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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTOINE J. McCULLOUGH, Defendant and Appellant.	C064982 (Super. Ct. No. 09F08232)

APPEAL from a judgment of the Superior Court of Sacramento County, Steve White, Judge. Affirmed as modified.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Antoine J. McCullough entered a plea of no contest to being a convicted felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and admitted a prior prison

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I. and III. of the Discussion.

term allegation (*id.*, § 667.5, subd. (b)) in exchange for dismissal of the remaining counts and allegations and a stipulated state prison sentence of an aggregate term of four years. The court sentenced defendant accordingly.

Defendant appeals. The trial court granted defendant's request for a certificate of probable cause. (Pen. Code, § 1237.5.)

Defendant contends there is no evidence to support a finding of his ability to pay a $270.17 jail booking fee and a $10 crime prevention fine. He also claims the crime prevention fine is inapplicable to his crime and thus unauthorized. Finally, he claims that he is entitled to additional presentence custody credit pursuant to recent amendments to Penal Code section 4019.

In the published portion of the opinion, we hold that defendant forfeited his challenge to the booking fee by failing to object in the trial court.

In the unpublished portion of the opinion, we modify the judgment by striking the crime prevention fee and awarding additional credits.

DISCUSSION

I. CRIME PREVENTION FINE

The People concede that the trial court imposed an unauthorized $10 crime prevention fine. We accept the concession. Penal Code section 1202.5 authorizes a $10 fine for specified offenses. Defendant was convicted of violating Penal Code section 12021, which is not listed in Penal Code

section 1202.5.[1] We will order the $10 crime prevention fine stricken. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371-372 (*Crittle*).)

II. JAIL BOOKING FEE

When defendant entered his plea, the trial court advised him that as a consequence, fees would be imposed. Having waived referral to probation, defendant was immediately sentenced following entry of his plea. When the court imposed the first fine, an $800 restitution fine, defense counsel asked that the court impose the statutory minimum amount of $200, claiming defendant was on a "fixed income." The court refused, finding $800 to be a "relatively low amount." Defendant does not challenge the restitution fine in this appeal. The court thereafter imposed other fees and fines *to which defendant did not object*, including a $20 court security surcharge fee, the unauthorized $10 crime prevention fine, a $51.34 jail classification fee not challenged in this appeal, and the $270.17 jail booking fee he does challenge.

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[1] Penal Code section 1202.5, subdivision (a), provides in relevant part as follows:

"In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed."

The trial court did not cite the statutory authority for the $270.17 jail booking fee. Defendant suggests that it was imposed pursuant to Government Code section 29550.2.[2]

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[2] Government Code section 29550.2 provides:

"(a) Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons. *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee.

"(b) All fees collected by a county as provided in this section and Section 29550, may be deposited into a special fund in that county which shall be used exclusively for the operation, maintenance, and construction of county jail facilities.

"(c) As used in this section, 'actual administrative costs' include only those costs for functions that are performed in order to receive an arrestee into a county detention facility. Operating expenses of the county jail facility including capital costs and those costs involved in the housing, feeding, and care of inmates shall not be included in calculating 'actual administrative costs.' 'Actual administrative costs' may include any one or more of the following as related to receiving an arrestee into the county detention facility:

"(1) The searching, wristbanding, bathing, clothing,

The People claim that defendant "waived" his challenge to the booking fee by failing to object at sentencing. Defendant claims that waiver does not apply because he is challenging the lack of evidence to support a finding of his ability to pay the fee, citing the rule that a claim of insufficiency of the evidence to support a judgment is cognizable on appeal even

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fingerprinting, photographing, and medical and mental screening of an arrestee.

"(2) Document preparation, retrieval, updating, filing, and court scheduling related to receiving an arrestee into the detention facility.

"(3) Warrant service, processing, and detainer.

"(4) Inventory of an arrestee's money and creation of cash accounts.

"(5) Inventory and storage of an arrestee's property.

"(6) Inventory, laundry, and storage of an arrestee's clothing.

"(7) The classification of an arrestee.

"(8) The direct costs of automated services utilized in paragraphs (1) to (7), inclusive.

