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

THE PEOPLE,

Plaintiff and Respondent,

v.

OWEN KENNY GARDNER,

Defendant and Appellant.

H037574

(San Benito County

Super. Ct. No. CR-10-02114)

Pursuant to a negotiated disposition Owen Gardner (appellant) pleaded no contest to one count of unlawful sexual intercourse with a minor more than three years younger (Pen. Code, § 261.5, count one) and one count of oral copulation on a person under 18 years of age (Pen. Code, § 288(a) subd. (b)(1), count two).

In exchange for his no contest pleas, appellant was promised that felony probation would be "open" depending on whether or not there was a "favorable 288.1 report."¹ Four remaining counts were to be dismissed.

¹ Penal Code section 288.1 provides: "Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person."

It appears that although the psychologist's report was not for the purpose of determining whether sentence should be suspended for a person convicted of the

On September 23, 2011, the court suspended imposition of sentence and placed appellant on probation on condition, among other things, that he serve 180 days in county jail. The court awarded appellant eight days of custody credits (six actual days and two days of conduct credit). In addition, relevant to appellant's arguments on appeal, the court ordered that appellant register as a sex offender, and as "[a]dditional conditions" of probation ordered that appellant pay an "eighty dollar security fee," a "hundred fifty dollar presentence investigation fee" a "sixty dollar criminal conviction assessment fee," and "thirty dollars probation supervision fee," as "directed by the probation officer."

Appellant filed a timely notice of appeal.

On appeal, appellant contends that the court abused its discretion in ordering him to register as a sex offender. Further, appellant challenges the imposition of some of the fees he was ordered to pay on various grounds, which we shall outline later. Finally, on equal protection grounds appellant asserts that he is entitled to two days of presentence conduct credits for every two days served under a 2011 amendment to section 4019. For reasons that follow, we remand this case to the trial court for further proceedings.

Facts and Proceedings Below²

In November 2009, appellant met Jane Doe, a 15-year-old fellow student at San Benito High School; at some point they began a dating relationship. Sometime between March and August 2010, the two had a series of consensual sexual encounters. Jane told investigators that she had sex with appellant two or three times and that appellant performed oral sex on her five or six times. Jane became pregnant. When she told appellant about the pregnancy he asked Jane to lie and tell her parents he was not the

commission of a lewd act on a child under 14, as provided by Penal Code section 288.1, the court ordered a report of such a nature in determining whether to grant probation and whether to order sex offender registration under Penal Code section 290.006.

² The facts are taken from the police reports in this case, the probation officer's report and testimony presented at appellant's sentencing hearing. The police reports supplied the factual basis for the plea.

father of the child. When Jane's parents found out about the pregnancy in September 2010, they called the police and asked them to investigate appellant for having unlawful sexual contact with their daughter.³

Appellant was aware that Jane was only 15 years old. Initially, appellant told Jane and her parents that he was 17 years old; however, after a final sexual encounter with Jane he told her that he was 19 years old. Appellant told Jane that if she reported him, he would kill himself.

The court took judicial notice of the record in appellant's juvenile case out of Monterey County. In that case, appellant was convicted of sexual penetration of a person under 18 years old. (Pen. Code, § 289, subd. (h).) The conviction was based on an October 2006 sexual encounter between appellant who was 15 years old at the time and his then girlfriend who was 14 years old.

In connection with the Monterey County case, appellant's former girlfriend testified that initially she told the police that appellant used force in the sexual encounter she had with him. However, she explained that it was a consensual encounter, but she told the police that appellant forced her because she was ashamed and her parents were angry with her.

San Benito County Deputy Sheriff Terry Edwards testified at appellant's sentencing hearing. She said that when she was a school resource officer at appellant's high school she had several telephone calls from appellant asking if it was illegal to date girls who were 14 or 15 years old. Deputy Edwards advised appellant that it was not illegal to date them, but to not do anything sexual with them as they were not old enough to give consent. She told him that he should date girls who were closer to his age. Appellant was 18 years old at the time. Deputy Edwards thought the conversations she had with appellant occurred in the fall of 2008 through to the spring of 2009. Deputy

³ Eventually, the pregnancy was terminated.

