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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL EDWARD HENSLEY, Defendant and Appellant.	C072743 (Super. Ct. No. CM036139)

Defendant Daniel Edward Hensley entered a plea of no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count one) and admitted a prior prison term allegation (Pen. Code, § 667.5, subd. (b)) in exchange for a stipulated term of four years state prison and dismissal of the remaining count and allegations. The court sentenced defendant to the stipulated term and imposed various fines, fees and assessments. Defendant's only challenges on appeal are to one of the fines, one fee, and three assessments. As we explain, we will modify the judgment to lower the dollar amount of the challenged assessments.

BACKGROUND

In view of defendant's contentions on appeal, we need not recite the underlying facts. Suffice it to say that the fines, fees and assessments imposed by the trial court at sentencing included in relevant part the following: (1) a fine of $780 imposed for defendant's crime of conviction pursuant to Penal Code section 672 (section 672 fine); (2) a probation report fee of $286 pursuant to Penal Code section 1203.1, subdivision (b) (section 1203.1(b) fee); and a set of three penalty assessments imposed pursuant to Government Code section 76104.7 (collectively: section 76104.7 assessments) constituting, respectively, $20 of the total lab fee (Health & Saf. Code, § 11372, subd. (a)), $60 of the total drug program fee (Health & Saf. Code, § 11372.7, subd. (a)), and $80 of the total section 672 fine.

On appeal, defendant contends that the section 672 fine was unauthorized. He also argues the trial court erred in imposing the section 1203.1(b) fee without first determining his ability to pay. He concludes the section 76104.7 assessments violate ex post facto principals. As we will explain, we agree with his ex post facto claim and will lower the section 76104.7 assessments and affirm as modified.

DISCUSSION

I

Section 672 Fine

Penal Code section 672 provides in pertinent part that: "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 . . . ." Relying on *People v. Breazell* (2002) 104 Cal.App.4th 298 (*Breazell*), defendant claims the section 672 fine was unauthorized because Health and Safety Code section 11377, subdivision (c) provides for a $70 fine for an AIDS education program, thus defendant's crime of

conviction does indeed prescribe a fine.[1] Because we find *Breazell* distinguishable, we disagree.

In *Breazell*, the defendant was convicted of violating Health and Safety Code section 11351.5 (possession of cocaine base for sale). Because Health and Safety Code section 11372 specifically authorized a fine for a violation of Health and Safety Code section 11351.5, imposition of a fine pursuant to section 672 for this violation constituted an unauthorized sentence.[2] (*Breazell, supra*, 104 Cal.App.4th at p. 304.)

Another appellate district decided the issue of whether a trial court may impose a $70 AIDS education program fine pursuant to Health and Safety Code section 11377, subdivision (c), in addition to a section 672 fine in *People v. Clark* (1992) 7 Cal.App.4th 1041 (*Clark*). The *Clark* court held that the trial court may impose both fines because the

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[1] Health and Safety Code section 11377, subdivision (c) provides in pertinent part:

"(c) *In addition to any fine assessed under subdivision (b), the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates subdivision (a),* with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. . . ." (Emphasis added.)

Penal Code section 1463.23 provides in pertinent part:

" . . . fifty dollars ($50) of each fine imposed pursuant to . . . subdivision (c) of Section 11377 . . . shall be deposited in a special account in the county treasury which shall be used exclusively to pay for the reasonable costs of establishing and providing for the county, or any city within the county, an AIDS (acquired immune deficiency syndrome) education program under the direction of the county health department, in accordance with Chapter 2.71 (commencing with Section 1001.10) of Title 6, and for the costs of collecting and administering funds received for purposes of this section."

[2] Health and Safety Code section 11372, subdivision (a), provides:

"(a) In addition to the term of imprisonment provided by law for persons convicted of violating Section 11350, 11351, 11351.5, 11352, 11353, 11355, 11359, 11360, or 11361, the trial court may impose a fine not exceeding twenty thousand dollars ($20,000) for each offense. In no event shall a fine be levied in lieu of or in substitution for the term of imprisonment provided by law for any of these offenses.

$70 fine "is expressly intended to be additional to any fines the court may impose for the specified offenses." (*Clark, supra,* 7 Cal.App.4th at p. 1046; accord *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518, fn. 2.) We agree with these cases. Defendant has failed to demonstrate that the trial court erred in imposing the section 672 fine.

