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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re CHRISTIAN A., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTIAN A.,

Defendant and Appellant.

F063987

(Super. Ct. No. 10CEJ600325-3)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell III, Judge.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Kane, J., and Detjen, J.

Appellant, Christian A., a minor, was initially adjudged a ward of the juvenile court in July 2010 based on an adjudication of a misdemeanor violation of Penal Code section 422 (criminal threat). He was readjudged a ward in September 2011 based on an adjudication of misdemeanor battery (Pen. Code, § 242).

In the instant case, in November 2011, following a jurisdiction hearing, the juvenile court found true an allegation that appellant committed misdemeanor battery (Pen. Code, § 242) against his mother. At the subsequent disposition hearing, the court again readjudged appellant a ward of the court, committed him to the care, custody and control of the probation department for suitable placement, and ordered that he pay a \$50.00 restitution fine pursuant to Welfare and Institutions Code section 730.6.¹ Appellant made no objection to the restitution fine.

On appeal, appellant contends the court erred in imposing the restitution fine because in doing so the court abused its statutory discretion (§ 730.6) and violated appellant's constitutional equal protection rights (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)). Alternatively, appellant argues that if his abuse-of-discretion argument is deemed forfeited by appellant's failure to raise it below, appellant has been denied his constitutional right to the effective assistance of counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15). We affirm.

¹ Except as otherwise indicated, all statutory references are to Welfare and Institutions Code section 730.6. We refer to subdivisions of section 730.6, and to smaller components of those subdivisions, in abbreviated form, e.g., sections 730.6(d)(2), 730.6(m).

FACTUAL AND PROCEDURAL BACKGROUND

Instant Offense

On October 19, 2011, while at home with his younger brother and his mother, Rosa Sanchez, appellant became “disrespectful” toward Sanchez.² “He was pretty much cussing and being extremely loud.” In appellant’s presence, Sanchez telephoned appellant’s probation officer and left a voice mail message in which she stated that if appellant did not “follow [her] instructions,” she would have “no choice but to call the [Fresno County Sheriff’s Department (FCSD)].” At that point, appellant picked up a knife off of the kitchen counter and “placed it near his chest.” He eventually “threw the knife on the counter” and, when he noticed Sanchez “trying to find the number to the [FCSD],” he “came toward[] [her].”

Sanchez, who had her cell phone in her hand, walked into another room, but appellant, who was “extremely angry,” followed her and “pulled” her by her left arm, causing her to drop the cell phone. She “went down to the floor” in an attempt to pick up the phone, but appellant “immediately grabbed [her] right arm and pulled [her] up off the floor.” Sanchez “managed to get out of his ... grip,” and ran out the front door.

Sanchez suffered “bruises on the inside of [her] arms.” Later that night, she took a “muscle relaxer” for pain.

Additional Background

Appellant was 15 and one-half years old at the time of the instant offense.

² Our summary of the facts of the instant offense is taken from Sanchez’s testimony at the jurisdiction hearing.

DISCUSSION

Claim of Court's Abuse of Statutory Discretion

Where, as in the instant case, a minor is adjudged a ward of the court based on the commission of a misdemeanor, section 730.6 mandates the imposition of a restitution fine that does not exceed \$100.00. (§ 730.6(a)(2)(A), (b)(2).) Subject to the \$100 maximum, the amount of the fine imposed is within the court's discretion. (§ 730(b).) Appellant contends the court abused its discretion in imposing a \$50.00 restitution fine under section 730.6.

The People argue that appellant has forfeited his abuse-of-discretion challenge to the restitution fine by not raising the issue below. We agree. As our Supreme Court has held, "all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review." (*People v. Smith* (2001) 24 Cal.4th 849, 852, quoting *People v. Scott* (1994) 9 Cal.4th 331, 353.) This forfeiture rule exists "to reduce the number of errors committed in the first instance" (*Scott*, at p. 353), and "the number of costly appeals brought on that basis" (*Smith*, at p. 852, quoting *People v. Welch* (1993) 5 Cal.4th 228, 235). The doctrine generally applies to juvenile court proceedings. (*In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 536-537 [forfeiture doctrine regarding sentencing choices is normally applicable to juvenile court proceedings but would not be applied in the unique circumstance of an HIV testing order].)

