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

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE BARA, JR.,

Defendant and Appellant.

H037394

(Santa Clara County

Super. Ct. No. C1081733)

INTRODUCTION

Defendant Eddie Bara, Jr., pleaded no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and the following four misdemeanors: being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), possession of a switchblade knife (former Pen. Code, § 653k), possession of marijuana in a vehicle (former Veh. Code, § 23222, subd. (b)), and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). Defendant also admitted that he had one prior strike (Pen. Code, §§ 667, subs. (b)–(i), 1170.12), and that he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced defendant to 32 months in prison. Defendant was granted 120 actual days credit and 34 days conduct credit for a total of 154 days. Without objection the court also ordered defendant to pay various fines and fees, including a criminal justice administration fee of \$129.75 to the City of San Jose.

On appeal, defendant contends that the statute authorizing imposition of the criminal justice administration fee in this case, Government Code section 29550.1,¹ must be interpreted as including an ability-to-pay requirement in order to satisfy equal protection requirements, that the trial court did not make an inquiry into his ability to pay, that there was no evidence to support a finding that he had an ability to pay, and that this court may consider these claims for the first time on appeal. Defendant also contends that the abstract of judgment fails to accurately reflect the total amount of presentence custody credit granted by the trial court, and that further, he is entitled to additional conduct credit under the current version of Penal Code section 4019.

For reasons that we will explain, we conclude that the absence of an ability-to-pay requirement in section 29550.1 does not present an equal protection problem, and that defendant is not entitled to additional conduct credit under Penal Code section 4019. We agree with defendant that the record contains a clerical error concerning the total amount of presentence custody credit granted by the trial court. We also determine that the court failed to impose the correct amount for the court security charge under former Penal Code section 1465.8. Accordingly, after also correcting other clerical errors, we will affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

As defendant was convicted by plea, the following factual summary is taken from the probation report. In June 2010, law enforcement officers observed defendant driving and initiated a vehicle stop for Vehicle Code violations. Defendant made furtive movements and was ordered to put his hands outside the vehicle. The officers approached the vehicle and smelled marijuana. Defendant also displayed symptoms of being under the influence of a controlled substance. Defendant was arrested and searched. He had a usable amount of marijuana in his pants pocket, along with a three-

¹ Further unspecified statutory references are to the Government Code.

and-one-half-inch folding blade knife. Upon a search of defendant's vehicle, the officers found two bags of methamphetamine, one containing 3.55 grams and the other containing 1.52 grams. Also in the vehicle was a digital scale disguised as an iPod. Defendant's license had previously been suspended.

In January 2011, defendant was charged by information with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 1), and four misdemeanors: being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a); count 2), possession of a switchblade knife (former Pen. Code, § 653k; count 3), possession of marijuana in a vehicle (former Veh. Code, § 23222, subd. (b); count 4), and driving with a suspended license (Veh. Code, § 14601.1, subd. (a); count 5). The information further alleged that defendant had one prior strike (Pen. Code, §§ 667, subds. (b) –(i), 1170.12), and that he had served two prior prison terms (Pen. Code, § 667.5, subd. (b)).

On March 30, 2011, defendant pleaded no contest to all five counts and admitted the prior allegations, based on the court's offer that he would "not receive more than 32 months" in prison and that, if the court granted his anticipated *Romero* motion to dismiss his strike prior,² the court would also consider granting probation.

On September 8, 2011, the trial court denied defendant's *Romero* motion and sentenced him to prison for 32 months, double the lower term, for possession of a controlled substance (count 1). The court struck the punishment for the prison priors pursuant to section 1385. The court granted defendant 120 actual days credit and 34 days conduct credit for a total of 154 days. For the remaining four misdemeanor counts, the court imposed a concurrent 90-day jail term, with 90 days credit for time served. Defendant was ordered to pay various fines and fees including, pursuant to the probation officer's recommendation, a criminal justice administration fee of \$129.75 to the City of

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

San Jose. Defendant did not object to imposition of the criminal justice administration fee.

DISCUSSION

I. Criminal Justice Administration Fee

The record reflects that defendant was arrested by San Jose police and that he was booked into county jail. On appeal, the parties agree that the criminal justice administration fee was imposed by the trial court pursuant to section 29550.1. Defendant contends that, although this section does not expressly require the trial court to find a defendant has the ability to pay the fee before ordering payment, the equal protection provisions of the state and federal Constitutions require the section to be interpreted as including an ability-to-pay requirement. Defendant further contends that the court below did not make an inquiry into his ability to pay, and that there was no evidence to support a finding that he had an ability to pay. Although he did not object to the fee below, defendant argues that his appellate claim for insufficiency of the evidence has not been forfeited. Alternatively, if this court determines that “the challenged error does not qualify as a sufficiency of the evidence claim and that an objection was therefore required,” defendant contends that this court has the discretion to consider the claim because it presents a pure question of law.

The Attorney General “assume[s],” “[f]or purposes of this case only,” that section 29550.1 has “an implied ability-to-pay requirement.” The Attorney General contends, however, that defendant has forfeited his claim of insufficiency of the evidence concerning the ability to pay, that the issue does not involve a pure question of law, and that this court should not exercise its discretion to consider the claim. The Attorney General further argues that the trial court made an implied finding that defendant had the ability to pay the fee, and that there was substantial evidence to support the finding.

