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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE TERRY MOORE, JR.,

Defendant and Appellant.

D061477

(Super. Ct. No. SCD236880)

APPEAL from a judgment of the Superior Court of San Diego County, Honorable Leo Valentine, Jr., Judge. Affirmed.

A jury convicted Clyde Terry Moore, Jr. of burglary (Pen. Code,<sup>1</sup> § 459), forgery (§ 470, subd. (d)), and receiving stolen property (§ 496, subd. (a)). Directly after the jury was excused, Moore admitted he had four prior felony convictions within the meaning of section 1203, subdivision (e)(4) (probation denial priors), and one prior felony conviction

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

within the meaning of section 667, subdivisions (b) through (i) (the Three Strikes Law), sections 1170.12, and 668. He also admitted he had served three prior prison terms within the meaning of section 667.5, subdivision (b).

The court denied probation and sentenced Moore to prison for the middle term of two years as to count 1, doubling it to four years due to the prior felony strike. The court also sentenced Moore to the middle term of two years as to count 2, again doubling it to four years, but stayed that sentence under section 654. Finally, the court sentenced Moore to the middle term of two years as to count 3, to run concurrently with count 1. The court imposed one year for the prison prior and struck the two remaining prison priors, for a total term of five years. The court ordered Moore to pay \$1,680 in restitution, along with various fines and court fees. Additionally, the court ordered Moore to pay a criminal justice administration fee (booking fee) in the amount of \$154.

Moore appeals, contending that the trial court erred by not informing him of his various constitutional rights before accepting his admission of his prior convictions. He further contends the admissions were not intelligent and voluntary. Additionally, Moore contends that the booking fee imposed by the court violates the equal protection clause of the constitution because Government Code section 29550.1, unlike Government Code section 29550, does not require a finding of ability to pay. We conclude that in light of the totality of the circumstances, Moore intelligently and voluntarily waived his constitutional rights before admitting his prior convictions. We also conclude Moore forfeited his equal protection argument regarding the booking fee imposed by the court,

and that the booking fee does not violate the equal protection clause because there is sufficient evidence of Moore's ability to pay. Accordingly, we affirm the judgment.

## FACTS

On October 5, 2011, San Diego Police Officer Juan Gomez arrested Moore for attempting to cash a stolen and forged check at a Wells Fargo Bank. At trial, Moore was advised of his right to testify, but chose not to. After his conviction and during sentencing, Moore admitted he had prior felony convictions and had served a prior prison term after the court told him he had the right to a trial on these issues, but did not further advise him of his specific constitutional rights. The court then sentenced Moore, ordered restitution, and imposed fines and a booking fee of \$154.

## DISCUSSION

### I

#### *ADMONITIONS*

Moore contends his admission of his prior convictions should be set aside because the trial court failed to obtain an informed waiver of his right to a trial on the prior convictions. However, we believe under the totality of the circumstances test as stated by the California Supreme Court in *People v. Mosby* (2004) 33 Cal.4th 353, 365 (*Mosby*), Moore voluntarily and intelligently waived his rights to a jury trial, to confront witnesses against him, and to remain silent before admitting his prior felony convictions.

Thirty-eight years ago, the California Supreme Court held that before a defendant could admit an alleged prior conviction, he or she must first be informed of and then

validly waive certain basic trial rights regarding such allegations. (*In re Yurko* (1974) 10 Cal.3d 857, 863-864.) Specifically, the court required that defendants in such circumstances be informed of their rights: (1) to a jury trial, (2) to assert the privilege against self-incrimination, and (3) to confront and cross-examine witnesses. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243; see also *In re Tahl* (1969) 1 Cal.3d 122, 132.) For nearly two decades after the court's decision in *Yurko*, lack of express advisement, and waiver, of all three *Boykin-Tahl* rights was viewed as error requiring automatic reversal. Then, in *People v. Howard* (1992) 1 Cal.4th 1132, 1175, the court revised its decision and held that the pertinent inquiry is whether "the record affirmatively shows that [the admission] is voluntary and intelligent under the totality of the circumstances."

In *Mosby, supra*, 33 Cal.4th at page 365, the court applied the revised rule and held that the admission of a prior conviction may be voluntary and intelligent even where a defendant is advised of and waives only his right to a jury trial. There, immediately after a jury conviction, defendant was told only that he had a right to a jury trial on his prior convictions. (*Id.* at p. 364.) After waiving that right, defendant admitted the prior convictions. (*Ibid.*) In holding that the lower court did not err in finding the waiver intelligent and voluntary, the court stated that "the reviewing court must examine the record of the 'entire proceeding' to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of the circumstances." (*Id.* at p. 361.)