Appellant next argues that if failure to object to the fine results in forfeiture of the issue, his counsel's failure to object constituted ineffective assistance of counsel. This contention too is without merit.

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, "a defendant must show both that his counsel's performance was deficient when measured against the

standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant” (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) “Such prejudice exists only if the record shows that but for counsel’s defective performance there is a reasonable probability the result of the proceeding would have been different.” (*People v. Cash* (2002) 28 Cal.4th 703, 734.)

The defendant “‘must carry his burden of proving prejudice as a “demonstrable reality,” not simply speculation as to the effect of the errors or omissions of counsel.’” (*People v. McPeters* (1992) 2 Cal.4th 1148, 1177; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 217 [“prejudice must be affirmatively proved”].) “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding....” (*People v. Cox* (1991) 53 Cal.3d 618, 656, internal quotation marks omitted.) “[T]here is no reason for a court deciding an ineffective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” (*Ibid.*)

Appellant argues he has established prejudice because (1) “he had no source of income and thus no ability to pay the fine,” and (2) under section 730.6(m), probation may be revoked “for failure ... to make restitution pursuant to [section 730.6]” if “the court determines that the person has willfully failed to pay or failed to make sufficient bona fide efforts to legally acquire the resources to pay.” (§ 730.6(m).) As to the second of these points, we assume for the sake of argument that the failure to make the “restitution” to which section 730.6(m) refers to a restitution fine, as well as direct victim restitution (§ 730.6(a)), and we recognize that a statutory provision for the revocation of probation is, in some broad sense, prejudicial. However, the existence of a statutory provision for the revocation of probation under certain circumstances has no bearing on

the question of whether appellant has established the prejudice prong of the showing required for ineffective assistance of counsel, viz., that there is a reasonable probability of a more favorable outcome absent counsel's purported deficient performance.

As to appellant's claim that he lacked the ability to pay the \$50.00 restitution fine and that therefore it is reasonably probable that the court would have imposed a lesser fine had he objected to the amount, we note the following: Although ability to pay is one of the factors the court may consider in setting the amount of the restitution fine (§ 730.6(d)), the "[a]bility to pay does not necessarily require existing employment or cash on hand." (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) A court may consider the person's ability to earn money by obtaining employment in the future. (§ 730.6(d)(2); *Staley*, at pp. 785-786; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.) Moreover, because section 730.6(r) provides that enforcement of a judgment for a section 730.6 restitution fine is governed by Penal Code section 1214, and under Penal Code section 1214, subdivision (d), the 10-year period of enforceability of a money judgment (Code of Civ. Proc., § 683.010 et seq.) does not apply to restitution fines (*People v. Willie* (2005) 133 Cal.App.4th 43, 47-48), appellant has a lifetime to pay the restitution fine.

On this record, although it is possible the court might have imposed a restitution fine of less than \$50.00 had appellant raised the issue below, appellant has not met his burden of showing as a demonstrable reality that such a result was reasonably probable, given the statutory mandate that the fine be imposed, the relatively modest amount of the fine, the fact that it was one-half of the maximum possible amount, and the potentially very long time in which appellant has to pay the fine. Therefore, appellant's claim of ineffective assistance of counsel fails.

