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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.

IGNACIO MARMOLEJO AGUIRRE,

Defendant and Appellant.

E054996

(Super.Ct.No. RIF1102360)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed as modified.

Neil Auwarter, 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, Sabrina Lane Erwin and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

In June 2011, defendant and appellant Ignacio Marmolejo Aguirre was convicted of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and placed on formal probation for a period of 36 months with various terms and conditions. In August 2011, defendant violated probation by possessing methamphetamine and being under the influence of a controlled substance. On November 8, 2011, after defendant pled guilty to being in possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) in case No. RIF1104629, the trial court found defendant to be in violation of his probation in case No. RIF1102360. Defendant was thereafter immediately sentenced to the low term of 16 months in county jail to be served concurrently with case No. RIF1104629.

On appeal, defendant contends (1) the trial court erred in imposing a parole revocation fine pursuant to Penal Code section 1202.45; and (2) the trial court erred in imposing a booking fee in the amount of \$414.45 pursuant to Government Code section 29550. We agree that the parole revocation fine must be stricken, but reject defendant's remaining contention.

## II<sup>1</sup>

### DISCUSSION

#### A. *Parole Revocation Fine Pursuant to Penal Code Section 1202.45*

Defendant contends that the trial court erred in imposing a parole revocation fine pursuant to Penal Code section 1202.45 because that statute is inapplicable in this case. The People agree that the trial court erred in imposing the fine because defendant was ordered to serve time in county jail, instead of state prison, and therefore his sentence does not include “a period of parole” within the meaning of Penal Code section 1202.45. We also agree and order the parole revocation fine stricken.

Penal Code section 1202.45 requires assessment of a parole revocation restitution fine “[i]n every case where a person is convicted of a crime and whose sentence *includes a period of parole.*” (Italics added.) Because defendant’s sentence included no period of parole and he was sentenced to county jail, instead of state prison, for a period of 16 months pursuant to Penal Code section 1170, subdivision (h), it was improper to impose the parole revocation fine. (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1075; *People v. Battle* (2011) 198 Cal.App.4th 50, 63; *People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1183; see also Pen. Code, § 3000 et seq. [requiring a period of parole only if a defendant has been committed to state prison].)

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<sup>1</sup> The details of defendant’s criminal conduct are not relevant to the limited legal issues raised in this appeal.

B. *Booking Fee Order Pursuant to Government Code Section 29550*

Defendant also contends that the \$414.45 booking fee imposed under Government Code section 29550 must be stricken because the trial court did not make an assessment of his ability to pay.

The People argue that defendant forfeited this issue by failing to object in the trial court. The People also assert that defendant's argument is meritless because subdivision (d)(1) of Government Code section 29550 does not require a court to base the reimbursement of the fee based on a defendant's ability to pay.

1. Forfeiture

Following his guilty plea and a finding of a probation violation, defendant was immediately sentenced. When the trial court imposed the \$414.45 booking fee, there was no objection by defendant. The People argue that defendant forfeited any objection to the booking fee 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. Whisenand* (1995) 37 Cal.App.4th 1383, 1394-1395 (Fourth Dist., Div. Two), and *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.

Defendant argues that he can raise the issue on appeal for the first time, as the determination of booking 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.]” (*People v. Gibson, supra*, 27 Cal.App.4th at p. 1468; see also *People v. Hodges* (1999) 70 Cal.App.4th 1348, 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.)<sup>2</sup>

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<sup>2</sup> 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.

We need not determine whether *Pacheco* was wrongly decided. Because the People have addressed the issue on the merits and, out of an abundance of caution, we consider the merits of defendant's challenge to the trial court's imposition of the \$414.45 booking fee.

2. Imposition of booking fee

Government Code sections 29550, 29550.1, and 29550.2 govern fees for booking or otherwise processing arrested persons into a county jail. To a certain extent, the fees vary depending on the identity of the arresting agency and the eventual disposition of the person arrested.

Arrests made by an agent of a city "or other local arresting agency" are governed by Government Code sections 29550, subdivision (a)(1) and 29550.1. Under Government Code section 29550, subdivision (a)(1), the county may charge the local arresting agency a booking fee. When it does so, under Government Code section 29550.1, "The court *shall*, as a condition of probation, order the convicted person to reimburse the [local agency]." (Italics added.)