Edwards knew that around the time appellant was asking her advice he was dating two girls both of whom were 14 or 15 years old.

Deputy Richard Brown testified that when he was a school resource officer at San Benito High School, similar to Deputy Edwards, he had in-person and telephone conversations with appellant regarding the appropriateness of dating younger girls. Deputy Brown advised appellant that it was not appropriate to date 14- and 15-year-old girls. Appellant asked him the same question on more than one occasion. Deputy Brown warned appellant that he could be charged with a crime if he engaged in sexual activity with an underage girl.

Dr. Thomas Reidy performed appellant's Penal Code section 288.1 evaluation. Dr. Reidy stated that appellant revealed that he had sexual relations with three different girls when he and the girls were all between 14 and 17 years old. Dr. Reidy concluded that there was no evidence of deviant sexual behavior or psychosexual deviance, except for the sexual contact with Jane. Dr Reidy opined that appellant was not a psychopath nor did he suffer from a diagnosable behavioral disorder. Dr Reidy concluded that the sexual contact with Jane constituted adult antisocial behavior, but he stated that he did not uncover evidence of behavior that met the criteria for Antisocial Personality Disorder.

Discussion

Sex Offender Registration

Appellant contends that the court erred in ordering him to register as a sex offender. Appellant's challenge to the order is based upon the claim that the court's finding that he was at risk for committing similar offenses was unsupported by the evidence; and therefore, was an abuse of discretion. Respectfully, we disagree.⁴

⁴ Penal Code section 290.006 requires the court to make a finding that an underlying sex offense was committed by the defendant based upon sexual compulsion or gratification and state the reasons for that finding. (§ 290.006.) The court made such a finding, but did not state the reasons for that finding. However, appellant does not challenge that finding here.

In ordering appellant to register as a sex offender, the court stated that it found that "the circumstances are such that, first of all, the threshold issue that the crimes were committed for purposes of sexual gratification and, in terms of determining . . . recidivism, which is the issue you that have all spent a lot of time on, very difficult to obviously have the crystal ball, determine with any degree of complete certainty, complete certainty isn't required. [¶] While there are many factors that indicate that Mr. Gardner's circumstances were such as were characterized by the defense, the problem I have to the contrary is the fact that Mr. Gardner had, one, he understood the problems that he could get involved in the evidence by his unfortunate involvement in Monterey County, although the charges were very serious, they became less serious as indicated by the witness. [¶] Nevertheless, that's something that Mr. Gardner had the benefit of long before the circumstances that appear today. [¶] And in the intervening time before he gets involved with a second offense, he solicits numerous times the statements from the police officers as to propriety of the conduct that he ultimately engaged in, they unequivocally apprised him of something that really he should have realized in the first place given his involvement in the second but he couldn't seem to prevent himself from acting in the regard that he acted causing the instant conviction and harm caused to the victim. [¶] His static 99 indicates a low to moderate risk.⁵ I would indicate that moderate is probably the more likely if not more given the actual circumstances that he's exhibited from his behavior throughout the last few years. And therefore, I will order the registration under 290."

Lifetime sex offender registration under section 290,⁶ subdivision (b) is mandatory where a person is convicted of one or more sex crimes enumerated in subdivision (c) of

⁵ "The Static-99[R] is a 10-item actuarial assessment instrument created for use with adult male sexual offenders, which is designed to estimate the probability of sexual and violent recidivism. [Citation.]" (*People v. Reynolds* (2010) 181 Cal.App.4th 1402, 1410, fn. 5.)

⁶ All undesignated section references are to the Penal Code

that statute.⁷ " "The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]" [Citations.]" (*In re Alva* (2004) 33 Cal.4th 254, 264.) Another purpose is to notify the public of convicted sex offenders' existence and location so that persons may take protective action. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196 (*Hofsheier*).

In addition to section 290 mandatory registration, section 290.006 provides that a court in its discretion may order a defendant, throughout the course of his or her life while residing in California, to register as a sex offender. Section 290.006 states: "Any person ordered by any court to register pursuant to the [Sex Offender Registration] Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."⁸

As our Supreme Court has explained, in exercising its discretion to order registration under section 290.006, "[T]he trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or

⁷ Section 290 subdivision (b) provides that "Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California . . . shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act."

