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

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN WRIGHT,

Defendant and Appellant.

H037722

(Monterey County

Super. Ct. No. SS111338A)

Following a court trial, defendant Benjamin Wright was found guilty of eight counts of lewd acts on a child (Pen. Code, § 288, subd. (a), counts one, two, three, four, five, seven, nine and 10.) The court found true the allegations that defendant had substantial sexual contact with the victim in masturbating the victim, penetrating the victim with his penis, and kissing the victim's vagina. (Pen. Code, § 1203.066, subd. (a)(8).)¹

On November 22, 2011, the court sentenced defendant to 12 years in state prison, consisting of the mid-term of six years on count 10, concurrent six-year terms for counts

¹ The court found defendant not guilty on one additional count of lewd acts on a child (Pen. Code, § 288, subd. (a), count six), and the District Attorney dismissed another count of lewd acts on a child in the furtherance of justice. (Pen. Code, § 1385, count eight.)

one, two, three and four, and one third the midterm on counts five, seven and eight, to be served consecutively.

On December 8, 2011, defendant filed a notice of appeal.

Initially, defendant's counsel filed an opening brief in which no issues were raised and asked this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738.

In reviewing the record this court noticed that in sentencing defendant the court imposed a fine pursuant to Penal Code section 290.3 in the amount of \$1200. There was no explanation as to how the court arrived at this amount; and after this court calculated the fine and various penalty assessments that attach, we became concerned that the amount of the fine was unauthorized under the version of Penal Code section 290.3 that was in effect when defendant committed his crimes. Accordingly, we asked the parties to brief the issue. Having received that briefing we will address that issue.

Facts and Procedural History

By way of an amended information the Monterey County District Attorney charged defendant with 10 counts of lewd acts on a child. (§ 288, subd. (a).)² All the acts were alleged to have occurred between February 1, 2003, and February 1, 2005. The information contained three allegations that in the commission of some of these offenses, the defendant engaged in substantial sexual conduct with a child under 14 years within the meaning of section 1203.066, subdivision (a).

Before trial, the District Attorney agreed to a 12 year "lid" on defendant's sentence, if the defendant waived his right to a jury trial. After an extensive explanation by the court of the rights he would be giving up, defendant agreed to waive jury trial.

² All unspecified section references are to the Penal Code.

During the court trial, Jane Doe³ testified to eight distinct incidents involving defendant, which occurred when she was in either third or fourth grade.

As noted, the court found defendant guilty on eight counts and sentenced him to 12 years in state prison. The court imposed various fines and fees including a \$1200 fine pursuant to "section 290.3 as it's been adopted by the Monterey County board of supervisors."

Discussion

The Section 290.3 Fine

At the time defendant committed his crimes between 2003 and 2005, section 290.3 provided "(a) Every person who is convicted of any offense specified in subdivision (a) of Section 290, shall, in addition to any imprisonment or fine, or both, imposed for violation of the underlying offense, be punished by a fine of two hundred dollars (\$200) upon the first conviction or a fine of three hundred dollars (\$300) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (Stats. 1995, ch. 91, § 121, pp. 346-347.)

Effective September 20, 2006, section 290.3 was amended to increase the fine to "three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (Stats. 2006, ch. 337, § 18.)⁴

Defendant was found guilty of eight counts of violating section 288, subdivision (a), which is an offense specified in subdivision (c) of section 290. (§ 290, subd. (c).) Therefore, the fine was properly imposed in this case.

³ At the time of trial in 2011, Jane was 16 years old; she testified that the first incident happened when she was about eight years old, which would have been sometime in 2003.

⁴ The section 290.3 fine has remained at this level. (Stats. 2007, ch. 579, § 35, eff. Oct. 13, 2007; Stats. 2008, ch. 699, § 9.)

Defendant concedes that the fine was properly imposed, but argues that it is apparent from the record the court imposed a fine of \$300 under section 290.3 and \$900 in penalty assessments. Respondent agrees.

Fines imposed under section 290.3 are punitive and therefore are subject to the prohibition against ex post facto laws. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) Accordingly, the base fine in this case should have been \$200.

Without doubt, the fine is subject to penalty assessments. As the court 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, namely (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),⁵ (4) a 70 percent additional penalty (Gov. Code, § 76000, subd. (a)(1)), (5) a 20 percent additional penalty if authorized by the county board of supervisors for emergency medical services (Gov. Code, § 76000.5, subd. (a)(1)), (6) a 10 percent additional penalty " [F]or the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act' " (*Castallanos, supra*, at p. 1529) (Gov. Code, § 76104.6, subd. (a)(1)), and (7) a 10 percent

⁵ 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*.

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, "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 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.)⁶ Thus, currently, the seven assessments, surcharges and penalties parasitic to an underlying fine can increase that fine by up to 300 percent, which is what it appears the trial court did in this case.⁷

Nevertheless, several of these punitive fund-raising measures took effect after defendant's crimes were committed between February 1, 2003 and February 1, 2005. In *People v. High* (2004) 119 Cal.App.4th 1192 (*High*) the court concluded that section 1465.7 (effective September 30, 2002) and Government Code section 70372 (effective January 1, 2003) imposed punishment and cannot be constitutionally applied retroactively. (*Id.* at pp. 1197-1199.) Following *High*, *People v. Batman* (2008) 159 Cal.App.4th 587, 591, concluded that Government Code section 76104.6 (effective November 3, 2004) cannot be applied retroactively. Based on the logic of these decisions, penalties under Government Code sections 76000.5 (effective January 1, 2007), and 76104.7 (effective July 12, 2006) cannot be imposed on defendant.

