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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES VINCENT LUEVANO,

Defendant and Appellant.

B294547

(Los Angeles County
Super. Ct. No. KA115880)

APPEAL from an order of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Robert A. Werth, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant appeals his two robbery convictions. He argues that under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court's imposition of fines and assessments without an ability to pay hearing violated his federal and state due process rights. Defendant also argues that the trial court incorrectly calculated his presentence custody credits. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Defendant was the getaway driver for two bank robberies, where his accomplice threatened to shoot bank tellers unless they emptied their cash drawers.¹ A jury convicted defendant of two counts of robbery. Evidence produced at trial showed that the getaway vehicle, a white Chevrolet pickup truck, was registered to defendant.

The trial court sentenced defendant to a total term of three years in state prison. The court awarded defendant credit for 447 days of actual custody plus 67 days of conduct credits for a total of 514 days of custody credits.

Pursuant to Penal Code section 1202.4, subdivision (b), the court ordered defendant to pay a \$300 restitution fine, and imposed and stayed a parole revocation fine in the same amount pursuant to Penal Code section 1202.45.² The court also imposed an \$80 court operations assessment under section 1465.8 (\$40 per

¹ A later accounting showed that \$711 was stolen from the first bank. It appears \$2,149.36 was stolen from the second bank, as that was the amount the court ordered defendant and his accomplice to pay the bank in victim restitution.

² All subsequent statutory references are to the Penal Code unless indicated otherwise.

conviction), and a \$60 conviction assessment under Government Code section 70373 (\$30 per each conviction). The trial court imposed a \$10 theft crime prevention fund fine pursuant to section 1202.5 and a \$2 state surcharge pursuant to section 1465.7. Lastly, unchallenged on appeal, the court ordered defendant to pay victim restitution to the second bank in the amount of \$2,149.36 with interest at ten percent a year, for which he and his accomplice are jointly and severally liable.

Defendant filed a notice of appeal.

DISCUSSION

1. The Trial Court Did Not Violate Defendant's Due Process in Imposing the Fine and Assessments

Defendant argues that, under *Dueñas, supra*, 30 Cal.App.5th 1157, the trial court violated his federal and state right to due process rights because the court imposed the assessments and fine without a hearing on his ability to pay. Defendant requests this court to “to vacate the assessments and stay the fine.”

In *Dueñas*, a homeless, jobless mother of two children, who subsisted on public aid while suffering from cerebral palsy, appealed fines imposed against her despite the trial court's finding that she could not pay them. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160-1161.) *Dueñas* was caught in a longstanding cycle of poverty that had been exacerbated by fines she accrued by driving with a suspended license. *Dueñas* had repeatedly served time in jail in lieu of paying fines because of her inability to pay, and had suffered other severe adverse consequences due to nothing more than her own impoverishment. (*Ibid.*)

In the matter before the Court of Appeal, Dueñas had requested, and the trial court had granted, a hearing to determine her ability to pay a \$30 court facilities assessment (Gov. Code, § 70373), a \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), and a \$150 restitution fine (Pen. Code, § 1202.4, subd. (b)), as well as previously imposed attorney fees. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161–1162.) Dueñas presented undisputed evidence of her inability to pay, and the trial court waived the attorney fees. However, the court imposed the assessments and fine despite its finding that Dueñas was unable to pay them because it was statutorily required to impose them. (*Id.* at p. 1163.) The Court of Appeal held that the consequences Dueñas faced amounted to punishment on the basis of poverty, which the state and federal constitutional rights to due process and equal protection forbid. (*Id.* at pp. 1166–1172.)

The *Dueñas* court treated Government Code section 70373 and Penal Code section 1465.8 differently than Penal Code section 1202.4, subdivision (f). It concluded “the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . 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.” (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) As for the Penal Code section 1202.4, subdivision (f) fees, court also held the trial court must conduct an ability-to-pay hearing to ascertain a defendant’s present ability to pay before it imposes these assessments. (*Ibid.*) Further, although Penal Code section 1202.4, subdivision (c), bars consideration of a defendant’s inability to pay when imposing a restitution fine unless the court is considering imposing more than the minimum

fine required by statute, in light of the due process issues the *Dueñas* court held “the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine.” (*Dueñas*, at p. 1172.)

The harm that caused *Dueñas*’s situation to rise to the level of a constitutional violation was the application of the statutes imposing fines, fees, and assessments, in the face of undisputed evidence that she was unable to pay and would undoubtedly suffer penalties based solely on her indigence.

That constitutional violation does not exist in the case at bar. The factual differences are considerable. In contrast to *Dueñas*, at the sentencing hearing in this case, defendant did not object to the above assessments or fine, nor did he alert the court to any issues relating to his ability to pay. The record contains sparse information about defendant’s financial circumstances, but the information available to us shows defendant did not lack the ability to pay. In his conversation with police officers, defendant communicated that he was working but was waiting on his paycheck, which would come when he finished his job. At trial, defendant’s attorney stated defendant had been gainfully employed most of his life, when arguing mitigation factors for a lighter sentence. Defendant’s mother likewise testified on defendant’s behalf that defendant is “not a lazy man. He’s always worked hard, real hard work. He’s done Caltrans. He’s done gas. He’s done horticulture. He’s done numerous jobs. And he’s achieved at every one of them.” Thus, the record shows defendant was able-bodied. We conclude that defendant’s prison wages are adequate to require defendant to pay off these fines and assessments. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [ability to pay includes a defendant’s ability to obtain

prison wages].) It is also apparent from the manner in which defendant's crimes were committed that he owned a vehicle, a sellable asset.

Contrary to the suggestion defendant has made in his opening brief, that defendant was represented in the trial court and on appeal by appointed counsel does not demonstrate an inability to pay the assessments or the restitution fine. "[A] defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine." (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397.) Finally, there is no evidence that defendant may suffer any additional penalties or adverse consequences because he must pay the assessments and fine.

Because defendant's situation lacks the hallmarks that defined *Dueñas*, we decline to apply its reasoning to the facts before us.

2. No Error in Awarding Custody Credits

At sentencing, the trial court awarded defendant credit for 447 days of actual custody plus 67 days of conduct credits for a total of 514 days of custody credits. Defendant argues that he was entitled to credit for 478 days of actual custody plus 71 days of conduct credits, for a total of 549 days of custody credits. He does not pursue the argument in his reply brief, in an apparent acknowledgement that the Attorney General's calculations are correct.

We find the credits were properly awarded. Defendant was arrested on July 27, 2017, and sentenced on October 16, 2018. Defendant remained in custody during that period of time. The period from July 27, 2017 to October 16, 2018 was 447 days in custody. Conduct credit amounted to fifteen percent of the 447

days, which is 67.05 days. (§§ 667.5, subd. (c)(9) and 2933.1, subd. (a).) Therefore, the trial court correctly awarded defendant 447 days of actual custody plus 67 days of conduct credits, for a total of 514 days of custody credits.

DISPOSITION

The judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

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BAKER, J., Concurring

I join the court's opinion in full. I write separately only to state I need not, and do not, consider in this case whether *People v. Dueñas* (2019) 30 Cal.App.5th 1157 was correctly decided. (See, e.g., *People v. Allen* (2019) ___ Cal.App.5th ___ [2019 WL 5387925] [citing cases].)

BAKER, J.