"(9) Unit management and supervision of the detention function as related to paragraphs (1) to (8), inclusive.

"(d) It is the Legislature's intent in providing the definition of 'actual administrative costs' for purposes of this section that this definition be used in determining the fees for the governmental entities referenced in subdivision (a) only. In interpreting the phrases 'actual administrative costs,' 'criminal justice administration fee,' 'booking,' or 'otherwise processing' in Section 29550 or 29550.1, it is the further intent of the Legislature that the courts shall not look to this section for guidance on what the Legislature may have intended when it enacted those sections." (Italics added.)

absent such a claim in the trial court. We agree with the People.

This court has held on more than one occasion that in order to preserve a challenge to a fee or fine, a defendant must object in the trial court. (*Crittle*, *supra,* 154 Cal.App.4th at p. 371 [crime prevention fine -- Pen. Code, § 1202.5, subd. (a)]; *People v. Hodges* (1999) 71 Cal.App.4th 1348, 1357 (*Hodges*) [jail booking fee -- Gov. Code, § 29550.2].) Even sufficiency of the evidence claims with respect to fees and fines may be subject to forfeiture. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 (*Gibson*) [restitution fine -- Gov. Code, former § 13967, subd. (a)].)

Defendant relies primarily on *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*). His reliance is misplaced. *Butler* is distinguishable. That case did not involve a belated challenge to the imposition of a fee. *Butler* involved an order, not supported by a finding of probable cause, to submit to AIDS testing. (*Id.* at p. 1125.) Penal Code section 1202.1, subdivision (e)(6)(A) requires that a defendant convicted of certain enumerated sex crimes submit to AIDS testing when the trial court makes a finding of "probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." The trial court in *Butler* did not make an express finding of probable cause. The Supreme Court held that the defendant could challenge the sufficiency of the evidence supporting this order on appeal even in the absence of an objection in the trial court

because the statute requires a finding of probable cause. (*Butler*, *supra*, 31 Cal.4th at p. 1126.)

As noted by the court, the holding in *Butler* is limited. "Our conclusion in this case is controlled not only by the specific terms of [Penal Code] section 1202.1 but also by the general mandate that involuntary HIV testing is strictly limited by statute. For this reason, nothing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott*[(1994)] 9 Cal.4th 331, that absent timely objection sentencing determinations are not reviewable on appeal . . . ." (*Butler*, *supra*, 31 Cal.4th at p. 1128, fn. 5.) "[I]t remains the case that *other* sentencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the defendant's ability to pay a fine [citations] . . . ." (*Butler*, *supra*, at p. 1130 (conc. opn. of Baxter, J.) Thus, *Butler* does not support defendant's position.

Defendant also relies upon *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), in which the court concluded the defendant did not forfeit his challenge to the imposition of court-appointed counsel cost reimbursement fees (Pen. Code, § 987.8), jail booking fees (Gov. Code, § 29550, subd. (c) & § 29550.2) and probation cost fees (Pen. Code, § 1203.1b) by failing to object to the imposition of those fees based on the trial court's failure to determine his ability to pay. *Pacheco* relied upon two cases in which the court determined that a

defendant who fails to object to the imposition of a Penal Code section 987.8[3] court-appointed counsel cost reimbursement fee in the trial court is not barred from challenging the order on appeal -- *People v. Viray* (2005) 134 Cal.App.4th 1186, 1214-1217 (*Viray*) and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1536-1537 (*Lopez*). (*Pacheco, supra,* at pp. 1397, 1399.) Defendant relies upon those two cases as well. Discussion of *Viray* and *Lopez* is warranted. As will be seen, the reasoning justifying an exception to the forfeiture rule related to court-appointed counsel cost reimbursement fees does not apply to the failure to object to booking fees.