Accordingly, the only penalties applicable to defendant's fine are the 100 percent penalty assessment under section 1464, the 20 percent surcharge under section 1464.7, the 70

⁶ Assembly Bill No. 1466 (2011-2012 regular sess.) proposes to amend it yet again from \$3 to \$4.

⁷ One hundred percent under section 1464, subdivision (a); 70 percent under Government Code section 76000, subdivision (a); 50 percent under Government Code section 70372; 20 percent under section 1465.7; 20 percent under Government Code section 76000.5; 10 percent under Government Code section 76104.6; and 30 percent under Government Code section 76104.7.

percent additional penalty under Government Code section 76000, the 10 percent penalty under Government Code section 76104.6, and the courthouse construction penalty under Government Code section 70372. As this court noted in *Voit, supra*, 200 Cal.App.4th 1192, "[i]dentifying the amount of the courthouse construction penalty is not as straightforward as the others." (*Id.* at p. 1374.)

"Except as otherwise provided in subdivision (b) of Section 70375," when defendant committed his crimes, the state court construction penalty was 50 percent (Gov. Code, § 70372, subd. (a)(1), Stats. 2002, ch. 1082 (S.B.1732), § 4), but it is subject to reduction by a county "as provided in subdivision (b) of Section 70375." (Gov. Code, § 70372, subd. (a)(2).) 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. 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*, we note that the version of Government Code section 76000, subdivision (e) applicable in 2005, when defendant's last crime was committed, indicates that Monterey County was collecting \$2 from the \$7 penalty in Government Code section 76000 for local courthouse construction. (Stats. 2003, ch. 592, § 24.) In other words, the state court construction fee of \$5 per \$10 fine was reduced to \$3, or

30 percent, at that time. Following *High*, 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.⁸

According to our calculation, the amount of penalty assessments applicable to defendant's \$200 fine, are \$460 (a 100 percent penalty under section 1464, subdivision (a), a 70 percent penalty under Government Code section 76000, a 30 percent penalty under Government Code section 70372, a 20 percent penalty under section 1465.7, and a 10 percent penalty under Government Code section 76104.6) for a total fine plus penalty assessments of \$660.

Respondent argues that we should remand this case to the superior court for imposition of a lawful fine and penalty assessments. Respondent contends that defendant was subject to a \$200 fine for his first offense and \$300 for each of his seven subsequent offenses. Thus, respondent asserts the court should have imposed a \$2300 fine.

In *People v. O'Neal* (2004) 122 Cal.App.4th 817, the court held that each qualifying conviction in a single proceeding constitutes a separate conviction for purposes of imposing sex offender fines pursuant to section 290.3. (*Id.* at p. 822.) Nevertheless, a trial court is required to impose sex offender fines on each qualifying conviction "*unless the court determines that the defendant does not have the ability to pay the fine.*" (§ 290.3, subd. (a) (italics added); *People v. Burnett* (2004) 116 Cal.App.4th 257, 261, [imposition of fine is

⁸ As this court pointed out in *Voit, supra*, 200 Cal.App.4th 1192, "[p]resumably reflecting a continuing struggle to fund courthouse construction, Government Code section 70375, subdivision (b) has been amended several times since the *McCoy* decision. A 2007 amendment seemingly codified the calculations undertaken in *McCoy*. (Stats. 2007, ch. 302, § 2, p. 2440.) However, an amendment effective January 1, 2009 completely eliminated further reductions for money collected for the local courthouse construction fund, while preserving reductions to be transmitted to the state for the Transitional State Court Facilities Construction Fund. (Stats. 2008, ch. 311, § 8, p. 2114.) . . . The most recent change, effective January 1, 2011, seems to have eliminated any reductions, thus returning the state courthouse construction penalty to its maximum of 50 percent. (Stats. 2010, ch. 709, § 4.)" (*Voit, supra*, at p. 1375, fn. 18.)

mandatory unless court determines that defendant does not have the ability to pay the fine]; *People v. McMahan* (1992) 3 Cal.App.4th 740, 749, [same].) However, "[i]f a trial court fails, without explanation, to impose the section 290.3, subdivision (a) sex offender fine, that is not a jurisdictional error." (*People v. Stewart* (2004) 117 Cal.App.4th 907, 911; *People v. Burnett, supra*, 116 Cal.App.4th at p. 261.) On a silent record, we presume the trial court determined that defendant did not have the ability to pay additional fines and thus should not be compelled so to do. (*People v. Stewart, supra*, at p. 911; *People v. Burnett, supra*, at p. 261.)

We reject respondent's argument that we should return this case to the trial court to impose fines on defendant's seven remaining convictions. The People did not object in the trial court to the trial court's failure to impose the additional fines and thus have forfeited any objection to the imposition of only one fine. (*People v. Burnett, supra*, 116 Cal.App.4th at p. 262; see *People v. Tillman* (2000) 22 Cal.4th 300, 301–302 [People's failure to object forfeits assertion that trial court erred in making discretionary choice not to impose fines].)

The trial court in this case imposed a sex offender fine for only one conviction. Accordingly, we must presume that the trial court determined that defendant does not have the ability to pay the seven additional \$300 fines.

Disposition

The judgment is modified to impose a \$200 fine under section 290.3 and total penalty assessments of \$460. As so modified, the judgment is affirmed. The clerk of the court is directed to prepare an amended abstract of judgment and forward a certified copy of the same to the Department of Corrections and Rehabilitation.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.