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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOE SEDILLO,

Defendant and Appellant.

C072684

(Super. Ct. No. CM036219)

Defendant Michael Joe Sedillo pleaded no contest to three counts of commission of a lewd act with a child under age 14. (Pen. Code, § 288, subd. (a).)<sup>1</sup> In exchange, the prosecution agreed not to file a section 667.61 allegation. Defendant was sentenced to prison for 10 years and was ordered to pay, among other things, a \$200 penal fine (§ 672) plus penalty assessments on each count, a sex crime fine (§ 290.3) plus penalty assessments on each count, a \$7,200 restitution fine (§ 1202.4), a \$7,200 restitution fine suspended unless parole is revoked (§ 1202.45), and a \$736 presentence investigation report fee (§ 1203.1b).

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

On appeal, defendant contends the trial court erred when it (1) failed to determine his ability to pay the investigation report fee, (2) imposed the penal fines in addition to the sex crime fines, and (3) imposed a restitution fine greater than \$240 pursuant to section 1202.4, subdivision (b)(1). We affirm.

## FACTS<sup>2</sup>

Defendant is the uncle of the three child victims of sexual abuse. On one occasion, the first victim slept on an air mattress in defendant's garage. He lay next to her, placed his hand on her clothing, and "squeezed" her vagina. She left the garage and slept in the house.

Defendant molested the second victim several times during visits to his residence. He would sit close to her on a couch and cover them both with a blanket. Then he would grab her vagina through her clothing. On one occasion when she was asleep, he tried to touch her genitals under her clothing but she awakened and moved away from him. On another occasion, he grabbed her hand and tried to make her touch his penis. Defendant treated this victim differently than other family members, following her around, giving her anything she wanted, and always buying her special treats.

Defendant molested the third victim while they were lying on a bed in the "toy room." He rubbed her vagina in a circular motion. On another occasion, he put his hand inside her underwear. Although this victim's account is not entirely clear, defendant may have digitally penetrated her vagina.

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<sup>2</sup> Because the matter was resolved by plea, our statement of facts is taken from the probation officer's report.

## DISCUSSION

### I

#### *Presentence Investigation Report*

In his opening brief, defendant contends the trial court erred when it failed to assess his ability to pay \$736 for the presentence investigation report. He argues the fee must be reversed because there was no evidence, and thus no substantial evidence, that he was able to pay. He claims he never was advised of his right to a judicial determination of ability to pay, and thus he never waived his right to such a determination.

After defendant filed his opening brief, our Supreme Court decided *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*), which held the defendant forfeited his inability-to-pay objection to a “ ‘main jail booking fee’ ” (Gov. Code, § 29550.2) by failing to assert it in the trial court. (*McCullough, supra*, at pp. 592-599.) *McCullough* explained that, by “ ‘failing to object on the basis of his [ability] to pay,’ ” the defendant “forfeits both his claim of factual error and the dependent claim challenging ‘the adequacy of the record on that point.’ [Citations.]” (*Id.* at p. 597.) *McCullough* disapproved *People v. Pacheco* (2010) 187 Cal.App.4th 1392, on which defendant relies. (*McCullough, supra*, at p. 599.) The People argue that *McCullough* is fatal to defendant’s claim of error.

Defendant counters that *McCullough* “does not control in the instant case” because it expressly contrasted the booking fee statute there at issue with section 1203.1b, which is at issue in this case. *McCullough* stated: “In contrast to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination. Certain fee payment statutes require defendants to be apprised of their right to a hearing on ability to pay and afford them other procedural safeguards. (See, e.g., Pen. Code, §§ 987.8, 1203.1b [payment of cost of probation supervision].)” (*McCullough, supra*, 56 Cal.4th at p. 598.) *McCullough* “note[d] these statutes because they indicate that the Legislature considers the financial burden of the booking fee to be

de minimis and has interposed no procedural safeguards or guidelines for its imposition.” (*Id.* at p. 599.) But *McCullough* did not purport to confine its forfeiture rule to the booking fee or to other fines and fees whose burden is de minimis. Defendant’s claim that *McCullough* “does not control in the instant case” has no merit.

Defendant does not contend his trial counsel rendered ineffective assistance with respect to the presentence investigation report fee. Any such contention is forfeited. (E.g., *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Wharton* (1991) 53 Cal.3d 522, 563.)

## II

### *Penal Fine*

Defendant contends the trial court erred when it imposed a \$200 penal fine under section 672 because it had already imposed fines under section 290.3 for all three counts. He claims the \$200 fine and its attendant penalty assessments and surcharges must be stricken.<sup>3</sup> We disagree.

Defendant was convicted of three counts of violation of section 288, subdivision (a), which provides: “Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.”

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<sup>3</sup> Defendant did not object to imposition of the penal fine at sentencing. His argument that the fee is not authorized by statute is reviewable for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887.)

