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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JULIO AYALA,

Defendant and Appellant.

H037382

(Santa Clara County

Super. Ct. No. C1093123)

Defendant Jose Julio Ayala pleaded no contest to one count of inflicting corporal injury upon a coparent and admitted an enhancement that he had previously been convicted of a felony for which he served a prison term. Defendant was sentenced to three years in prison.

Defendant claims that the court erred in imposing a criminal justice administration (booking) fee of \$259.50 as part of the sentence. He argues that there was insufficient evidence to support a finding that he had the ability to pay the booking fee. Defendant also argues that there was no evidence that the fee assessed represented no more than the actual administrative costs of booking. He acknowledges that he did not assert the insufficiency-of-the-evidence claim below but that such failure did not result in its forfeiture. We conclude that defendant's claim was not forfeited and that it has merit. Accordingly, we will order the booking fee stricken and affirm the judgment as modified.

FACTS¹

In the afternoon of June 29, 2010, San Jose police officers were dispatched after a report of a domestic violence incident. They went to the home of Amanda, a woman with whom defendant had an on-again, off-again dating relationship and who was the mother of his two children. She reported that at approximately 8:30 that morning, after going outside with her son and dog for a few minutes, she returned and found defendant in the house. He accused Amanda of sending people to kill him and also of being unfaithful. Defendant “appeared to be ‘high on meth.’ ” He lifted her off the ground and threw her on the bed. He then sat on her chest and held a five-inch serrated knife under her chin and said, “ ‘I don’t care if I kill you.’ ” Amanda was able to leave the house with her son.

PROCEDURAL BACKGROUND

Defendant was charged by a two-count information with assault with a deadly weapon other than a firearm, a felony (Pen. Code, § 245, subd. (a)(1); count 1), and infliction of corporal injury on the mother of his child which resulted in a traumatic condition, a felony (Pen. Code, § 273.5, subd. (a); count 2). It was alleged further that defendant had suffered a prior felony conviction for which he had served a prison term. (Pen. Code, § 667.5, subd. (b)). On August 10, 2011, defendant entered a plea of no contest to the second count and admitted the prison prior allegation with the understanding that he would receive a three-year prison sentence.

On November 19, 2010, the court sentenced defendant on the second count to the midterm of three years in prison, and dismissed count 1 and the prison prior

¹ Our summary of the facts is taken from the probation report.

enhancement.² Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea.³

DISCUSSION

I. *Imposition of the Booking Fee*

A. *Background*

At sentencing, the court imposed a criminal justice administration fee of \$259.50, payable to the County of Santa Clara (County). The court indicated that this booking fee was being imposed pursuant to Government Code sections 29550, 29550.1, and 29550.2.⁴ At the sentencing hearing, the court heard no evidence and made no findings concerning the booking fee.

B. *Applicable Booking Fee Statute*

Defendant contends that—although it was not specified by the court—the statute under which the fee was imposed was section 29550. The Attorney General does not respond to this point.

On March 24, 2011, the court, upon application of the District Attorney, issued an order requiring the Department of Corrections and Rehabilitation and the warden of the Tehachapi Correctional Institution to produce defendant to the County’s director of corrections to stand trial in this case. The record shows that defendant was in fact “picked up [from the Tehachapi State Prison] on April 12, 2011 by the Santa Clara County Sheriff’s Office.”

² The court also denied defendant’s motion to withdraw his plea. The denial of that motion is not a subject of this appeal.

³ Defendant also indicated in the notice of appeal that he was seeking a certificate of probable cause, which application was denied by the court.

⁴ All further statutory references are to the Government Code unless otherwise stated.

It is thus readily apparent that defendant was arrested by officials of the County and booked into County jail. And the court ordered that the booking fee be paid to the County. Under these circumstances, it is apparent that defendant is correct that the court imposed the booking fee pursuant to section 29550. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399, fn. 6 (*Pacheco*) [generally, booking fees are imposed under section 29550, subd. (c), when county has made arrest].)⁵

Such booking fees are considered to be “nonpunitive user fees primarily because they are designated fees and are limited to the actual administrative costs in booking or otherwise processing those arrested and convicted [citation].” (*People v. Sharret* (2011) 191 Cal.App.4th 859, 868.)

C. *Forfeiture of Claim*

Before addressing the merits, we consider as a threshold matter whether defendant’s challenge to the booking fee has been forfeited because he failed to assert it below.⁶ We conclude that the claim was not forfeited.

⁵ Government Code section 29550, subdivision (c) reads: “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.” And subdivision (d) provides in relevant part: “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 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, (continued)

Defendant concedes that he did not object below to the imposition of the booking fee. But, citing principally *Pacheco, supra*, 187 Cal.App.4th 1392, he asserts that this omission did not result in his forfeiture of the claim.

