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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.

DEMARCUS BAILEY,

Defendant and Appellant.

E053496

(Super.Ct.Nos. SWF027829 &
SWF10001383)

OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge.
(Retired judge of the former Orange Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Theodore M.
Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

This opinion addresses two trial court cases, which have been consolidated at this court. In the first trial court case, defendant and appellant Demarcus Bailey pled guilty to being a felon in possession of a firearm. (Former Pen. Code, § 12021 (a)(1) [eff. 2009].)¹ Also in the first case, defendant admitted suffering five prior convictions, which resulted in prison terms. (§ 667.5, subd. (b).) The trial court granted defendant 36 months of formal probation, with the condition that he serve 360 days in the custody of the County Sheriff.²

In the second trial court case, a jury found defendant guilty of receiving stolen property. (§ 496, subd. (a).) Also in the second case, the trial court found true the allegations defendant suffered four prior convictions, which resulted in prison terms. (§ 667.5, subd. (b).) The trial court sentenced defendant to prison for a term of six years in the second case. The trial court then sentenced defendant to prison for a term of six years for violating probation in the first case. The trial court ordered the two six-year terms to run concurrently.

Defendant raises five issues on appeal. First, defendant contends the trial court erred in the second case by permitting the prosecutor to introduce defendant's pre-

¹ All subsequent statutory citations will be to the Penal Code, unless indicated.

² The reporter's transcript reflects defendant was required to serve a total of 360 days in custody, while the clerk's minute order reflects defendant was required to serve a total of 315 days in custody. The discrepancy is not pertinent to the issues on appeal, so we do not resolve it. (See *People v. Smith* (1983) 33 Cal.3d 596, 599 [resolving discrepancies in the transcripts].) We note the discrepancy only for the sake of being thorough in our procedural history.

*Miranda*³ statements. Second, defendant contends the trial court erred by not reducing his conviction for receiving stolen property (§ 496, subd. (a)) to a misdemeanor. Third, defendant asserts the trial court erred by not striking one of the prison prior enhancements (§ 667.5, subd. (b)), in the first case. Fourth, defendant contends the abstract of judgment in the first case must be amended to correct two fines. Fifth, defendant asserts the security fee imposed in the first case must be reduced from \$40 to \$30. We affirm the judgment with directions.

FACTUAL AND PROCEDURAL HISTORY

In the first case, defendant admitted previously being convicted of a felony offense on June 5, 1997, and possessing a Beretta .25-caliber handgun on March 13, 2009.

We now turn to the second case. The victim in the second case (the victim) had a checking account at Citibank with her husband. At the end of May 2010 the victim ordered checks for the Citibank checking account. The checks never arrived in the mail. When the victim tried to make a \$2 purchase, her checking account card was declined. The victim looked at the Citibank account online, and discovered the missing checks had been cashed at various stores and banks over a five-day period. The victim filed a police report related to the stolen checks.

Hemet Police Officer Brett Riley was on duty on July 4, 2010, at approximately 3:11 p.m. While on patrol in Hemet, Officer Riley saw a Toyota Camry; he conducted a

³ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

records check of the Camry's license plate and found the registration had expired in November 2009, but the car was displaying a current registration tag. The Camry was stopped when Officer Riley approached it. There were four individuals inside the car, and defendant was in the driver's seat. Officer Riley had the four individuals sit on the curb towards the rear of the car, while he searched the vehicle. None of the individuals were handcuffed while they sat on the curb.

Inside the car's glove compartment, Officer Riley found a checkbook containing two checks. The victim's name and her husband's name were printed on the checks inside the checkbook found in the car. Defendant's first name was written on the back of the checkbook. Officer Riley asked defendant about the checkbook. Defendant said he knew the victim and her husband, and they gave him the checkbook. However, defendant soon thereafter said an acquaintance of his knew the victim and her husband. Officer Riley arrested defendant, placed him in handcuffs, and transported him to the police station.

Officer Riley searched defendant at the police station. Inside defendant's wallet, Officer Riley found another check from the victim's checkbook. The check in defendant's wallet was marked as paid to the order of defendant, in the amount of \$200 (although the amount only appeared in numerical form, it was not spelled out on the check), with the victim's husband's name on the signature line. The victim's husband's handwriting was not on the face of the check found in defendant's wallet.

After conducting the inventory search, Officer Riley read defendant his *Miranda* rights. Defendant waived his rights and spoke to Officer Riley.

