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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LORNE R. NATHAN,

Defendant and Appellant.

D060053

(Super. Ct. No. SCD230377)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed in part, reversed in part, and remanded.

INTRODUCTION

Lorne R. Nathan pleaded guilty to attempted possession of cocaine base (Pen. Code, § 664; Health & Saf. Code, § 11350) and admitted having a prior strike (Pen. Code, § 667, subs. (b)-(i), 1170.12). As stipulated by the parties, the trial court sentenced him to 16 months in prison, of which he had to serve 80 percent. Against this sentence, the trial court awarded him 301 days of presentence custody credit, consisting

of 201 days of actual custody and 100 days of conduct credit. The trial court also ordered him to pay various fines and fees, including a \$154 criminal justice administration fee (Gov. Code, § 29550.1) (booking fee), a \$570 drug program fee (Health & Saf. Code, § 11372.7) and a \$190 lab analysis fee (Health & Saf. Code, § 11372.5).

Nathan appeals, contending we must vacate the drug program and booking fees because the trial court failed to determine his ability to pay before imposing them. He also contends he is entitled to additional presentence conduct credits because of amendments to Penal Code section 4019 that took effect after his sentencing hearing. Lastly, he contends we must direct the trial court to modify the abstract of judgment to separately list, along with the statutory basis, any penalty assessments included in the drug program and laboratory fees.

We agree with the latter contention and direct the trial court to modify the abstract of judgment accordingly. In all other respects, we affirm the judgment.

DISCUSSION¹

I

Ability To Pay Claims

A

Bars to Appellate Review

1

Certificate of Probable Cause

When Nathan filed his notice of appeal he did not request a certificate of probable cause. The People contend Nathan's failure to obtain a certificate requires us to dismiss his ability to pay claims. We disagree.

Before a defendant may appeal a conviction based on a guilty plea, the defendant must obtain a certificate of probable cause from the trial court. (Pen. Code, § 1237.5.) A defendant need not obtain a certificate of probable cause, however, if the defendant's appeal is based on grounds that arose postplea and do not affect the plea's validity. (Cal. Rules of Court, rule 8.304(b)(4); *People v. Johnson* (2009) 47 Cal.4th 668, 676-677 (*Johnson*).)

As sentencing occurs postplea, a defendant does not need a certificate of probable cause to raise a sentencing claim on appeal unless the claim attacks the plea's validity. (*Johnson, supra*, 47 Cal.4th at p. 678; *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) An

¹ We omit a summary of the facts underlying Nathan's conviction as they are not relevant to the issues raised on appeal.

attack on the plea's validity occurs when the sentencing claim involves "an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement."

(*Johnson*, at p. 678.) It does not occur when the sentencing claim involves an aspect of the sentence the plea agreement left open for resolution by the trial court's exercise of its normal sentencing discretion. (*People v. Buttram* (2003) 30 Cal.4th 773, 785.)

Consequently, "when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was 'part of [the] plea bargain.' [Citation] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself." (*Id.* at p. 786.)

In this case, the parties did not agree to specific or recommended fines or fees as part of their plea bargain or discuss them during the plea colloquy. They, therefore, left the imposition of the booking and drug program fees to the trial court's discretion. (See *People v. Villalobos* (2012) 54 Cal.4th 177, 183 [a restitution fine is set at the trial court's discretion when it is not mentioned in a plea agreement or during the plea colloquy].) As Nathan's ability to pay claims do not involve matters to which he agreed as an integral part of his plea agreement, these claims do not attack the plea's validity and he was not required to obtain a certificate of probable cause to raise them.

2

Forfeiture

The People also contend Nathan forfeited his ability to pay claims by failing to object to the booking and drug program fees below. There is a split of authority on the issue of whether the forfeiture doctrine applies to challenges to fines and fees. (*People v.*

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Pacheco (2010) 187 Cal.App.4th 1392, 1397 [holding forfeiture doctrine inapplicable]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [holding forfeiture doctrine applicable]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467-1468 [holding forfeiture doctrine applicable].) The California Supreme Court is currently reviewing the issue. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Assuming, without deciding, Nathan has not forfeited his ability to pay claims, we conclude they lack merit.

