Filed 6/18/20 P. v. Smith CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KALEAH SMITH, Defendant and Appellant.	B295351 (Los Angeles County Super. Ct. No. NA103415)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Otto, Judge. Affirmed.

Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, David E. Madeo, Acting Supervising Deputy Attorney General, and Idan Ivri, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Following a no contest plea to murder and attempted murder, Kaleah Smith appeals from the judgment, challenging the trial court's imposition of court operations and court facilities assessments, a booking fee, and a restitution fine. Smith argues the court's failure to determine her ability to pay before imposing these amounts violated her due process rights under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). Smith also argues the trial court's victim restitution award lacked evidentiary support.

We conclude Smith forfeited all of her arguments. In particular, she forfeited her challenge to the $10,000 restitution fine by failing to object at her sentencing hearing, and by failing to object to the restitution fine, she forfeited her right to challenge the assessments and booking fee. Smith also forfeited her challenge to the $3,106.50 victim restitution award by failing to object it was unsupported by the evidence. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2015 there was a shooting at an apartment complex that left one person dead. Smith's role in the shooting included conspiring with her codefendants to shoot the victim, stating (referring to the victim) "I want this nigga dead," and driving with the shooter to the apartment complex.

The People charged Smith with one count of murder (Pen. Code, § 187, subd. (a))[1] and one count of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664). The People also alleged that Smith committed the crimes for the

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

benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1), and that a principal personally and intentionally discharged a firearm causing great bodily injury and death, within the meaning of section 12022.53, subdivisions (d) and (e). Smith pleaded no contest to the charges and admitted the allegations.

The trial court sentenced Smith to 25 years to life on the murder conviction and imposed and stayed pursuant to section 654 execution of a term of life on the attempted murder conviction. The trial court also ordered Smith to pay (1) a $80 court operations assessment (§ 1465.8, subd. (a)(1)), (2) a $60 court facilities assessment (Gov. Code, § 70373), (3) a $266.52 booking fee (Gov. Code, § 29550.1),[2] (4) a $10,000 restitution fine (§ 1202.4, subd. (b)), and (5) $3,106.50 in victim restitution (§ 1202.4, subd. (f)).[3] Smith did not object at the sentencing hearing when the court imposed these fines, fees, and assessments, nor did she object to the restitution award. Smith timely appealed.

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[2] Smith does not identify the statutory provision under which the court imposed the booking fee, and the record does not contain any statutory references to the booking fee. The People assert the trial court imposed the booking fee under Government Code section 29550.1, which Smith does not dispute. Because the probation report reflects that officers from the Long Beach Police Department arrested Smith, it appears Government Code section 29550.1, which concerns a city "arresting agency," applies.

[3] The court also imposed but stayed a $10,000 parole revocation fine (§ 1202.45). Smith does not challenge the imposition of this fine.

DISCUSSION

A. *Smith Forfeited Her Right To Challenge the $10,000 Restitution Fine*

Section 1202.4, subdivision (b), states: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." A restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1169; accord, *People v. Belloso* (2019) 42 Cal.App.5th 647, 655 (*Belloso*), review granted Mar. 11, 2020, S259755.) Under section 1202.4, subdivision (c), the trial court may not consider a defendant's ability to pay when imposing the minimum restitution fine of $300, but the court may consider the defendant's ability to pay when the court imposes a restitution fine above the minimum. (*People v. Miracle* (2018) 6 Cal.5th 318, 356; see § 1202.4, subd. (d) ["[i]n setting the amount of the [restitution] fine . . . in excess of the minimum fine," the court "shall consider any relevant factors, including, but not limited to, the defendant's inability to pay"]; *Dueñas*, at p. 1170, fn. 6 ["a trial court may . . . consider a defendant's ability to pay if the court is considering imposing a restitution fine in excess of the statutory minimum amount"].)

In general, failing to object to a ruling in the trial court forfeits the argument the ruling was erroneous. (See *People v. Trujillo* (2015) 60 Cal.4th 850, 856 ["""[A] constitutional right," or a right of any other sort, "may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."""]). With certain exceptions not relevant here, "a defendant generally must preserve claims of

trial error by contemporaneous objection as a prerequisite to raising them on appeal," and "'the forfeiture rule applies in the context of sentencing as in other areas of criminal law.'" (*Ibid.*)

Here, because the trial court imposed the maximum $10,000 restitution fine, Smith had the opportunity to argue, and the court could consider whether, she was unable to pay it. By failing to object she did not have the ability to pay the $10,000 restitution fine, Smith forfeited the argument the court erred in imposing it without considering her ability to pay. (See *People v. Miracle*, *supra*, 6 Cal.5th at p. 356 ["[b]ecause [the] defendant did not object to the [restitution] fine at his sentencing hearing, he has forfeited his challenge"]; *People v. Avila* (2009) 46 Cal.4th 680, 729 ["in not adducing evidence of his inability to pay" a $10,000 restitution fine, the defendant "forfeited the argument"]; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [defendant "forfeited any ability-to-pay argument regarding the restitution fine by failing to object"].)

