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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICKY DILLINGHAM, Defendant and Appellant.	B265316 (Los Angeles County Super. Ct. No. SA083006)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Modified and, as so modified, affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ricky Dillingham appeals from the judgment entered following his plea of no contest to being a felon in possession of a firearm. The trial court placed Dillingham on probation pursuant to a negotiated plea. When Dillingham violated probation, the trial court imposed an upper term sentence of three years. Dillingham contends the trial court erred by (1) imposing the upper term based on events subsequent to the plea, and (2) imposing two restitution fines and increasing the amount of the parole revocation fine. Dillingham has forfeited the first contention, but the second has merit. We order the judgment modified accordingly, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In an information filed on March 28, 2013 the People alleged that on January 15, 2013, Dillingham was a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1));[1] drove with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)); possessed a smoking device (Health & Saf. Code, former § 11364.1, subd. (a)); and committed forgery (§ 476). It was further alleged that Dillingham had suffered a prior "strike" conviction for robbery (§§ 667, subds. (b) – (i), 1170.12, subds. (a)-(d), 211) and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

On March 13, 2014, pursuant to a negotiated plea, Dillingham pleaded no contest to being a felon in possession of a firearm. The trial court suspended imposition of sentence, placed Dillingham on formal probation for three years, and dismissed

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[1] All further undesignated statutory references are to the Penal Code.

the other three counts. It imposed a $280 restitution fine, a suspended probation revocation fine in the same amount, a $40 court security assessment, and a $30 criminal conviction assessment.

In May 2014, Dillingham entered Vy's Wireless, a Long Beach cellular telephone store, dragged the employee working behind the counter to a back room, stole her purse, and threatened that if she reported the incident to the police he would kill her and her family.

On February 23, 2015, probation was revoked in the felon-in-possession case in light of the May 2014 offenses.

On April 1, 2015, after a preliminary hearing, the People filed an information charging Dillingham with robbery (§ 211), kidnapping to commit robbery (§ 209, subd. (b)(1)), false imprisonment (§ 236), and dissuading a witness (§ 136.1, subd. (c)(1)), based on the May 2014 Vy's Wireless offenses.

On April 22, 2015, the trial court granted Dillingham's request for self-representation. (*Faretta v. California* (1975) 422 U.S. 806.)

On May 26, 2015, the prosecutor stated the People were unable to proceed due to witness unavailability. The case was dismissed and refiled that day.

On June 9, 2015 the trial court held a new preliminary hearing concurrently with the probation violation hearing. Dillingham was held to answer on the charges stemming from the May 2014 incident, and the trial court found him in violation of probation on the felon-in-possession case.

On June 23, 2015, the trial court sentenced Dillingham to the upper term of three years on the felon-in-possession case. The court explained: "The reason why the court chose that term is because of the nature of the new charges in this case, in the

open case giving rise to the probation violation." Dillingham, who was representing himself, did not object. The court ordered Dillingham to pay a $300 restitution fine, a $300 suspended parole revocation fine, a $30 criminal conviction assessment, and a $40 court security assessment.

Dillingham appeals.

DISCUSSION

1. *Dillingham has forfeited his contention that the trial court erred by selecting the upper term*

Dillingham argues that the trial court erred by imposing the upper term based on his conduct in the May 2014 incident at Vy's Wireless, because the Vy's Wireless incident occurred after probation was granted. He is correct. California Rules of Court, rule 4.435(b)(1) provides: "(b) On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison: [¶] (1) If the imposition of sentence was previously suspended, the judge must impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c). [¶] *The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found*." (Italics added.) The rule "clearly prohibits the superior court from considering events subsequent to the grant of probation when determining the length of a prison term upon revocation of probation." (*People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163, fn. 2.) The "spirit and purpose of the rule" is to "preclude the possibility that a defendant's bad acts

while on probation" will influence his sentence upon revocation of probation. (*Id.* at p. 1163.)

However, Dillingham has forfeited this claim. A " 'party in a criminal case may not, on appeal, raise "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" if the party did not object to the sentence at trial. [Citation.] The rule applies to "cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons . . . ." ' " (*People v. Scott* (2015) 61 Cal.4th 363, 406; *People v. Scott* (1994) 9 Cal.4th 331, 356; *People v. Boyce* (2014) 59 Cal.4th 672, 730-731; *People v. Gonzalez* (2003) 31 Cal.4th 745, 751.) The reason for this rule is "practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*People v. Scott, supra,* 9 Cal.4th at p. 353.)

