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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.

STEVEN EARL HILL,

Defendant and Appellant.

E053994

(Super.Ct.No. INF1100060)

OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Affirmed in part; reversed in part with directions.

Robert L.S. Angres, 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, Scott Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Steven Earl Hill pled guilty to possession of a controlled substance, to wit, methamphetamine (Health & Saf. Code,

§ 11377, subd. (a)) and unlawful trespassing (Pen. Code, § 602, subd. (m)). In return, an enhancement allegation was dismissed, and he was placed on formal probation for a period of 36 months with various terms and conditions. On appeal, defendant contends that the booking fee ordered pursuant to Government Code section 29550 and reimbursement of appointed counsel fees pursuant to Penal Code section 987.8, subdivision (b), must be stricken because the trial court failed to find if defendant had the ability to pay these fees. We agree and will remand the matter to the trial court for determination of whether defendant has the ability to pay the challenged fees.

I

FACTUAL BACKGROUND¹

On November 13, 2010, around 2:15 a.m., Sergeant Cortez and Officer Pairrett, public safety officers for Fantasy Springs Resort Casino, were on duty when Sergeant Cortez recognized defendant as a person who he had permanently banned from the casino on November 27, 2009. Sergeant Cortez thereafter directed Officer Pairrett to contact and detain defendant for trespassing.

Officer Pairrett contacted defendant, who was playing at a casino machine. Once the officer verified defendant's name, he told defendant that he was trespassing, and asked defendant to go with him to the security office. Once in the security office, the officer searched defendant's person and found a cigarette box, containing what appeared

¹ The factual background is taken from testimony at the preliminary hearing.

to be methamphetamine and two cigarettes, in his front jacket pocket. Officer Pairrett then handcuffed defendant and contacted the local sheriff's department.

Riverside County Sheriff's Deputy Klicka was dispatched to the casino around 2:30 a.m. Upon his arrival, Officer Pairrett brought to his attention the suspected methamphetamine found on defendant's person. The deputy conducted a field test of the substance. The substance tested positive for methamphetamine and, with its packaging, weighed 2.8 grams. Based on his training and experience, Deputy Klicka determined the methamphetamine was a useable amount.

II

DISCUSSION

Defendant contends that the \$414.45 booking fee imposed under Government Code section 29550 and the \$119.50 appointed counsel fee imposed under Penal Code section 987.8, subdivision (b), must be stricken because the trial court did not make an assessment of his ability to pay these fees as required by the statutes.

The People correctly agree that the trial court had an obligation to determine defendant's ability to pay any fees before it imposed the booking fee and reimbursement of appointed counsel fee, but they maintain that defendant forfeited these issues by failing to object in the trial court. The People also assert that if this court does not find that defendant forfeited these issues, then the proper remedy is to remand the matter to the trial court to determine defendant's ability to pay.

Defendant responds that the issues have not been forfeited, and agrees that the matter should be remanded to determine his ability to pay.

A. *Forfeiture*

Following his guilty plea, defendant was immediately sentenced. When the trial court imposed the \$414.45 booking fee and the \$119.50 appointed counsel fee, there was no objection by defendant. The People argue that defendant forfeited any objection to the booking fee and reimbursement of attorney fees by failing to object in the lower court because the resulting sentence is not an unauthorized sentence, citing to *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072, *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 (*Hodges*), and *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 (*Gibson*).

Defendant argues that he can raise the issue on appeal for the first time, as the determination of booking fees and reimbursement toward appointed counsel fees presents an insufficient evidence claim that cannot be forfeited, citing to *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397-1401 (*Pacheco*), among other cases.

We note that there is conflicting authority on the issue of whether the failure to object to an imposed fee based on the trial court's failure to make a determination of an ability to pay forfeits the issue on appeal. On one hand, courts have found, "[B]ecause the appropriateness of a restitution fine is fact-specific, as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine. Otherwise, the People would be deprived of the opportunity to cure the defect by presenting additional information to the trial court to support a finding that defendant has the ability to pay.

[Citations.]” (*Gibson, supra*, 27 Cal.App.4th at p. 1468; see also *Hodges, supra*, 70 Cal.App.4th at p. 1357.)

However, other courts have found that a challenge to a defendant’s ability to pay attorney fee reimbursement need not be raised below because it is essentially a challenge to the sufficiency of the evidence supporting the trial court’s order. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) Recently, in *Pacheco, supra*, 187 Cal.App.4th 1392, the court considered whether the imposition of a booking fee, probation supervision fee, and other fees are forfeited without an objection in the trial court. It concluded, “[T]hese claims are based on the insufficiency of the evidence to support the order or judgment. We have already held that such claims do not require assertion in the court below to be preserved on appeal. [Citations.] Respondent offers nothing to convince us otherwise.” (*Id.* at p. 1397.)²

We need not determine whether *Pacheco* was wrongly decided because under the circumstances of this case, the forfeiture rule is inapplicable here. The trial court never stated the amount of the booking fee or reimbursement of appointed counsel fees and, therefore, there was no reason for defendant to object that he did not have the ability to pay those fees. Although the trial court inquired of defendant whether he had the “two-page document entitled Sentencing Memorandum,” which had “all the terms and conditions of formal felony probation,” and whether he went over those terms and

² We note that the Supreme Court has recently granted review in *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513. *McCullough* disagreed with *Pacheco*’s substantial evidence waiver exception.

conditions with his attorney, the record is unclear whether his counsel went over the fee sections with defendant.³ Because the record is unclear whether defendant was placed on any notice of the amount of the booking fee and/or the reimbursement of appointed counsel fees, we decline to find forfeiture under these circumstances. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Phillips* (1994) 25 Cal.App.4th 62, 74.) Further, out of an abundance of caution, we consider the merits of defendant's substantial evidence challenge to the trial court's implied finding that he had the ability to pay the \$414.45 booking fee and \$119.50 toward appointed counsel.

B. *Ability to Pay*

The finding of an ability to pay may be express or implied and must be supported by substantial evidence. (*Pacheco, supra*, 187 Cal.App.4th at p. 1400.) Under the substantial evidence test, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, to support the judgment below and will include every fact that can reasonably be deduced from the evidence. (*People v. Phillips, supra*, 25 Cal.App.4th at pp. 71-72.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

³ The sentencing memorandum box entitled "Pay booking fees of \$414.45 or \$_____ (GC § 29550)" is checked, but leaves the amount unclear. For example, the \$414.45 portion is not circled and the blank section is left blank. Presumably, defendant was ordered to pay the \$414.45.

The box pertaining to the reimbursement of appointed counsel fees is also checked, with the amount of \$119.50 filled in.

The record here does not support the implied finding that defendant had the ability to pay the booking fee and the reimbursement of appointed counsel fee because there is no evidence of how much defendant earned or whether he had the ability to pay such fees. The record does not contain a probation report and, therefore, it is unknown what defendant's employment or financial status is. Accordingly, as suggested by the parties, we will remand the case for an appropriate hearing and determination of defendant's ability to pay the booking and appointed counsel fees. (See, e.g., *People v. Flores* (2003) 30 Cal.4th 1059, 1068-1069 [when a fee reimbursement order has been made without notice and a hearing, a remand is the appropriate remedy].)

III

DISPOSITION

The judgment is reversed solely with respect to the order for defendant to pay a \$414.45 booking fee (Gov. Code, § 29550) and a \$119.50 appointed counsel fee (Pen. Code, § 987.8, subd. (b).) The matter is remanded to the trial court with directions to determine defendant's ability to pay these fees. In all other respects, the judgment is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.