

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY ALLEN WARREN,

Defendant and Appellant.

E056792

(Super.Ct.No. INF1102093)

OPINION

APPEAL from the Superior Court of Riverside County. Charles Everett Stafford, Jr., Judge. Affirmed in part as modified and reversed in part with directions.

Matthew A. Siroka, 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, Senior Assistant Attorney General, Barry Carlton, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Timothy Allen Warren was caught redhanded stealing his neighbor's air conditioning units. He was found guilty of grand theft and vandalism. Defendant now contends on appeal as follows: (1) the trial court should have stayed one of his sentences pursuant to Penal Code section 654¹; (2) the trial court erred by ordering him to pay the fees for the presentence probation report, probation supervision, and the booking fee without first determining his ability to pay the fees; and (3) he is entitled to one additional day of custody credit.²

I

PROCEDURAL BACKGROUND

Defendant was convicted by a jury of grand theft of property exceeding the value of \$950 within the meaning of section 487, subdivision (a). In addition, he was convicted of felony vandalism within the meaning of section 594, subdivision (b)(1). Defendant was sentenced to state prison for two years on the grand theft conviction and a concurrent sentence of two years for the vandalism. The sentence was suspended, and he was granted formal probation for a period of 36 months.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant raised one additional issue in his opening brief but has since withdrawn the claim.

II

FACTUAL BACKGROUND

On September 11, 2011, while on patrol, Indio Police Officer Craig Sanetrick received a call to respond to an alarm that had been set off from an air conditioning unit at a house located on Cray Mill Drive in Indio. It was common in the area for air conditioning units to have alarms on them to prevent theft. When Officer Sanetrick arrived at the house, it was vacant.

Officer Sanetrick noticed that the air conditioning units from the house had been moved approximately 20 to 30 feet away from the house. There were wires exposed and side panels missing from the units. The bases where the air conditioning units had been located were empty and had exposed wires that had been cut.

At that point, Officer Sanetrick noticed the top of a ladder leaned against the wall of the next door neighbor's house. As Officer Sanetrick approached the air conditioning units, he saw the ladder move. Officer Sanetrick got on top of one of the air conditioning units and looked over the wall. He saw defendant holding the ladder. Officer Sanetrick also observed the missing air conditioning panels from the units.

Defendant told Officer Sanetrick that he was using the ladder to put up a hammock. He then spontaneously told Officer Sanetrick that he had not moved the air conditioning units; they had been moved in the prior three weeks. Officer Sanetrick accused defendant of taking the air conditioning units. Defendant put his head down and responded, "I'm in trouble, aren't I?" Defendant was arrested. At the police station, he admitted he moved the air conditioning units and was planning on taking them.

Defendant planned to sell or recycle the units for money. The units together were worth \$5,200 to \$6,600. The cost to reinstall the units was \$1,152.

III

SECTION 654

Defendant contends that the sentence on one of his convictions of felony vandalism and grand theft should have been stayed because both crimes were part of an indivisible transaction within the meaning of section 654. The People concede the issue.

Defendant was convicted of grand theft, in violation of section 487, subdivision (a), which required that he took possession of property; took the property without the owner's consent; intended to permanently deprive the owner of the property; and moved the property and kept it for a brief period of time. (*People v. Torres* (1962) 201 Cal.App.2d 290, 294.) Defendant was also convicted of felony vandalism, which required him to "maliciously damage or destroy any real or personal property not his . . . own" and that the value exceeded \$400. (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 743.) As noted, defendant was sentenced to the middle term of two years for the grand theft and a concurrent sentence of two years for the vandalism.

Section 654, subdivision (a) "bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective." (*People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be

punished for any one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Here, defendant cut the wires on the air conditioning units in order to steal them. As the People argued in support of a conviction of both counts, it advised the jury it should find “[t]hat the defendant did, in fact, take those units with the intent of permanently depriving them and did, in fact, move them and did, in fact, have custody and control over them. And in order to do that, he did, in fact, sever those . . . electrical lines to those units and those units were not his.”

As such, the grand theft and the vandalism constituted one indivisible transaction with one criminal objective. (See *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.) The trial court erred by imposing concurrent sentences.

Normally, the lesser of the two terms must be stayed. (See § 654, subd. (a).) Here the two convictions share the same sentence, and therefore, the trial court could have stayed either sentence. Since we are remanding the matter as discussed in more detail, *post*, the trial court can determine which sentence to stay within its discretion.

IV

FEES IMPOSED AT SENTENCING

Defendant contends that the trial court improperly imposed the presentence probation report, probation supervision, and booking fees without first deciding if he had the ability to pay the fees. Defendant was ordered, pursuant to section 1203.1b, to pay the cost to prepare the presentence probation report in an amount not to exceed \$1,095. Also pursuant to section 1203.1b, he was ordered to pay the cost of probation supervision

in the amount of \$591.12, and the trial court also ordered the fee could be increased to an amount not to exceed \$3,744. Defendant was also ordered to pay \$450.34 for the booking fees to “enhanced collections” Defendant did not object to the imposition of these fees.

