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

THE PEOPLE,

Plaintiff and Respondent,

v.

LAVELL JORDAN,

Defendant and Appellant.

H037163

(Santa Clara County

Super.Ct.No. CC512062)

Defendant Lavell Jordan pleaded no contest to one count of voluntary manslaughter and admitted the allegations that he personally used a firearm and that the offense was committed for the benefit of a criminal street gang. Defendant was sentenced to a 20-year prison term.

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 make a determination of defendant's ability to pay the fee. He contends that because under the general statutory scheme, comparable booking fees may only be imposed if the court makes a determination that the defendant has the ability to pay them, imposing the booking fee here without such a determination violated his equal protection rights under the federal and state Constitutions. Defendant also claims that the clerk's minutes and abstract of judgment do not conform with the court's oral pronouncement of sentence

with respect to the amounts fixed for the restitution fine and parole revocation restitution fine.

We conclude that defendant forfeited the constitutional challenge concerning the imposition of the booking fee, but that he has correctly noted an inconsistency between the oral pronouncement of sentence, on the one hand, and the clerk's minutes and abstract of judgment, on the other hand. Accordingly, we will order the minutes and abstract of judgment modified and will affirm the judgment as modified.

FACTS¹

On November 25, 2005, used a firearm to shoot and kill Michael DeJesus.

PROCEDURAL BACKGROUND

Defendant was charged by an amended information with one count of voluntary manslaughter, a felony (Pen. Code, § 192, subd. (a)).² It was alleged further that defendant personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)), and that he committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). On May 26, 2011, defendant entered a plea of no contest to voluntary manslaughter and admitted the firearm and gang allegations.³ The plea was entered with the understanding that he would receive a prison sentence of 20 years.

On June 16, 2011, the court sentenced defendant on the voluntary manslaughter conviction to the midterm of six years, added the midterm of four years for the firearm

¹ There is no preliminary hearing transcript, probation report, or other materials in the record from which to identify the facts underlying the conviction.

² All further statutory references are to the Penal Code unless otherwise stated.

³ It was alleged further in the amended information, and was admitted by defendant when he entered a no contest plea, that defendant was a minor 16 years or older, and specifically was 17 years old, at the time of the commission of the offense (Welf. & Inst. Code, § 707, subd. (b)).

enhancement and 10 years for the gang enhancement, for a total prison term of 20 years. 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 San Jose. The court did not specify the statutory authority under which this booking fee was being imposed. 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 contends that the court erred in its imposition of the booking fee. He contends that the statute under which the fee was imposed was Government Code section 29550.1. (The Attorney General acknowledges that the booking fee was imposed under Government Code section 29550.1.) He 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:

Government Code 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

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
(continued)

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, Government Code section 29550, subdivisions (c) and (d),⁵ and Government Code section 29550.2, subdivision (a)⁶—contain specific requirements that the court determine that the defendant has the ability to pay the fee. Defendant argues: “[I]t makes no sense that the applicability of such [an ability-to-pay] provision depends on which police agency slaps handcuffs on an arrestee. In other words, there is no logical relationship between an ability to pay and the identity of the arresting agency.” Because (defendant argues) there is no rational basis for treating arrestees who are arrested by city peace

district, college, university, or other local arresting agency for the criminal justice administration fee.” (Gov. Code § 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.” (Gov. Code, § 29550, subdivisions (c) and (d).)

⁶ “Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in [Government Code] 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).)

officers differently from arrestees who are arrested by county peace officers or other non-city officials, the absence of an express clause requiring a court finding of ability to pay in Government Code section 29550.1 cannot survive constitutional muster.

Defendant asserts that it is proper to imply an ability-to-pay clause in Government Code section 29550.1 in order to harmonize it with Government Code sections 29550, subdivisions (c) and (d), and 29550.2, subdivision (a). 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 matter should be remanded for the trial court to determine whether defendant has the ability to pay the booking fee.

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.

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

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.)

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, 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.) 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. *In re Sheena K.*, at pp. 887-889 [unpreserved challenge that probation condition was unconstitutionally vague and overly broad presented pure questions 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*

Clearly, defendant forfeited his constitutional challenge by failing to raise any objection below to the imposition of the criminal justice administration fee. His claim that the court's imposition of a booking fee through application of Government Code 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.)

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 Government Code 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 Government Code 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.⁸

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.” He cites *In re 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 *In re Sheena K.* does not afford defendant grounds for reviewing his forfeited claim here.

⁸ 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 Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467 [restitution fine].) A case involving an unpreserved challenge to a booking fee imposed under Government Code section 29550.2 is pending before the California Supreme Court. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on Jun. 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.

For the foregoing reasons, defendant has forfeited his claim that the imposition of the booking fee under Government Code section 29550.1 violated his constitutional right to equal protection.

II. *Restitution and Parole Revocation Restitution Fines*

Defendant contends that the minute order and abstract of judgment do not properly reflect the court's order with respect to the imposition of a restitution fine under section 1202.4, subdivision (b)(1), and a parole revocation restitution fine under section 1202.45. Defendant correctly points out that there is a discrepancy between the court's oral pronouncement, in which it imposed restitution and parole revocation restitution fines each in the amount of \$200, and the clerk's minutes and the abstract of judgment, which indicate the fine amounts as \$220. The Attorney General concedes the discrepancy.

Where the clerk's minutes or abstract of judgment do not accurately reflect the oral pronouncement, the appellate court may order them corrected. (*People v. Zackery* (2007) 147 Cal.App.4th 380; 385-386, 388, 389; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123-124.) Here, the court's oral pronouncement setting the amounts for the restitution and parole revocation restitution fines each at \$200 controls over the fine amounts listed in the minutes and abstract. Accordingly, we will order that the clerk's minutes and abstract be amended to properly reflect this aspect of the sentencing.

DISPOSITION

The clerk's minutes of June 16, 2011, and the abstract of judgment dated June 23, 2011, are both ordered amended to reflect that the restitution fine imposed pursuant to section 1202.4, subdivision (b)(1) and the suspended parole revocation

restitution fine under section 1202.45 are each in the amount of \$200. As modified, 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.