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

THE PEOPLE,

Plaintiff and Respondent,

v.

NICK AGUILAR,

Defendant and Appellant.

H036875

(Santa Clara County

Super. Ct. No. C1090532)

Defendant Nick Aguilar appeals a judgment of conviction following his plea of no contest to a number of crimes, for which he was sentenced to four years eight months in state prison. On appeal, defendant asserts the trial court erred in imposing a criminal justice administration fee pursuant to Government Code section 29550.1.

STATEMENT OF THE CASE

Defendant was charged by information with transportation of phencyclidine (Health & Saf. Code, § 11379.5, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), possession of phencyclidine (Health & Saf. Code, § 11377, subd. (a)), reckless driving (Vehicle Code, § 2800.2, subd. (a)), resisting, delaying, obstructing an officer (Pen. Code, § 148, subd. (a)(1)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and driving under the influence of drugs (Vehicle Code, § 23152, subd. (a)). In addition, the information alleged defendant had two prior convictions for being under the influence of

a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and seven prior prison convictions (Pen. Code, § 667.7, subd. (b)).

Defendant pleaded no contest to all of the charges, and admitted the prior convictions. The court sentenced him to a total of four years eight months in state prison. In addition to the prison commitment, the court also ordered defendant to pay a criminal justice administration fee of \$129.75 to the City of San Jose.

DISCUSSION

In this appeal, defendant asserts the trial court erred in imposing a criminal justice administration fee pursuant to Government Code section 29550.1.

At sentencing, the court ordered \$129.75 Criminal Justice Administration Fee to the City of San Jose. The court did not specify upon which code section it relied when imposing the fee.

Initially, defendant argues that although he did not raise an objection to the imposition of the fee in the trial court, he should still be permitted to assert it on appeal. In support of this argument, defendant cites this court's recent decision in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*). In *Pacheco*, the defendant failed to object to certain probation conditions below. Among other issues, he challenged a \$259.50 criminal justice administration fee (Gov. Code, § 29550, subd. (c) [if the arresting agency was the county] or Gov. Code, § 29550.2 [if the arresting agency was other specified arresting agencies]), \$64 per month probation fee (Pen. Code, § 1203.1b), and \$100 attorney fee (Pen. Code, § 987.8). "His challenge to all three fines or fees [was] based on the court having failed to determine his ability to pay them." (*Pacheco, supra*, 187 Cal.App.4th at p. 1396.)

In *Pacheco*, this court relied on two attorney fees cases (*People v. Viray* (2005) 134 Cal.App.4th 1186; *People v. Lopez* (2005) 129 Cal.App.4th 1508) and held that "claims . . . based on the insufficiency of the evidence . . . do not require assertion in the

court below to be preserved on appeal.” (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.) This court specifically discussed the criminal justice administration or “booking” fee. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1399-1400.) This court explained “Government Code sections 29550, 29550.1, and 29550.2 govern fees for booking or otherwise processing arrested persons into a county jail. To some degree, they vary based on the identity of the arresting agency. Arrests made by a ‘city, special district, school district, community college district, college, university or other local arresting agency’ are governed by Government Code sections 29550, subdivision (a)(1) and 29550.1. Arrests made by a county are governed by Government Code section 29550, subdivision (c) and those made by ‘any governmental entity not specified in Section 29550 or 29550.1’ are governed by Government Code section 29550.2, subdivision (a).” (*Id.* at p. 1399, fn. 6.)

Here, we infer from the record that defendant was arrested by San Jose police officers, and the fee was to go to the City of San Jose. Defendant asserts that the criminal justice administration fee was imposed pursuant to Government Code section 29550.1. However, defendant concedes, that there is no requirement of an ability to pay in that code section.

Specifically, Government Code section 29550.1 provides, “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. . . .” Nothing in this statute requires that the court make a determination of the defendant’s ability to pay.

Defendant argues that we should interpret the statute as containing an implied ability to pay requirement, because corresponding provisions of the statutory scheme require findings of a defendant's ability to pay and the constitutional principles of equal protection prohibit arbitrary distinctions among criminal defendants.

Defendant's challenge to the criminal justice administration fee is not a sufficiency of the evidence argument, as it was in *Pacheco*. Accordingly, *Pacheco* is distinguishable and does not support defendant's contention that he did not forfeit his equal protection challenge; rather, defendant is asserting an equal protection challenge.

Defendant asserts that although he did not challenge imposition of the fee in the trial court, and his claim is not based on the sufficiency of the evidence, we should decide this case on the merits because it presents a pure question of law based on undisputed facts. (See, e.g., *In re Sheena K.* (2007) 40 Cal.4th 875.)

However, the problem with defendant's equal protection challenge is that by failing to raise this issue below on equal protection grounds, he has failed to make a record that affirmatively shows that he is aggrieved by the law he attacks. In other words, he has failed to make a record that shows that he has standing to raise an equal protection challenge to Government Code section 29550.1. “ ‘One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation.’ [Citation.]” (*People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212.) The record must contain evidence showing that defendant is actually aggrieved by the law he attacks. (*People v. Black* (1941) 45 Cal.App.2d 87, 96.)

To be aggrieved by the law he challenges, defendant must show that he does not have the ability to pay the fee, but that it will be imposed regardless of this inability to pay. Defendant is serving a four-year term in prison. Since the record does not affirmatively show that he will not be able to obtain prison employment, we must assume

that for purposes of the booking fee he will be able to obtain prison employment. (See *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486–1487.) Penal Code section 2700 provides, in relevant part, “The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.” This section requires that prisoners who perform assigned work be compensated. With nothing developed below that shows that defendant is unable to work in prison, we must assume that defendant will have the ability to pay the minimal booking fee and therefore is not aggrieved by the statute.

As a result, we conclude that defendant does not have standing to raise this equal protection challenge to Government Code section 29550.1. Consequently, we need not consider the merits of defendant’s attempted challenge to Government Code section 29550.1 on equal protection grounds.

DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

BAMATTRE-MANOUKIAN, J.