B

Drug Program Fee

Health and Safety Code section 11372.7, the statute authorizing the drug program fee, indisputably requires an ability to pay determination before the trial court may impose the fee.² Nonetheless, the trial court's determination need not be express. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) Moreover, the " 'ability to pay' a drug program fee does not require existing employment or cash on hand. Rather, a determination of ability to pay may be made based on the person's *ability to earn* where

² Specifically, Health and Safety Code section 11372.7, subdivision (b), provides, "The court shall determine whether or not the person who is convicted of a violation of this chapter has the ability to pay a drug program fee. If the court determines that the person has the ability to pay, the court may set the amount to be paid and order the person to pay that sum to the county in a manner that the court believes is reasonable and compatible with the person's financial ability. In its determination of whether a person has the ability to pay, the court shall take into account the amount of any fine imposed upon that person and any amount that person has been ordered to pay in restitution. If the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee."

the person has no physical, mental or emotional impediment which precludes the person from finding and maintaining employment once his or her sentence is completed." (*Id.* at p. 783.)

At the time of his sentencing hearing, Nathan was 45 years old and, because of presentence custody credits, had between three and six months of prison time to serve. There is no evidence in the record to suggest Nathan was physically, mentally or emotionally unable to find and maintain productive employment once his sentence was completed. To the contrary, Nathan effectively represented himself during the trial court proceedings, demonstrating ample intelligence and education for gainful employment.

Although the record indicates Nathan has a lengthy criminal and substance abuse history, this history does not compel a finding of inability to pay where there is a demonstrated desire for treatment and rehabilitation. (*People v. Staley, supra*, 10 Cal.App.4th at p. 786.) Nathan demonstrated such a desire by repeatedly deferring his sentencing hearing while he attempted, albeit unsuccessfully, to obtain admission into a special prisoner reentry program. Thus, the record supports an implied determination of ability to pay and the trial court not did err in imposing the drug program fee. (*Ibid.*)

C

Booking Fee

Unlike the statute authorizing the drug program fee, Government Code section 29550.1, the statute authorizing the booking fee does not expressly require an ability to

pay determination.³ Nonetheless, Nathan argues we must read such a requirement into the statute to avoid an equal protection violation because a similar statute within the same statutory scheme, Government Code section 29550.2, contains such a requirement.⁴

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. [Citation.] Accordingly, '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly* situated groups in an unequal manner.'" [Citation.] "This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly

³ Government Code section 29550.1 provides: "Any . . . local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the . . . local arresting agency for the criminal justice administration fee."

⁴ Government Code section 29550.2, subdivision (a), provides: "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in [Government Code] Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee." (Italics added.)

situated for purposes of the law challenged." ' ' " (*People v. Brown* (2012) 54 Cal.4th 314, 328, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Assuming, without deciding, equal protection principles require us to imply an ability to pay requirement into Government Code section 29550.1, we conclude there is sufficient evidence in the record to support an implied finding Nathan had the ability to pay the fee for the reasons stated in part I.B, *ante*.

II

*Additional Presentence Custody Credits*⁵

At the time of Nathan's sentencing, former Penal Code sections 2933 (Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010) and 4019 (Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010) allowed inmates like him, who had a prior serious or violent felony conviction, but whose current commitment offense was not a serious or violent felony, to earn up to two days of presentence conduct credit for each six-day period of confinement. (Former Pen. Code, §§ 2933, subd. (e)(3), 4019, subs. (b) & (c).) Consequently, if an inmate earned all available presentence conduct credit, the inmate would be deemed to have served six days for every four days confined. (Former Pen. Code, § 4019, subd. (f).)