In *Viray*, the court found an exception to the forfeiture rule based on the defendant's right to effective assistance of counsel. "[W]e must consider respondent's contention that defendant has failed to preserve her challenge to the reimbursement order for appeal because she lodged no predicate

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[3] Penal Code section 987.8, subdivision (b), provides:

"(b) In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, *after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof*. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Italics added.)

objection in the trial court. We recognize that such a view has been adopted by published authority, but we find that authority distinguishable, and do not believe it can be rationally extended to bar objections to an order for reimbursement of *counsel* fees, for the reason that unless the defendant has secured a new, independent attorney when such an order is made, she is effectively *unrepresented* at that time, and cannot be vicariously charged with her erstwhile counsel's failure to object to an order reimbursing his own fees." (*Viray*, *supra*, 134 Cal.App.4th at p. 1214, original italics.) "We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees.* It seems obvious to us that when a defendant's attorney stands before the court asking for an order taking money from the client and giving it to the attorney's employer, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel's omissions to the client. In such a situation the attorney cannot be viewed, and indeed should not be permitted to act, as the client's representative. Counsel can hardly be relied upon to contest an order when a successful contest will directly harm the interests of the person or entity who hired him and to whom he presumptively looks for future employment." (*Id.* at pp. 1215-1216, original italics.)

The conflict in *Viray* was particularly apparent because "it was defense counsel himself--the very person who was supposedly protecting defendant's rights in the matter--who brought the

fee request to the court's attention" and requested that it be imposed. (*Viray, supra,* 134 Cal.App.4th at p. 1216.) The court reasoned that the defendant "was not, at that moment, 'represented by counsel' for purposes of the waiver rules on which the cited cases rely," and under the circumstances, it was "absurd to rely on the conduct of the attorney to impose a procedural forfeiture upon the client." (*Ibid*.)

Further emphasizing the distinction supporting an exception to the forfeiture rule, the court in *Viray* noted that its analysis would have no application where the defendant engaged independent counsel before the fee is ordered. "Such a case would be governed by the usual principles concerning preservation of objections by a represented party. [Citation.] Our remarks apply where, at the time of a reimbursement order, the defendant's sole representative is the same publicly financed counsel for whose services reimbursement is sought." (*Viray, supra,* 134 Cal.App.4th at p. 1216, fn. 15.)

Lopez involves a different subdivision of Penal Code section 987.8. Unlike *Viray*, the defendant in *Lopez* was sentenced to prison. Penal Code section 987.8, subdivision (g)(2)(B) provides that "a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense" "[u]nless the court finds unusual circumstances." The court construed this provision to require an express finding of unusual circumstances before ordering a

state prisoner to reimburse his or her attorney. (*Lopez*, *supra*, 129 Cal.App.4th at p. 1537.)

The statutory provisions governing court-appointed counsel cost reimbursement fees include procedural mechanisms designed to ensure due process. "'[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing.' [Citation.] . . . Under [Penal Code section 987.8], a court may order a defendant, who has the ability to pay, to reimburse the county for the costs of legal representation. However, the defendant must be given notice and afforded specific procedural rights, including the right to present witnesses at the hearing and to confront and cross-examine adverse witnesses. [Citations.] The statute also requires the court to advise a defendant--prior to the furnishing of legal counsel--of his potential liability for the costs of court-appointed counsel. [Citation.]"[4] (*People v. Phillips* (1994) 25 Cal.App.4th 62, 72-73.)

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[4] Penal Code section 987.8, subdivision (e), provides in pertinent part as follows:

"(e) At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights:

"(1) The right to be heard in person.

"(2) The right to present witnesses and other documentary evidence.

"(3) The right to confront and cross-examine adverse witnesses.

Unlike *Viray*, there is no conflict of interest in this case. There is no statutory requirement, such as that required in *Lopez*, to find "unusual circumstances" before imposing the booking fee on a defendant sentenced to state prison. The statutory provisions concerning booking fees do not contain elaborate due process procedures like those contained in the provisions concerning court-appointed counsel cost reimbursement fees. There was no discussion in *Pacheco* of the cases in which the court held that a first-time-on-appeal evidentiary challenge to other fees is forfeited. In fact, relying on *Viray* and *Lopez*, the court in *Pacheco* stated the People had "offer[ed] nothing to convince [the court] otherwise." (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1397.) Consequently, we cannot agree with

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"(4) The right to have the evidence against him or her disclosed to him or her.