After defendant waived his rights, he told Officer Riley that an acquaintance left the checkbook in the car approximately one month prior. Defendant said he wrote his name on the back of the checkbook, but then realized what he was writing on and stopped.

DISCUSSION

A. MIRANDA

1. *PROCEDURAL HISTORY*

In defendant's written motions in limine, he requested that the trial court exclude any references to the statements he made during the traffic stop. Defendant argued he was detained by Officer Riley, when Officer Riley conducted a probation search of the vehicle, because the officer ordered defendant and the other individuals to sit on the curb, while Officer Riley and another uniformed officer were present. Defendant pointed out that, at the preliminary hearing, Officer Riley testified defendant was detained while he was sitting on the curb, although defendant was not handcuffed. Officer Riley found defendant was driving with an expired license.

Defendant argued a reasonable person would not feel free to leave in such a situation, and therefore, defendant should have been given his *Miranda* rights before being asked about the checkbook. Defendant concluded his traffic stop statements to Officer Riley should be excluded.

During a hearing prior to the start of trial, the trial court found "the evidence supports that he's clearly not in custody, custodial setting. He is temporarily detained because of other reasons, and there's plenty of explanation that would have meaning

and no import, including what he said, except it turns out there's factual difficulties with him stating that he was innocent, innocuous, and whatever." Thus, the trial court denied the motion.

2. DISCUSSION

Defendant contends the trial court erred by not suppressing the pre-*Miranda* statements defendant made during the traffic stop. We disagree.

"Because a *Miranda* warning is only required once custodial interrogation begins, the defendant must necessarily have been in custody in order to assert a violation. 'In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation' [Citation.] These circumstances must be measured 'against an objective, legal standard: would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest.' [Citations.]" (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 35 [Fourth Dist., Div. Two].)

"California courts have identified a number of factors relevant to this determination. While no one factor is conclusive, relevant factors include:

"(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.'" [Citations.] (*People v. Bejasa, supra*, 205 Cal.App.4th at pp. 35-36.) "While a reviewing court must apply a

deferential substantial evidence standard to the trial court's factual findings, it must independently determine whether the defendant was in custody." (*Id.* at p. 38.)

As to the first factor, it does not appear defendant was formally arrested at the time of the checkbook question, since he was sitting on a curb waiting while Officer Riley searched the vehicle. Officer Riley did not order the four individuals to sit with their hands behind their backs, so it appears from the record that the encounter was more informal than formal, with no restraints on defendant's hands or arms.

Second, it does not appear the detention lasted for a lengthy period of time. The record reflects Officer Riley ordered defendant and the passengers out of the car, and then began searching it. When the officer discovered the checkbook, he asked defendant a question about it. There is nothing indicating the search took a prolonged amount of time or that there was a great delay between asking defendant to sit on the curb and asking defendant about the checkbook.

Third, Officer Riley asked defendant about the checkbook while defendant sat on a street curb. Thus, it appears defendant was in a public place, where people passing by could observe the actions of the two officers. The United States Supreme Court has concluded that being in a public location, such as a street, reduces the feeling of being in custody, because such a setting is substantially less police dominated than a police station setting. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 438-439.) Thus, the street setting favors a finding that defendant was not in custody.

Fourth, as to the ratio, there were twice as many suspects as there were officers. Officer Riley and a second uniformed officer were present during the search and

question about the checkbook, while defendant and the three passengers from the car were sitting on the curb. Thus, the ratio was two officers to four suspects. The ratio of officers to suspects would lead to a conclusion defendant was not in custody at the time of the checkbook question, since there were twice as many suspects as officers present.

Fifth, we address the demeanor of the officer, including the nature of the questioning. At the preliminary hearing, Officer Riley described giving the following sequence of questions during the traffic stop: (1) Officer Riley asked defendant for his driver's license, and defendant said it was expired; (2) Officer Riley asked defendant if he was on probation, and defendant admitted being on probation; (3) Officer Riley asked the four people in the car to exit the car and sit on the curb, so he could conduct a probation search of the vehicle; (4) after finding the checkbook and checks, Officer Riley asked defendant about the checkbook.