Dillingham argues that no objection was necessary because "the sentence was illegal or an abuse of discretion as a matter of law." He posits that the sentence was unauthorized because the record does not suggest the high term was otherwise warranted. He also points out that no objection is necessary to preserve a challenge to a "pure question of law applied to undisputed facts."

But these principles do not assist Dillingham here. *Scott* clearly precludes challenges based on an alleged abuse of discretion; it held the forfeiture rule applies to claims involving the trial court's failure to properly make or articulate its

discretionary sentencing choices. (*People v. Scott, supra,* 9 Cal.4th at p. 356.)

Scott's forfeiture rule does not apply when a sentence is legally unauthorized. (*People v. Gonzalez, supra,* 31 Cal.4th at p. 751.) However, the " ' "unauthorized sentence" concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]' " (*People v. Anderson* (2010) 50 Cal.4th 19, 26.) A sentence is unauthorized where it could not lawfully be imposed under any circumstance in the particular case. (*Ibid.*) On the record here, we cannot discern whether, as a matter of law, the upper term could have been selected. Whether or not an upper term sentence was appropriate was a factual question to be determined in the trial court's exercise of its discretion, not a pure question of law as Dillingham suggests. Dillingham's citations to cases holding that an objection is unnecessary to preserve a claim that section 654 requires a stay of sentence do not assist him; no section 654 issue is involved here. Instead, his argument is that the stated basis for imposing the upper term did not apply to his case, and the court gave no other sufficient reason for its discretionary sentencing choice – precisely the type of contention that falls within the forfeiture rule. (See *People v. Scott*, *supra*, 61 Cal.4th at p. 406.)

Nor does the fact that Dillingham represented himself provide a basis for the relief sought. A defendant cannot choose to represent himself and then "plead ignorance of the law or the consequences of his actions as a ground for reversal of his conviction." (*People v. Espinoza* (2016) 1 Cal.5th 61, 75.) A "self-represented defendant 'cannot premise a claim of ineffective assistance of counsel on his own shortcomings.' " (*Ibid.*)

2. *Corrections to the restitution fines*

Dillingham argues the trial court erred when it imposed the second, $300 restitution fine (§ 1202.4, subd. (b)) and a $300 parole revocation fine (§ 1202.45) at the June 23, 2015 sentencing hearing because it had already imposed a $280 restitution fine and a $280 probation revocation fine when it granted probation on March 13, 2014. The People concede the errors.

The parties are correct that the trial court improperly imposed two restitution fines. Section 1202.4, subdivision (b) provides that 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. Subdivision (m) of section 1202.4 provides that "[i]n every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation." A "restitution fine imposed at the time probation is granted survives the revocation of probation. Because of this, an additional restitution fine imposed at the time probation is revoked is unauthorized and must be stricken from the judgment." (*People v. Urke* (2011) 197 Cal.App.4th 766, 779; *People v. Arata* (2004) 118 Cal.App.4th 195, 201-203; *People v. Chambers* (1998) 65 Cal.App.4th 819, 822.)

Here, the trial court imposed a $280 restitution fine when Dillingham was granted probation. The second restitution fine was therefore unauthorized and must be stricken. (*People v. Urke, supra,* 197 Cal.App.4th at p. 779.)

Likewise, the court improperly imposed a parole revocation fine of $300, rather than the $280 fine originally imposed but stayed. Section 1202.45, subdivision (a) requires that the parole revocation fine must be in the same amount as the restitution

fine. Accordingly, the parole revocation fine imposed at the June 2015 hearing must be set at $280.[2]

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[2] Dillingham argues that the parole revocation fine cannot exceed $280 because $280 was the statutory minimum amount in effect at the time he committed the felon-in-possession offense, and imposition of a higher amount violates ex post facto principles. (See § 1202.4, subd. (b)(1).) In light of the fact that the parole revocation fine and the restitution fine must be in the same amount, we need not reach this issue.

DISPOSITION

The judgment is modified to reflect a restitution fine of $280 and a suspended parole revocation fine in the same amount. The clerk of the superior court is directed to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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ALDRICH, Acting P. J.

We concur:

LAVIN, J.

STRATTON, J.*

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