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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL TROY KENDALL,

Defendant and Appellant.

C074140

(Super. Ct. No. SF117377A)

Defendant Michael Troy Kendall pleaded no contest to two counts of second degree robbery and admitted a prior strike conviction in exchange for a stipulated sentence of 12 years in state prison. As part of defendant's sentence, he was ordered to pay restitution and parole revocation fines in the amount of \$280 each. (Pen. Code, §§ 1202.4, 1202.45.)¹

¹ Undesignated statutory references are to the Penal Code.

On appeal, defendant contends the fines violate the constitutional prohibition against ex post facto laws because they exceed the applicable statutory minimum of \$200 at the time he committed his crimes—and the trial judge had intended to impose the minimum fine. The People respond that defendant forfeited his argument by failing to object in the trial court.

We requested supplemental briefing on the issue of whether defense counsel rendered ineffective assistance in failing to object to the fines at the time of sentencing. Having reviewed the parties' supplemental briefs, we conclude that there is a reasonable possibility that the trial court would have imposed the minimum fine of \$200 had defense counsel objected. Accordingly, we will remand with instructions to reconsider the amount of the restitution and parole revocation fines in light of the applicable statutory minimum.

Defendant also contends that the trial court erred in calculating his presentence custody credits, and urges us to remand for resentencing. The People agree that the trial court erred in calculating defendant's presentence custody credits and further contend that remand is necessary to determine the date defendant was booked into jail. We agree with the parties that the trial court erred in calculating defendant's presentence custody credits. We also agree with the People that remand is necessary to determine the date that defendant was booked into jail. Accordingly, we affirm the judgment, as modified, but remand for resentencing with directions to determine the date defendant was booked into jail and, if appropriate, to adjust his custody credits. We also order that the abstract of judgment be amended to reflect any change in the amount of the restitution and parole revocation fines and accurately reflect defendant's conduct credits.

BACKGROUND²

Defendant committed a series of bank robberies between December 8, 2010, and January 14, 2011. On May 2, 2013, defendant entered a plea of no contest to two counts of second degree robbery (§ 211) and admitted a prior strike conviction (§§ 667, subd. (d), 1170.12, subd. (b)) in exchange for a stipulated sentence of 12 years in state prison.

During the change of plea hearing, the trial court explained that defendant would be “ordered to pay a restitution fine and fees of not less than \$280, not more than \$10,000, plus a 10 percent surcharge, \$30 conviction assessment fee per count, \$40 court security fee per count. That’s the minimum and maximum, but the actual amount for the two counts . . . [¶] . . . would be \$448.” The trial court also explained that “[t]he Court would impose an additional \$280 parole revocation fine that’s equal to the restitution portion of that \$448 fine. However, you would not have to pay the additional \$280 unless parole was permanently revoked.” After advising defendant of his rights and other consequences of the change of plea, the trial court accepted defendant’s waiver and took his plea.

Defendant waived time for sentencing and a referral to the probation department for a report. Following defendant’s change of plea, the trial court sentenced defendant to the stipulated term of 12 years in state prison. The trial court also assessed various fees and fines, including a restitution fine in the amount of \$280 pursuant to section 1202.4 and a parole revocation fine in the amount of \$280 pursuant to section 1202.45, which the court stayed pending successful completion of parole. With respect to the foregoing fines, the trial court stated, “The Court is imposing the \$280 parole revocation fine that’s equal to the restitution portion of your fine. Again, that is stayed. You won’t have to pay that unless parole was permanently revoked.” Defendant did not object.

² We dispense with a recitation of the facts surrounding defendant’s crimes as they are not relevant to the issue raised on appeal.