Section 672, which was enacted in 1872, provides: “Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.” Because section 288, subdivision (a), does not prescribe any fine for its violation, section 672 appears to authorize the imposition of a fine between \$1,000 and \$10,000.

Defendant counters that, notwithstanding the Legislature’s omission of any fine from section 288, subdivision (a), a fine for its violation is “prescribed” in section 290.3, subdivision (a), which was enacted in 1988. Section 290.3, subdivision (a) provides: “Every person who is convicted of any offense specified in subdivision (c) of Section 290 [(including section 288)] shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.”

By its terms, the section 290.3 fine is “in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense . . . .” Because section 672 imposes a fine “for the commission of the underlying [section 288, subdivision (a)] offense,” the section 290.3 fine necessarily is “in addition to” that penal fine. Defendant does not dispute that the section 290.3 fine was properly imposed.

Instead, defendant claims the condition precedent to application of section 672--that “no fine is herein prescribed”--does not exist because the requisite fine *is* “prescribed,” albeit in section 290.3 rather than section 288. He relies on *People v. Breazell* (2002) 104 Cal.App.4th 298, which addressed section 672’s intent and legislative history in relevant part as follows:

“Section 672 was enacted in 1872, and has been amended only twice. . . . As originally enacted, a fine of \$200 was authorized for any crime punishable by imprisonment. In 1949, the section was amended to provide a maximum fine of \$500 for misdemeanors and \$5,000 for felonies. In 1983, the maximum fines were increased to \$1,000 for misdemeanors and \$10,000 for felonies. [Citations.] [¶] . . . [¶] . . . The language used in section 672 demonstrates that it was meant to provide a fine for offenses for which another statute did not impose a fine. In other words, this is a catchall provision allowing a fine to be imposed for every crime, even if the statute criminalizing the conduct did not specifically authorize a fine. The limiting provision *was meant to ensure that a fine pursuant to section 672 would not be imposed if another statute authorized a fine for the offense.*” (*People v. Breazell, supra*, 104 Cal.App.4th at pp. 303-304, italics added.)

But the Legislature’s intent in 1873, or 1949, or 1983, could not have been to preclude a future Legislature from enacting, in 1988, a section 290.3 penalty that expressly applies “in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense . . . .” Under these circumstances, “ ‘the more recent enactment prevails as the latest expression of the legislative will.’ ” (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 526, quoting 2B Sutherland, *Statutory Construction* (5th ed. 1992) § 51.02, p. 122.) Defendant’s argument thwarts this latest expression of legislative will and must be rejected. The penal fine and attendant penalty assessments and surcharges were properly imposed.

### III

#### *Restitution Fine*

Defendant contends the trial court erred when it imposed a \$7,200 restitution fine. He reasons that (1) the court’s imposition of a restitution fine greater than \$240 pursuant to section 1202.4, subdivision (b)(1), violated his rights to jury trial and to due process

under the Sixth and Fourteenth Amendments to the United States Constitution, and (2) he does not have the ability to pay a \$7,200 restitution fine. Neither point has merit.

#### A. *Jury Trial*

At sentencing, the trial court ordered defendant to pay a restitution fine in the amount recommended in the probation report. The court did not make any specific findings regarding this fine nor did it state for the record its reasons for imposing the fine in that amount.

Defendant did not object to the restitution fine. He claims the appellate court can correct it at any time because the trial court was not authorized to impose it under any circumstances absent the requisite jury determination. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

In 2012, when the crimes were committed and defendant was sentenced, section 1202.4, subdivision (b) provided: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” In the case of a felony conviction, the minimum restitution fine was \$240 and the maximum fine was \$10,000. (§ 1202.4, subd. (b)(1).) The fine was to “be set at the discretion of the court and commensurate with the seriousness of the offense.” (*Ibid.*)

Section 1202.4, subdivision (d) provides: “In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant’s inability to pay

may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.”

Defendant asserts that under *Southern Union Co. v. United States* (2012) 567 U.S. \_\_\_ [183 L.Ed.2d 318] (*Southern Union Co.*), the trial court’s imposition of the restitution fine in the amount of \$7,200 violated his constitutional rights to a jury trial and due process. He claims that his conviction alone does no more than make him eligible for the minimum fine and that the court cannot impose a fine greater than \$240 without making additional findings. In his view, those additional findings must be made by a jury.

As defendant acknowledges, his contention was rejected in *People v. Kramis* (2012) 209 Cal.App.4th 346 (*Kramis*). *Kramis* explained:

“In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*), the United States Supreme Court held, ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ As the United States Supreme Court explained in *Blakely v. Washington* (2004) 542 U.S. 296, 303 [159 L. Ed. 2d 403] . . . ‘[T]he “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.’ (Some italics omitted.) Stated differently, ‘[T]he relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.’ [Citation.] Therefore, in sentencing a defendant, a judgment may not ‘inflict[] punishment that the jury’s verdict alone does not allow.’ [Citation.] In *Southern Union Co.*, the United States Supreme Court held *Apprendi* applies to the imposition of criminal fines. [Citation.] The statutory fine imposed in *Southern Union Co.* was \$50,000 for

*each day* of violation. In other words, the amount of the fine was tied to the *number of days the statute was violated*. In *Southern Union Co.*, the trial court, not the jury, made a specific finding as to the number of days of violation. The United States Supreme Court held the district court’s factual finding as to the number of days the defendant committed the crime violated *Apprendi*. [Citation.]

