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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MURL GARDNER SALMON,

Defendant and Appellant.

H036664

(Santa Clara County

Super. Ct. No. CC827450)

Defendant Murl Gardner Salmon pleaded no contest to reckless driving in fleeing or attempting to elude a peace officer, a felony, and pleaded guilty to two misdemeanors. He also admitted that he had been previously convicted of two prior strike offenses. He was sentenced to a prison term of 25 years to life.

Defendant claims that the court erred in imposing a criminal justice administration (booking) fee of \$129.75 because it did not make a determination of defendant's ability to pay the fee. He acknowledges that the statute under which the booking fee was imposed here does not include a requirement that the court determine that the defendant has the ability to pay the fee. But he contends that comparable booking fee statutes contain an ability-to-pay requirement, and therefore imposing the booking fee here without such a determination violated his equal protection rights under the federal and state Constitutions. He contends further that if his claim concerning the booking fee

was forfeited, we should nonetheless consider it because he received prejudicially ineffective assistance of counsel.

The Attorney General's contention that defendant forfeited this constitutional challenge notwithstanding, we elect to address the controversy on the merits and conclude that the equal protection claim fails. Accordingly, we will affirm the judgment.

FACTS¹

At approximately 11:30 p.m. on December 3, 2008, an officer with the San Jose Police Department observed defendant driving his car on city streets at a high rate of speed without his lights. The officer attempted to stop defendant; he failed to pull over and quickly accelerated. Defendant swerved between lanes and nearly collided with moving and parked cars. Defendant reached speeds of over 100 miles per hour, and the officer, being concerned about public safety, terminated his pursuit.

A short time later, a second San Jose police officer observed defendant speeding without his lights on and gave pursuit. Defendant was traveling at speeds in excess of 100 miles per hour in a 35-miles-per-hour zone. He frequently changed lanes and nearly collided with two cars. Defendant entered the 280 freeway with the second San Jose police officer still in pursuit. Defendant eventually stopped at an off-ramp. In response to the officer's questioning, defendant admitted that he had been drinking. It was later determined from the results of laboratory tests that defendant had a blood alcohol content of 0.23 percent.

¹ Our summary of the facts is taken from the probation report. There are two errors in that report, noted by the Attorney General, which are material to this appeal. (See fn. 4, *post.*) The probation officer in her report identified the two officers as both being affiliated with the California Highway Patrol. In fact, both were San Jose City police officers.

PROCEDURAL BACKGROUND

Defendant was charged by information filed August 20, 2009, with reckless driving in fleeing or attempting to elude a peace officer, a felony (Veh. Code, § 2800.2, subd. (a)), driving under the influence of alcohol, a misdemeanor (Veh. Code, § 23152, subd. (a)), and driving with a blood alcohol level of 0.08 or more, a misdemeanor (Veh. Code, § 23152, subd. (b)). It was alleged further that defendant had been convicted previously of two violent or serious felonies (strikes) (Pen. Code, §§ 667, subds. (b) - (i)/1170.12), namely, two counts of robbery (Pen. Code, §§ 211-212.5, subd. (c)). On December 9, 2009, defendant entered an unconditional plea of no contest to the felony count and guilty to the two misdemeanors, and admitted the strike priors.

Defendant thereafter filed a request that the court exercise its discretion to dismiss the prior strike allegations in the furtherance of justice, in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), which the People opposed. The court denied the *Romero* motion and sentenced defendant on the felony count to 25 years to life in prison and imposed a concurrent 60-day sentence for the misdemeanor convictions, Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea.²

DISCUSSION

I. *Imposition of the Booking Fee*

A. *Background and Contentions*

At sentencing, the court imposed a criminal justice administration fee of \$129.75, payable to the County of Santa Clara. The court did not specify the statutory authority under which this booking fee was being imposed. Further, the court neither inquired

² Defendant filed a motion to recall the sentence pursuant to Penal Code section 1170, subdivision (d), opposed by the People, which was denied by the court on April 29, 2011. Defendant filed a second notice of appeal after entry of that order.

about defendant's ability to pay the fine nor made a specific finding about defendant's ability to pay.

Defendant contends that the court erred in its imposition of the booking fee. He contends that, because he was arrested by San Jose City police officers, the statute under which the fee was imposed was Government Code section 29550.1.³ He asserts that the statute violates his right to equal protection under the United States and California Constitutions.⁴ In summary, this constitutional challenge runs as follows:

Section 29550.1 provides, inter alia, that where a city's officer or agent arrests an individual, the city is entitled to recover from the arrestee any criminal justice administration fee imposed upon it by a county.⁵ The code section makes no mention of

³ All further statutory references are to the Government Code unless otherwise stated.