II

Section 76104.7 Assessments

Defendant contends, and the People concede, that the section 76104.7 assessments violated ex post facto principals by including a slight increase in dollar amounts as a result of calculating these amounts using a recently amended version of section 76104.7 that postdated defendant's commission of his crime of conviction. We agree with the parties.[3] When defendant committed his offense in March 2012, section 76104.7 provided for a state DNA penalty assessment of three dollars for every ten dollars, or part of ten dollars, upon every fine. (Stats. 2011, ch. 36, § 16, eff. June 30, 2011.) Effective June 2012, the state DNA penalty assessment increased from three dollars to four dollars for every ten dollars or part thereof. (Stats. 2012, ch. 32, § 25.)[4]

In *People v. Batman* (2008) 159 Cal.App.4th 587 (*Batman*), we held that the trial court's imposition of a nearly identical assessment (pursuant to Government Code section

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[3] Because the resulting assessment constituted an unauthorized portion of defendant's sentence, defendant's claim on appeal is not forfeited by his failure to object in the trial court.

[4] The current version of section 76104.7 provides, in relevant part, as follows:

"(a) Except as otherwise provided in this section, in addition to the penalty levied pursuant to Section 76104.6, there shall be levied an additional state-only penalty of four dollars ($4) for every ten dollars ($10), or part of ten dollars ($10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses involving a violation of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code.

76104.6) upon a defendant who committed his offense prior to the statute's effective date violated the constitutional prohibition against ex post facto laws. (*Id.* at pp. 590-591.)[5] The trial court's imposition of the assessment at issue here is similarly problematic. Because the trial court's application to defendant's sentence of the amended statute containing the increased assessment formula violated ex post facto principles, we will order the judgment modified, reducing the section 76104.7 assessments as follows: from $80 to $60 on the section 672 fine, from $20 to $15 on the lab analysis fee (Health & Saf. Code, § 11372.5), and from $60 to $45 on the drug program fee (Health & Saf. Code, § 11372.7, subd. (a)).

III

Section 1203.1(b) fee

Defendant further contends that the trial court erred in imposing the section 1203.1(b) fee without finding he had the ability to pay it. We conclude that defendant has forfeited this claim by failing to object in the trial court.

As our Supreme Court recently clarified with its holding in *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough)*, "Defendant may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as a legal error.' [Citation.] By

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[5] Government Code section 76104.6 provides, in relevant part, as follows:

"(a) (1) Except as otherwise provided in this section, for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Proposition 69), as approved by the voters at the November 2, 2004, statewide general election, there shall be levied an additional penalty of one dollar ($1) for every ten dollars ($10), or part of ten dollars ($10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses involving a violation of the Vehicle Code or a local ordinance adopted pursuant to the Vehicle Code.

'failing to object on the basis of his [ability] to pay,' 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.) "[A] defendant who does nothing to put at issue the propriety of imposition of a booking fee forfeits the right to challenge the sufficiency of the evidence to support imposition of the booking fee on appeal, in the same way that a defendant who goes to trial forfeits his challenge to the propriety of venue by not timely challenging it." (*Id.* at p. 598.)

We see no reason to distinguish the section 1203.1(b) fee at issue here with the booking fee considered by the high court in *McCullough*. Indeed, defendant does not argue that we should distinguish the two fees. Instead he argues for remand, claiming that he attempted to object to this fee in the trial court by asking for a restitution hearing. Although we understand his argument, the record does not support it.

Defendant was represented by counsel and was on notice that the probation department had recommended imposition of the section 1203.1(b) fee, but did not object either in writing or orally and never requested a hearing. Contrary to defendant's assertion, his vague pro per request for a "restitution" hearing (which the trial court explained to him was inapplicable due to the fact that it did not order any restitution) did not preserve his challenge to the fee at issue based on an inability to pay. He did not ask the trial court for further explanation but merely replied, "Okay." Further, after the trial court denied defendant's request, his counsel specifically indicated to the trial court that there was not "anything further" before the hearing concluded.

Thus *McCullough* directs our conclusion that defendant has forfeited his challenge to the section 1203.1(b) fee.

DISPOSITION

The judgment is modified to reduce the Government Code section 76104.7 assessments as specified in this opinion. The trial court is directed to prepare an amended

abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

DUARTE, J.

We concur:

MAURO, Acting P. J.

HOCH, J.