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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH L. ROGERS

Defendant and Appellant.

D059240

(Super. Ct. No. SCE297479)

APPEAL from a judgment of the Superior Court of San Diego County, Charles W. Ervin, Judge. Affirmed in part; reversed in part; remanded with directions.

I.

INTRODUCTION

Keith L. Rogers pled guilty to one count of indecent exposure (Pen. Code, § 314, subd. (1))¹ (count 1), and admitted having suffered a prior conviction for the same offense. The trial court sentenced Rogers to the upper term of three years and ordered him to pay various fines and fees, including a \$500 sex offender registration fine under

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

section 290.3. Rogers appeals the imposition of this fine. We affirm the conviction but reverse the imposition of the section 290.3 fine and remand.

II.

FACTUAL AND PROCEDURAL BACKGROUND²

A. *Factual background*

On August 27, 2009, Rogers exposed himself to a female counselor in the library of the George Bailey Detention Facility. On September 22, 2009, Rogers exposed himself to a sales associate at a Gap store in San Diego, and stole a pair of shorts and a drawstring from the store.

B. *Procedural background*

On January 15, 2010, the People filed a complaint charging Rogers with two counts of indecent exposure, with the allegation that he had suffered a prior conviction for the same offense (§ 314, subd. (1)) (counts 1 and 2), and one count of petty theft (§ 484) (count 3).

On February 19, the trial court determined that Rogers was not mentally competent to stand trial and ordered him committed to Patton State Hospital for treatment. On December 20, the court found Rogers to be mentally competent to stand trial and reinstated proceedings.

On December 28, Rogers pled guilty to count 1 and admitted having suffered a prior conviction for indecent exposure. In exchange for his guilty plea, the People agreed

² In light of Rogers's plea of guilty, there was no trial in this case. The statement of facts is taken from the probation report and the clerk's transcript.

to dismiss the remaining charges. On February 7, 2011, the trial court sentenced Rogers to three years in prison. In addition, the court imposed various fines and penalties, including a sex offender registration fee in the amount of \$500, under section 290.3.

III.

DISCUSSION

A. *Imposition of fines and fees at sentencing*

At Rogers's sentencing hearing, Rogers's attorney informed the court that both Rogers and his counsel had concerns about Rogers's ability to pay the fines and fees set out in the probation report. The probation report recommended that the court impose: 1) a restitution fine pursuant to section 1202.4, subdivision (b) in the amount of \$600, plus penalty assessment; 2) an additional restitution fine pursuant to section 1202.45 in the amount of \$600, which the probation report suggested should be stayed; 3) a court security fee pursuant to section 1465.8 in the amount of \$40; 4) an immediate critical needs account fee in the amount of \$30; 5) a criminal justice administration fee in the amount of \$154; 6) victim restitution in the amount of \$66; and 7) a sex registration fee pursuant to section 290.3 in the amount of \$500. Under the heading "Financial Information," the probation report states, "The defendant is unemployed with no assets or savings." The probation report also indicates that Rogers had been living with his grandmother for 10 years, and that he had been unemployed since 2008. Rogers's counsel noted that the probation report indicated that Rogers suffers from paranoid schizophrenia. Counsel stated that in his experience, people who suffer from this condition have a very difficult time finding and retaining employment. In view of these

facts, Rogers's counsel requested that, in the interest of justice, the court reduce the restitution fines from the recommended amount of \$600 to the statutory minimum amount of \$200, or not impose restitution fines at all, and further requested that the court not impose the \$40 court security fee, the \$30 immediate critical needs account fee, the \$154 criminal justice fee, or the \$500 sex offender registration fine. The prosecutor submitted the matter of the imposition of fines to the court's discretion.

In imposing sentence, the court stated, "I concur with [Rogers's] counsel." The court then stated, "I cannot stay or strike these fines. They are mandatory, they are required. Some of the fines are required to be imposed by the court, but to impose the amount that is suggested is onerous in the court's opinion, given his mental stability. Whether or not he could ever pay these fines is subject to some other review at a later date and his ability to pay." The court proceeded to impose the statutory minimum restitution fine of \$200, rather than the \$600 recommended in the probation report, and imposed and suspended a second restitution fine of \$200 rather than the \$600 recommended. After imposing the restitution fines, the court stated, "Court security fee of \$40. Critical needs [fee] of \$30 and criminal justice administration fee of \$154 are required by statute and ordered. Sex registration fee of \$500 pursuant to [section] 290.3 is ordered."

B. Analysis

Section 290.3, subdivision (a) provides in relevant part,

"Every person who is convicted of any offense specified in subdivision (c) of Section 290 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."

Rogers contends that the trial court abused its discretion in imposing the \$500 sex offender registration fine. Specifically, Rogers maintains that the court was under the misimpression that the fine was mandatory, and therefore failed to consider whether Rogers had the ability to pay the fine. Rogers further argues that the court's comments at the sentencing hearing indicate that the court would not have imposed the fine if the court had recognized that it was not required to do so. Rogers notes that the court's statement at the sentencing hearing to the effect that "[w]hether or not [Rogers] could ever pay these fines is subject to some other review at a later date and his ability to pay," indicates that the court did not understand that the court was to determine whether Rogers had the ability to pay the sex offender registration fee before imposing it, and instead, erroneously believed that the issue of whether Rogers had the ability to pay the fines would be determined at some future proceeding.

Under section 290.3, the trial court must impose a fine in the amount of \$300 for the first qualifying conviction and a fine in the amount of \$500 for additional qualifying convictions, or no fine if the court determines that the defendant does not have the ability to pay the fine. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1370-1371.) The defendant bears the burden to establish his inability to pay the sex offender registration fine. (*Id.* at p. 1371.) The evidence presented to the court at sentencing demonstrates that Rogers has been unemployed since 2008, that he has no assets or savings, and that he

suffers from a serious, chronic mental illness. This constitutes sufficient evidence from which the court could have found that Rogers did not have the ability to pay the \$500 fine. In fact, it appears that the court considered this evidence in reducing the recommended \$600 restitution fines to the statutory minimum of \$200.

"[A]n erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Further, a failure to exercise discretion may constitute an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.) The record of Rogers's sentencing hearing indicates that the trial court may have believed that it was required to impose the \$500 sex offender registration fine, irrespective of Rogers's ability to pay the fine, or that the court may have been under the misimpression that the question of Rogers's ability to pay that fine was not before the court at sentencing, but instead, would be addressed at a future proceeding. This reflects an erroneous understanding of the court's discretionary power, and a failure to exercise that discretion. Further, the court's comment that it agreed with Rogers's counsel's assessment of his financial prospects, its imposition of the minimum restitution fine rather than the recommended amount of \$600, and its statement that to impose a restitution fine in the recommended amount would be "onerous in the court's opinion, given [Rogers's] mental stability" indicate that if the court had understood that it had the discretion to not impose the \$500 sex offender registration fine, it may not have done so.

Because the record reflects that the trial court did not fully understand its discretionary power with respect to the sex offender registration fine, we remand the matter to the trial court to determine whether Rogers has the ability to pay that fine.

IV.

DISPOSITION

Rogers's conviction is affirmed. The court's imposition of a \$500 sex offender registration fine pursuant to section 290.3 is reversed. The matter is remanded for the trial court to determine whether Rogers has the ability to pay this fine, and for resentencing that corresponds with the court's determination in this regard.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.