⁸ The discretionary registration provisions were previously contained in former section 290, subdivision (a)(2)(E). It was renumbered as section 290.006 without substantive change. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76, fn. 4.)

for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) In determining whether to exercise its discretion in requiring registration under section 290.006, the court may consider all relevant available information. (*People v. Garcia* (2006) 161 Cal.App.4th 475, 483 (*Garcia*), disapproved on other grounds in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4.)

The decision to impose registration pursuant to section 290.006 lies within the trial court's discretion. "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377; see also *People v. Jordan* (1986) 42 Cal.3d 308, 316 (*Jordan*) [trial court's ruling under abuse of discretion standard will not be overruled unless it is arbitrary, capricious or patently absurd].)

The court properly considered various circumstances in exercising its discretion under section 290.006. (See *Garcia, supra*, 161 Cal.App.4th at p. 483.) One such factor was appellant's obvious lack of control—that is, after being warned by two deputy sheriffs that he should not have sexual relations with underage girls he engaged in a sexual relationship with Jane. Moreover, as the court noted the evidence suggested that appellant engaged in a pattern of dating 14- and 15-year-old girls. The testimony of the school resource officers supports the inference that appellant had at least two girlfriends in that age range while he was over the age of 18 and the questions that appellant asked of the officers supports the inference that appellant was at least considering having sexual relations with them. Based on this pattern, the court felt that there was moderate if not greater risk that appellant would reoffend. As this court has explained before, one very

important consideration in deciding whether to order registration is whether a defendant is likely to commit similar offenses in the future. (*Lewis v. Superior Court, supra*, 169 Cal.App.4th at pp. 78-79.) Appellant's pattern of past behavior is a good predictor of future behavior. (See generally, *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169 [past conduct is a good predictor of future behavior].)

Appellant argues that it was possible to view his conduct differently. That is, that he engaged in a normal pattern of sexual relationships with classmates that he viewed as his peers. However, appellant's argument provides no basis for relief. As our Supreme Court explained in *Hofsheier, supra*, 37 Cal.4th at page 1197, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case. A trial court's exercise of discretion must be viewed in the context of the particular law it is applying. If a court applies the correct legal principles in a manner which, in its reasoned judgment, best effectuates the purposes of that law, then it has not abused its discretion, even if a different court could have reached a different conclusion. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393–394; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298.)

The trial court's findings were supported by the record and we cannot say that the trial court's conclusions from those findings were "arbitrary, capricious, or patently absurd." (*Jordan, supra*, 42 Cal.3d at p. 316.)

Fees

As noted *ante*, as conditions of probation the court ordered that appellant pay a court security fee in the amount of \$80 (§ 1465.8), a presentence investigation fee of \$150 (§ 1203.1b), a criminal conviction assessment fee in the amount of \$60 (Gov. Code, § 70373) and a monthly probation supervision fee in the amount of \$30 (§ 1203.1b) .

Appellant challenges these fees on two different grounds. First, he argues that there was insufficient evidence of his ability to pay the probation fees or that the court

complied with the procedural requirements of section 1203.1b. Second, the court's order that he pay all these fees as conditions of probation was unauthorized.

Ability to Pay

Appellant contends that the court erred in imposing a \$150 fee for the presentence investigation and a \$30 a month probation supervision fee under section 1203.1b because the court did not make a determination of his ability to pay. Further, there was insufficient evidence that he had the ability to pay the fees imposed.

Respondent asserts that appellant is mistaken as to both contentions.

Relying largely upon this court's decision in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), appellant argues that because the court did not make an ability to pay determination at sentencing, all of the orders regarding the disputed fees must be reversed.

In *Pacheco*, the trial court imposed a variety of fees as conditions of probation—attorney's fees, booking fees, probation supervision fees, and court security fees—all of which were statutorily conditioned on the defendant's ability to pay them. The trial court made no assessment of the defendant's ability to pay any of the fees, two of which (attorney's fees and probation supervision costs) could not legally have been imposed as conditions of probation. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1396–1399, 1401–1402.) The trial court had referred the matter to the Santa Clara County Department of Revenue for a determination of the defendant's ability to pay attorney's fees, but had not conditioned imposition of the fees on the outcome of that determination. (*Id.* at pp. 1396, 1398.) We noted that the referral, "shed[] no light on the issue" of the defendant's ability to pay. (*Id.* at p. 1398.) While a county officer may inquire into a defendant's ability to pay, it is the court that must make the ultimate determination and a referral alone does not fulfill this requirement. (*Id.* at pp. 1398–1399.) Further, we found that attorney's fees, probation supervision fees, and court security fees could not be imposed as conditions of probation and required separate orders. (*Id.* at pp. 1403–1404.)