The trial court awarded defendant 745 days of custody credit for time actually served and 112 days of conduct credit for a total of 857 days.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Restitution Fine

The first amended information and indictment alleges that defendant's crimes took place on December 8, 2010, and January 14, 2011. At the time, section 1202.4, subdivision (b)(1) provided in pertinent part: "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. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony" (§ 1202.4, subd. (b)(1), as amended by Stats. 2011, ch. 45 (Sen. Bill No. 208), § 1, eff. July 1, 2011.) Effective January 1, 2012, the Legislature amended section 1202.4 to provide that the minimum amount of the fine in felony cases "shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012, two hundred eighty dollars (\$280) starting on January 1, 2013, and three hundred dollars (\$300) starting on January 1, 2014, and not more than ten thousand dollars (\$10,000)." (§ 1202.4, subd. (b)(1), as amended by Stats. 2011, ch. 358, § 1.)

Defendant contends the imposition of the \$280 restitution fine was a violation of the constitutional prohibition against ex post facto penalties. The People respond that defendant forfeited his ex post facto argument by failing to object in the trial court. We agree with the People.

The ex post facto clauses of the state and federal constitutions prohibit statutes which increase the punishment for a crime. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *People v. McKee* (2010) 47 Cal.4th 1172, 1193; *People v. Schoop* (2012) 212 Cal.App.4th 457, 475; *People v. Callejas* (2000) 85 Cal.App.4th 667, 670.) “It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the proscriptions of the ex post facto clause and other constitutional provisions.” (*People v. Souza* (2012) 54 Cal.4th 90, 143; see also *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) Accordingly, the amount of a restitution fine is calculated as of the date of the offense. (*Ibid.*)

Assuming the trial court intended to select the statutory minimum, defendant has forfeited any challenge to the amount of the restitution fine by failing to object in the trial court. The rule of forfeiture applies to ex post facto claims, particularly where the alleged error could easily have been corrected had it been timely brought to the trial court’s attention. (See *People v. White* (1997) 55 Cal.App.4th 914, 917.) “[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 356; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 881 [“the forfeiture rule applies in the context of sentencing as in other areas of criminal law”]; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 [“[a]n objection to the amount of restitution may be forfeited if not raised in the trial court”].) We, therefore, conclude that defendant has forfeited his ex post facto challenge to the amount of the restitution fine. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189.) Our finding of forfeiture does not end the matter, however, as we further conclude that defense counsel rendered ineffective assistance in failing to object to the \$280 restitution fine.

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance

resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) That is, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

Here, the trial court’s statements indicate that the court intended to impose the statutory minimum fine, but mistakenly believed that the applicable minimum was \$280, not \$200. As noted, the trial court stated that defendant would be “ordered to pay a restitution fine and fees of not less than \$280, not more than \$10,000,” which the court characterized as “the minimum and maximum.” Although the trial court’s statements were made during the change in plea hearing, the court sentenced defendant immediately thereafter, strongly suggesting that the court held an incorrect belief as to the applicable minimum at the time of sentencing. On this record, we conclude there is a reasonable probability that the trial court intended to impose the statutory minimum fine, but mistakenly believed that the minimum was \$280.

The People suggest that defense counsel “could have made a reasonable tactical decision not to object that the fines were \$80 too high” Specifically, the People hypothesize that defense counsel opted to stay silent fearing that an objection could prompt the trial court to exercise its discretion to impose a more onerous fine. Given the record before us, we are not persuaded and perceive no reasonable tactical explanation for defense counsel’s failure to advise the trial court that the applicable minimum fine was \$200, rather than \$280.

We conclude that defense counsel’s failure to object resulted from ignorance or misunderstanding of the controlling law, rather than an informed tactical determination, and therefore constitutes deficient performance. (*In re Wilson* (1992) 3 Cal.4th 945, 955-956.) Defense counsel’s deficient representation prejudiced defendant because there is a reasonable probability that, but for counsel’s failure to object, the trial court would have imposed fines in the amount of \$200, rather than \$280. Rather than speculate as to what

the trial court may have intended, we will remand with instructions to reconsider the restitution and parole revocation fines in light of the applicable statutory minimum at the time of defendant's crimes.