A. *Booking Fees*

During the pendency of this appeal, the California Supreme Court decided the case of *People v. McCullough* (2013) 56 Cal.4th 589 (*McCullough*). In *McCullough*, the court noted it had held on numerous occasions that a defendant may forfeit a constitutional or other right by not timely asserting it. (*Id.* at p. 593.) It further noted that errors that can be easily corrected or avoided should be timely brought to the trial court’s attention. (*Ibid.*) In *McCullough*, the court addressed the question of whether a defendant forfeited a challenge to a Government Code section 29550.2 booking fee by not objecting at the time of sentencing on the ground there was insufficient evidence to support a finding he had the ability to pay that fee. (*McCullough*, at pp. 590-591, 596-597.) *McCullough* concluded the defendant’s ability to pay the booking fee was a question of fact and not law. (*Id.* at p. 597.) The court held: “[B]ecause a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*Ibid.*)

Although the instant case involves a different provision pertaining to booking fees,³ these fees are sufficiently similar to booking fees to apply *McCullough's* reasoning in this case, and we conclude defendant's failure to object to the fee in the lower court forfeited or waived his claim on appeal.

Defendant has claimed that if we find that he forfeited the claim, he received ineffective assistance of counsel.

To establish ineffective assistance of counsel, defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's error, there is a reasonable probability that defendant would have obtained a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

Defendant cannot meet his burden because the record is silent as to why his trial counsel did not object to the booking fee. Counsel may have been aware that defendant *did* have the ability to pay and any objection would have been frivolous. A claim of ineffective assistance of counsel on direct appeal must be rejected if “““the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one,

³ As to the booking fee, according to the probation report, defendant was arrested by the City of Indio Police Department and placed in the Riverside county jail in Indio. Hence, the booking fee was imposed under Government Code section 29550.1. That provision does not have an ability-to-pay requirement, despite Government Code sections 29550 and 29550.2 having such a requirement. We will assume without deciding that an ability to pay is implied in section 29550.1.

or unless there simply could be no satisfactory explanation””” (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266.)

Based on the foregoing, defendant forfeited his claim on appeal that the trial court improperly imposed the booking fee.

B. *Presentence Probation Report Fee and Probation Supervision Fee*

Section 1203.1b, subdivision (a), in pertinent part, provides: “In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report . . . and in any case in which a defendant is granted probation . . . the probation officer, . . . taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision . . . , of conducting any preplea investigation and preparing any preplea report . . . [, and] of conducting any presentence investigation and preparing any presentence report The reasonable cost of these services and of probation supervision . . . shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be

made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

Prior to *McCullough*, an appellate court concluded that where the record does not indicate that the probation officer or the trial court made a determination of the defendant's ability to pay probation supervision costs or that the defendant was informed of the right to a court hearing on the ability to pay, a remand for the purpose of compliance with section 1203.1b is warranted. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068.)

In *McCullough*, the court characterized a booking fee as the type of fee the "Legislature considers . . . de minimis" and for which the Legislature has provided no procedural safeguards or guidelines for imposition, and it concluded that "the rationale for forfeiture is particularly strong." (*McCullough, supra*, 56 Cal.4th at p. 599.) However, it also stated, in determining that the rationale for forfeiture of bookings fees was strong, that "our review of other statutes where the Legislature has similarly required a court to determine if a defendant is able to pay a fee before the court may impose it supports our conclusion. In contrast to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay

determination. (See, e.g. Pen. Code, §§ 987.8, 1203.1b [payment of cost of probation supervision].)” (*Id.* at p. 598.)

Although *McCullough* did not decide the issue as to whether a defendant could forfeit or waive a presentence probation fee or probation supervision fee, imposed under section 1203.1b, it certainly can be deduced that the court would find the argument for forfeiture to be less convincing. Moreover, there is no indication that defendant ever knowingly and intelligently waived his right to a hearing on the matter. As such, in an abundance of caution, we will remand the matter to the trial court in order for it to comply with the procedural requirements of section 1203.1b.

We also note that the probation supervision fee was made part of the probation conditions, which is impermissible. (See *People v. O’Connell, supra*, 107 Cal.App.4th at p. 1068 [“any order for payment of probation costs should be imposed not as a condition of probation but rather as a separate order”].) Upon remand, any costs imposed should not be made a condition of probation.

V

ADDITIONAL ACTUAL CUSTODY CREDIT

Defendant contends that the trial court erred by awarding him only seven days of actual custody credit when he was entitled to eight. The People concede that defendant is entitled to eight days of actual custody credit. However, they argue that under section 4019 he should have been granted only four days of *conduct* credit rather than seven days. Defendant concedes for purposes of this appeal that such calculation is correct.

“A defendant is entitled to actual custody credit ‘for all days of custody’ in county jail and residential treatment facilities, including partial days. [Citations.]” (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) The trial court stated as to the credits as follows: “I am not going to impose local custody. You will be given seven days actual credit and seven days 4019 time for a total of 14 days.” However, pursuant to the probation report, defendant was arrested on September 11, 2011, and released on bail on September 15, 2011, a total of five days. On November 14, 2011, he was apparently rearrested. He was released again November 16, 2011, a total of three days. As such, defendant was entitled to eight days of actual custody credit.

Further, as to the conduct credits, for crimes committed after September 28, 2010, but before October 1, 2011, the conduct credits should be calculated under the two days for every four days formula under the law in effect on September 28, 2010. (See *People v. Rajanayagam, supra*, 211 Cal.App.4th at pp. 48-52 [the amendment to section 4019 effective October 1, 2011 applies only to those who commit their crimes after its effective date].) As such, we agree with the People that he was only entitled to four days of conduct credit. We will direct the trial court to correct defendant’s custody credits as reflected in this opinion.

VI

DISPOSITION

We remand the case to the trial court for a determination of defendant’s ability to pay the presentence probation report fee and the probation supervision fee. In addition, upon remand, the trial court is ordered to modify the judgment by staying one of his two

year sentences pursuant to section 654. In addition, it shall modify defendant's presentence custody credits to eight days for actual days spent in custody and four days of conduct credit pursuant to section 4019. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.