We reiterate, section 1203.1b, subdivision (b) states in pertinent part: "The court shall order the defendant to pay the reasonable costs [of probation supervision and any presentence investigation and report] if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." The statute describes the procedure the trial court must follow before making such an order. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1400–1401.) The court shall first order the defendant to appear before "the probation officer, or his or her authorized representative" so that the officer may ascertain the defendant's ability to pay any part of these costs, and to propose a payment schedule. (§ 1203.1b, subd. (a).) Unless the defendant waives the right, before the court orders payment of these costs the defendant is entitled to a court hearing on his or her ability to pay them. (*Id.*, subds. (a) & (b).)

"The term 'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the . . . presentence report . . . and probation supervision . . . and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position [within the one-year period from the date of the hearing] [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (§ 1203.1b, subd. (e).) Where, as here, the record does not indicate that the probation officer or the trial court made a determination of the defendant's ability to pay probation supervision costs or that the defendant was informed of the right to a court hearing on the ability to pay, it has been held that a remand for the purpose of compliance with section 1203.1b is warranted. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067–1068; see also *Pacheco, supra*, 187 Cal.App.4th at pp. 1401, 1404.)

As to appellant's argument that there is insufficient evidence of his ability to pay the probation related fees, we note that the fees were to be paid "as directed by the probation officer." As such, and in the absence of a determination of ability to pay in accordance with the statutory procedures quoted above, currently, appellant is not properly subject to an order to pay any particular amount of probation-related costs. At most, he is subject to an order for a determination of ability to pay that could require him to pay up to certain amounts depending on his financial ability. Accordingly, in essence, his challenge to the probation order on the ground that there is no evidence to support a finding of his ability to pay is premature.

For this reason, we reject respondent's argument that the record contains substantial evidence that appellant has the ability to pay the amounts set by the court.

We will remand this case to the trial court for an ability to pay determination.

Fees as Conditions of Probation

Respondent concedes that appellant is correct in arguing the assessments imposed under sections 1465.8, subdivision (a)(1), and 1203.1b and Government Code section 70373 may not be imposed as conditions of probation. Nevertheless, respondent argues they should be imposed as separate orders.

The court security fee under section 1465.8 is designed to "ensure and maintain adequate funding for court security." (§ 1465.8, former subd. (a)(1), Stats.2011, ch. 10 § 8, eff. March 24, 2011.) Government Code section 70373 shares a similar purpose with section 1465.8 to ensure and maintain adequate funding for court facilities. (Gov. Code, § 70373.) These fees finance the criminal justice system by funding the courts and are not rehabilitative or restitutionary in nature. Thus, they may not be made conditions of probation. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1402–1403.)

Similarly, an order for probation costs may not be a condition of probation. (*People v. Hart* (1998) 65 Cal.App.4th 902, 907 (*Hart*).) As this court has explained before, a probation supervision fee, which is collectible as a civil judgment, "cannot be

made a condition of probation. [Citations.]" (*Pacheco, supra*, 187 Cal.App.4th at p. 1401.)

Section 1203.1b, subdivision (a),⁹ provides that a defendant, depending upon his or her ability to pay, may be ordered to pay "all or a portion of the reasonable cost of any probation supervision . . . [and] of conducting any preplea investigation and preparing any presentence report" However, section 1203.1b does not authorize payment of either costs or fees as a condition of probation. "These costs are collectible as civil judgments; neither contempt nor revocation of probation may be utilized as a remedy for failure to pay. ([§] 1203.1b, subd. (d) . . .)" (*People v. Washington* (2002) 100 Cal.App.4th 590, 592.)¹⁰ Thus, it is well established that the trial court may not require, as a condition of probation, payment of probation fees or costs. (*Hart, supra*, 65 Cal.App.4th at p. 907; see also *People v. Bradus* (2007) 149 Cal.App.4th 636, 641-642; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068; *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321; *People v. Washington, supra*, 100 Cal.App.4th at pp. 592-593.)