II

Custody Credit

Next, defendant contends the trial court erred in calculating his presentence custody credits. The trial court awarded defendant 745 days of custody credit and 112 days of conduct credit for a total of 857 days. Defendant claims he is entitled to 746 days of custody credit and 111 days of conduct credit for a total of 857 days. Defendant urges us to remand the case to the trial court to correct the abstract of judgment to reflect the proper number of credits. Based on defendant's claim that he was booked into jail on April 18, 2011, the People agree that defendant is only entitled to 111 days of conduct credit. However, the People also argue that the case should be remanded to determine the date that defendant was booked into jail. We have reviewed the record and agree with the parties that the trial court erred in calculating defendant's conduct credit. We also agree with the People that the case should be remanded to determine the date defendant was booked into jail. We consider these issues in reverse order.

Custody credit is calculated from the date of arrest through the time of sentencing. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) Defendant claims he was arrested on April 18, 2011. In the absence of a probation report, defendant relies on an incident report prepared by the Stockton Police Department. The incident report describes the preparation of a search warrant and a "Ramey warrant" on April 18, 2011. (See *People v. Ramey* (1976) 16 Cal.3d 263.) The incident report states that, "On 041811 approximately 2010 hrs., [the author] was contacted by Sgt Ridenour who advised me [that defendant] had been arrested on the Ramey warrant and officers were at [defendant's] house."

The People contend that custody credits should not be calculated on the basis of the incident report, which does not disclose the date defendant was booked into jail. The People correctly observe that nothing in the record discloses the date that defendant was booked into jail. Although we suspect that defendant was booked into jail on the date of his arrest, we recognize that resolution of the issue turns on a question of fact, which requires resolution in the the trial court. Accordingly, we will remand the case to the trial court with directions to determine the date defendant was booked into jail and, if appropriate, to adjust the award of custody credits.

We agree with the parties that the trial court erred in calculating defendant's conduct credits. The trial court determined that defendant was entitled to 112 days of conduct credit based on 745 actual days in custody. However, 15 percent of 745 days is 111.75 days, which we round down to 111 days. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) Thus, defendant would be entitled to 111 days of conduct credit based on 745 actual days in custody, not 112 days, and he would then be entitled to a total of 856 days credit, not 857. Assuming, as defendant contends, that he was booked into jail on April 18, 2011, he is entitled to conduct credit based on 746 actual days in custody, and would still be entitled to 111 days of conduct credit (15 percent of 746 days is 111.90 days, which we round down to 111 days), for a total of 857 days (the same total number of days originally awarded by the trial court). Because we cannot determine conduct credits without knowing defendant's actual days in custody, we must direct the trial court to correct the abstract of judgment to reflect the proper number of conduct credits once the court has determined the date defendant was booked into jail.

DISPOSITION

The judgment of conviction is affirmed, but the case is remanded to the trial court for reconsideration of the amount of the restitution and parole revocation fines, and to determine the date defendant was booked into jail. If the trial court finds defendant was booked into jail on April 18, 2011, the court shall award one additional day of

presentence custody credit. The trial court is also directed to recalculate defendant's conduct credits in a manner consistent with this opinion.

The trial court is ordered to prepare an amended abstract of judgment reflecting the reduced restitution and parole revocation fines, and reflecting any additional custody credits ordered at the hearing to determine the date defendant was booked into jail, as well as the correct number of conduct credits. A copy of the amended abstract of judgment shall be sent to the Department of Corrections and Rehabilitation.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is ordered to forward a copy of this opinion to the State Bar upon finality of this appeal.³ Further, pursuant to Business and Professions Code section 6086.7, subdivision (b), the clerk of this court shall notify defendant's trial counsel that the matter has been referred to the State Bar.

RENNER _____, J.

We concur:

HULL _____, Acting P. J.

MURRAY _____, J.

³ Business and Professions Code section 6086.7, subdivision (a)(2) requires the court to notify the State Bar "[w]henver a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney."