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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY LEE CARRUTHERS,

Defendant and Appellant.

E052445

(Super.Ct.No. FSB900226)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Kenny Carruthers, of unlawfully taking/driving a vehicle (Veh. Code, § 10851, subd. (a)). In bifurcated proceedings, the trial court found

true allegations that defendant had been convicted of two strike priors and two prior offenses for which he served prison terms. He was sentenced to prison for 25 years to life, plus two years and appeals, claiming his *Romero*¹ motion was erroneously denied, and the trial court erred in calculating his presentence custody credits, his booking fee, his restitution fee and his parole period. The People agree with defendant that the trial court erroneously calculated his presentence custody credits and his parole period. We conclude that the trial court misspoke when it imposed the amount of the booking fee. We direct the trial court to correct these errors and to reflect those corrections in the minutes of the sentencing hearing and the abstract of judgment. Otherwise, we reject defendant's contentions and affirm.

The facts of this case are irrelevant to this appeal except to the extent they are discussed below.

¹ *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497 (*Romero*).

ISSUES AND DISCUSSION

1. *Denial of Defendant's Romero Motion*²

Below, on March 16, 2010, defendant filed a written motion seeking dismissal of either one of both of his strike priors.³ The ground he asserted, which was actually pertinent to the facts in the case⁴ was, that the present conviction was not for a violent offense, as defendant's prior convictions had been, and no one had been physically injured during the current offense. Also on March 16, defense counsel below filed a motion to a new trial on the truth of the allegations of the priors. On March 22, 2010, the People filed a response to defendant's *Romero* motion, asserting that defendant's extensive and violent criminal history, the fact that he was a self-admitted member of a

² Trial judges work hard. Their burden does not have to needlessly be increased by the failure of the attorneys appearing before them to proof-read the motions they submit. In his "Invitation to [the] Court To Make [Its] Own Motion to Strike [the] 'Strike' Priors" defense counsel below obviously used a document written for another defendant (a person named Johnson) and did not carefully review it to substitute defendant's name in the place of this other defendant's name in the document, which, we are sure, left the trial court asking itself, as did we, "Who is Mr. Johnson and what does he have to do with this case?" Additionally, trial counsel for defendant did not edit the document to change the facts from those we assume pertained to Mr. Johnson to those pertaining to defendant. Hence, counsel asked the trial court to "strike all of [defendant's] prior strikes, except one." However, there were only two alleged and found to be true. Additionally, counsel's main argument for seeking dismissal of one of defendant's strikes was that the strike priors resulted from the same case. However, defendant's strike priors were separated by ten years. Finally, in purporting to discuss the facts of the instant case, counsel instead reported facts about Mr. Johnson, which we assume were actually pertinent to Mr. Johnson's case.

³ See footnote one, *ante*, page two. Defense counsel below did not clear up the ambiguity at the end of his written motion when he asked the trial court "to dismiss the prior conviction[s] . . ."

⁴ See footnote two, *ante*, page three.

Crips gang and his violent conduct while incarcerated made him an inappropriate candidate to have his strikes dismissed. Also on March 22, 2010, the People filed a written opposition to defendant's motion for a new trial. On March 25, 2010, defense counsel below filed a written reply to the People's written opposition to his motion for a new trial.

On March 25, 2010, defense counsel told the trial court that he had filed some "paper work," although he was not certain if he had complied with the filing deadlines. The trial court noted that it had received it and had "considered it in connection with the rulings on this matter. We have three matters on. First is the motion for a new trial on the [priors]." Based on defense counsel's representation that defendant was being forced to take psychotropic medication at jail, the trial court continued the hearing on that motion for one month. The prosecutor then asked the trial court if it would "take up the *Romero* portion of the sentencing" immediately. The trial court responded that while it could, it would prefer to do everything at once "because . . . if the new trial motion is granted, the *Romero* [motion] becomes moot." The matter was continued until August 27, 2010, when the trial court granted defendant's motion to a new trial on the priors. Trial on the priors took place on December 3, 2010. The trial court found that defendant had suffered the prior convictions alleged and it rejected defendant's assertion that a factual basis for one of them had not been taken at the time defendant's plea to it had been entered, therefore, defendant's guilty plea to it had not been knowing, intelligent and voluntary. At the prompting of defense counsel, the trial court then denied defendant's *Romero* motion, without further argument by either counsel. The trial court

concluded that there were no grounds for granting the *Romero* motion. The court then sentenced defendant.