However, the fees may be imposed separately from appellant's probation conditions. (*Pacheco, supra*, 187 Cal.App.4th at pp. 1402–1403.) Accordingly, the probation order should be modified to delete the court security fee (§ 1465.8) and court

⁹ Section 1203.1b, subdivision (a), provides in pertinent part, "In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report"

¹⁰ Section 1203.1b, subdivision (d), provides in pertinent part, "Execution may be issued on the order issued pursuant to this section in the same manner as a judgment in a civil action. The order to pay all or part of the costs shall not be enforced by contempt."

facilities funding fee (Gov. Code, § 70373), and a separate order should be entered for such fees. Similarly, if on remand the court determines that appellant has the ability to pay the presentence investigation fee and the monthly probation supervision fee (§ 1203.1b) the court shall enter a separate order for those fees.

Finally, we note that a review of our records reveals that these issues—failure to determine a person's ability to pay before imposing various fees, fines, and costs and improper imposition of some of these items as conditions of probation—have been the subject of numerous cases in our court in recent years. The issue is consuming considerable time and resources at both the trial and appellate levels and appears to be one that could be resolved by a standardization of procedures in the trial court; something that we urge the trial courts in this district undertake.

The 20 percent Surcharge

The court imposed a 20 percent surcharge purportedly pursuant to Health and Safety Code section 11372.7 in the amount of \$120.

Appellant contends that Health and Safety Code section 11372.7 does not authorize a 20 percent surcharge on fines or fees. Rather, it authorizes a fine only for certain convictions. Appellant is correct.

Health and Safety Code section 11372.7 provides, "(a) Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense. The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law." Appellant was not convicted of any crime related to use, possession or sale of drugs.

Nevertheless, respondent points out that section 1465.7 provides for a state surcharge of 20 percent to be levied on the base fine used to calculate the state penalty assessment.

Certainly, section 1465.7 provides, "(a) A state surcharge of 20 percent shall be levied on the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464. [¶] (b) This surcharge shall be in addition to the state penalty assessed pursuant to Section 1464 of the Penal Code and may not be included in the base fine used to calculate the state penalty assessment as specified in subdivision (a) of Section 1464."

In turn section 1464 provides, "(a)(1) Subject to Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and except as otherwise provided in this section, there shall be levied a state penalty in the amount of ten dollars (\$10) for every ten dollars (\$10), or part of ten dollars (\$10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses, including all offenses, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code."

Respondent argues that because the surcharge is mandatory and the trial court must impose it, this court should correct the probation order to reflect that the 20 percent surcharge was imposed pursuant to section 1465.7.

Appellant counters that according to the minute order of the sentencing hearing, the court imposed on a separate line \$1389 in penalty assessments. Implicitly, appellant asserts that included within this amount is the 20 percent surcharge (§ 1465.7).

As we shall explain, we find problems with the amount of the penalties imposed in this case, as well as the amount of the base fine.

As the Second District Court of Appeal pointed out in *People v. Castellanos* (2009) 175 Cal.App.4th 1524, a fine is subject to seven different penalties and surcharges. In Los Angeles County, these penalties and surcharges are (1) a 100 percent state penalty assessment (§1464, subdivision (a)(1)), (2) a 20 percent state surcharge

(§1465.7), (3) a 30 percent state courthouse construction penalty (Gov. Code, § 70372),¹¹ (4) a 70 percent additional penalty (Gov. Code, § 76000, subdivision (a)(1)), (5) a 20 percent additional penalty if authorized by the county board of supervisors for emergency medical services (Gov. Code, § 76000.5, subdivision (a)(1)), (6) a 10 percent additional penalty "[F]or the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act" (Gov. Code, § 76104.6, subdivision (a)(1)), and (7) a 10 percent additional state-only penalty to finance Department of Justice forensic laboratories (Gov. Code, § 76104.7). (*Id.* at pp. 1528-1530.)