Arrests made by a county agent or officer are governed by Government Code section 29550, subdivision (c). Under subdivision (c) of Government Code section 29550, if the person is convicted of a crime related to the arrest, the county is entitled to recover a booking fee from the arrestee, but the fee may not exceed its actual administrative costs, including fixed overhead.

Government Code section 29550, subdivisions (c), (d)(1) and (d)(2), specify what a court is to do when it has been notified that the county is entitled to a booking fee.

Under subdivision (d)(1) of Government Code section 29550, the judgment of conviction “may” include an order imposing the booking fee. However, under subdivision (d)(2), if the person convicted is granted probation, the fee becomes mandatory, although subject to a finding of an ability to pay: “The court *shall*, as a condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the . . . fee.” (Italics added.)

Finally, arrests made by “any governmental entity not specified in [Government Code] Section 29550 or 29550.1” are governed by Government Code section 29550.2, subdivision (a). In general, with one subtle difference, the language of this provision is consistent with the language of the others. The difference is that, under Government Code section 29550.2, all convicted persons—those sent to prison as well as those granted probation—are subject to a mandatory booking fee conditioned upon their ability to pay. The county may be entitled to recover a booking fee, but whether it can get an order for the fee depends on the arrestee’s financial condition.

Due to the varying differences as noted above, defendant insists that while subdivision (d)(1) of Government Code section 29550 “does not mention ability to pay,” “it is evident from the overall statutory scheme that a finding of ability to pay is required.” The parties do not dispute that this case is governed by Government Code section 29550, subdivisions (c) and (d)(1), not Government Code section 29550.2.<sup>3</sup> Furthermore, since defendant was not granted probation, under Government Code section

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<sup>3</sup> The record contains no evidence as to what agency arrested defendant.

29550, subdivisions (c) and (d)(1), a fee is due and must be included in the judgment of conviction. Accordingly, under subdivision (d)(1) of Government Code section 29550, no ability to pay determination is necessary.

Defendant also asserts, without supporting authority, that “Nothing in the statutory scheme suggests the Legislature meant to discriminate between defendants based on whether they receive a prison or jail term versus probation, or based on the identity of the arresting agency.” He further claims “[n]or would any such discrimination be logical.”

We reject defendant’s purported equal protection assertion for several reasons. First, when counsel asserts a point but fails to support it with reasoned argument and citations to authority, the court may deem it to be waived and pass it without consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Second, it is undisputed that defendant did not raise any challenge below to the booking fee. His claim that the court’s imposition of a booking fee through application of Government Code section 29550 violated his equal protection rights, like other unpreserved equal protection challenges, cannot be maintained on appeal. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; *People v. Burgener* (2003) 29 Cal.4th 833, 861, fn. 3.) And his contention is not one concerning the imposition of an unauthorized sentence that would fall within the “narrow exception to the waiver rule” for unpreserved claims of sentencing error. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Furthermore, *Pacheco*, *supra*, 187 Cal.App.4th 1392, is distinguishable and would not support a contention that defendant did not forfeit his equal protection challenge. As previously noted, *Pacheco* involved a sufficiency-of-the-evidence argument. Moreover, the problem with

defendant's equal protection challenge is that by failing to raise this issue below, he has failed to make a record that affirmatively shows that he is aggrieved by the law he attacks. In other words, he has failed to make a record that shows that he has standing to raise an equal protection challenge to Government Code section 29550. "One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is *actually* aggrieved by its operation." [Citation.]” (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212, italics added.) Consequently, we need not consider the merits of defendant's attempted challenge to Government Code section 29550 on equal protection grounds.

In view of the plain language of Government Code section 29550, subdivision (d)(1), the trial court did not have to determine defendant's ability to pay prior to imposing the fee.

III

DISPOSITION

The parole revocation fine imposed on defendant is stricken. As modified, the judgment is affirmed. The trial court is directed to amend the sentencing minute order and forward a copy to the Riverside County Sheriff's Department.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

MILLER  
J.