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

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTORIA LEA BETTS,

Defendant and Appellant.

H037576

(Santa Clara County

Super. Ct. No. C1197915)

Pursuant to a negotiated disposition, appellant Victoria Betts pleaded no contest to one felony count of receiving stolen property. (Pen. Code, § 496.) In exchange for her no contest plea she was promised an eight month state prison term to be served consecutive to a term she was already serving.

On September 29, 2011, in accordance with the terms of the plea bargain, the court sentenced appellant to the eight month prison term. In addition, among other things, the court ordered appellant to pay restitution to Anjum Afzal in the amount of \$62.41; a \$200 restitution fund fine; and a criminal justice administration fee of \$259.50 payable to Santa Clara County.

On November 15, 2011, appellant filed a notice of appeal.

On appeal, appellant challenges the imposition of the criminal justice administration fee.

### *Facts*

Given the issue on appeal, the facts underlying appellant's conviction are not relevant.

### *Discussion*

After appellant entered her no contest plea, the probation officer submitted a report in which she recommended that appellant be required to pay a criminal justice administration fee (booking fee) of \$259.50 pursuant to Government Code sections 29550, 29550.1, 29550.2.

Appellant challenges the imposition of the booking fee in the amount of \$259.50 on the grounds that the trial court did not determine if she had the ability to pay this fee or determine the actual booking cost.

At the sentencing hearing, the court made no explicit finding that appellant had the ability to pay the fee; and appellant did not object on any grounds.

#### *Ability to Pay*

Respondent concedes that the record does not contain substantial evidence as to appellant's assets or employment prospects, but contends that appellant has forfeited this issue by failing to object below.

Respondent acknowledges that in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), this court held that no objection was necessary to preserve a challenge to the imposition of a booking fee where the court did not consider a defendant's ability to pay. (*Id.* at pp. 1397-1399.) Respondent urges this court to reconsider the reasoning of *Pacheco*.

We decline respondent's invitation for the following reason. *Pacheco* followed our decision in *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 (*Viray*). (*Pacheco, supra*, 187 Cal.App.4th at p. 1397.) In turn, *Viray* quoted *People v. Butler* (2003) 31 Cal.4th 1119, for the rule that the absence of substantial evidence to support a challenged

judicial action presents an obvious exception to the requirement that an objection must be asserted in the trial court before it can be heard on appeal. (*Viray, supra*, 134 Cal.App.4th at p. 1217.) If the trial court was required to find the facts asserted by defendant, then the absence of substantial evidence to support such findings would point to error which could, under the cited rule, be raised for the first time on appeal. This is a sound rule of long standing. We note that the Supreme Court has granted review in a case declining to follow *Pacheco* and distinguishing *Viray*. (*People v. McCullough* (2011) 193 Cal.App.4th 864, 123 Cal.Rptr.3d 341, review granted June 29, 2011, S192513.) Until we receive further guidance from the Supreme Court we will continue to adhere to our views as expressed in *Pacheco*.

As we explained in *Pacheco*, Government Code sections 29550, 29550.1, and 29550.2 "govern fees for booking or otherwise processing arrested persons into a county jail." (*Pacheco, supra*, 187 Cal.App.4th at p. 1399, fn. 6.) These three code sections vary to some degree based on the identity of the arresting agency. (*Ibid.*) Arrests made by a "city, special district, school district, community college district, college, university or other local arresting agency" are governed by section 29550, subdivisions (a) and (b) and section 29550.1; arrests made by a county are governed by section 29550, subdivision (c); and arrests made by "any governmental entity not specified in Section 29550 or 29550.1" are governed by section 29550.2, subdivision (a). (*Ibid.*)

The record provides little in the way of showing which agency, if any, arrested appellant for the offenses charged in this case. An arrest warrant dated January 26, 2011, shows that "S24 Sullivan" of the "Campbell Police Department" was the affiant for the search warrant; and the preliminary hearing transcript shows that the Campbell Police Department investigated the underlying case. However, upon application of the District Attorney, on May 25, 2011, the court issued an order requiring the Department of Corrections and Rehabilitation and/or the warden at Valley State Prison for Women in Chowchilla, to release appellant to the Santa Clara County Department of Corrections for

legal proceedings. From this we deduce that a county agent booked appellant into the county jail.

"Government Code section 29550, subdivision (c) provides that if the county was the arresting agency, the fee 'shall not exceed the actual administrative costs' of booking. [Section 29550, s]ubdivision (d)(1) further provides that a 'judgment of conviction may impose an order for payment' of the fee and 'execution on the order may be issued on the order in the same manner as a judgment in a civil action.' Subdivision (d)(2) further provides that '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 fee." (*Pacheco, supra*, 187 Cal.App.4th at pp. 1399–1400.)