⁴ Defendant erroneously asserted in his opening brief that because he was arrested by California Highway Patrol officers, the booking fee imposed by the court was made pursuant to section 29550.2. That statute expressly provides that a judgment of conviction must include an order to pay a booking fee "[i]f the person has the ability to pay . . ." (§ 29550.2, subd. (a).) The essence of defendant's argument in his opening brief was that the court erred in imposing a booking fee under section 29550.2 without making a finding that defendant had the ability to pay the fine as specifically provided by that statute. After the Attorney General pointed out in her respondent's brief that defendant's position was based upon the erroneous factual premise that the arresting agency was the California Highway Patrol, when in fact it was the San Jose Police Department (see fn. 1, *ante*), defendant's contention shifted to the one made in his supplemental opening brief and addressed by us here: The booking fee was imposed pursuant to section 29550.1, and although the statute contains no express ability-to-pay requirement, one must be implied in order to remedy an equal protection violation created by the statutory scheme.

⁵ "Any city, special district, school district, community college district, college, university, or other local arresting agency whose officer or agent arrests a person is entitled to recover any criminal justice administration fee imposed by a county from the arrested person if the person is convicted of any criminal offense related to the arrest. A judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be

(continued)

the booking fee's imposition being conditioned on the defendant's ability to pay the fee. In contrast, other statutes that address booking fees—specifically, section 29550, subdivisions (c) and (d),⁶ and section 29550.2, subdivision (a)⁷—contain specific requirements that the court determine that the defendant has the ability to pay the fee. Defendant argues: “[T]he defendants subject to these three statutes are similarly situated. All of them will have been arrested, booked into a county jail, and convicted of a criminal offense related to the arrest. In all cases, the county jail has incurred actual booking costs, . . . There is no relevant difference in the nature of these defendants or in their

enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the city, special district, school district, community college district, college, university, or other local arresting agency for the criminal justice administration fee.” (§ 29550.1.)

⁶ “Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked. . . . [¶] (d) When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] (1) A judgment of conviction may impose an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution may be issued on the order in the same manner as a judgment in a civil action, but shall not be enforceable by contempt. [¶] (2) 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 criminal justice administration fee, including applicable overhead costs.” (§ 29550, subdivisions (c) and (d).)

⁷ “Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. . . . If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee.” (Gov. Code, § 29550.2, subd. (a).)

presumptive financial status.” He contends further that “[f]or a defendant who, like appellant, is booked into a county jail and ultimately is convicted and not granted probation, the statutes make arbitrary distinctions as to whether an order to pay a booking fee is mandatory or discretionary[,] and whether imposition of the fee is contingent on a finding that a defendant has the ability to pay the fee. The distinction is based solely on what agency makes the underlying arrest. In other words, because appellant was arrested by a city police officer, the statute apparently imposes a mandatory booking fee requirement without regard to ability to pay (§ 29550.1). Had he been arrested by a county sheriff’s deputy, the fee would have been discretionary (§ 29550). Had appellant been arrested by any other type of agency, no booking fee could be imposed unless the court first determined that he was able to pay it (§ 29550.2).” Because (defendant argues) there is no rational basis for this different treatment, the requirement under section 29550.1 that a criminal justice administration fee be imposed, irrespective of the defendant’s ability to pay it, violates equal protection.

Defendant asserts that the proper remedy here is to imply an ability-to-pay clause in section 29550.1. Under this approach, since the court made no finding of defendant’s ability to pay the booking fine, and there is no substantial evidence in the record upon which an implied court finding of ability to pay may rest, the booking fee cannot withstand attack. Defendant argues that the remedy under the circumstances is for this court to strike the fee from the judgment.

B. *Discussion of Equal Protection Challenge*

1. *Forfeiture of Challenge*

We consider as a threshold matter whether, as claimed by the Attorney General, defendant’s equal protection claim has been forfeited because he failed to assert it

below.⁸ We conclude that even were the constitutional claim forfeited—a finding we do not make here—we will address it on its merits as a question of law submitted on undisputed facts.

“ ‘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.’ [Citation.]’ [Citation.]” (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731.) The purpose of the forfeiture doctrine “ ‘is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .’ ” (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

Our high court has applied the doctrine of forfeiture in a variety of contexts to bar claims not preserved in the trial court in which the appellant had asserted an abridgement of fundamental constitutional rights. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20.) Courts in a number of instances have found that the appellant’s unpreserved equal protection claims were forfeited. (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.) The forfeiture doctrine generally applies to the area of sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 351; see also *People v. Welch* (1993) 5 Cal.4th 228, 237 [unpreserved challenge to reasonableness of probation conditions forfeited].)

Defendant did not raise any challenge below to the imposition of the criminal justice administration fee. This omission occurred notwithstanding the recommendation

⁸ While “ ‘waiver’ ” is the term commonly used to describe a party’s loss of the right to assert an appellate challenge based upon the failure to raise an objection below, “ ‘forfeiture’ ” is the more technically accurate term. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

that a booking fee of \$129.75 “pursuant to Government Code [sections] 29550, 29550.1 and 29550.2” was made by the probation officer in the report available to the parties and considered by the court.