Equal Protection

Appellant argues that section 730.6 violates his right to equal protection of the laws because that statute contains no provision for the court to waive the restitution fine

for a minor who, like him, is adjudicated of a *misdemeanor*, whereas a court can waive (1) the restitution fine for a minor adjudicated of a felony, and (2) the otherwise statutorily mandated restitution fine for an adult offender convicted of a misdemeanor, if the court finds “compelling and extraordinary reasons” for doing so. (§ 730.6(g);³ Pen. Code, § 1202.4, subd. (b).⁴) The People argue the issue is not cognizable on appeal. Appellant counters that he has not forfeited his equal protection claim, notwithstanding his failure to raise it below, because it “raises a pure question of law which is based on undisputed facts” and “involves an important issue of public policy.”

Law Relating to Forfeiture

““No procedural principle is more familiar to this Court than that a constitutional right,” or a right of any other sort, “may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”” (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *United States v. Olano* (1993) 507 U.S. 725, 731; accord, *People v. Carpenter* (1997) 15 Cal.4th 312, 362, superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, superseded by statute on another ground as recognized in *People v. Gonzales* (2011) 51 Cal.4th 894, 927, fn. 15 [claim that denial of severance motion violated equal protection forfeited].) However, “appellate courts have discretion to address constitutional issues raised on appeal ..., particularly where the issue presented is

³ Section 730.6(g) provides, in relevant part: “In a case in which the minor is [adjudged a ward of the juvenile court] by reason of having committed a *felony offense*, if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the restitution fine required by subparagraph (A) of paragraph (2) of subdivision (a).” (Italics added.)

⁴ Penal Code section 1202.4, subdivision (b) provides: “In *every case where a person is convicted of a crime*, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (Italics added.)

‘a pure question of law’ turning on undisputed facts ... or when “‘important issues of public policy are at issue.’”” (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.)

Analysis

We first address appellant’s contention that his equal protection claim raises a pure issue of law. “‘‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’”” (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1427.) “If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold.” (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.) As indicated above, in order for a court to waive a restitution fine for persons in either of the two groups to which appellant claims he is similarly situated—juveniles adjudicated of felonies and adults convicted of misdemeanors—there must be “compelling and extraordinary reasons” for doing so. (§ 730.6(g); Pen. Code, § 1202.4, subd. (b).) Therefore, in order to find that appellant has met the “similarly situated” requirement, the court must determine that there are compelling and extraordinary reasons to waive the restitution fine.

That determination, however, is within the court’s discretion. (Cf. *People v. Giordano* (2007) 42 Cal.4th 644, 662 [Cal. Const., art. I, § 28, subd. (b), which provides that victim restitution need not be imposed if “‘compelling and extraordinary reasons exist’” for not imposing restitution, and “allows a trial court some discretion to decline to impose restitution in unusual situations”].) Thus, implicit in appellant’s equal protection claim is a further claim that touches on, and requires the exercise of, the court’s sentencing discretion. That claim does not involve a facial challenge to a statute’s constitutionality; rather it is an “as-applied” challenge that considers the facts and circumstances of his particular case. Such a claim does not present a pure question of law. Rather, it is precisely the kind of attack on a court’s sentencing discretion that is

forfeited if not raised in the trial court. (*People v. Smith, supra*, 24 Cal.4th at p. 852 [“all ‘claims involving the trial court’s failure to properly make or articulate its *discretionary sentencing choices*’ raised for the first time on appeal are not subject to review”] (italics added); *In re Sheena K.* (2007) 40 Cal.4th 875, 885 [“Applying the [forfeiture] rule to appellate claims involving discretionary sentencing choices ... is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option ... that is premised upon the facts and circumstances of the individual case”].

Moreover, we decline to exercise our discretion to consider what appellant characterizes as an important public policy issue. The People should have the opportunity to weigh in on how the court’s sentencing discretion should be exercised at the time the issue of how that discretion is to be exercised is before the court. As demonstrated above, this is precisely the kind of issue that is subject to the forfeiture rule. Further, “we have an obligation to avoid deciding constitutional questions unless it is absolutely necessary to do so.” (*City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1299.) For these reasons, we decline to reach the equal protection issue.

DISPOSITION

The judgment is affirmed.