Filed 11/12/20 P. v. Sealy CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA LEE SEALY, Defendant and Appellant.	C089772 (Super. Ct. No. 18CF00203)

Defendant Joshua Lee Sealy pleaded guilty to voluntary manslaughter and admitted to personal use of a firearm during the commission of his crime. Defendant also admitted to previously being convicted of a strike offense. The trial court sentenced defendant to serve an aggregate term of 32 years in state prison. The court also imposed the minimum $300 restitution fine (Pen. Code, § 1202.4),[1] a $40 court operations

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[1] Undesignated statutory references are to the Penal Code.

assessment (§ 1465.8), and a $30 criminal conviction assessment (Gov. Code, § 70373). Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168, 1172 (*Dueñas*), defendant argues these fines and fees should be stayed until the trial court holds an ability to pay hearing. We disagree with *Dueñas* and its reasoning. Accordingly, we affirm the judgment.

DISCUSSION

Defendant challenges the trial court's imposition of a restitution fine, a court operations assessment, and a criminal convictions assessment. Citing *Dueñas, supra*, 30 Cal.App.5th 1157, defendant argues imposition of this fine and these assessments without an ability to pay hearing is unconstitutional. He contends they should be stayed and the matter remanded for an ability to pay hearing. We disagree.

At sentencing, the trial court ordered defendant to pay a $300 restitution fine under section 1202.4, a $40 court operations assessment under section 1465.8, and a $30 court facilities assessment under Government Code section 70373. Defendant did not object.

On appeal, defendant argues the trial court violated his right to due process and equal protection and the federal and state constitutional prohibitions on excessive fines by imposing these fines and fees without holding a hearing to determine his ability to pay them. This argument relies primarily on *Dueñas*, which held "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under . . . section 1465.8 and Government Code section 70373." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.)

The *Dueñas* court also held "that although . . . section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas, supra*,

30 Cal.App.5th 1164.) Defendant seeks remand for a hearing regarding his present ability to pay.

The People argue defendant forfeited his claim by failing to object in the trial court. Assuming no forfeiture, we are not persuaded the analysis used in *Dueñas* is correct.

Our Supreme Court is now poised to resolve this question, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, that agreed with the court's conclusion in *Dueñas*, *supra*, 30 Cal.App.5th 1157 that due process requires the trial court to conduct an ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments under section 1465.8 and Government Code section 70373, but not restitution fines under section 1202.4. (*Kopp*, at pp. 95-96.)

In the meantime, we join those authorities that have concluded the principles of due process do not require determination of a defendant's present ability to pay before imposing the fines and assessments at issue in *Dueñas* and in this proceeding. (*People v. Kingston* (2019) 41 Cal.App.5th 272, 279; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 928.) Accordingly, we conclude the imposition of fines, fees, and assessments on an indigent defendant without consideration of ability to pay does not violate due process or equal protection and there is no requirement that the trial court conduct an ability to pay hearing prior to imposing these fines, fees, and assessments.

Likewise, we conclude imposing the minimum $300 restitution fine without considering defendant's ability to pay does not violate the excessive fines clauses of the federal and state Constitutions (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17). (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 731 (*R.J.*

Reynolds Tobacco Co.) [after examining the relevant considerations, a reviewing court can decide for itself whether a fine or penalty is unconstitutionally excessive].)

"The Eighth Amendment prohibits the imposition of excessive fines. The word 'fine,' as used in that provision, has been interpreted to be ' "a payment to a sovereign as punishment for some offense." ' " (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1040 (conc. opn. of Benke, J.) (*Gutierrez*).) The determination of whether a fine is excessive for purposes of the Eighth Amendment is based on the factors set forth in *United States v. Bajakajian* (1998) 524 U.S. 321 [141 L.Ed.2d 314] (*Bajakajian*). (*R.J. Reynolds Tobacco Co.*, *supra*, 37 Cal.4th at pp. 728-729 [applying Eighth Amendment analysis to both defendant's federal and state excessive fines claims].)

" 'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. [Citations.] . . . [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.' (*Bajakajian*, *supra*, 524 U.S. at p. 334.)

"The California Supreme Court has summarized the factors in *Bajakajian* to determine if a fine is excessive in violation of the Eighth Amendment: '(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay. [Citations.]' ([*R.J. Reynolds Tobacco Co*.], *supra*, 37 Cal.4th at p. 728; see *Gutierrez*, *supra*, 35 Cal.App.5th at p. 1040 (conc. opn. of Benke, J.).) While ability to pay may be part of the proportionality analysis, it is not the only factor. (*Bajakajian*, *supra*, 524 U.S. at pp. 337-338.)" (*People v. Aviles*, *supra*, 39 Cal.App.5th at p. 1070.) We review the excessiveness of a fine challenged under the Eighth Amendment de novo. (*Id.* at p. 1072.)

Here, we conclude the $300 restitution fine imposed for voluntary manslaughter is not grossly disproportional to the level of harm and defendant's culpability in this matter.

In light of defendant's violent conduct, the minimum $300 restitution fine is not excessive under the Eighth Amendment or the equivalent provision of the California Constitution.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
HULL, Acting P. J.

/s/
RENNER, J.