The issue of whether a defendant has forfeited an appellate claim that the defendant is unable to pay a criminal justice administration fee under section 29550.2 by

failing to object below is currently before the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513; see also *People v. Mason* (2012) 206 Cal.App.4th 1026, review granted August 29, 2012, S203747 [further action deferred pending disposition of a related issue in *People v. McCullough, supra*]; *People v. Almanza* (2012) 207 Cal.App.4th 269, review granted September 26, 2012, S204410 [further action deferred pending disposition of a related issue in *People v. McCullough, supra*].) In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, this court held that the defendant's insufficiency-of-the-evidence claim regarding a criminal justice administration fee under section 29550 or 29550.2 was not forfeited by the defendant's failure to raise the issue below. (*Id.* at p. 1397.)

In this case, defendant's challenge to the criminal justice administration fee raises the initial question of whether equal protection principles require section 29550.1 to be interpreted as including an ability-to-pay requirement. The forfeiture doctrine has been applied to unpreserved equal protection claims. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14.) However, an appellate court may reach the merits of a constitutional claim when it is " 'one of law presented by undisputed facts in the record . . . that does not require the scrutiny of individual circumstances, but instead requires the review of abstract and generalized legal concepts' " (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493; see *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323; *In re Sheena K.* (2007) 40 Cal.4th 875, 887-888 & fn. 7.)

Assuming, without deciding, that defendant may challenge the criminal justice administration fee for the first time on appeal, we determine that the trial court was not required under equal protection principles to consider defendant's ability to pay. Although the Attorney General has assumed in this case that section 29550.1 has an implied ability-to-pay requirement, we are not required to accept this assumption. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 [a respondent's failure to respond to an appellant's argument does not necessarily constitute a concession], overruled on another

point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; accord *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 227, fn. 9; *People v. Kim* (2011) 193 Cal.App.4th 836, 847 [an appellate court is not required to accept a concession by the Attorney General].)

Sections 29550, 29550.1, and 29550.2 authorize the imposition of a criminal justice administration fee on an arrestee who is ultimately convicted, in order to cover the expenses involved in booking or otherwise processing the arrestee in a county jail. Sections 29550 and 29550.2 expressly require a finding that the person has the ability to pay the fee when the fee is imposed under certain circumstances. (See §§ 29550, subd. (d)(2),³ 29550.2, subd. (a).) Section 29550.1, the statute which authorizes imposition of the fee on defendant in this case, does not contain an express ability-to-pay requirement. According to defendant, the absence of an ability-to-pay requirement in section 29550.1 violates his state and federal rights to equal protection.

To prevail on an equal protection claim, a defendant must first establish that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Brown* (2012) 54 Cal.4th 314, 328 (*Brown*); *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*).) Unless the statutory distinction at issue involves a suspect classification, touches upon a fundamental interest, or is based on gender, most equal protection challenges are analyzed under the rational relationship

³ Subdivision (d)(2) of section 29550 provides that the court “shall” order the defendant to pay the criminal justice administration fee to the county as a condition of probation “based on his or her ability to pay.” By comparison, subdivision (d)(1) of section 29550 provides that a “judgment of conviction *may* impose an order for payment of the amount of the criminal justice administration fee” by the defendant, and this subsection does not expressly require an ability-to-pay determination. (§ 29550, subd. (d)(1), italics added.) Defendant contends that the use of the word “may” in subdivision (d)(1) of section 29550 “implicitly allow[s] a court to consider a defendant’s ability to pay.” Whether this is an accurate interpretation is not an issue we need to decide in this case.

test. (*Hofsheier, supra*, at p. 1200.) Defendant in this case asserts that the statutory scheme fails the rational relationship test. Under this test, “ ‘ ‘ ‘ a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ [Citations.]” (*Id.* at pp. 1200-1201, italics omitted.)

We determine that persons subject to section 29550.1 and those subject to sections 29550 and 29550.2 are not similarly situated. Counties typically operate the jails and bear the expense of providing for persons held there. (§ 29602, Pen. Code, §§ 4000, 4015; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1813-1814.) Under section 29550, subdivision (c), a county may recover its “actual administrative costs” directly from the arrested person if the person was arrested by county personnel. The county may also recover its actual costs directly from the arrested person when the arrest was made by a governmental entity not specified in sections 29550 or 29550.1, which would include state law enforcement agencies. (§ 29550.2, subd. (a).) But where the arrest was made by a “city, special district, school district, community college district, college, or university,” the county may impose a fee on that local arresting entity for no more than “one-half” of the county’s “actual administrative costs.” (§ 29550, subd. (a)(1).) Under section 29550.1, the local arresting entity may, in turn, recover from the arrested person the fee “imposed by a county.” (§ 29550.1.) Thus, someone like defendant, who was arrested by a local entity such as San Jose police, is liable for one-half the amount for which county or state arrestees are liable. Consequently, the local arrestee and the county and state arrestees are not similarly situated.

