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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

AZIZ HABIB HANNA,

Defendant and Appellant.

D060276

(Super. Ct. No. SCE304574)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed as modified.

Aziz Habib Hanna was convicted of burglary for breaking into a neighbor's laundry room while under the influence of methamphetamine. Hanna had prior convictions, including a serious felony prior, which were alleged in the information. Due to these convictions plus the fact that Hanna was on probation at the time of the immediate offense, the court found he was automatically ineligible for probation pursuant

to Penal Code¹ section 1203, subdivision (k). However, while Hanna's prior convictions were pled and conceded, Hanna's probation status was neither pled nor proved in his trial. Hanna now appeals, claiming section 1203, subdivision (k) contains an implied statutory requirement to plead and prove a defendant's probation status before imposing automatic ineligibility for probation. We disagree and affirm the judgment.

FACTUAL BACKGROUND

On the morning of September 12, 2010, Hanna broke the laundry room window of a neighbor's house. The owner called 911. Responding officers found Hanna walking in a drainage ditch away from the house. Hanna had placed his clothes in the washing machine, left his keys, wallet and two cell phones on top of the running machine, and at the time of arrest was clad only in a small towel which he had removed from the house.

Hanna was charged with burglary of an inhabited building (§§ 459, 460) in which another person other than an accomplice was present during the burglary (§ 667.5, subd. (c)(21)). The information also alleged Hanna had been convicted of two serious felonies making him presumptively ineligible for probation under section 1203, subdivision (e)(4).

Hanna, in fact, had suffered four previous convictions in total, and was on probation for an offense committed in 2007. Upon his arrest in the immediate case, his probation in the 2007 case was revoked and he was returned to custody.

¹ All further statutory references are to the Penal Code unless otherwise specified.

In the burglary which is the subject of this case, Hanna was found guilty. After the verdict, the court found beyond a reasonable doubt that the People had established Hanna suffered previous felony convictions rendering him presumptively ineligible for probation under section 1203, subdivision (e)(4).

At sentencing, the court applied section 1203, subdivision (k), which automatically rendered Hanna ineligible for probation. While the court acknowledged that section 1203, subdivision (k) was only applicable to defendants on probation for prior convictions and Hanna's probationary status had not been pled or proved in the immediate case, it found that section 1203, subdivision (k) did not contain language requiring the pleading or proof of any material fact. The court then sentenced Hanna to seven years in state prison, gave him 83 days of credit towards his sentence for the period of confinement between conviction and sentencing, and ordered him to pay multiple fines and fees, including a booking fee in the amount of \$154. Hanna did not object to the booking fee at trial.

DISCUSSION

Hanna now appeals, claiming: (1) section 1203, subdivision (k) contains an implied requirement to plead and prove his probation status before he can be found automatically ineligible for probation; (2) he was entitled to additional presentence custody credits for time served between his probation revocation at the time of his arrest and his conviction in the immediate case; and (3) he was entitled to a determination of his

ability to pay the \$154 administrative booking fee levied under Government Code section 29550.1.

1. *Section 1203(k) Probation Ineligibility*

Section 1203, subdivision (k) states: "Probation shall not be granted to, nor shall the execution of, or imposition of sentence be suspended for, any person who is convicted of a violent felony, as defined in subdivision (c) of Section 667.5, or a serious felony, as defined in subdivision (c) of Section 1192.7, and who was on probation for a felony offense at the time of the commission of the new felony offense."

The statute automatically bars probation for individuals who: (1) commit certain felonies and do so (2) while on probation for a previous felony. Hanna met both of these requirements, and thus was subject to automatic probation ineligibility in the immediate case.

Automatic ineligibility for probation is an increase in punishment which requires pleading and proof of when underlying *prior convictions* trigger it. (*People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1193; *In re Varnell* (2003) 30 Cal.4th 1132, 1140; *People v. Dorsch* (1992) 3 Cal.App.4th 1346.) However, courts deciding the issue have done so on a statutory basis, relying on sections of the Penal Code that establish "a detailed

procedure for the charging, trying, and finding of previous felony convictions."² (*People v. Lo Cicero, supra*, 71 Cal.2d at p. 1192.)

No similar statutes exist for probation status, nor does section 1203, subdivision (k) itself contain an explicit pleading and proof requirement. By contrast, several analogous statutes which also automatically preclude probation eligibility do contain explicit pleading and proof requirements. (§§ 1203.06, 1203.66, 1203.7, 1203.075, 1203.08, 1203.085, 1203.09.) Moreover, section 1203 has been amended over 40 times since its original passage, with subdivision (k) added in 1996. (Stats 1996, ch. 719, § 1 (AB 893).) Presumably, had the Legislature intended section 1203, subdivision (k) to contain a pleading and proof requirement, it would have included one. In determining the intent of the statute, our role is " 'simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted. . . . ' " (*People v. Ali* (1967) 66 Cal.2d 277, 280.) We must conclude that the Legislature intentionally omitted a pleading and proof requirement from the language of section 1203, subdivision (k).