"(5) The right to a written statement of the findings of the court."

Penal Code section 987.8, subdivision (f), provides:

"(f) Prior to the furnishing of counsel or legal assistance by the court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to enforcement against the property of the defendant in the same manner as any other money judgment."

the holding in *Pacheco*, or its underlying reasoning, concerning jail booking fees.

Our reasoning in *Gibson* remains sound. In *Gibson*, the defendant contended the trial court erred by imposing a restitution fine without a determination that he had the ability to pay. (*Gibson, supra,* 27 Cal.App.4th at p. 1467.) Like here, the defendant failed to make this objection in the trial court. This court said, "[t]he purpose of the waiver doctrine is to bring errors to the attention of the trial court so they may be corrected or avoided. [Citation.] The rule that contentions not raised in the trial court will not be considered on appeal is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law. [Citations.] [¶] As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal. [Citations.]" (*Gibson*, *supra,* 27 Cal.App.4th at p. 1468.)

"Requiring the defendant to object to the fine in the sentencing court if he or she believes it is invalid places no undue burden on the defendant and ensures that the sentencing court will have an opportunity to correct any mistake that might

exist, thereby obviating the need for an appeal. Conversely, allowing the defendant to belatedly challenge a restitution fine in the absence of an objection in the sentencing court results in the undue consumption of scarce judicial resources and an unjustifiable expenditure of taxpayer monies. It requires, in almost all cases, the appointment of counsel for the defendant at taxpayers' expense and the expenditure of time and resources by the Attorney General to respond to alleged errors which could have been corrected in the trial court had an objection been made. Moreover, it adds to the already burgeoning caseloads of appellate courts and unnecessarily requires the costly depletion of appellate court resources to address purported errors which could have been rectified in the trial court had an objection been made. This needless consumption of resources and taxpayer dollars is unacceptable, particularly since it greatly exceeds the amount of the fine at issue. Statewide, taxpayers are spending hundreds of thousands of dollars on challenges to relatively minuscule restitution fines." (*Gibson, supra,* 27 Cal.App.4th at p. 1469.) This reasoning applies with equal force to the failure to object to jail booking fees. (See *Hodges, supra,* 71 Cal.App.4th at p. 1357.)

In *People v. Forshay* (1995) 39 Cal.App.4th 686, the court analogized defendant's failure to object to a restitution fine to the circumstances in *People v. Welch* (1993) 5 Cal.4th 228, 234-236, which held "that the reasonableness of a probation condition is waived if not raised at the time of sentencing. In so holding, the Supreme Court distinguished factual errors from

legal ones. The latter are ordinarily not waived, because they 'can be resolved without reference to the particular sentencing record developed in the trial court.'" (*Id.* at p. 235.) The issue here is one of fact. A party, aware of relevant facts, cannot withhold them from the court and then blame the tribunal for failing to ferret out that known to the party all along." (*Forshay, supra,* 39 Cal.App.4th at p. 689.) The same applies to a belated claim of inability to pay booking fees.

Here, defendant did not object in the trial court to the imposition of the $270.17 jail booking fee. The forfeiture rule applies. Defendant is barred from challenging the booking fee on appeal.

III. CUSTODY CREDITS

The court awarded 66 actual days and 33 conduct days for a total of 99 days of presentence custody credit. Defendant claims he is entitled to additional credit pursuant to recent amendments to Penal Code section 4019. We agree.

We conclude that the recent amendments to the statutes involving custody credits apply here. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits].) The record on appeal does not reflect that defendant is among the prisoners

excepted from the additional accrual of credit. (Pen. Code, §§ 4019, subds. (b)(2), (c)(2), as amended by Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50, & 2933, as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010.) Consequently, defendant, having served a total of 66 actual days, is entitled to 66 conduct days, for a total of 132 days of presentence custody credit. We shall modify the judgment accordingly.

DISPOSITION

The judgment is modified, striking the $10 crime prevention fine and awarding defendant 66 conduct days for a total of 132 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

MURRAY, J.

We concur:

RAYE, P. J.

BUTZ, J.