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

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY CHARLES SHERMAN,

Defendant and Appellant.

H036809

(Santa Clara County

Super. Ct. No. C1081685)

Defendant Larry Charles Sherman pleaded no contest to one count of sale of methamphetamine and admitted allegations that he had suffered two strike prior convictions. In April 2011, 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 as part of the sentence because the court did not determine that defendant had the ability to pay the fee. He acknowledges that the statute under which the booking fee was imposed 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.

We conclude that defendant forfeited this constitutional challenge. Accordingly, we will affirm the judgment.¹

FACTS²

On April 20, 2010, Santa Clara Police Officer Nick Nguyen (working undercover) telephoned defendant and asked if he could purchase one-sixteenth of an ounce of methamphetamine from defendant. Defendant agreed and arranged to meet with the undercover officer at a McDonald's parking lot in San Jose. The two met at the designated location that evening about 10:00 p.m. Defendant got into Officer Nguyen's car. Officer Nguyen gave defendant \$120 and in exchange, defendant handed him a plastic baggie containing 1.6 grams of methamphetamine. Defendant left the area shortly thereafter. An arrest warrant was issued about two and one-half months later, and defendant was arrested on July 16, 2010.

PROCEDURAL BACKGROUND

Defendant was charged by a complaint with one count of sale of a controlled substance, methamphetamine, a felony (Health & Saf. Code, § 11379, subd. (a)). It was alleged further that defendant had suffered two prior violent or serious felony convictions, or strikes (Pen. Code, §§ 667, subs. (b)-(i), 1170.12), namely, kidnapping and assault with intent to commit rape. On December 7, 2010, defendant entered a plea of no contest to sale of methamphetamine and admitted the two strike priors.

¹ In his separate petition for habeas corpus that we ordered to be considered with this appeal (*In re Sherman* (H038154)), defendant raises factual material outside of the record in this appeal in support of his contention that he did not receive effective assistance of trial counsel with respect to his motion to strike one or both of the strike priors made pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). By separate order of this date, we deny the petition for habeas corpus.

² Our summary of the facts is taken from the probation report.

Defendant thereafter made a motion to have the court exercise its discretion to strike both of the prior strike allegations, in accordance with *Romero*, 13 Cal.4th 497, which was opposed by the People. After hearing argument on April 7, 2011, the court denied defendant's *Romero* motion. The court deemed a lengthy statement by defendant to constitute a motion to reconsider the prior denial of the *Romero* motion. After hearing further from defendant and receiving argument from counsel, the court denied the motion to reconsider. It imposed a prison sentence of 25 years to life for the sale of methamphetamine conviction. Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea.

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 City of Santa Clara. The court did not specify the statutory authority under which it imposed this booking fee. Further, the court neither inquired about defendant's ability to pay the fine nor made a specific finding about defendant's ability to pay. Defendant did not object to the imposition of the booking fee.

Defendant contends that the court erred in its imposition of the booking fee. He argues that the statute under which the fee was imposed was Government Code section 29550.1.³ (The Attorney General acknowledges that the booking fee was imposed under this statute.) Defendant asserts that the statute violates his right to equal protection under the United States and California Constitutions. In summary, this constitutional challenge runs as follows:

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

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.⁴ The code section makes no mention of 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),⁵ and section 29550.2, subdivision (a)⁶—contain specific

⁴ “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 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.)

⁵ “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, subs. (c) and (d).)

⁶ “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

(continued)

requirements that the court determine that the defendant has the ability to pay the fee. Defendant argues: “[T]he three statutes treat the similarly situated persons differently. For 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.” 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 most efficient remedy under the circumstances is for this court to strike the fee from the judgment.

B. *Discussion of Equal Protection Challenge*

We consider as a threshold matter whether defendant’s equal protection claim has been forfeited because he failed to assert it below.⁷ We conclude that the constitutional claim is indeed forfeited.

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.” (§ 29550.2, subd. (a).)

⁷ 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.)

1. *Forfeiture Generally*

“ “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. Padilla* (1995) 11 Cal.4th 891, 971, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Courts in a number of instances have found that the appellant’s unpreserved equal protection claims, such as the one made by defendant here, were forfeited. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 [claim that denial of motion to exclude testimony based upon possible hypnosis of witness violated equal protection forfeited]; *People v. Burgener* (2003) 29 Cal.4th 833, 861, fn. 3 [claim that practice of supplementing jury panels with additional minority prospective jurors violated equal protection forfeited]; *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 [claim that denial of severance motion violated equal protection forfeited]; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354, fn. 3 [claim that departmental practice of not recording SVP interviews violated equal protection forfeited]; *People v. Hall* (2002) 101

Cal.App.4th 1009, 1024 [claim that interpretation of statute authorizing AIDS testing violated equal protection forfeited].)