It appears from the record that Officer Riley's question about the checkbook was meant to follow up on an item found during the probation search. In other words, the officer's question was a routine preliminary question designed to determine if a crime had occurred at all. Such questions are permissible pre-*Miranda* inquiries, because an officer needs information to ascertain whether his suspicions about a possible crime are correct. (*Berkemer v. McCarty*, *supra*, 468 U.S. at p. 439; see also *People v. Farnam* (2002) 28 Cal.4th 107, 180.) Overall, it appears Officer Riley's demeanor was non-accusatory; rather, he was trying to assess the situation—identify defendant via his driver's license, and then identify items found in the vehicle. Thus, the officer's

demeanor and nature of the question favors a finding that defendant was not subject to a custodial interrogation.

In sum, the factors reflect defendant was not subject to a formal arrest, he was not kept for a prolonged period of time, he was in a non-threatening setting, the suspects outnumbered the officers present at the scene, and defendant was only asked to identify himself and a checkbook found in the car. Given the foregoing analysis, we conclude the trial court properly admitted defendant's pre-*Miranda* statements, since it appears defendant was not subject to a custodial interrogation.

Defendant contends a reasonable person in defendant's position would not have felt free to leave during the checkbook question, because (1) the officers were in uniform, (2) the officers had marked patrol cars, (3) Officer Riley was conducting a probation search of the car; (4) defendant had already admitted a probation violation by admitting he was driving without a license, and defendant was eventually formally arrested for the probation violation and driving without a license. If we assumed defendant was correct, and that he was in custody at the time of the checkbook question, we would conclude the trial court's error was harmless.

If evidence is admitted pursuant to a *Miranda* violation, we must examine whether the admission of the evidence was harmless beyond a reasonable doubt. (*People v. Bradford* (2008) 169 Cal.App.4th 843, 854.) The prosecution presented evidence that (1) defendant's first name was written on the back of the checkbook; (2) defendant was in the car with the checkbook; and (3) defendant had one of the checks in his wallet, with his name on the check. The foregoing evidence provides

much stronger indications of defendant's guilt than defendant's pre-*Miranda* statement that he knew the victims, or had an acquaintance who knew the victims. Thus, given the strong evidence of defendant's guilt, which was not associated with the pre-*Miranda* statements, we conclude any error in admitting the statements was harmless beyond a reasonable doubt.

B. WOBBLER

1. *PROCEDURAL HISTORY*

After trial, defendant moved the trial court to reduce his felony of receiving stolen property (§ 496, subd. (a)) to a misdemeanor. Defendant argued his offense was not so serious as to qualify as a felony because (1) the checks were worthless, since the checking account had been closed; (2) the handwriting on the cashed checks appeared different from defendant's handwriting; (3) there was no evidence of defendant benefiting from the cashed checks; (4) the victims were not particularly vulnerable; (5) the victims' monetary loss could not be directly attributed to defendant; and (6) the victims only lost \$1,000, which "is not a significant amount of money." Defendant conceded he had a criminal history, but explained that he "had difficulty escaping a lifestyle involving drugs." Defendant argued he should be granted probation.

At the hearing on the motion, defendant argued the conduct creating the crime was "de minimus," and there was no evidence defendant knew the checkbook was stolen, which mitigated defendant's culpability. Further, defendant asserted he wanted to rehabilitate himself, so as to "help troubled youth."

The trial court informed defendant it received his written motion and considered it. The court then denied defendant's motion to reduce the felony to a misdemeanor. The trial court explained, "He was on felony probation at the time of this current conviction for the 12021(a)(1) [felon in possession of a firearm], where he did that along with the five priors that are the bases for whatever the Court's going to do in SWF027829 [(the first case)]." The trial court concluded, "So—just so we're all on the same page, he's going to go to prison."

2. *DISCUSSION*

Defendant contends this court should direct the trial court to reconsider its ruling on defendant's motion to reduce the felony of receiving stolen property (§ 496, subd. (a)) to a misdemeanor, because the trial court incorrectly focused on defendant's criminal history. We disagree.

