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

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ARMANDO ARELLANO,

Defendant and Appellant.

H036949
(Monterey County
Super.Ct.No. SS110568)

Defendant appeals from the trial court's imposition of probation conditions that, in his view, do not contain an adequate knowledge requirement. Defendant also claims that: the trial court erred in imposing a probation condition to avoid gang contact; the court failed to rule correctly on the matter of booking fees; the court's minute order erroneously assessed him certain amounts for the probation report and probation supervision; and he is entitled to more generous presentence conduct credits than the court awarded. Some of defendant's claims are meritorious, whereas others are not. We will affirm the judgment with modifications.

FACTS AND PROCEDURAL BACKGROUND

Defendant sped along Monterey County roads at speeds reaching more than 100 miles per hour, weaving, driving on the left side of a two-way road, nearly colliding with another motorist, and running red lights. Pursued by law enforcement officers, he

stopped his vehicle and ran. A sheriff's deputy "shoved Arellano to the ground and handcuffed him." Breathalyzer tests administered within the hour revealed blood-alcohol concentrations of 0.15 and 0.14 grams of alcohol per deciliter of blood.

Defendant pleaded no contest to a felony count of dangerously evading a peace officer (Veh. Code, § 2800.2, subd. (a)), a count of driving under the influence of an intoxicant (*id.*, § 23152, subd. (b)), and a count of driving with a license suspended or revoked because of a prior vehicular intoxication offense (*id.*, § 14601.2, subd. (a)). He admitted to certain prior convictions. The trial court placed defendant on five years' formal probation with a number of conditions, including a 300-day jail sentence for these offenses, to be served consecutively with two 30-day terms for violations of probation awarded in other cases.

DISCUSSION

I. *Lack of Knowledge Element in Certain Probation Conditions*

Defendant claims that the following probation conditions are unconstitutionally vague, overbroad, and/or otherwise in violation of his constitutional rights:

"You're to totally abstain from the use of alcoholic beverages and not purchase or possess alcoholic beverages and stay out of places [in which] you know alcohol to be the main item of sale.

"Not use or possess alcohol, narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances.

"[¶] . . . [¶]

"You're not to possess, receive, or transport any firearm, ammunition, or any deadly or dangerous weapon."

A reviewing court reviews a trial court's imposition of a probation condition under one of two different standards. The applicable standard depends on the condition's effect on a defendant's civil liberties. " [A] probation condition that imposes limitations on a

person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' ” (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) All others are reviewed for abuse of discretion, i.e., “[w]e do not apply such close scrutiny in the absence of a showing that the probation condition infringes upon a constitutional right. . . . [and] absent such a showing . . . simply review[] such a condition for abuse of discretion, that is, for an indication that the condition is ‘arbitrary or capricious’ or otherwise exceeds the bounds of reason under the circumstances.” (*Ibid.*)

The trial court may “impose conditions to foster rehabilitation and to protect public safety.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.)

“A probation condition should be given ‘the meaning that would appear to a reasonable, objective reader.’ ” (*People v. Olguin, supra*, 45 Cal.4th at p. 382.)

“ ‘A probation condition is subject to the “void for vagueness” doctrine’ ” (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070.) “ ‘The underlying concern’ ” of the void for vagueness doctrine “ ‘is the core due process requirement of adequate notice: [¶] “ ‘No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.’ [Citations.]” ’ ” (*Ibid., quoting People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 890.) In sum, “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*In re Sheena K., supra*, at p. 890.)

As for overbreadth, “[a] probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K., supra*, 40 Cal.4th at p. 890.)

Defendant could unwittingly violate the probation conditions by driving a car not knowing that a prohibited substance or weapon is in the trunk or underneath a car seat. Thus, the conditions are defective—the People concede the point—and we will modify them as set forth in the dispositional order below. In addition, we will tailor the condition regarding possession of drugs to refer to illegal or prescription drugs, as opposed to all drugs, and the gang association condition to refer to illegal drug users, not the users of any drug whatsoever. It should not be a violation of probation for defendant to knowingly possess an aspirin without a doctor’s prescription, or to knowingly associate with someone who is consuming an aspirin.

II. *Probation Condition Requiring Defendant to Avoid Gang Associations*

Defendant claims that the trial court abused its discretion by imposing a probation condition that prohibits him from associating with gang members.