Hanna next argues that due process concerns mandate pleading and proof requirements when a statute increases a penalty. However, our courts have not found a

² "(See Pen. Code, §§ 969, 969a, 969b, 969 1/2, 1025, 1093, 1158.) This procedure affords an accused advance notice that his prior conviction is in issue (§§ 969, 969a) and gives him an opportunity to contest the fact and validity of the prior conviction to a jury (§ 1025) which will be instructed that the prosecution must prove the former conviction beyond a reasonable doubt. (2 Witkin, Cal. Crimes (1963) § 1020; see *People v. Morton* (1953) 41 Cal.2d 536, 539 [261 P.2d 523]; *In re Tartar* (1959) 52 Cal.2d 250, 257 [339 P.2d 553].) The jury must return a special verdict on the issue. (§ 1158.)" (*People v. Lo Cicero, supra*, 71 Cal.2d at p. 1192.)

constitutional right to have aggravating factors—including probation status—pled and proven when the resulting increase in punishment does not exceed the ordinary statutory maximum for the underlying offense. (Cf. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531] [aggravating factor increasing punishment beyond statutory maximum must be pled and proved]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S. Ct. 2348] (*Apprendi*) [statutory enhancement other than a prior conviction increasing punishment beyond ordinary maximum must be pled and proved as element of offense]; *People v. Mancebo* (2002) 27 Cal.4th 735, 753 [declaring defendant probation-ineligible at sentencing without prior notice does not implicate the same due process concerns as do statutory enhancements].)

In this case, the portion of Hanna's punishment based on his probation status did not increase his punishment beyond the statutory maximum for the underlying offense of residential burglary. Rather, Hanna received the low term of two years for burglary, with an additional five-year "nickel prior" enhancement for his prior convictions. His prior convictions were pled and conceded.

Thus, the term of Hanna's sentence was increased beyond the underlying offense maximum solely by application of a constitutionally and statutorily acceptable enhancement; meanwhile, Hanna's probation status at the time of conviction merely ensured he would spend that term in prison rather than on probation. Although perhaps harsh, this result is lawful. Accordingly, we reject Hanna's claim the trial court erred in applying section 1203, subdivision (k).

2. Section 2900.5 Custodial Credits

Hanna next claims he is entitled to additional presentence custody credits for time he served between his probation revocation September 12, 2010,³ and his conviction in the immediate case May 9, 2011. We agree.

Section 2900.5, subdivision (a) allows a defendant to receive credit for any amount of time spent in custody pursuant to a conviction, including that spent pre-conviction or pre-sentencing. However, subdivision (b) limits that credit to instances " 'where the custody to be credited is *attributable to proceedings related to the same conduct for which the defendant has been convicted.*' " (*In re Nickles* (1991) 231 Cal.App.3d 415, 419.) Defendants on probation who find themselves in custody for "mixed conduct," where the conduct leading to conviction is merely *a cause* rather than *the strict cause* of preconviction incarceration, are not entitled to custodial credit against their new sentence. (*In re Joyner* (1989) 48 Cal.3d 487, 489.) "Mixed conduct" consists of both "conduct which is, and conduct which is not, attributable to the proceedings related to the conduct for which he was convicted and sentenced." (*In re Nickles, supra*, at p. 419.) In such mixed conduct cases, the burden is on the defendant to show strict causation. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193.) In other words, defendants who are returned to custody on probation revocations due to multiple acts of unlawful conduct may not receive custodial credit in their new sentence, whereas defendants

³ Probation was formally revoked September 28, 2010.

returned to custody on probation revocations solely due to the conduct underlying the new conviction are entitled to credit. (*See People v. Williams* (1992) 10 Cal.App.4th 827.)

Here, the record shows no mixed conduct on Hanna's part. Rather, the only basis for Hanna's "failure to remain law-abiding" was his conduct in the immediate case. We must conclude his probation was revoked and he was thus returned to custody solely because of the burglary, making him eligible for custodial credit for the period of incarceration between September 12, 2010, and May 9, 2011.

Therefore, Hanna is entitled to additional credit for 239 days of actual custody, plus 35 days of section 2933.1 credit, for a total of 274 days of custodial credit.

3. *\$154 Administrative Booking Fee*

Finally, Hanna challenges the \$154 booking fee he received pursuant to Government Code section 29550.1, claiming the court was required to find he had the ability to pay the fee prior to imposing it. We find Hanna's argument waived, and in any case meritless.

Generally, only issues properly objected to and preserved below may be reviewed on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Smith* (2001) 24 Cal.4th 849, 852.) Our courts have routinely held the waiver rules to apply to fines imposed without findings or evidence of ability to pay. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072.) Parties may not "stand silent as the court imposes a fee. . . and

then complain for the first time on appeal that some aspect of the statutory procedure was not followed[.]" (*Id.* at p. 1075.)

To support his argument against forfeiture, Hanna cites *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), which held that claims based on insufficient evidence of ability to pay appointed counsel fees cannot be forfeited. However, *Viray* is an exception to the general rule discussed above, premised on the proposition that a clear conflict of interest arises when an attorney fails "to object to an order reimbursing his own fees." (*Id.* at p. 1214.) The *Viray* court explained that such a situation left a defendant "effectively *unrepresented*." (*Ibid.*)

Here, no such conflict exists. Hanna's booking fee will reimburse the city, not his attorney or the public defender's office. Thus, Hanna's argument is subject to the normal forfeiture rules outlined above, and his failure to preserve the matter in trial court procedurally bars it from appellate review.

Hanna's argument also fails on the merits. Government Code section 29550.1, unlike similar sections authorizing nearly identical fees, contains no provision requiring an ability to pay determination. Hanna nevertheless claims that because section 29550 contains an ability to pay provision in allowing imposition of a booking fee pursuant to a grant of probation, section 29550.1 must implicitly require an ability to pay determination based on the statutes' "interdependence." As above, we decline to "correct" the Legislature's omission.

DISPOSITION

The judgment of conviction is affirmed. The San Diego County Superior Court is directed to amend the abstract of judgment to show 239 days of section 2900.5 credit for the period of incarceration from September 12, 2010, to May 9, 2011, plus 35 days' additional credit under section 2933.1, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.