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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT DOUGLAS KILE,

Defendant and Appellant.

G045974

(Super. Ct. No. 11WF0939)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified and remanded.

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, William M. Wood and Megan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Douglas Kile's sole contention on appeal is he should not be asked to reimburse the City of Huntington Beach a \$275 booking fee because he cannot afford to pay it. Kile asserts the fee, imposed under Government Code section 29550.1, must be stricken because the court failed to determine his ability to pay. In addition, he complains there is no evidence to support a finding of ability to pay. The Attorney General replies the appeal is untimely and the fee was mandatory regardless of Kile's ability to pay. However, what turns out to be the dispositive issue in this case is the Attorney General's acknowledgement the trial court failed to orally impose the disputed booking fee and that Kile appears to be appealing from the court clerk's notation in the minute order. The Attorney General asserts this court can and should correct the clerk's error and impose the fee.

We find the trial court's failure to order the booking fee is dispositive. The case must be remanded to the trial court for further proceedings. If we were to impose the fee, as suggested by the Attorney General, Kile would have no avenue for review. We affirm the judgment as modified, and remand the matter for further proceedings consistent with this opinion.

## I

In April 2011, the district attorney filed a felony complaint asserting Kile and codefendant Sergy S. Culicov entered a Target store with the intent to commit larceny. The complaint charged Kile with second degree commercial burglary (Pen. Code, § 459, count 1), and theft with three prior convictions (Pen. Code, §§ 666, subd. (a), 484, subd. (a), 488, count 2). Pursuant to a plea agreement, Kile pled guilty to the burglary in exchange for a grant of probation and dismissal of count 2.

On June 13, 2011, the trial court (Judge John Nho Trong Nguyen) granted Kile three years of formal probation on the following usual terms and conditions: (1) he serve 90 days in the Orange County jail (he was given credit for 87 days); (2) he pay a

\$200 restitution fine (Pen. Code, § 1202.4); (3) he pay a \$40 security fee (Pen. Code, § 1465.8); (3) he pay a criminal conviction assessment fee (Gov. Code, § 70373, subd. (a)(1); (4) he pay a \$200 probation revocation restitution fine, which was stayed and scheduled to become effective only upon final revocation of probation (Pen. Code, § 1202.44); (5) he submit to various probation conditions such as drug testing and searches; (6) he pay on both counts “restitution in the amount as determined and directed” by the probation officer; and (7) he pay “the costs of probation based on the ability to pay as directed by the [p]robation [o]fficer” (Pen. Code, § 1203).

In addition, the court’s minute order indicates the court also ordered Kile to pay a “\$275.00 booking fee to [the] City of Huntington Beach.” However, the reporter’s transcript does not reflect the court ordered Kile to pay a booking fee. The booking fee is also not mentioned in the *Tahl* form.<sup>1</sup> In addition, as noted by the Attorney General, the *Tahl* form did not contain the currently used standard provision stating defendant will pay all fees, fines, penalties, or assessments as imposed by the trial court.

In October 2011, the probation department petitioned to revoke Kile’s probation on the grounds he committed an assault against his girlfriend and he failed to report to probation on three different occasions. On October 14, 2011, Kile waived his right to a probation hearing and admitted violating his probation. After the court ruled Kile violated his probation, Kile waived the probation report and waived arraignment for sentencing. He requested immediate sentencing. The trial court (Commissioner Vickie L. Hix) reinstated probation with the original terms plus an additional 90 days in the Orange County jail. His jail sentence was to run consecutive with a 30-day jail sentence

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<sup>1</sup> *In re Tahl* (1969) 1 Cal.3d 122 [trial court record must explicitly reveal “on its face” that before defendant entered a plea of guilty, he or she was aware of the three major constitutional rights he or she was foregoing by pleading guilty and that he or she knowingly and voluntarily waived such rights].

imposed in a different misdemeanor case (*People v. Kile* (Super. Ct. Orange County, 2011, No. 11WF13991)).

At the same hearing, the trial court stated it would give Kile some “extra time” on his other cases. Due to the new jail sentence, the court changed the date for his batterer’s treatment program and community service to January and March 2012. The court told Kile, “You are also to speak to collections for any fines and fees by that January [2012] date, and set up a payment plan.” The court noted Kile still owed fines and fees on a probation ending in 2007, which related to driving on a suspended license. The court stated it would “revoke and reinstate” that probation with a January 2012 date to set up a new payment plan. The court added it would do the “same thing” for the burglary conviction, “I will revoke and reinstate, same terms and conditions, and put your fees out to February [2012].” The court, with Kile’s consent, converted eight hours of litter cleanup owed in a different case to one additional day in the Orange County jail to get rid of the obligation. The court vacated the fines and fees related to that case but reminded Kile the other fines and fees would be continued “for you to set up a payment plan.”

## II

Government Code sections 29550, 22950.1, and 22950.2 govern fees for processing or “booking” arrested persons into a county jail, sometimes referred to as a “criminal justice administration fee.” The fees vary depending on the identity of the arresting agency and the eventual disposition of the person arrested. As noted in Kile’s opening brief, the legislative scheme regarding booking fees raises equal protection concerns because for some arrestees the court must inquire about his or her ability to pay and it need not for others. The issue is currently being reviewed by our Supreme Court in *People v. Mason* (2012) 206 Cal.App.4th 1026, review granted August 29, 2012, S203747.

We need not address the equal protection issue because, as conceded by the Attorney General, the trial court failed to actually impose the contested booking fee. It is well settled, “‘Rendition of judgment is an oral pronouncement.’ Entering the judgment in the minutes being a clerical function (Pen. Code, § 1207), a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling. ‘The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms (see Pen. Code, § 1213.5) it cannot add to or modify the judgment which it purports to digest or summarize.’ [Citation.]” (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 248-249 [generally, conflicts between reporter’s and clerk’s transcripts are presumed clerical in nature and resolved in favor of reporter’s transcript unless particular circumstances require otherwise].)

In short, a court clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order or the abstract of judgment. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387-388.) The minutes must accurately reflect what occurred at the hearing. In this case, Kile’s appeal is based on a court clerk’s notation in a minute order. The trial court did not orally pronounce the booking fee as a condition of Kile’s probation. It appears the trial court clerk unlawfully included in the minutes of Kile’s sentencing a booking fee never imposed by the trial judge.

Accordingly, we must strike from the minute order line number 52 having the code “PRFBK” and stating, “Pay \$275.00 booking fee to the City of Huntington Beach.” The case must be remanded for the trial court to consider (in Kile’s presence)

imposing the booking fee as a condition of probation pursuant to Government Code section 29550.1.<sup>2</sup>

### III

The judgment is affirmed but modified to strike any reference to the \$275 booking fee. The case is remanded for the court's consideration of whether to impose the booking fee as a condition of probation pursuant to Government Code section 29550.1. Following such consideration, the court shall prepare an amended probation order.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.

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<sup>2</sup> We requested and reviewed the superior court file and located only one request for booking fees filed by the City of Huntington Beach. The request, filed June 27, 2011, states the booking fee related only for the arrest of codefendant Culicov. The court's minutes reflect Culicov was ordered to pay the \$275 booking fee as part of his sentence. The record does not contain a fee request from the City for booking Kile. And it is interesting to note Kile's sentence was imposed on June 13, 2011, (14 days before the City's request in Culicov's case was filed). It is unclear how or why the court clerk determined Kile should also pay a \$275 booking fee.