B. *Smith Also Forfeited Her Challenge to the Assessments Under Section 1465.8 and Government Code Section 70373*

Section 1465.8, subdivision (a)(1), provides, in part: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense." Government Code section 70373, subdivision (a)(1), provides, in part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . in the amount of thirty dollars ($30) for each misdemeanor or felony."

These assessments, when imposed on defendants without the ability to pay them, "in effect transform a funding mechanism for the courts into additional punishment for a criminal

conviction" (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1168), even though "[i]t is irrational to impose a funding burden on litigants who are unable to pay, for collection from them, by definition, is futile" (*People v. Cowan* (2020) 47 Cal.App.5th 32, 59 (conc. opn. of Streeter, J.)). "In our complex scheme of criminal fees and fines, what may appear in isolation to be tiny amounts are in fact just the foundation for the imposition of much larger amounts. Thus, court-imposed debt, even in small amounts, may threaten an indigent person's means of subsistence when penalties, interest and collections costs flowing from default are considered. In addition to blocking access to early probation termination and hindering eligibility for expungement, delinquency on court-ordered debt may diminish prospects for employment and housing, disqualify the debtor from government benefits and professional licenses, put public housing out of reach, and create incentives to obtain money by illegal means, thus working at cross-purposes with the rehabilitative goals of criminal sentencing, probation, and reentry. And because court-ordered debt is not subject to any statute of limitations and not dischargeable in bankruptcy, the consequences can last a lifetime, effectively resulting in what amounts to perpetual punishment." (*Id.* at pp. 62-63; see *Dueñas*, at p. 1163 ["'When a minor offense produces a debt, that debt, along with the attendant court appearances, can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden—a cycle as predictable and counterproductive as it is intractable.'"].) For these reasons, among others, this court in *Dueñas* held that "the assessment provisions of Government Code section 70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair," that "imposing these assessments upon indigent defendants without a determination

that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution," and that "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 [these] assessments." (*Dueñas*, at pp. 1164, 1168; accord, *Belloso*, *supra*, 42 Cal.App.5th at pp. 654-655.)

Smith, however, forfeited her argument the court violated her constitutional rights by imposing the assessments without determining her ability to pay, but not because she could or should have anticipated *Dueñas*, which was decided after the trial court sentenced Smith. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) [defendant did not forfeit his contention the trial court violated his due process rights in imposing assessments under section 1465.8 and Government Code section 70373 without determining his ability to pay by failing to object]; see also *Belloso*, *supra*, 42 Cal.App.5th at p. 662; *People v. Santos* (2019) 38 Cal.App.5th 923, 932 (*Santos*); *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 (*Johnson*).)[4] Smith forfeited her right to challenge the court

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[4] The court in *People v. Frandsen* (2019) 33 Cal.App.5th 1126 held that the defendant, by failing to object to the imposition of the court operations and facilities assessments, forfeited his challenge under *Dueñas* to those assessments. (*Id.* at pp. 1153-1155.) Several cases have followed *Frandsen* rather than *Belloso*, *Santos*, *Johnson*, and *Castellano*. (See, e.g., *People v. Abrahamian* (2020) 45 Cal.App.5th 314, 338; *People v. Lowery* (2020) 43 Cal.App.5th 1046, 1053.) Those cases, however, were decided before the Supreme Court's most recent discussion of forfeiture law in *People v. Perez* (2020) 9 Cal.5th 1, which rejected the contention that "forfeiture can occur whenever the argument is not 'legally foreclosed,' or the law is 'unsettled,' in an

operations and court facilities assessments because she did not object to the $10,000 restitution fine. Smith's failure to object to the $10,000 restitution fine, a significantly larger amount than the $140 in court operations and court facilities assessments, leaves no doubt she would not have challenged the $140 in assessments even if she knew she had a right under *Dueñas* to request a hearing on her ability to pay the assessments. (See *People v. Smith* (2020) 46 Cal.App.5th 375, 395 [defendant forfeited challenge to assessments and fines because he "did not object in the trial court on the grounds that he was unable to pay, even though the trial court ordered him to pay the $10,000 statutory maximum restitution fine"]; *People v. Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033 ["[a]s a practical matter, if [the defendant] chose not to object to a $10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional $1,300 in fees"]; but see *People v. Taylor* (2019) 43 Cal.App.5th 390, 400-401 [defendant did not forfeit *Dueñas* challenge to court operations and facilities assessments, even though he did not object to the maximum $10,000 restitution fine, because the "defendant's inability to pay is just one among many factors the court should consider in setting the restitution fine above the minimum"].)[5]

'odd state of flux,' or when the high court has not 'squarely held as much in a majority opinion,' or when it is just a "'restoration" [citation] of a legal principle that over the years had become "blurred."'" (*Id.* at p. 13.)