Moore's case is very similar to the facts in *Mosby, supra*, 33 Cal.4th 353. Here, Moore, who was represented by counsel, had just undergone a jury trial at which he had stated that he understood and exercised his right not to testify. And because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right to confront and cross-examine witnesses. Further, the court did explicitly advise Moore of his right to a jury trial on the fact of the prior convictions and ensured Moore understood that he was waiving that right. Immediately after the jury convicted Moore, the discussion leading to admission of the prior convictions was as follows:

"The Court: All right. The record should reflect the jurors have been excused. Counselors, what did you decide as relates to the bifurcated proceeding?"

"[Defense counsel]: Your honor, I received a copy of the certified copies of the convictions. I have reviewed those with Mr. Moore. He is prepared to stipulate to sustaining one strike prior conviction and three prison prior convictions.

"The Court: All right. Mr. Moore, you have a right, as we talked earlier, to have the state prove these up. [Defense counsel] says you are prepared to waive that right and admit these allegations. Is that what you are prepared to do, sir?"

"The Defendant: Yes, your honor.

"The Court: Any questions about any of that?"

"The Defendant: About me?"

"The Court: About the procedure, your rights? Any questions you have?"

"The Defendant: No, sir.

"The Court: Okay. So you understand, as I have said, you have a right to have the state produce the evidence and prove beyond a reasonable doubt that these allegations are true? You understand that?"

"The Defendant: Correct."

Moore then admitted a number of prior convictions. At sentencing, Moore and his counsel had a lengthy discussion with the court about the penal consequences of his prior convictions. This, coupled with the court's discussion of the possible penal effects of Moore's prior convictions before trial, shows that Moore was aware of how his admission might affect his sentence. Under the totality of the circumstances, Moore knew of his constitutional rights and voluntarily and intelligently waived them before admitting his prior convictions.

## II

### *BOOKING FEE*

Moore also contends that the booking fee imposed under Government Code section 29550.1 violated his equal protection right because under that provision the court is not required to consider his ability to pay, whereas the court may consider a defendant's ability to pay under Government Code section 29550, subdivision (d).<sup>2</sup> Moore, however, did not challenge the Government Code section 29550.1 booking fee in the trial court and equal protection claims not preserved at trial are deemed forfeited. (*People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.)

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<sup>2</sup> The California Supreme Court is currently reviewing the equal protection issue concerning Government Code section 29550.1. (*People v. Mason* (2012) 206 Cal.App.4th 1026, review granted August 29, 2012, S203747.)

As our Supreme Court has held, "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852, citing *People v. Scott* (1994) 9 Cal.4th 331, 353.) This forfeiture rule exists "to reduce the number of errors committed in the first instance" (*ibid.*), and " 'the number of costly appeals brought on that basis' " (*Smith, supra*, at p. 852, quoting *People v. Welch* (1993) 5 Cal.4th 228, 235). Moore neither raised his challenge to the court's imposition of booking fees at sentencing nor presented evidence of differential treatment in the record. His claim is therefore not subject to review.

Even assuming Moore's claim was not forfeited and equal protection requires this court to make an implied finding of an ability to pay, there was sufficient evidence of Moore's ability to pay. A court's finding of a defendant's present ability to pay may be express or implied "through the content and conduct of the hearings." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398; *People v. Phillips* (1994) 25 Cal.App.4th 62, 71.)

Here, 42-year-old Moore was living on the streets when he was arrested, having been paroled only three months earlier, and was earning money "collecting recyclables." He also receives \$200 in electronic benefits transfer (EBT) benefits. His employment history was sporadic and the majority of his work experience is in plumbing, janitorial work, maintenance, and food service. Moore has made no showing that he owes child support and has no other debts and no assets. He graduated from high school and

attended community college for two years. He has a diagnosis of paranoid schizophrenia and is prescribed medication. Presumably he will have prison wages; he did not make a contrary claim. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1486-1487.) Thus, the imposition of the \$154 booking fee was proper.

DISPOSITION

The judgment is affirmed.

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HUFFMAN, J.

WE CONCUR:

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BENKE, Acting P. J.

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McDONALD, J.