The trial court and defense counsel had this exchange at sentencing:

“[THE COURT:] You’re not to associate with any individuals you know or have reason to know to be gang members, drug users, or on any form of probation or parole supervision.

“[DEFENSE COUNSEL]: Your Honor, I’m going to object to gang members as lack of nexus. He has no gang history.”

“THE COURT: The nexus is he is to stay away from people he knows are trouble. That’s the nexus. Probationers, parolees. We’re providing a structure in these terms and conditions that are aimed at trying to help him succeed. Keeping him away from gang members is going to do that. It’s going to help anyway.”

As noted, a trial court may “impose conditions to foster rehabilitation and to protect public safety.” (*People v. Carbajal, supra*, 10 Cal.4th at p. 1120.) “The trial court’s discretion, although broad, nevertheless is not without limits: a condition of probation must serve a purpose specified in the statute. In addition, we have interpreted Penal Code section 1203.1 to require that probation conditions which regulate conduct

‘not itself criminal’ be ‘reasonably related to the crime of which the defendant was convicted or to future criminality.’ [Citation.] As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or “ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” [Citations.]’ ” (*Id.* at p. 1121.) Similarly, in *People v. Lent* (1975) 15 Cal.3d 481, the court stated that a probation condition is at risk of being held invalid if it “ ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ ” (*Id.* at p. 486.)

Defendant is correct that the probation condition he challenges is, as far as we can discern on this record, not related to the crimes of which he was convicted. None of them showed indications of gang involvement, and the probation report stated that as far as the probation officer knew defendant “has never been involved with any gangs and he does not have any family members [who] associate with any gangs.” Nor do we discern on this record any *reasonable* relation to future criminality, as opposed to a speculative relation, which can always be offered. We will strike this condition in our dispositional order.

III. *Booking Fees*

Defendant claims that the trial court erroneously ordered him to pay any booking fee that might eventually be assessed under Government Code section 29550, subdivision (c), without determining that he has the ability to pay it and without assessing the actual cost of his booking.

The probation report prepared for sentencing summarized information defendant provided about his employment history. The probation officer recited that for two weeks before his arrest, defendant worked “full time for six months at the Home Town Buffet in Santa Maria, California. [Before then] he was employed for four months as a seasonal field laborer [Before then] he was employed full time for two years at the Silver

[Terrace] Nurser[ies] in Pescadero, California.” She also took down defendant’s information that he has two daughters, ages five and two years old, as a result of a relationship that had not resulted in marriage.

The probation officer found defendant’s financial capability to be “[m]inimal; however, it is anticipated the defendant will be able to pay any victim restitution, fines, or fees[] associated with this case.” She recommended that the trial court order defendant to contact the Monterey County Revenue Division “within three days, or if in custody, within three days of release, and make arrangements to pay all fines, fees, and victim restitution as directed by the Revenue Division.” Listing specific dollar amounts, she also recommended that the court order defendant to pay various enumerated fees, but the county booking fee was not among them.

At sentencing, the trial court adopted the probation officer’s recommendation concerning the fees she had listed and for which she had provided dollar amounts. Regarding the unlisted booking fee, it ordered defendant to “[p]ay in accordance with your ability to pay any booking fees that might be assessed.”

The People contend that defendant has failed to preserve for review his contentions regarding the booking fee by failing to raise them during the sentencing proceedings. (See *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072.) Whether or not he has, however, in most cases “an appellate court may review a forfeited claim—and ‘[w]hether or not it should do so is entrusted to its discretion.’” (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 887, fn. 7; cf. *id.*, p. 888, fn. 7, 3d par. [appellate courts lack discretion to review otherwise forfeited claims regarding the admission or exclusion of evidence].) Therefore, whether or not defendant has forfeited the claim, we will not impose the procedural bar of forfeiture. We take this course of action because the issue is sufficiently important to address it at greater length than would be warranted if we held the claim to be forfeited at the threshold.

As discussed below, however, a second procedural argument by the People—that there has not yet been a determination of defendant’s ability to pay any amount of probation-related costs—has merit. Also, the trial court did not order defendant to pay any specific amount, even provisionally or contingently, to reimburse the cost of being booked. Therefore, any adjudication of this claim would be premature.

The parties agree that a sheriff’s deputy was the arresting officer. Subdivision (c) of Government Code section 29550 provides: “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. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons.”