As this court has explained before, "In other words, there are seven assessments, surcharges, and penalties parasitic to an underlying fine that could increase the fine" (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1374 (*Voit*).

We note that before appellant's last crime was committed, effective June 10, 2010, the DNA assessment imposed pursuant to Government Code section 76104.7 increased from \$1 to \$3. (Stats. 2009-2010, 8th Ex.Sess., ch. 3, § 1.) Thus, at the time appellant

¹¹ This penalty was reduced in *Castellanos* from a maximum of 50 percent. As the Second District Court of Appeal (Div. 5) explained in *People v. McCoy* (2007) 156 Cal.App.4th 1246 (*McCoy*), for a period of time Government Code section 70375, subdivision (b) authorized two potential reductions in the 50 percent state court construction penalty, one the amount collected for deposit into a local courthouse construction fund pursuant to Government Code section 76100, and the other the amount collected for the "Transitional State Court Facilities Construction Fund" to the extent it is funded by the local courthouse construction fund. (*McCoy, supra*, at pp. 1252-1253; Stats. 2002, ch. 1082, § 4, p. 6996; Stats. 2003, ch. 592, § 18, p. 3590.) By reference to a chart included in Government Code section 76000, subdivision (e) that reflected the amounts various counties were collecting for local courthouse construction, *McCoy* concluded that Los Angeles County had, by virtue of its local courthouse collections, effectively reduced the 50 percent maximum to a 30 percent penalty assessment for state courthouse construction. (*McCoy, supra*, 156 Cal.App.4th 1246, 1254.) It was this reduction that was later applied by the same court in *Castellanos*.

was sentenced there were seven assessments, surcharges and penalties parasitic to an underlying fine that could have increased that fine by up to 300 percent.¹²

Here the court imposed two fines that are potentially subject to the penalties and surcharges; a \$400 fine and a \$200 sex offender fine (§ 290.3). If the San Benito County Board of Supervisors has authorized the Government Code section 76000.5, subdivision (a)(1) additional penalty for emergency medical services, the \$600 in fines could have led to penalties and surcharges in the amount of \$1800. If not, the penalties and surcharges could have amounted to \$1680.

The calculation of penalties and surcharges is complicated further by the fact that the courthouse construction penalty is not necessarily 50 percent. As this court noted in *Voit, supra*, 200 Cal.App.4th at p. 1374, "[i]dentifying the amount of the courthouse construction penalty is not as straightforward as the others."

At the time appellant committed his crimes, Government Code section 70372 provided: "Except as otherwise provided in subdivision (b) of Section 70375," the state court construction penalty was 50 percent (Gov. Code, § 70372, subd. (a)(1), Stats.2009-2010, 2nd Ex.Sess., ch. 10, § 5, eff. May 21, 2009), but it was subject to reduction by a county "as provided in subdivision (b) of Section 70375." (Gov. Code, § 70372, subd. (a)(2), Stats. 2009-2010, 2nd Ex.Sess., ch. 10, § 5.) As the Second District Court of Appeal (Div. 5) explained in *People McCoy, supra*, 156 Cal.App.4th 1246, for a period of time Government Code section 70375, subdivision (b) authorized two potential reductions in the 50 percent state court construction penalty, one the amount collected for deposit into a local courthouse construction fund pursuant to Government Code section 76100, and the other the amount collected for the "Transitional State Court Facilities Construction Fund" to the extent it is funded by the local courthouse construction fund. (*McCoy, supra*, at pp. 1252-1253; Stats. 2002, ch. 1082, § 4, p. 6996; Stats. 2003, ch.

¹² Effective June 27, 2012, the DNA assessment imposed pursuant to Government Code section 76104.7 increased from \$3 to \$4. (Stats. 2012, ch. 32, § 25.)

592, § 18, p. 3590.) By reference to a chart included in Government Code section 76000, subdivision (e) that reflected the amounts various counties were collecting for local courthouse construction, *McCoy* concluded that Los Angeles County had, by virtue of its local courthouse collections, effectively reduced the 50 percent maximum to a 30 percent penalty assessment for state courthouse construction. (*McCoy, supra*, 156 Cal.App.4th at p. 1254.)