A trial court may exercise "its discretion pursuant to section 17, subdivision (b), to treat as a misdemeanor a 'wobbler' offense charged as a felony. [Citation.] Relevant factors include the nature and circumstances of the offense; the defendant's appreciation of and attitude toward the offense; his character, as evidenced by his behavior and demeanor at the trial; and the defendant's criminal history. [Citation.]" (*People v. Smith* (2012) 203 Cal.App.4th 1051, 1062.) "The trial court's decision is reviewed deferentially. [Citation.] The 'trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' [Citation.]" (*Ibid.*)

At the hearing, the trial court stated, in regard to defendant's written motion, "I have seen it, I've read it, and I've considered it." The trial court then explained defendant's criminal history was the factor preventing the offense from being reduced to a misdemeanor. The trial court's statement does not reflect it only considered one factor; rather, the trial court stated that it considered the motion, which went through a variety of mitigating issues, but ultimately decided to retain the felony status of the offense, due to defendant's criminal history. (See *People v. Myers* (1999) 69 Cal.App.4th 305, 310 ["The fact that the court focused its explanatory comments on the violence and potential violence of appellant's crimes does not mean that it considered only that factor."].) Since the trial court considered the motion, and appeared to rely on proper factors, such as criminal history, when ruling on the motion, we conclude the trial court did not abuse its discretion.

Defendant argues the trial court's wobbler decision was arbitrary because even if the offense had been reduced to a misdemeanor, defendant would have been subject to a prison sentence, due to the probation violation and prison prior enhancements. Defendant contends the trial "court abused its discretion in denying the requested relief because the act of denying relief did nothing to achieve a legitimate sentencing objective."

Contrary to defendant's position, it does not appear that the trial court denied the motion out of a desire to send defendant to prison. Rather, the trial court denied the motion due to defendant's criminal history, and then went on to explain that defendant would be sentenced to a prison term. Thus, we are not persuaded that the trial court

erred because defendant could have be sentenced to a prison term even if the offense had been reduced to a misdemeanor, because sentencing defendant to a prison term did not appear to be the basis for the trial court’s decision—it was defendant’s criminal history that tipped the scales in favor of retaining the crime’s felony status.

C. PRISON PRIOR

1. *PROCEDURAL HISTORY*

In the first case, the prosecutor charged defendant with five prison priors. (Pen Code, § 667.5, subd. (b).) The five priors were: (1) unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), in January 1996; (2) being a felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1)), in June 1997; (3) possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), in May 2000; (4) possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), in July 2003; and (5) being a felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1)), in January 2004. Defendant admitted suffering all five of the prior convictions.

In the second case, the prosecutor charged defendant with the same five prior convictions. During the second case, at the bifurcated prison prior hearing, the prosecutor stated, “in reviewing the 969(b) packet, the People discovered that the alleged prior offense No. 4 and the alleged prior offense No. 5, the first one being for 11377(a), and the second one being 12021(a)(1), those actually ran concurrent, and those would not be separate and individual prison priors.” The trial court said, “Four and five are the same. Five goes out.” The trial court told the prosecutor, “You can

prove one through four, the '96, '97, 2000, [and] 2003.” The court found the allegations of the four alleged prison priors to be true. (§ 667.5, subd. (b).)

In the second case, the trial court sentenced defendant to the midterm of two years for the felony of receiving stolen property (§ 496, subd. (a)), and four consecutive years for the four prison priors (one year each). (§ 667.5, subd. (b).) In the first case, the trial court sentenced defendant to a two-year prison term for the offense of being a felon in possession of a firearm. (Former § 12021 (a)(1).) As to the prison priors, the trial court struck one of the prison priors, and imposed a four-year sentence for the four remaining prison priors (one year each). (§ 667.5, subd. (b).) When the trial court struck the prison prior, it said, “And the Court is going to strike one of the priors in that case and run the other four consecutive to the two years. All of this concurrent to this sentence I just imposed in the case for which he was convicted in this court. And I will choose to strike the last prior.” The minute order from the hearing reflects: “Court orders Prior(s) 5 Stricken.”

2. *DISCUSSION*

Defendant asserts the trial court erred by not stating its reason for striking the prison prior (§ 667.5, subd. (b)), in the first case. Defendant requests we “remedy the unauthorized sentence by remanding this case for the [trial] court to state its reason on the record, and for the clerk to record the reason in the court minutes.” The People support defendant’s contention, asserting, “[T]he matter must be remanded so that the trial court can state its reasons for the dismissal on the record.” We agree.

Section 1385, subdivision (a), provides: “The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.” The requirement of stating reasons also applies to the dismissal of an enhancement. (§ 1385, subd. (c)(1).)

Our Supreme Court has written, “““The statement of reasons is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement. It is not enough that on review the reporter’s transcript may show the trial court’s motivation; the *minutes* must reflect the reason ‘so that all may know why this great power was exercised.’”” [Citation.]” (*People v. Williams* (1998) 17 Cal.4th 148, 159.)