In *Pacheco*, after the defendant pleaded no contest to welfare fraud, the court granted probation in which it imposed conditions, among others, that the defendant pay a booking fee of \$259.50 in favor of the County (pursuant to §§ 29550, subd. (c) or 29550.2), a probation fee (pursuant to Pen. Code, § 1203.1b, subd. (a)), and attorney fees (pursuant to Pen. Code, § 987.8). (*Pacheco, supra*, 187 Cal.App.4th at pp. 1395-1396.) The defendant challenged these fees on the basis that the statutes authorizing them conditioned their imposition on a finding of the defendant's ability to pay them. (*Id.* at p. 1397.) This court rejected the Attorney General's assertion that the defendant's claims were forfeited because he had failed to raise them below. (*Ibid.*) We held that, because the nature of the appellate claims were insufficiency of the evidence, they were not forfeited. (*Ibid.*) In so holding, 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.)

Similarly, here, the challenges to the booking fee—based upon the absence of a showing that the fee did not exceed the actual administrative costs of booking and of defendant's ability to pay the fee—are both founded on a sufficiency-of-the-evidence rationale. As such, under *Pacheco, supra*, 187 Cal.App.4th at page 1397, defendant has not forfeited the claims.

But the Attorney General urges that we reject our holding in *Pacheco*, and instead follow a line of authority holding that "challenges to the imposition of fines and fees

" 'forfeiture' " is the more technically accurate term. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

must be raised first in the trial court and will not be entertained for the first time on appeal. [Citations.]” We acknowledge that some courts have held that evidentiary challenges to fines and fees may not be raised on appeal where the defendant failed to raise an objection in the trial court. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine under Pen. Code, § 1202.5, subd. (a)]; *People v. Valtakis* (2003) 105 Cal.App.4th 1066 [probation costs fee under Pen. Code, § 1203.1b]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee under § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467 [restitution fine under former § 13967, subd. (a)].) To the extent that these cases, relied on by the Attorney General here, may be in conflict with *Pacheco*, a case has been accepted for review in which the Supreme Court may resolve whether a defendant’s failure to assert at trial a sufficiency-of-the-evidence challenge to a booking fee results in the claim’s forfeiture. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.)

We nonetheless, after considering the authorities relied on by the Attorney General, conclude that the reasoning in *Pacheco* is persuasive. Accordingly, we find that defendant did not forfeit his challenges to the booking fee imposed in this instance.

D. *Whether Booking Fee Was Erroneously Imposed*

Defendant asserts that under section 29550, the booking fee (1) may not exceed the actual administrative costs of the booking, and (2) may be imposed only if the defendant is found to have the ability to pay it. Because, defendant posits, there is no evidence here supporting the actual administrative costs of booking or of defendant’s ability to pay, imposition of the booking fee was error. The Attorney General does not respond at all to the merits of defendant’s argument, having elected in the respondent’s brief to argue only that the claim has been forfeited. (See *California Ins. Guar. Ass’n v. Workers’ Comp. App. Bd.* (2005) 128 Cal.App.4th 307, 316, fn. 2 [issue to which respondent’s brief contains no reply “will be deemed submitted on appellant’s brief”].)

A booking fee imposed under section 29550, subdivision (c) “shall not exceed the actual administrative costs, including applicable overhead costs incurred in booking or otherwise processing arrested persons.” (See also *Pacheco*, *supra*, 187 Cal.App.4th at p. 1400.) The term, “ ‘actual administrative costs’ ” is further defined to “include only those costs for functions that are performed in order to receive an arrestee into a county detention facility” and operating expenses for running the jail are expressly excluded from the definition. (§ 29550, subd. (e).)

In this instance, as defendant correctly points out, there is no evidence in the record that the booking fee reflected an amount that did “not exceed the actual administrative costs” of booking or otherwise processing arrestees as mandated by section 29550, subdivision (c). Accordingly, the booking fee cannot be upheld. In the interests of judicial economy, we elect to strike the fee. (*People v. Walker* (1991) 54 Cal.3d 1013, 1029 [judicial economy warranted modifying judgment on review to reduce restitution fine to statutory minimum rather than remand for determination of appropriate amount of fine]; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.)⁷

⁷ Because there is insufficient evidence to support that the booking fee imposed reflected no more than the County’s “actual administrative costs” of booking, we need not address defendant’s additional argument that there was insufficient evidence to support an implied finding of his ability to pay a booking fee. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 980, fn. 12 [case disposed of on one argument of respondent; other arguments need not be considered].) We note in passing, however, that the ability-to-pay requirement under section 29550 appears in the subdivision under which the court is required to impose a booking fee as a condition of probation. (§ 29550, subd. (d)(2).) The booking fee here was imposed in connection with the judgment of conviction sentencing defendant to a three-year prison term. We express no opinion on whether there is in fact an ability-to-pay requirement where the booking fee is imposed under section 29550 under the circumstances presented here.

DISPOSITION

The judgment is modified to strike the imposition of a criminal justice administration (booking) fee of \$259.50. The clerk is directed to amend the abstract to reflect that this fee is stricken. As so modified, 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.