Defendant here asserts that the trial court “fail[ed] to properly consider” his *Romero* motion and this constituted an abuse of discretion. The record belies his claim. As stated above, the court noted on March 25, 2010 that it had received and considered defendant’s “paper work” concerning the three matters which were then before it, including the *Romero* motion. The fact that the trial court did not rule on the motion until December 3, 2010 does not mean it did not do what it stated on the record it had, i.e., read and considered defendant’s *Romero* motion.

In an unrelated argument (although he apparently does not think so), defendant asserts that the trial court abused its discretion in failing to dismiss either one or both of his strikes. While defendant cites cases holding that where a defendant has an extensive record, the minor and non-aggravated nature of the current offense “is a powerful factor which *can* support the dismissal of strike priors” he cites no authority holding that the refusal to dismiss strikes in such a case constitutes an abuse of discretion. Additionally, we take issue with defendant’s categorization of the instant crime as non-aggravated. Had defendant merely been caught driving a car which did not belong to him, his crime would have been non-aggravated. However, upon being confronted by the owner of the car, who demanded that defendant give it back to her, defendant took off and took her on a chase, driving off the curb and along the center divider, driving over the speed limit, squealing the tires and failing to stop at a stop sign, and they were eventually joined by the police. The car’s interior had been stripped and defendant acknowledged that he

perhaps should have realized that it had been stolen. He said that if he had known he was going to jail, he would have run from the police. This crime was not non-aggravated.

The record does not support defendant's suggestion that the trial court was unaware of the full scope of its discretion under *Romero*.

Defendant asserts that the fact that he unsuccessfully challenged the validity of the 1994 prior conviction on the grounds that the trial court who took defendant's plea to it did not take a factual basis for the plea should somehow have factored into the trial court's consideration of his *Romero* motion.⁵ Again, he cites no authority for this proposition. Moreover, as stated before, the trial court here concluded that defendant had failed to carry his burden of showing that a factual basis for the 1994 prior had not been taken. We will assume, for purposes of this argument only, that a defendant may collaterally attack a prior conviction on the basis that the trial court that took the plea resulting in that conviction failed to find that a factual basis for the plea. (But see *Garcia v. Superior Court* (1997) 14 Cal.4th 953, 963.) The only evidence defendant advanced below that there was no factual basis for his plea was the fact that the courtroom clerk did not check the box next to the words "Factual basis established" on the minute order. In contrast, in the minute order for the taking of the plea of defendant's codefendant in this

⁵ We disagree with the People's interpretation of defendant's argument that he is contesting the trial court's finding that he did not carry his burden of showing that his plea to the prior did not have a factual basis and, therefore, was not knowing, intelligent and voluntary as an issue *separate* from the trial court's denial of his *Romero* motion. It is clear to us that he is asserting the matter only as one of several reasons he advances why his *Romero* motion should have been granted. Defendant's response to the People's argument in his reply brief reinforces our position.

prior case, which occurred the same day *and time* as the taking of defendant's plea, before the same judge, involving the same crime and enhancement, the box before the words "Factual basis established" is checked. Based on the foregoing, it is safe to assume that the pleas of both defendant and his codefendant in the prior case were taken simultaneously, and the conflict created by the courtroom clerk's failure to check the factual basis box on defendant's minute order, while checking the box on the codefendant's, was due to human error. This court, in a not insignificant percentage of the criminal cases coming before it, corrects similar errors in minute orders for sentencing hearings and abstracts of judgment, which are filled out by court room clerks, unskilled in the law, whose work is not reviewed by the trial court. Therefore, the trial court did not err in finding that defendant failed to carry his burden of showing that a factual basis for his plea to the 1994 carjacking had not been made. (*People v. Seaton* (2001) 26 Cal.4th 598, 677; *People v. Green* (2000) 81 Cal.App.4th 463.)

The fact that defendant's 1994 carjacking conviction was, by the time he was sentenced in this case, remote in time, according to defendant, is not a valid consideration, contrary to defendant's assertion. What matters is how long defendant was able to live without running afoul of the criminal justice system and, as the People asserted below, he did not go more than six months after any of his convictions without doing this.

Defendant finally asserts that the trial court was required to give "more specifics" as to the reason it was denying his motion, and, therefore, the matter should be remanded. However, he cites no authority in support of his position.

2. *Award of Presentence Conduct Credits*

The parties agree that defendant is entitled to an additional award of 221 days of custody credits, based on his service of 686 days, bringing his custody credits to 342, for a total of 1,028 days of presentence credits. We will direct the trial court to make this award and amend the abstract of judgment and minutes of the sentencing hearing to reflect it.

3. *Booking Fee*

The trial court imposed a booking fee of \$89.76. It did not state under what provision of law it imposed the fee, although the probation report requested the order pursuant to Government Code section 29550.1. Defendant did not object to the fee at the time, but now claims that the trial court erred by failing to determine first that he had the ability to pay it, as is required by Government Code section 29550.2.