[5] Although the court in *People v. Taylor, supra*, 43 Cal.App.5th at pages 400 to 401 pointed out a defendant's ability to pay the restitution fine is only one of the factors the court should consider in setting the restitution fine above the statutory minimum, there is nothing in the record here that shows Smith

C. *Smith Forfeited Her Right To Challenge the Booking Fee Too*

"Three statutes address [a defendant's] payment of jail booking fees, Government Code sections 29550, 29550.1, and 29550.2. Which section applies to a given defendant depends on which governmental entity has arrested a defendant before transporting him or her to a county jail." (*People v. McCullough* (2013) 56 Cal.4th 589, 592 (*McCullough*).) Government Code section 29550.1, the provision at issue here, requires the court to order the defendant to reimburse the local arresting agency for booking fees the agency incurred by using the county's jail services. Like the statutes authorizing the trial court to impose court operations and court facilities assessments (see *Dueñas*, *supra*, 30 Cal.App.5th at p. 1166), this provision is silent on the court's duty to consider a defendant's ability to pay. Also like the court operations and court facilities assessments, the booking fee under section 29550.2 is not punitive. (*People v. Batman* (2008) 159 Cal.App.4th 587, 591; *People v. Rivera* (1998) 65 Cal.App.4th 705, 707.) Thus, imposing the booking fee on an indigent defendant "is not only unfair," but "may be counterproductive." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1167; see *People v. Kopp* (2019) 38 Cal.App.5th 47, 95 [due process requires the trial court to assess a defendant's ability to pay the booking fee under Government Code section 29550.1], review granted Nov. 13, 2019, S257844.)

As with the court operations and court facilities assessments, however, Smith's failure to object to the $10,000 restitution fine leaves no doubt she would not have challenged

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failed to object to the restitution fine for a reason other than her ability to pay. The absence of any indication of the record supports application of forfeiture in this case.

the $266.52 booking fee had she known she had the right to object and request an ability-to-pay hearing. Smith's failure to raise her ability to pay a restitution fine of $10,000 forfeited her argument the trial court erred in imposing a considerably less booking fee without considering her ability to pay it. (See *People v. Jenkins* (2019) 40 Cal.App.5th 30, 40-41 [defendant's failure to object to the $10,000 restitution fine forfeited his right to appeal the $154 booking fee under Government Code section 29550.1]; *People v. Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033 [same].)

D. *And Smith Forfeited Her Right To Challenge the Victim Restitution Award*

Smith does not argue she lacked the ability to pay the $3,106.50 victim restitution award. Instead, she argues the award was not based on "*any* evidence in [the] record showing the amount of damage suffered by any victims." Smith, however, forfeited this argument as well.

Section 1202.4, subdivision (f), provides that, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (See *People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075; see also *Walker v. Appellate Division of Superior Court* (2017) 14 Cal.App.5th 651, 656 ["'[r]estitution is constitutionally and statutorily mandated in California'"].) A defendant who fails to object the victim's economic loss "was not shown by documentation or sworn testimony . . . . forfeit[s] any claim that the order was . . . unwarranted by the evidence." (*Brasure*, at p. 1075; see *People v. Mays* (2017) 15 Cal.App.5th 1232, 1237 ["[a] defendant wishing to argue on appeal that there is no factual

basis for a restitution order must object on that ground in the trial court to preserve the issue for appeal"]; see also *People v. Anderson* (2010) 50 Cal.4th 19, 26, fn. 6 [defendant forfeited the "claim of error as to the amount of restitution [under section 1203.1] by failing to object on that ground in the trial court"].) Smith forfeited her right to challenge the restitution award by failing to object at her sentencing hearing that there was no or insufficient evidentiary support for the $3,106.50 the court ordered.

Citing *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), Smith argues her failure to object to the victim restitution award did not forfeit her right to challenge the award because the "[n]ormal rules of forfeiture include an exception for a contention that the court's order was not supported by substantial evidence." Smith attempts to equate the victim restitution order with the HIV testing order in *Butler*, which the Supreme Court held the defendant could challenge for the first time on appeal. (*Id.* at p. 1126.) In *McCullough*, *supra*, 56 Cal.4th 589, however, the Supreme Court rejected a virtually identical argument in the context of a defendant's failure to object to the imposition of a booking fee without any evidence of the defendant's ability to pay. In distinguishing *Butler* as involving a legal defect rather than insufficiency of the evidence, the Supreme Court in *McCullough* explained that "a court's imposition of a booking fee is confined to factual determinations" and that a defendant "may not 'transform . . . a factual claim into a legal one by asserting the record's deficiency as a legal error.'" (*McCullough,* at pp. 596-597.) The Supreme Court in *McCullough* concluded: "By 'failing to object on the basis of his [ability] to pay,' [the] defendant forfeits both his claim of factual error and the dependent claim challenging 'the adequacy of the record on that point.'" (*Ibid.*) Here, as in *McCullough*, the defendant's ability to

pay victim restitution "does not present a question of law," but "is confined to factual determinations" (*ibid*.) based on the victim's economic loss (§ 1202.4, subd. (f)), and the forfeiture rule applies.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.