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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN MANUEL DIEGO,

Defendant and Appellant.

D060804

(Super. Ct. No. SCE306400)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Jr., Judge. Affirmed as modified.

John Manuel Diego pleaded guilty to burglary of an inhabited dwelling following his arrest by the San Diego County Sheriff's Department. Diego also admitted to a serious felony prior and prison prior. The court sentenced him to prison for two years for the burglary, with an additional five years for the serious felony prior. Among various fines and fees, the court imposed a \$154 booking fee. According to the October 11, 2011 minutes (minutes), Diego was subject to the fee under Government Code section 29550.1. (All subsequent statutory references are to the Government Code.) On the

minutes, next to a handwritten entry of "154," the clerk checked the box marked "BOOKING FEE [GC29550.1]." Diego did not object to the imposition of the booking fee and now appeals the order.

Diego contends: (1) he did not forfeit his claim by not raising an objection; (2) the fee is "unauthorized" because the court cited the wrong code section; and (3) the court impermissibly imposed the fee absent evidence of his ability to pay. We conclude that Diego forfeited his claim by not objecting, and the court was not required to assess ability to pay and he is obligated to pay the booking cost.

DISCUSSION

Sections 29550, 29550.1, and 29550.2 govern fees for processing arrested persons into county jail. The fees vary depending on the identity of the arresting agency and the eventual disposition of the person arrested. As Diego asserts, and the Attorney General concedes, Diego was arrested by the San Diego County Sheriff's Department and therefore governed by subdivision (c) of section 29550, not section 29550.1 as it appears on the minutes and abstract of judgment.

As a threshold matter, the Attorney General asserts Diego forfeited any challenges to the booking fee by not raising it below. Generally, only claims properly raised and preserved by the parties may be reviewed on appeal. A defendant "must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Diego claims he is entitled to an exception to the forfeiture rule because there was insufficient evidence to support imposition of the booking fee. Diego relies on the court's statement in *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*) that "[w]e have already held that such claims do not require assertion in the court below to be preserved on appeal." *Pacheco* in turn relies on *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 (holding that failure of counsel to contest an order for attorney fees did not forfeit an objection on appeal) and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 (holding that a statute concerning attorneys fees required the court to make an "express finding of unusual circumstances" before imposing such fees). Here, there is no exceptional circumstance such as a conflict of interest or particular statutory requirement to sustain an exception to forfeiture.

We have routinely held the forfeiture rules apply to fines imposed without findings or evidence of ability to pay. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357.) A defendant "should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine." (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) Diego received notice of the fee in the minutes and was in the best position to object based on an inability to pay. "Requiring the defendant to object to the fine in the sentencing court if he or she believes it is invalid places no undue burden on the defendant and ensures that the sentencing court will have an opportunity to correct any mistake that might exist," where the alternative is "undue consumption of scarce judicial resources and an unjustifiable

expenditure of taxpayer monies." (*People v. Gibson, supra*, at p. 1469.) The California Supreme Court has granted review on the issue of whether failure to object to booking fees forfeits a defendant's insufficient evidence claim. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Without the Supreme Court's definitive decision on the matter, we follow the precedents holding that failure to object to the fee prevents us from reviewing Diego's challenges on appeal. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 750.) In any event, we address his contentions on the merits and conclude that under the circumstances presented, the trial court was not required to determine Diego's ability to pay the booking fee.

Diego first contends that the incorrect citation to section 29550.1, rather than section 29550, makes the booking fee "unauthorized." We disagree. Unauthorized sentences are those that "could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) Here, the booking fee statutes provide that a county (§§ 29550, subd. (c), 29550.2, subd. (a)) or other arresting agency (§ 29550.1) is entitled to recover a booking fee from a person convicted of any criminal offense related to the arrest. Thus, imposition of a booking fee is mandatory under section 29550 except in certain situations, which we will discuss, where the trial court must determine the defendant's ability to pay the fee. Diego was arrested by county deputy sheriffs and convicted of a criminal offense within the terms of subdivision (c) of section 29550. Accordingly, we direct the trial court to amend the minutes and abstract of judgment to cite subdivision (c) of section 29550, not section 29550.1. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328 [appellate court can order that the judgment

be modified to reflect the imposition of mandatory fees]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519 [criminal laboratory analysis fee was mandatory, and not subject to a finding of ability to pay; trial court's imposition of a fee in excess of the statutory limit was jurisdictional error subject to correction on appeal].)

Diego next contends that the trial court was required to determine his ability to pay as a condition of imposing the fee and that substantial evidence supported a finding of his inability to pay. Diego relies on *Pacheco*, which states: "[A] prerequisite to the imposition of a booking fee . . . under [] section 29550, subdivision (c) . . . is a finding, whether express or implied, of the defendant's ability to pay. Such a finding must be supported by substantial evidence." (*Pacheco, supra*, 187 Cal.App.4th at p. 1400.)

Diego's reliance on *Pacheco* is misplaced. The fee in *Pacheco* was imposed as a condition of probation and subject to defendant's ability to pay as provided by subdivision (d)(2) of section 29550. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1399-1400.) Subdivision (d)(2) applies to conditions of probation and contains explicit language that conditions payment of a booking fee on defendant's ability to pay. Here, Diego was sentenced to prison without the possibility of probation; thus, subdivision (d)(2) does not apply. Rather, subdivision (d)(1) of section 29550 applies because this subdivision covers "conviction[s]," not probation, and does not condition the booking fee on defendant's ability to pay. (*People v. Valentine* (1946) 28 Cal.2d 121, 142 ["Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject [in this case, the *same* subject] is significant to show that a different intention existed."].) The distinction makes

sense. Persons sentenced to prison who cannot pay the fee when sentenced can work off the fee while in custody. In contrast, persons placed on probation burdened with a fee that they have no ability to pay, might be tempted to commit another crime to obtain the money needed to remain out of prison. Accordingly, the trial court properly imposed the booking fee and evidence in the record of Diego's ability to pay is irrelevant.

DISPOSITION

The trial court is directed to amend the minutes and the abstract of judgment to cite subdivision (c) of section 29550, not section 29550.1. A copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

MCCDONALD, J.