Defendant argues that his claim is not forfeited under the authority of *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*). In *Pacheco*, this court held that the defendant’s challenges to the court’s imposition of a booking fee under either sections 29550, subdivision (c) or 29550.2 (as well as a probation and attorney fees) were not forfeited, notwithstanding his failure to object to them at the trial court. (*Pacheco*, at p. 1397.) The defendant challenged the booking fee because the court did not make a determination that defendant had the ability to pay the fee and there was insufficient evidence to support such a determination. (*Ibid.*)⁹ Here, although defendant makes an equal protection challenge, his related arguments are that—because an ability-to-pay requirement should be implied in section 29550.1 to save it from being unconstitutional—(1) the court was required to make a finding that defendant had the ability to pay the booking fee, and (2) there was no factual support for any such finding. Accordingly, we believe that *Pacheco*’s holding that unpreserved sufficiency-of-the-evidence challenges to a booking fee are cognizable offers support for defendant’s position that he may assert his constitutional claim here.¹⁰

Even were we to conclude that *Pacheco* is distinguishable because the nature of defendant’s challenge here is a constitutional one, we would nonetheless find it

⁹ A case involving an unpreserved sufficiency-of-the-evidence challenge to a booking fee imposed under 29550.2 is pending before the California Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.)

¹⁰ We acknowledge that there is authority to the contrary, including *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 (cited by the Attorney General). But we decline to repudiate our holding in *Pacheco*.

cognizable. We recently held that a similar equal protection challenge to section 29550.1 was not forfeited, reasoning: “Defendant’s argument . . . is that the statute under which the booking fee was imposed is unconstitutional on its face unless a saving construction is supplied by reading it to require a finding of ability to pay. Such a challenge may be raised for the first time on appeal because the issue thus presented is ‘ “one of law presented by undisputed facts in the record before us that does not require the scrutiny of individual circumstances, but instead requires the review of abstract and generalized legal concepts—a task that is suited to the role of an appellate court.” ’ (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 885; [citations].)” (*People v. Mason* (June 5, 2012, H036598) ___ Cal.App.4th ___ [2012 Lexis 653, *5-6] (*Mason*).)

Moreover, even were we to find that defendant forfeited his equal protection challenge, we nonetheless elect to decide it on the merits. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7 [appellate courts may exercise their discretion to review otherwise forfeited claims, generally ones involving important constitutional issues or substantial rights].) This is the approach we recently employed, stating: “Even if it appeared that appellant had otherwise failed to preserve his equal protection challenge for review, we would exercise our discretion to entertain it because it represents an issue which has been arising frequently but on which we find no published authority.” (*Mason*, *supra*, ___ Cal.App.4th ___ [2012 Lexis 653, *6].)¹¹

2. *Merits of Constitutional Challenge*

There are two requirements for a successful equal protection challenge. First, there must be “ ‘a showing that the state has adopted a classification that affects two or

¹¹ Because we reach the merits of defendant’s constitutional challenge, we need not address his argument that his trial counsel rendered ineffective assistance by failing to object to the court’s imposition of the booking fee.

more *similarly situated* groups in an unequal manner.’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530.)

Secondly, the party asserting the claim must show that there is no rational relationship to a legitimate state purpose for the state’s having made a distinction between the two similarly situated groups. (*Hofsheier*, at pp. 1200-1201.)¹² For the reasons we explained recently in *Mason*, defendant’s equal protection challenge to section 29550.1 fails because neither prerequisite is satisfied. (*Mason, supra*, ___ Cal.App.4th ___ [2012 Lexis 653, *6-15].)

With respect to the first—“similarly situated groups”—prerequisite, we recently held: “The statutory scheme at issue here provides for payment orders and probation conditions effecting the reimbursement of counties for at least part of their costs in booking persons arrested by their own officers and the officers of other entities such as municipalities and the state. [Citations.] It classifies defendants according to the identity of the entity whose employees arrest them. Section 29550.1, which furnishes the authority for the fee imposed on defendant, applies to persons arrested by an officer or agent of a ‘city, special district, school district, community college district, college, university, or other local arresting agency.’ Section 29550, subdivision (d) (§ 29550(d)), applies to defendants arrested by officers of a county. Section 29550.2 applies to arrests by a ‘governmental entity not specified in Section 29550 or 29550.1,’ i.e., neither a ‘local arresting agency’ nor a county, . . . [¶] The three classes of prisoners thus created may be roughly characterized as local arrestees, county arrestees, and state arrestees.