“*Southern Union Co.* does not impact the restitution fine imposed in the present case. *Apprendi* and *Southern Union Co.* do not apply when, as here, the trial court exercises its discretion within a statutory range. [Citations.] As the United States Supreme Court held in *Apprendi*, ‘[N]othing in [the common law and constitutional history] suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to the offense and offender—in imposing a judgment *within the range* prescribed by statute.’ [Citations.] As the Court of Appeal for the Fifth Appellate District noted in [*People v.*] *Urbano* [(2005) 128 Cal.App.4th 396], ‘*Apprendi* distinguishes a “sentencing factor”—a “circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense”—from a “sentence enhancement”—“the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict” constituting “an increase beyond the maximum authorized statutory sentence.” [Citation.]’ [Citation.] Nothing in *Southern Union Co.* alters that holding. Under the applicable version of section 1202.4, subdivision (b)(1), absent compelling and extraordinary circumstances, the trial court was required to impose a restitution fine in an amount between \$200 and \$10,000. The \$10,000 section 1202.4, subdivision (b) restitution fine imposed in the present case was within that statutory range. The trial court did not make any factual findings that increased the potential fine beyond what the jury’s verdict—the fact of the conviction—allowed. Therefore, *Apprendi* and its progeny do not preclude its imposition. [Citation.]’ (*Kramis, supra*, 209 Cal.App.4th at pp. 350-352.)

Defendant claims *Kramis* is flawed and should not be followed. He argues that, in determining the amount of a section 1202.4 fine, the trial court must make “an individualized determination” that “requires an evaluation and weighing of a defendant’s ability to pay; the seriousness and gravity of the offense; possible economic gain derived by the defendant; and the number of victims and the losses suffered by the victims as a result of the crime.”

But defendant has not shown that, in making these determinations, the trial judge is doing anything more than exercising discretion—taking into consideration various factors relating both to the offense and offender—in imposing a judgment *within the range* prescribed by statute. (*Kramis, supra*, 209 Cal.App.4th at pp. 350-352.) Defendant’s attempt to distinguish *Kramis* is not persuasive.

#### B. *Ability to Pay the Restitution Fine*

Defendant claims the trial court erred when it “failed to consider [his] ability to pay the \$7,200 restitution fine . . . .” He argues his ability to pay the increased fine “is not a fact reflected in his no contest plea nor was it something he admitted at sentencing.” Defendant forfeited this issue by failing to object to the restitution fine at sentencing. (Cf. *People v. McCullough, supra*, 56 Cal.4th at pp. 592-599.)

In any event, the prosecution was not required to establish defendant’s ability to pay as part of the no contest plea or at sentencing. Rather, as we have seen, *defendant* bore the burden of demonstrating his *inability* to pay. (See part III, A. *Jury Trial, ante*.) He failed to meet his burden. (§ 1202.4, subd. (d).) Although the probation officer speculated that defendant “may not have an ability to pay fines, fees, and restitution as ordered by the Court,” defendant never demonstrated that the officer’s speculation was correct.

Defendant responds that his trial counsel’s failure to address the ability to pay issue constituted 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.)

In this case, trial counsel was not asked, and he did not explain, why he failed to go forward on the issue of inability to pay the restitution fine. In any event, a possible explanation appears.

The probation report stated that defendant was 62 years old and was retired following a 28-year career with a local painters’ union. He had income from “Retirement and Social Security.” Specifically, he had monthly income in the amount of \$1,395.50. The report noted that defendant’s “Social Security stopped while [defendant is] incarcerated [on this case].” At another place, the report stated that “defendant is supported by Social Security Disability,” but it did not indicate the amount or whether this income, too, had stopped. Defendant owned personal property worth \$1,000 and owed \$11,000 on one or more personal loans.

Defendant's claim of inability to pay rests primarily on his assertion that his "monthly income" of \$1,395.50 was "from [S]ocial [S]ecurity," which has stopped, rather than from his retirement with the painters' union, which presumably is ongoing. We decline to read the probation report in this manner. Had defendant's entire monthly income been from Social Security, the probation officer, who duly noted that defendant's "Social Security" had "stopped," presumably would have listed his monthly income as \$0 rather than \$1,395.50. We thus construe the latter amount as what remained after the Social Security stopped.

Defendant's trial counsel could have believed that defendant had monthly income and thus had the ability to pay the restitution fines. The point is more appropriately considered in a habeas corpus proceeding. (*People v. Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

#### DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HULL, J.