The Legislature subsequently deleted Penal Code section 2933, subd. (e)(3) and amended Penal Code section 4019 so that inmates with a prior serious or violent felony conviction, but whose current commitment offense was not for a violent felony, may

⁵ Given the short duration of Nathan's sentence, this issue appears to be moot. We, nonetheless, exercise our discretion to decide it.

earn up to two days of presentence conduct credit for each four-day period of confinement. (Current Pen. Code, § 4019 (b) & (c), as amended by Stats. 2011, ch. 15, § 482, eff. Apr. 4, 2011, operative Oct. 1, 2011; Stats. 2011, ch. 39, § 53, eff. June 30, 2011, operative Oct. 1, 2011; Stats. 2011-2012, 1st Ex. Sess., ch. 12, § 35, eff. Sept. 21, 2011, operative Oct. 1, 2011.) Consequently, if an inmate earned all available presentence conduct credit, the inmate would be deemed to have served four days for every two days confined. (Current Pen. Code, § 4019, subd. (f).) Although the current statute expressly applies prospectively to inmates whose crimes were committed on or after October 1, 2011, Nathan contends equal protection principles compel us to apply the current statute retroactively to him and award him additional conduct credits.

While this case was pending, the California Supreme Court decided *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*) and *People v. Lara* (2012) 54 Cal.4th 896 (*Lara*).⁶ *Brown* held equal protection principles did not require retroactive application of a version of Penal Code section 4019 in effect from January 25, 2010, to September 28, 2010.⁷ (*Brown, supra*, 54 Cal.4th at pp. 317-318.) In reaching this conclusion, the Supreme Court explained the purpose of the increased conduct credits is to affect inmates' behavior by providing incentives for them to be productive and cooperative. (*Id.* at pp. 327-329.)

⁶ As the *Brown* and *Lara* decisions postdated the parties' briefs, we gave the parties an opportunity to submit supplemental letter briefs addressing the application of the decisions to this case.

⁷ (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, amended by Stats. 2010, ch. 426, § 2, Stats. 2011, ch. 15, § 482, Stats. 2011, ch. 39, § 53, & Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35.)

This purpose is "not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former [Penal Code] section 4019 took effect are not similarly situated necessarily follows." (*Id.* at pp. 328-329.)

In *Lara*, the Supreme Court applied *Brown* to reject the precise equal protection issue Nathan raises in this case. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) As Nathan acknowledges, we are bound by the Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we conclude equal protection principles do not require us to apply the current version of Penal Code section 4019 to Nathan and he is not entitled to additional presentence conduct credits.

III

Specification of Penalty Assessments Included in Drug Program and Laboratory Analysis Fees

Although Health and Safety Code section 11372.5 only authorizes a \$50 laboratory analysis fee,⁸ the trial court imposed a \$190 fee. Similarly, although Health and Safety Code section 11372.7 only authorizes a \$150 drug program fee,⁹ the trial

⁸ Health and Safety Code section 11372.5, subdivision (a), provides in part: "Every person who is convicted of a violation of Section 11350 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment."

⁹ Health and Safety Code section 11372.7, subdivision (a), generally provides: "[E]ach person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense."

court imposed a \$570 fee. Nathan acknowledges the higher fee amounts are likely due to the inclusion of mandatory penalty assessments. Nevertheless, he contends the trial court was required to separately list these penalty assessments, along with their statutory basis, on the abstract of judgment. Since the trial court did not do this, he requests we remand the matter back to the trial court for modification of the abstract of judgment.

Preliminarily, the People contend Nathan forfeited this issue by failing to raise it below. The claimed error, however, is essentially a clerical one which we may correct at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. High* (2004) 119 Cal.App.4th 1192, 1200.) Absent forfeiture, the People concede the trial court should be directed to modify the abstract of judgment in the manner Nathan requests. We agree.

Although "a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment." (*People v. High, supra*, 119 Cal.Ap.4th at p. 1200.) Since the laboratory analysis and drug program fees apparently contain unspecified penalty assessments, the trial court must modify the abstract of judgment to separately list these assessments and their statutory basis. (*Ibid.*)

The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law."

DISPOSITION

The drug program and laboratory analysis fees are reversed and the matter is remanded to the trial court to separately list the amount and the statutory basis for any penalties and assessments included in them. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

AARON, J.