Subdivision (d) of Government Code section 29550 specifies that “[w]hen 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.”

The statutes require, ultimately, that the trial court rule on the actual cost of defendant’s booking and his ability to pay that cost. That was not done here. We will remand for rulings on these questions. Defendant urges that it is a waste of money to remand the case. He asks that we consider striking the order in furtherance of judicial

economy. However, if one fee is in the range of \$150,¹ then a hundred such fees would be \$15,000, and we remand to reduce the possibility of future appeals raising this issue.

That brings us back to the question of ripeness and the need for a remand rather than a determination on the merits now.

“ ‘The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes. . . . [T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.’” (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 452.)

¹ We do not know the exact figure, but \$150 is within the realm of possibility because with regard to the 2009-2010 fiscal year, the Monterey County Sheriff–Coroner asked the county’s Board of Supervisors to set the booking fee at \$137.95. A county official’s memorandum on the subject stated: “Government Code Section (GCS) 29551 allows counties to recover lost appropriations in any fiscal year in which the state does not appropriate at least \$35 million for the purposes of GCS 29550. The proposed charges for booking and processing arrested persons for [fiscal year] 2009-10 is \$137.95. Pursuant to current statutory restrictions, the Sheriff is requesting authority to collect fees up to, but not to exceed, \$137.95 per booking then multiplied by the percentage to reflect the amount of reduced appropriations by the State of California and allowable by GCS 29551.” (“Monterey County Board of Supervisors—Approve and adopt the Amendment of Article VII of the Master Fee Resolution to set and authorize collection by the Sheriff’s Office, effective July 1, 2009 as attached in Exhibit I” [available at <http://publicagendas.co.monterey.ca.us/MG75229/AS75248/AS75249/AI80855/DO80856/DO_80856.PDF> (as of Feb. 29, 2012)].) The current fee may be close to the \$137.95 amount requested for the 2009-2010 fiscal year. (See Gov. Code, § 29551, subd. (e).)

There is no sufficiently definite framing of the issue here in light of an actual set of facts. To be sure, the trial court accepted the probation officer's determination regarding the booking fee. However, it ordered defendant to pay an unstated amount, if any amount at all, without any determination of his ability to pay whatever that amount, if any, might be. Accordingly, defendant's challenge to the probation order on the ground that there is no evidence to support a finding of his ability to pay is premature and unripe for adjudication, albeit through no fault of his own.

Accordingly, we will remand the matter to the trial court to enable it to rule on the cost of defendant's booking and his ability to pay the booking fees.

IV. *Probation Report and Probation Supervision Fees*

Defendant claims that the minute order directing him to pay probation-report and probation- supervision fees conflicts with the trial court's oral pronouncement of judgment and lacks any foundation in the form of a court finding regarding his ability to pay.

The trial court's minute order directed as follows: "The defendant is ordered to pay \$864.00 for the cost of preparation of the probation report, plus \$81.00 per month as the cost of supervised probation in accordance with his/her ability to pay. The defendant is ordered to provide the Probation Officer with financial information for evaluation of his/her ability to pay, and is ordered to pay the amount Probation determines he can afford. [¶] Unless otherwise stated, all financial obligations are to be paid through the Monterey County Revenue Division."

However, in open court the trial court ordered defendant to "[p]ay for the cost of the preparation of the report and monthly supervised probation in accordance with your ability to pay."

Penal Code section 1203.1b, subdivision (a), provides in relevant part: "In any case . . . in which a defendant is granted probation or given a conditional sentence, the probation officer . . . shall make a determination of the ability of the defendant to pay all

or a portion of the reasonable cost of any probation supervision The reasonable cost of these services and of probation supervision . . . shall not exceed the amount determined to be the actual average cost thereof. . . . The court shall order the defendant to appear before the probation officer . . . to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer . . . shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver.”

Penal Code section 1203.1b, subdivision (b), provides that when “the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer”

Defendant is correct that there is no source in the appellate record for the \$861 and \$81 per month figures. The record is vague—as noted, the probation officer found defendant's financial capability to be “[m]inimal; however, it is anticipated the defendant will be able to pay any victim restitution, fines, or fees[] associated with this case.” In theory, the rest of the order and the trial court's pronouncement in open court, which indicate that he must pay only what he can afford, may set the foregoing specific amounts as ceilings, assuming that these amounts are the “actual average cost” (Pen. Code, § 1203.1b, subd. (a)) and assuming that this section applies to both the report and the supervision. We agree with defendant, however, that “the appellate record does not

provide any information as to where the amounts . . . came from or what they reflect. As a result, the better course would seem to be to correct the minute order to delete the specified amounts and to let probation conduct the review envisioned in [Penal Code] section 1203.1b and make its initial determination of [defendant's] ability to pay that he may then contest in a court hearing if he wishes.” We will so direct.