However, the fee was not imposed pursuant to Government Code section 29550.2, which, indeed, requires that the defendant have the ability to pay, but under Government Code section 29550.1,⁶ because defendant's arrest was made by the San Bernardino

⁶ Government Code section 29550.1 provides, "Any city, special district, school district, community college district, college, university, or other 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 city, special district, school district, community college district, college, university, or other local arresting agency for the criminal justice administration fee."

Police Department and defendant was booked into the County's West Valley Detention Center. In his reply brief, defendant asserts that there should be no difference between arrestees taken into custody by city police officers under Government Code section 29550.1, for which no ability to pay is required, and those taken into custody by other agencies under Government Code section 29550.2, for which an ability to pay is. However, Government Code section 29550.1 is clear, as is our duty to apply it as it is written.

Defendant requests that if we uphold the imposition of the fee, it be amended to the \$79.86 requested in the Probation Report, rather than the \$89.76 actually imposed. The record is devoid of an explanation as why the latter amount, and not the former, was imposed. We note that in other cases before this court, a booking fee of \$79.86 has been imposed when defendants have been taken to the West Valley Detention Center. (*People v. Goshen*, E050402, filed 11/7/11, review pending.) Under the circumstances, it appears reasonable to assume that the trial court mistakenly transposed the numbers. For reasons of fairness, and because the amount of the booking fee is a factually specific inquiry, a defendant should be able to challenge the sufficiency of the record to support the fee for the first time on appeal. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397-98, 1400; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468, 1469.) Therefore, we will direct the trial court to amend the minutes of the sentencing hearing to show that reimbursement of a booking fee of \$79.86 was ordered.

4. Restitution Fine

The trial court imposed a restitution fine of \$10,000 pursuant to Penal Code section 1202.4, which was the amount recommended in the probation report.⁷ Defendant did not object below,⁸ but he now claims this was an abuse of discretion. However, he waived the matter by failing to object. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gamache* (2010) 48 Cal.4th 347, 409 (*Gamache*).

As a fall-back position, defendant asserts that the failure of his attorney below to object to the amount of the fine constituted ineffective assistance of counsel. He can prevail in this regard only if he can show that, had counsel objected, there is a reasonable probability that a lower fine would have been imposed. (See *Strickland v. Washington* (1984) 466 U.S. 668.) This he cannot do. Defendant's inability to pay, based solely on the fact that he faced incarceration, does not compel a fine of less than \$10,000. (*Gamache, supra*, 48 Cal.4th at p. 409.) Additionally, following the suggested formula for calculating the fine in Government Code section 12042.4, subdivision (b)(2) is not

⁷ Therefore, we reject defendant's assertion that he was not informed or provided with the opportunity to show his inability to pay. Sentencing courts routinely adopt amounts of fines recommended in probation reports, therefore, defense counsel went into the sentencing hearing knowing there was a distinct probability the trial court would impose a \$10,000 fine.

⁸ After the trial court originally stated that the amount of the restitution fine was \$800, it corrected itself and said it was \$10,000. Later, defense counsel pointed this out to the trial court, which said that it was vacating the \$800 order, noting that it had been looking at the wrong "cheat sheet." Contrary to defendant's current assertion, this does not constitute an objection by him to the amount of the fine or how the trial court calculated it.

required. We have already rejected defendant's categorization of this crime as non-aggravated. He offers no other reasons for the trial court to impose a lesser fine.

5. *Parole Period*

The parties agree that the trial court erred in imposing a lifetime parole period, rather than the five years provided by Penal Code section 3000, subdivision (b)(1). Therefore, the trial court will be directed to impose a five year period and amend the abstract of judgment and minutes of the sentencing hearing to reflect that.

DISPOSITION

The trial court is directed to order that defendant pay a booking fee of \$79.86, serve a parole period of five years, and be awarded 342 days of presentence custody credits, based on service of 686 actual days,⁹ for a total of 1,028 days, and to reflect these orders in the minutes of the sentencing hearing and the abstract of judgment. The trial court is further ordered to amend the minutes of the sentencing hearing and the abstract of judgment to show that he served 686 days of actual presentence custody, for which he is awarded 342 days of credits, for a total of 1028 days. In all other respects, the judgment is affirmed.

⁹ We note that the trial court correctly stated orally that defendant had served 686 days, but the minutes of the sentencing hearing and abstract of judgment incorrectly state 537. (See preceding citations to *People v. Seaton* and *People v. Green, ante*, page seven.)

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RAMIREZ
P.J.

We concur:

RICHLI
J.

MILLER
J.