Even if these classes of arrestees were similarly situated for purposes of the law, there is a conceivable rational basis for the differential treatment. Although a person arrested by a local entity will be required to pay a criminal justice administration fee even absent an ability-to-pay finding and other arrestees will not have to pay if they do not

have the ability, the local arrestee has the benefit of being charged one-half the amount that other arrestees are charged. The Legislature could rationally have concluded that imposing an ability-to-pay condition in cases of county and state arrestees but omitting it as to local arrestees was reasonable because the former are exposed to a potential debt two times the size of that the latter will have to pay. This is a plausible basis for the differential treatment.

Accordingly, we conclude that equal protection principles did not require the trial court to determine defendant's ability to pay before imposing a criminal justice administration fee payable to the City of San Jose. (See § 29550.1; *Hofsheier, supra*, 37 Cal.4th at pp. 1199, 1200-1201.) In view of our conclusion, we do not reach defendant's contentions concerning the court's failure to make an inquiry concerning his ability to pay and the purported lack of evidence of his ability to pay.

II. Conduct Credit

At the sentencing hearing on September 8, 2011, the trial court initially granted defendant 70 actual days credit and 34 days conduct credit for a total of 104 days. After the court and counsel further discussed the matter, the court granted defendant an additional 50 actual days credit to reflect time he had spent in a court-ordered residential treatment program. Thus, defendant was granted 120 actual days credit and 34 days conduct credit for a *total of 154 days*. However, as defendant argues and the Attorney General appropriately concedes, the clerk's minutes of the sentencing hearing and the abstract of judgment incorrectly indicate that defendant was granted a *total of 104 days*. We will order the clerk's minutes and the abstract of judgment corrected accordingly.

In his opening brief on appeal, defendant also argued that he was entitled to additional conduct credit under the current version of Penal Code section 4019 based on equal protection principles. After defendant filed his opening brief, the California Supreme Court issued its decision in *Brown, supra*, 54 Cal.4th 314, addressing certain amendments to Penal Code section 4019. In his reply brief, defendant acknowledges that

“his equal protection argument is no longer viable” and that *Brown* “precludes [his] equal protection claim before this court.” (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Defendant indicates that he is asserting the equal protection claim solely to preserve it for federal review. We therefore reject defendant’s claim for additional conduct credit based on the current version of Penal Code section 4019.

III. Other Errors

The Attorney General asserts in a footnote that the trial court imposed a court security fee of only \$30, but the abstract of judgment incorrectly indicates that a court security fee of \$150 was imposed. We do not agree with the Attorney General’s suggestion that the abstract of judgment should be modified to reflect a \$30 court security fee. The trial court imposed a \$30 “[c]ourt security fee” for *each* of defendant’s five convictions, for a total of \$150. Thus, the abstract of judgment correctly reflects the court’s oral pronouncement. However, we determine that the court should have imposed \$40, rather than \$30, for each conviction, pursuant to the version of Penal Code section 1465.8 in effect at the time defendant was convicted on March 30, 2011. (Stats. 2011, ch. 10, § 8, eff. March 24, 2011 [requiring court security charge of \$40 on every criminal conviction]; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372 [concluding that that trial court was required to impose a court security fee for each of the defendant’s felony and misdemeanor convictions]; *People v. Alford* (2007) 42 Cal.4th 749, 752, 759 [holding that the court security fee is not a punitive fine subject to ex post facto restrictions, and that the trial court properly imposed the fee where former Penal Code section 1465.8 took effect after the defendant committed his crime, but before he was convicted].) We will order the judgment modified accordingly.

We further observe that the trial court orally imposed a \$400 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a suspended \$400 parole revocation restitution fine (Pen. Code, § 1202.45). The fines, however, are not reflected in the clerk’s minutes or in

the abstract of judgment. We will order the minutes and abstract corrected to include these amounts.

We also observe that the clerk's minutes and the abstract of judgment refer to a drug program fee of \$150 (Health & Saf. Code, § 11372.7). The trial court orally stated that the drug program fee was waived. We will order the fee stricken from the minutes and the abstract. (See *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [on a silent record, the appellate court presumes the trial court found the defendant did not have the ability to pay the drug program fee].)

DISPOSITION

The judgment is ordered modified to reflect that a court security charge of \$40 is imposed for each of defendant's five convictions, for a total of \$200, pursuant to former Penal Code section 1465.8. As so modified, the judgment is affirmed. The abstract of judgment is ordered modified to conform to the judgment by: (1) stating that the court security charge is \$200 (former Pen. Code, § 1465.8), rather than "\$150"; (2) stating that the presentence custody credit is a total of 154 days, rather than "104" days; (3) stating that the restitution fine is \$400 (Pen. Code, § 1202.4, subd. (b)); (4) stating that the suspended parole revocation restitution fine is \$400 (Pen. Code, § 1202.45); and (5) striking the drug program fee of \$150 (Health & Saf. Code, § 11372.7). The clerk of the superior court shall prepare a copy of the amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. The clerk of the superior court is also ordered to correct the minutes of September 8, 2011 to reflect the same changes as those in the amended abstract of judgment.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.