In this case, the reporter’s transcript reflects that the trial court most likely struck the fifth prior because it was the same prison sentence as the fourth prior. Nevertheless, this apparent motivation reflected in the reporter’s transcript is not sufficient to meet the statutory requirements—the minutes must reflect the trial court’s reasoning. The minutes reflect the fifth prior was stricken, but not the court’s reasoning for the action. Accordingly, we direct the trial court to amend the minutes to include its reason(s) for striking the prison prior (§ 667.5, subd. (b)). (§ 1385, subds. (a) & (c)(1).)

D. RESTITUTION AND REVOCATION FINES

1. *PROCEDURAL HISTORY*

When defendant was granted probation in the first case, the trial court stated his restitution fine would be \$200 (§ 1202.4, subd. (b)). After revoking defendant's probation, when the trial court imposed a prison sentence for the first case, the trial court stated defendant's restitution fine for the first case would be \$800 (§ 1202.4, subd. (b)), and his parole revocation fine would also be \$800 (§ 1202.45). The abstract of judgment for the first case reflects a restitution fine of \$800 (§ 1202.4, subd. (b)), and a parole revocation fine of \$800 (§ 1202.45).

2. *DISCUSSION*

Defendant contends the abstract of judgment in the first case must be amended to reduce the amount of the restitution fine and the amount of the parole revocation fine from \$800 to \$200. The People support defendant's argument. We agree.

We begin with the restitution fine. (§ 1202.4, subd. (b).) "A restitution fine imposed at the time probation is granted survives the revocation of probation. Because of this, an additional restitution fine imposed at the time probation is revoked is unauthorized and must be stricken from the judgment. [Citations.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 779.)

The trial court imposed a \$200 restitution fine when it granted defendant probation. That \$200 fine survived the revocation of defendant's probation. Thus, the \$800 fine imposed when defendant's probation was revoked is unauthorized.

Accordingly, we will direct the trial court to amend the abstract of judgment in the first case to reflect a restitution fine of \$200.

A parole revocation fine must match the amount of the restitution fine.

(§§ 1202.45, 1204.4) Therefore, since defendant's restitution fine has to be lowered to \$200, his parole revocation fine must also be lowered to match that amount—\$200.

Accordingly, we will direct the trial court to correct the abstract of judgment in the first case to reflect a restitution fine of \$200 (§ 1202.4) and a parole revocation fine of \$200 (§ 1202.45).

E. SECURITY FEE

1. *PROCEDURAL HISTORY*

When the trial court granted defendant probation in the first case, it imposed a court security fee of \$30. (§ 1465.8.) Defendant's guilty plea in the first case was entered on October 9, 2009. When the trial court revoked defendant's probation, and sentenced him to a prison term for the first case, it imposed a court security fee of \$40. (§ 1465.8.) The trial court sentenced defendant to prison in the first case on April 29, 2011. The abstract of judgment for the first case reflects a court security fee of \$40.

2. *DISCUSSION*

Defendant contends the trial court erred by imposing a court security fee of \$40, because the fee was only \$30 in 2009, when defendant was convicted. The People support defendant's argument. We agree.

The triggering event for a court security fee is a conviction, so the date of conviction is the relevant date for determining the amount of the fee. (See *People v.*

Alford (2007) 42 Cal.4th 749, 754 [“[T]he Legislature intended to impose the court security fee to all convictions after its operative date.”].) On October 9, 2009, section 1465.8, subdivision (a)(1), required a court security fee of \$30. Thus, defendant’s court security fee for the first case should be \$30. Accordingly, we will direct the trial court to modify defendant’s court security fee in the first case.

DISPOSITION

The judgment is affirmed. The trial court is directed to: (1) amend the sentencing minute order dated April 29, 2011, in case No. SWF027829, to reflect the court’s reason(s) for striking the prison prior (§ 667.5, subd. (b)) (§ 1385, subds. (a) & (c)(1)); (2) in case No. SWF027829, modify defendant’s restitution fine to the amount of \$200 (§ 1202.4); (3) in case No. SWF027829, modify defendant’s parole revocation fine to the amount of \$200 (§ 1202.45); and (4) in case No. SWF027829, modify defendant’s court security fee to the amount of \$30 (§ 1465.8, subd. (a)(1)). After making these modifications, the trial court is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

KING
J.