Following the reasoning of *McCoy*,¹³ we note that the version of Government Code section 76000, subdivision (e) applicable in 2010, when defendant's last crime was

¹³ As the *McCoy* court explained, although the answer as to how much deduction must be made from the \$5 state court construction penalty is "not as clear as all would wish" the answer can be found in Government Code section 76000. "Section 76000, subdivision (a) authorizes a penalty assessment of \$7 on \$10 of every fine. This penalty assessment of \$7 on \$10 of every fine does not apply to: Penal Code section 1202, subdivision (b)(1) and 1202.45 restitution fines; Penal Code section 1464 penalty assessments; specified parking offenses, and the Penal Code section 1465.7 state surcharge. (§ 76000(a)(3) as amended by Stats.2007, ch. 302, § 4.) Government Code section 76000, subdivision (a)(2) grants each county board of supervisors the authority to specify, within limits, how the \$7 penalty assessment is to be spent: 'These moneys shall be taken from fines and forfeitures deposited with the county treasurer prior to any division pursuant to Section 1463 of the Penal Code. [¶] The county treasurer shall deposit those amounts specified by the board of supervisors by resolution in one or more of the funds established pursuant to this chapter.' The Los Angeles County Board of Supervisors has specified that \$2 of the Government Code section 76000, subdivision (a) is to be deposited with the county treasurer for courtroom construction purposes. (L.A. County Board of Supervisors, Resolution of the Board of Supervisors to Increase the Penalty Assessments for the Courtroom Construction and Criminal Justice Facility Funds, Mar. 8, 1988.) Section 76000, subdivision (e) consists in part of a chart that specifies for each county that amount of the penalty assessment of \$7 on \$10 of every fine the local board of supervisors has allocated for purposes *other than courthouse construction*. Government Code section 76000, subdivision (e) states in part; 'The seven-dollar (\$7) additional penalty authorized by subdivision (a) shall be reduced in each county by the additional penalty amount assessed by the county for the local courthouse construction fund established by Section 76100 as of January 1, 1998, when the money in that fund is transferred to the state under Section 70402. The amount each county shall charge as an additional penalty under this section shall be as follows: [¶] . . . Los Angeles [\$5.00].' Thus, the Los Angeles County Board of Supervisors has determined that \$5 of the penalty assessment of \$7 on \$10 of every fine is *not* to be used for

committed, indicates that San Benito County was collecting \$2 from the \$7 penalty in Government Code section 76000 for local courthouse construction. (Stats. 2008, ch. 218 § 5.) In other words, the state court construction fee of \$5 per \$10 fine was reduced to \$3, or 30 percent, at that time. Following *People v. High* (2004) 119 Cal.App.4th 1192,¹⁴ we apply the statutes (Gov. Code, §§ 70372, 70375, 76000) in effect at the time of defendant's crimes in order to avoid an ex post facto expansion of defendant's punishment by later statutory amendments. Thus, assuming for the sake of argument that the state court construction penalty is 30 percent, the penalties and surcharges applicable to appellant's \$600 in fines would be \$1680—if we include the 20 percent penalty for emergency medical services (Gov. Code, § 76000.5, subd. (a)) or \$1560 if we do not. Even if we were to remove the \$120 surcharge (§ 1465.7) the total would still be \$1560 or \$1440. As noted, the court imposed \$1395.

Since we must return this case to the trial court for other reasons, we will order the court to clarify the amount and statutory basis for penalty assessments it imposed and clarify that any surcharge is imposed pursuant to Penal Code section 1465.7. Further, we question the statutory basis for the \$400 fine as none was articulated by the court and nothing appears in the sentencing minute order. Accordingly, we order that the trial court articulate the statutory basis for the \$400 fine imposed on appellant.

Penal Code Section 4019 Credits

Appellant argues that an amendment to section 4019 effective October 1, 2011, must be applied to his case by virtue of the equal protection clauses of the California and federal Constitutions.

courtroom construction. That leaves \$2 of the \$7 assessment that is allocated for courthouse construction pursuant to the board of supervisor's March 8, 1988 resolution." (*McCoy, supra*, 156 Cal.App.4th at pp. 1253-1254.)

¹⁴ In *People v. High, supra*, 119 Cal.App.4th 1192, the court concluded that punitive fund raising measures cannot be applied retroactively without violating the Constitution. (*Id.* at pp. 1197-1199.)