The forfeiture doctrine generally “applies in the context of sentencing as in other areas of criminal law.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*.) For instance, in *People v. Scott* (1994) 9 Cal.4th 331, 352, the high court held that a defendant cannot complain for the first time on appeal about the trial court’s failure to state reasons for a sentencing choice, reasoning, inter alia, that “[r]outine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” (*Id.* at p. 353; see also *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [People forfeited its unpreserved challenge to court’s failure to state reasons for not imposing restitution fine, a decision constituting discretionary sentencing choice].) Similarly, relying on *Scott*, the Second District Court of Appeal (Seventh Division) held that a defendant’s unpreserved claim that the court committed sentencing error by failing to specify its reasons for selecting an upper term sentence had been forfeited. (*People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512.) Challenges to the reasonableness of probation conditions are likewise forfeited if the objection is not made in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; cf. *Sheena K.*, at pp. 887-889 [unpreserved challenge that probation condition was unconstitutionally vague and overly broad presented pure question of law not forfeited].)

As it applies to sentencing error claims, there is a narrow exception to the forfeiture doctrine recognized by the high court for sentences that are not authorized under the law. As the Supreme Court explained in *People v. Smith* (2001) 24 Cal.4th 849, 852, “We have . . . created a narrow exception to the waiver rule for ‘unauthorized sentences’ or sentences entered in ‘excess of jurisdiction.’” [Citation.] Because these sentences ‘could not lawfully be imposed under any circumstance in the particular case’ [citation], they are reviewable ‘regardless of whether an objection or argument was raised in the trial and/or reviewing court.’ [Citation.] We deemed

appellate intervention appropriate in these cases because the errors presented ‘pure questions of law’ [citation], and were ‘ “clear and correctable” independent of any factual issues presented by the record at sentencing.’ [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.”

2. *Whether Defendant’s Claim is Forfeited*

Defendant did not raise any challenge below to the imposition of the criminal justice administration fee. The recommendation that a booking fee of \$129.75 payable to the City of Santa Clara “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.⁸ This is an additional factor that we may consider in concluding that the forfeiture rule applies here. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 754 [citing fact that prospective sentencing choice of court is often found in the probation report available before hearing as one reason due process does not require court to give advance notice of its intended sentence].)

Clearly, defendant forfeited his constitutional challenge. His claim that the court’s imposition of a booking fee through application of section 29550.1 violated his equal protection rights—one that he did not assert at the trial level—like other unpreserved equal protection challenges, cannot be maintained on appeal. (*People v. Alexander, supra*, 49 Cal.4th at p. 880, fn. 14; *People v. Burgener, supra*, 29 Cal.4th at p. 861, fn. 3.) And defendant’s 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, supra*, 24 Cal.4th at p. 852.)

⁸ Indeed, in the written *Romero* motion, defense counsel made a number of objections to matters asserted in the probation report. There was no objection to the recommended booking fee.

Defendant, however, 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.*) In that context, we relied on two attorney fees cases (*People v. Viray* (2005) 134 Cal.App.4th 1186; *People v. Lopez* (2005) 129 Cal.App.4th 1508), concluding that "claims . . . based on the insufficiency of the evidence . . . do not require assertion in the court below to be preserved on appeal." (*Pacheco*, at p. 1397.) Here, the argument is that the imposition of the booking fee under section 29550.1 without an ability-to-pay requirement violated defendant's equal protection rights. This is not a sufficiency-of-the-evidence argument. Accordingly, *Pacheco* is distinguishable and does not support defendant's contention that he did not forfeit his equal protection challenge.⁹

In what may be an implicit acknowledgment that his claim is forfeited, defendant argues that we should address it nonetheless "because it presents a pure question of law."

⁹ We acknowledge that other courts have applied the forfeiture doctrine to unpreserved sufficiency-of-the-evidence claims similar to those raised in *Pacheco*. (See, e.g., *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [booking fee under § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 [restitution fine].) A case involving an unpreserved challenge to a booking fee imposed under section 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.) Because *Pacheco* is distinguishable from this case, which involves a forfeited constitutional challenge, the Supreme Court's ultimate determination of whether the forfeiture doctrine applies to sufficiency-of-the-evidence challenges such as those presented in *Pacheco* would have no bearing on our conclusion here that defendant forfeited his constitutional challenge.

He cites *Sheena K.*, *supra*, 40 Cal.4th 875 in support of this assertion. There, the high court held that the failure to object at sentencing did not forfeit a juvenile's claim that a probation condition was unconstitutionally vague and overly broad where the claim presented "a pure question of law, easily remediable on appeal by modification of the condition." (*Id.* at p. 888.) In so holding, the court noted that such a constitutional challenge to a probation condition had some similarity to a "challenge to an unauthorized sentence that is not subject to the rule of forfeiture" because correction of errors in both instances "may ensue from a reviewing court's unwillingness to ignore 'correctable legal error.' [Citation.]" (*Id.* at p. 887.) The constitutional claim here involves neither a probation condition nor a claimed unauthorized sentence, and we conclude that the "pure question of law" language of *Sheena K.* does not afford defendant grounds for reviewing his forfeited claim here.

For the foregoing reasons, defendant has forfeited his 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.