V. *Presentence Conduct Credit*

Defendant claims that he is entitled to more generous presentence custody credits than the trial court awarded him pursuant to the version of section 4019 of the Penal Code (Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50, pp.4427-4428, (West), eff. Jan. 25, 2010) in effect at the time of his crimes and his sentencing. He contends that a larger amount of conduct credit, i.e., one day of credit for each day of jail custody, was available under former subdivision (e)(1) of the version of Penal Code section 2933 then in effect (Stats. 2010, ch. 426, § 1, p. 2087 (West), eff. Sept. 28, 2010) to persons who received a prison sentence after serving time in county jail rather than probation, as he did, so that the less generous credits awarded under former section 4019 of the Penal Code denied him the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution.

The trial court awarded defendant 24 days’ presentence conduct credit for the 51 days he served in jail before being sentenced. He maintains that equal protection principles entitle him to the 51 days’ presentence conduct credit a prisoner would receive.

Defendant did not raise this equal protection challenge below and the trial court consequently was not given the opportunity to rule on it. The People contend that as a result of this failure, defendant has failed to preserve his claim for review. We agree.

“ “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.)

In a number of instances courts have found that a defendant’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 sexually violent predator 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].)

As is clear from the record, defendant’s claim that the court’s award of conduct credits under the former provision in section 4019 instead of the more generous former provision in section 2933 violated his rights to equal protection was not raised below. Because he had every opportunity to bring this claim to the trial court’s attention and failed to do so, and because of the consumption of the court’s time at this late stage, we are not inclined to exercise discretion to consider defendant’s claim on the merits under these circumstances. Accordingly, we conclude that defendant’s claim should not be entertained 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.)

DISPOSITION

The judgment is modified as follows:

Replace the following probation condition:

“You’re to totally abstain from the use of alcoholic beverages and not purchase or possess alcoholic beverages and stay out of places you know alcohol to be the main item of sale.”

As follows:

“Totally abstain from the knowing use of alcoholic beverages, do not knowingly purchase or possess alcoholic beverages, and stay out of places in which you know alcohol to be the main item of sale.”

Replace the following probation condition:

“Not use or possess alcohol, narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances.”

As follows:

“Not knowingly use or possess alcohol, narcotics, intoxicants, illegal or prescription drugs, or other controlled substances without the prescription of a physician; not traffic in or associate with persons known to you to use or traffic in narcotics or other controlled substances.”

Replace the following probation condition:

“You’re not to possess, receive, or transport any firearm, ammunition, or any deadly or dangerous weapon.”

As follows:

“Not knowingly possess, receive, or transport any firearm, ammunition, or any deadly and dangerous weapon.”

Replace the following probation condition:

“You’re not to associate with any individuals you know or have reason to know to be gang members, drug users, or on any form of probation or parole supervision.”

As follows:

“Not to associate with any individuals you know or have reason to know are illegal drug users or are on any form of probation or parole supervision.”

Replace the following order:

“The defendant is ordered to pay \$864.00 for the cost of preparation of the probation report, plus \$81.00 per month as the cost of supervised probation in accordance with his/her ability to pay. The defendant is ordered to provide the Probation Officer with financial information for evaluation of his/her ability to pay, and is ordered to pay the amount Probation determines he can afford. [¶] Unless otherwise stated, all financial obligations are to be paid through the Monterey County Revenue Division.”

As follows:

“The defendant is ordered to pay the costs of preparing the probation report and supervised probation in accordance with his ability to pay. The defendant is ordered to provide the Probation Officer with financial information for evaluation of his ability to pay and to pay the amount the Probation Department determines he can afford. Unless otherwise stated, all financial obligations are to be paid through the Monterey County Revenue Division.”

The cause is remanded to the trial court with directions to make rulings regarding the cost of defendant’s booking and his ability to pay his booking fees.

In all other respects, the judgment is affirmed.

Duffy, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Mihara, 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.