At the outset it is important to note that all appellant's presentence custody occurred after January 25, 2010 and before October 1, 2011.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

Before January 25, 2010, conduct credits under section 4019 could be accrued at the rate of two days for every four days of actual time served in presentence custody (sometimes referred to as one-third time or credits calculated at 33 percent). (Stats. 1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra*, 46 Cal.4th at p. 939 [section 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony such as appellant. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subs. (b), (c), & (f)].)¹⁵

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats. 2010, ch. 426, § 2.) By its express terms, the newly created section 4019, subdivision (g), declared these September 28,

¹⁵ For those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony, conduct credits continued to be calculated at two days for every four days of actual custody. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subs. (b), (c), & (f)].)

2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats. 2010, ch. 426, § 2.)

This brings us to legislative changes made to section 4019 in 2011 as relevant to appellant's equal protection challenge. These statutory changes, among other things, reinstated one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.¹⁶ (§ 4019, subds. (b), (c), & (h).)

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, (hereafter the October 2011 amendment) are to have prospective application only —i.e. to crimes committed on or after the effective date of the statute, appellant contends that the October 2011 amendment to section 4019 violates the equal protection clauses of the federal and California Constitutions if it is not applied retroactively.

Preliminarily, we note that to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837.)

Appellant contends that the Supreme Court has already issued binding authority for equal protection purposes and the holding in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) applies to this case.

In *Kapperman, supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new Penal Code section 2900.5) that made actual custody credits prospective,

¹⁶ These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Id.* at pp. 544–545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) In our view, *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

Our Supreme Court recently confirmed, "[c]redit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).)

Although the Supreme Court in *Brown* was concerned with the January 2010 amendment to section 4019 (*Brown, supra*, 54 Cal.4th at p. 318), the reasoning of *Brown* applies with equal force to the prospective-only application of the current version of section 4019.

As can be seen, in *Brown*, the California Supreme Court expressly determined that *Kapperman* does not support an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra*, 54 Cal.4th at pp. 328–330.) In rejecting the defendant's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and

after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra*, at pp. 328–329.)

Similarly, we reject appellant's reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604, as cited in a footnote in *Kapperman*. (11 Cal.3d at p. 547, fn. 6.) This Illinois case, similar to *Kapperman*, dealt with actual custody, and not presentence conduct credits with which we are concerned here. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis in *People ex rel. Carroll v. Frye* was the date of conviction, a date out of a defendant's control, and not the date the crime was committed. (*People ex rel. Carroll v. Frye, supra*, 35 Ill.2d at pp. 609–610.)

More importantly, in *Brown*, the Supreme Court confirmed that the October 2011 amendments to section 4019 have prospective application only. The court noted that the defendant had filed a supplemental brief in which he contended that he was entitled to retroactive presentence conduct credits under the 2011 amendment to Penal Code section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply prospectively . . . to prisoners who are confined to a county jail [or other local facility] for a crime committed [on] or after October 1, 2011.'" (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, appellant committed his offense in 2010.

Accordingly, we must reject appellant's argument that we must apply the October 2011 amendment to section 4019 to all his presentence custody in this case.¹⁷

¹⁷ In his reply brief, appellant acknowledges that this court must follow the Supreme Court's recent equal protection decision in *Brown, supra*, 54 Cal.4th 314 as it relates to the October 2011 amendment to section 4019. He raises the issue to preserve it for federal review.

Disposition

The judgment (order of probation) is reversed. We remand this case to the trial court to determine appellant's ability to pay the presentence investigation fee and monthly probation supervision fee. On remand, if any order imposing a presentence investigation fee and probation supervision fee is entered, the order will clarify that these items are not conditions of probation. Similarly, the court is to delete the \$80 court security fee (§ 1465.8) and the criminal conviction assessment fee in the amount of \$60 (Gov. Code, § 70373) imposed as conditions of probation and to clarify that these fees are a separate order. Further, the court is to clarify the statutory basis for the \$400 fine imposed on appellant and explain the amount and statutory basis for penalty assessments it imposed as well as clarify that any surcharge is imposed pursuant to Penal Code section 1465.7.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.