Nevertheless, we point out that in contrast to appellant, the defendant in *Pacheco* was placed on probation, not sentenced to prison. (*Id.* at p. 1395.) Where the fee is imposed on a defendant who is sentenced to prison, under the relevant provisions, subdivisions (c) and (d)(1) of section 29550, it appears that no ability to pay finding is required, and the reasoning of *Pacheco* does not apply.<sup>1</sup>

Even if this court were to determine that there was an implied ability to pay requirement in Government Code section 29550 for defendants sentenced to state prison, a trial court's determination of a defendant's ability to pay fines and fees need not be

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<sup>1</sup> There is good reason for making the distinction between defendants sentenced to prison and those granted probation. Defendants found to be ineligible for probation have generally been convicted of more serious crimes or have more extensive criminal histories than those eligible for probation. For defendants sentenced to state prison, an ability-to-pay determination is usually irrelevant; if they cannot pay at the time they are sentenced, they can work off the fee while in custody. (See *People v. Frye* (1994) 21 Cal.App.4th 1483, 1486-1487.) On the other hand, defendants who are eligible for probation are being granted conditional release partly to aid in their rehabilitation and partly because they are considered less dangerous to the public. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) These goals would not be best served if a probationer were burdened by costs beyond his or her ability to pay them—it would not help a probationer's rehabilitation if a probationer felt impelled to commit another crime in order to get the money to pay a booking fee.

express but may be implied through the content and conduct of the hearings. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516, [Health & Saf. Code, § 11372.7, subd. (a), drug program fee]; *People v. Phillips* (1994) 25 Cal.App.4th 62, 71 [Pen. Code, § 1203.1b, probation costs].)

In determining a defendant's ability to pay, the court is permitted to consider various criteria, including a defendant's future discernible financial position. (*People v. Phillips, supra*, 25 Cal.App.4th at p. 70; *People v. Frye, supra*, 21 Cal.App.4th at p. 1487.)

The record shows that appellant was already serving a sentence on another matter in case number B1047642, with a scheduled release date of January 15, 2012. Thus, when appellant was sentenced on September 29, 2011, she had at least three months left on her first sentence and the court ordered that the new sentence run consecutive to that sentence. Hence, appellant faced close to a year in state prison.

For purposes of the booking fee, the court could have, and it appears did, assume that appellant would be able to obtain prison employment.<sup>2</sup> (See *People v. Frye, supra*, 21 Cal.App.4th at pp. 1486–1487.) Penal Code section 2700 provides, in relevant part, "The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections." This section requires that prisoners who perform assigned work be compensated. (*Ibid.*) In the absence of an objection by appellant, the trial court could reasonably presume the fine would be paid out of appellant's prison wages. If appellant was ineligible for prison work assignment, it was incumbent upon her to alert the court to any such disability. (See *People v. Staley* (1992) 10 Cal.App.4th 782, 786.)

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<sup>2</sup> In fact, as to restitution to be paid to the victim in this case, the court specifically ordered that the director of the California Department of Corrections and Rehabilitation collect the money from appellant's earnings while in prison.

Accordingly, we find that the trial court's implied finding that appellant had the ability to pay the booking fee is supported by substantial evidence.

*Actual Cost of Booking*

As noted Government Code section 29550, subdivision (c) provides that the booking fee "shall not exceed the actual administrative costs" of booking. Where there is no evidence in the record of the actual administrative costs of booking a defendant the fee cannot stand. (*Pacheco, supra*, 187 Cal.App.4th at p. 1400.)

Even if we assume that the trial court impliedly ruled on the actual cost of booking appellant, nothing in the record would support such a finding. We will remand for a ruling on this question. Appellant urges that it is a waste of scarce resources to remand the case. She points out that the cost of transporting her from state prison and housing her locally for the hearing on the actual cost of booking her would be a waste of judicial, prosecution, and defense resources. She asks that we consider striking the fee. We decline so to do. One fee may be only \$259.50, but this court is concerned at the frequency with which this issue is raised in this court. We remand to the superior court to make the requisite finding in the hope that in these days of strained budgets, it will reduce the number of future appeals raising this issue.

Finally, we urge that the superior courts in this appellate district take notice of the requirement that the booking fee a defendant is ordered to pay "not exceed the actual administrative costs" of booking a defendant into a county jail. (Gov. Code, § 29550.) A court cannot undertake this task unless the court has evidence to show what the actual administrative costs are for this procedure. Absent evidence of a calculation made by the booking entity, the trial court must either determine the actual administrative costs or reserve jurisdiction to order reimbursement when those costs are known.

*Disposition*

The booking fees order is reversed. The matter is remanded to the trial court with directions to determine, in accordance with the applicable statute, the actual administrative cost of booking appellant into the Santa Clara County jail.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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GROVER, J.\*

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\* Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.