36 in each case, or the statutory basis for each breakdown amount.

As we explained in *People v. High* (2004) 119 Cal.App.4th 1192 at page 1200, at sentencing, the trial court must provide a “detailed recitation of all the fees, fines and penalties on the record,” including their statutory bases. All of these fines and fees must be set forth in the abstract of judgment. (*Ibid.*) In *High*, we also explained, “the inclusion of all fines and fees in the abstract may assist state and local agencies in their collection efforts. [Citation.]” (*Ibid.*) Since defendant cannot waive a requirement that benefits another party, the waiver did not relieve the trial court from its obligation to list every fine, fee, and assessment in the abstract of judgment.

Further, reciting the fines and fees at the judgment notifies the defendant of the financial obligations of his or her conviction, provides a record for review, and allows defendant the opportunity to contest any fines and fees he or she believes should not be imposed. (See, e.g., §§ 1202.5, subd. (a) [theft fine contingent on defendant's ability to pay]; 1202.4, subd. (b) [court may decline restitution fine for compelling and extraordinary reasons].)

Accordingly, we must remand the case to the trial court for it to set forth the fines, fees, and assessments imposed upon defendant, provide defendant the opportunity to contest them, and to identify and specify the statutory bases for all fines, fees, and assessments imposed upon defendant.

DISPOSITION

The case is remanded for resentencing limited to the imposition of fines, fees, and assessments. At that hearing, defendant may contest any fine, fee, or assessment so imposed. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment identifying and specifying the statutory basis for each fine, fee, and assessment imposed upon defendant and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HOCH, J.

We concur:

HULL, Acting P. J.

MAURO, J.