¹² “Of course, there are three potential standards by which to measure the challenged classifications under an equal protection analysis—strict scrutiny, rational basis, and an intermediate level of review applicable to gender classifications. (*Hofsheier, supra*, 37 Cal.4th at p. 1200.) However, legislation is usually subjected to a rational basis analysis (*ibid.*), . . .” (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 111, fn. 9.)

Defendant's challenge rests on the fact that on the face of the statutes, a local arrestee may be required to pay a booking fee without any showing that he is able to pay it, whereas state and county arrestees, or at least some of them, may only be subjected to such a fee if shown to possess such ability. [¶] . . . [¶] We have concluded that for purposes of the statutes challenged here, local arrestees are not 'similarly situated' to state and county arrestees. The lack of similarity arises from the fact that under section 29550.1, a local arrestee is only liable for the fee 'imposed by a county.' The quoted phrase is manifestly a reference to the charge described in section 29550, subdivision (a)(1) (§ 29550(a)(1)), which entitles a county to 'impose a fee' on a local arresting agency 'for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee' of that agency. The county may collect this charge simply by 'submit[ting] an invoice' to the arresting agency. (§ 29550(a)(1).) And it is this charge which is passed on to the local arrestee by section 29550.1. [¶] The statutes provide no comparable mechanism for reimbursing the county's expenses when the arrest is not made by a local agency. When the county itself makes the arrest, it obviously cannot reimburse itself; it must recover its expenses from the arrestee, or not at all. Nor is any provision made for reimbursement of county expenses when the arrest is made by the state or other unenumerated entity. . . . Thus, whereas sections 29550(d) and 29550.2 operate to reimburse a county for its own expenses, section 29550.1 operates to reimburse the arresting agency for sums it has already paid to, or at least been charged for by, the county. [¶] Of course it scarcely matters to the defendant whose account the proceeds go into. A difference of far greater significance to him is the amount he may be required to pay. And under the statutes as we read them, an arrest by a local agency has the automatic effect of cutting in half the arrestee's potential liability for booking expenses. This is because section 29550.1 empowers a local arresting agency to recover only the fee 'imposed by a county,' i.e., imposed on the arresting agency pursuant to section 29550(a)(1), which limits the

county's recovery to 'one-half' of the county's 'actual administrative costs . . . incurred in booking or otherwise processing arrested persons.' (§ 29550(a)(1), italics added.) This means that a local arrestee's potential liability is exactly half what it would have been if he had been arrested by a state or county agency, i.e., the county's 'actual administrative costs . . . incurred in booking or otherwise processing arrested persons.' (§ 29500, subd. (c) (§ 29500(c)), 29550.2.) [¶] All these statutes rest on the general premise that an arrestee, if convicted or placed on probation, should generally be obligated to absorb these costs. To that extent all arrestees are similarly situated. But beyond that point, a local arrestee's situation differs from that of a state or county arrestee in two respects. First, part of his 'debt' to the county has been already been defrayed by someone else—the arresting agency—which, in relation to him, stands in something like the position of a guarantor or subrogee. Second, and far more critically, the debt has been cut in half. For these reasons, when a local arrestee stands before the court at sentencing, he is not situated similarly to state and county arrestees ' "for purposes of the law challenged." ' [Citation.]" (*Mason, supra*, ___ Cal.App.4th ___ [2012 Lexis 653, *6-13, fns. omitted.]

Defendant's equal protection challenge also fails because it does not meet the second prerequisite of the constitutional claim. As we explained: "Even if defendant could satisfy the 'similarly situated' test, the foregoing considerations would establish a rational basis for the differential treatment of which he complains. Section 29550.1 denies him a benefit granted to other arrestees, i.e., the possibility of avoiding an assessment because he lacks the ability to pay it. But in conjunction with section 29550(a)(1), it also grants him a benefit denied to other arrestees: in effect, automatic forgiveness of half of his debt. This arrangement grants advantages as well as disadvantages to two of the three principals: The county receives a sure source of reimbursement in exchange for writing off half its expenses; the defendant receives the benefit of the write-off but give[s] up the opportunity to avoid all liability on grounds of

inability to pay. Even the local agency receives the benefit of an evident compromise, i.e., it does not assume the county's whole burden but only half of it, and it is granted the right to reimbursement without having to prove the defendant's ability to pay. The Legislature could rationally conclude that this arrangement justifies withholding an ability-to-pay condition as to this class of arrestees because other arrestees are exposed to a potential debt of twice the size. A statutory classification 'must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are 'plausible reasons' for [the classification], 'our inquiry is at an end.'" ' [Citation.]" (*Mason, supra*, ___ Cal.App.4th ___ [2012 Lexis 653, *13-14, fns. omitted.]

For the foregoing reasons, we reject defendant's claim that the imposition of the booking fee under section 29550.1 violated his constitutional right to equal protection.

DISPOSITION

The judgment is affirmed.

Duffy, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.