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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY NICHOLAS JAMES
ORTEGA,

Defendant and Appellant.

B291899

(Los Angeles County
Super. Ct. No. NA109050)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Katja Grosch, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters,
Assistant Attorney General, Zee Rodriguez and Paul S. Thies,
Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Ortega appeals from the judgment after his conviction for felony vandalism. Ortega contends the trial court abused its discretion by not reducing his conviction to a misdemeanor. He further argues that, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the trial court violated his right to due process by imposing court assessments and a restitution fine without first ascertaining his ability to pay them.

Ortega fails to persuade us that the trial court abused its discretion when it declined to reduce his conviction to a misdemeanor. We conclude, as we did in *People v. Caceres* (Sept. 12, 2019, B292031) ___ Cal.App.5th ___ [2019 D.A.R. 8861] (*Caceres*), that the due process analysis in *Dueñas* does not support its broad holding and it is distinguishable on its facts from this case. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND¹

On April 21, 2018, police officers, responding to a report of domestic violence, arrested Ortega, whom they handcuffed and placed in the back of a police vehicle. One of the officers heard Ortega “yelling incoherent statements.” The officer saw Ortega use both feet to “smash” the vehicle’s window.² Repairing the damage cost \$825.35.

The defense elicited testimony that Ortega was unemployed, had suffered one or two strokes, and was 90 percent blind in one eye.

¹ We limit our summary to the facts relevant to the issues on appeal.

² Ortega claimed he accidentally broke the window with his shoulder while repositioning his body to relieve the tightness of the handcuffs.

PROCEDURAL BACKGROUND

An information charged Ortega with felony vandalism causing over \$400 in damage. (Pen. Code,³ § 594, subd. (a).)⁴ A jury found Ortega guilty of this charge.

At sentencing, Ortega requested the trial court exercise its discretion under section 17, subdivision (b) to reduce his felony vandalism conviction to a misdemeanor. Ortega argued that he was almost 63 years old, had suffered two strokes and partial blindness, and had “lived an absolute crime-free life until this time.” The prosecution opposed the request.

The trial court suspended imposition of sentence and placed Ortega on three years of formal probation. The trial court ordered Ortega to serve 206 days in county jail, immediately awarding him credit for 206 days. The trial court imposed a \$300 restitution fine under section 1202.4, subdivision (b), a \$40 court security assessment under section 1465.8, subdivision (a)(1), and a \$30 criminal conviction assessment under Government Code section 70373, subdivision (a)(1). The trial court also ordered Ortega to pay victim restitution of \$825 and “to cooperate with the probation department in a plan for anger management.”

The trial court stated, “After 12 months of probation, you may petition the court for reduction to a misdemeanor. If you are in compliance with all terms and conditions, if the restitution has

³ Further unspecified statutory citations are to the Penal Code.

⁴ The information also charged Ortega with injuring his cohabitant (§ 273.5, subd. (a)), a charge arising from the purported domestic violence for which he was arrested. The jury acquitted Ortega of this charge, and it is not at issue in this appeal.

been paid, anger management classes have been completed and all the court fines have been paid, I will seriously consider reducing it to a misdemeanor and the balance of the probationary period will be summary probation.” After Ortega confirmed that he understood, the trial court continued, “So it’s up to you how long you stay on felony probation. Really. The ball is in your court. If you get all of this stuff done, it’s only a year. If you don’t, it’s three years.”

Ortega timely appealed.

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion By Declining To Reduce Ortega’s Conviction To A Misdemeanor

Ortega argues the trial court abused its discretion when it declined to reduce his conviction to a misdemeanor at sentencing. We disagree.

Under section 17, subdivision (b), a trial court may reduce a felony to a misdemeanor if the offense is “punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail.” (§ 17, subd. (b).) Crimes meeting this definition, which may be punished as either a felony or a misdemeanor, are commonly called “wobblers.” (See *People v. Park* (2013) 56 Cal.4th 782, 789–790 (*Park*).) Ortega’s offense, vandalism causing damage over \$400, is punishable by imprisonment pursuant to section 1170, subdivision (h)(1) or by fine or imprisonment in county jail (§ 594, subd. (b)(1)); the parties do not dispute that Ortega’s offense is a wobbler.

“A [trial] court ha[s] broad discretion under section 17, subdivision (b) in deciding whether to reduce a wobbler offense to a misdemeanor. [Citation.] We will not disturb the court’s decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. [Citation.] Absent such a showing, we presume the court acted to achieve legitimate sentencing objectives.” (*People v. Sy* (2014) 223 Cal.App.4th 44, 66 (*Sy*).)

In *Sy*, the defendant moved under section 17, subdivision (b) to reduce her conviction for selling or possessing counterfeit marks to a misdemeanor, “arguing the nature and circumstances of the offense, her remorse for it, and her character supported the reduction.” (*Sy, supra*, 223 Cal.App.4th at p. 66.) The trial court “denied the motion, indicating it would reconsider the motion at a later time after ensuring [the defendant] complied with the terms of her probation and did not continue selling counterfeit marks.” (*Ibid.*) The Court of Appeal held the trial court did not abuse its discretion: “[T]he court considered [the defendant’s] motion and determined it was too soon to reduce her conviction. The court indicated it wanted an opportunity to consider her performance on probation before granting her request to ensure she did not resume selling counterfeit marks. Nothing about the court’s stated reasons for denying her motion indicate its decision was irrational or arbitrary, and [the defendant] has not clearly shown to the contrary.” (*Ibid.*)

Sy is analogous to the instant case, in which the trial court similarly stated it would reconsider reducing Ortega’s offense to a misdemeanor after he had served 12 months of his three-year

probation.⁵ Nothing about that decision appears irrational or arbitrary, and indeed it “achieve[s] legitimate sentencing objectives” (*Sy, supra*, 223 Cal.App.4th at p. 66), by providing extra incentive for Ortega to comply with the conditions of probation.

Ortega argues the trial court failed to give individualized consideration “to the offense, the offender, and the public interest,” such as his age, disability, and lack of criminal history. Ortega also complains that the trial court denied his reduction request “without making any statements whatsoever about why he was denying” the request. Ortega cites no authority holding that the trial court must state on the record its reasons for denying a request under section 17, subdivision (b). In any event, the trial court did state its reasons, explaining that it was choosing to wait until Ortega had served a year of probation, which included cooperating with the probation department on an anger management plan, before evaluating whether to reduce his conviction to a misdemeanor. A similar explanation was adequate in *Sy*, and it is adequate here.

B. The Trial Court Was Not Required To Determine Ortega’s Ability To Pay Before Imposing Fines And Assessments

Ortega contends the trial court violated his due process rights by imposing the restitution fine and court assessments without first determining that he had the ability to pay those

⁵ Trial courts may reduce wobblers to misdemeanors at the time they grant probation “or at a later time—for example, when the defendant has successfully completed probation.” (*Park, supra*, 56 Cal.4th at p. 793.)

costs, citing *Dueñas, supra*, 30 Cal.App.5th 1157. In light of our holding in *Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8861], we reject this argument.⁶

1. *Dueñas*

In *Dueñas*, an unemployed, homeless mother with cerebral palsy lost her driver's license when she was unable to pay over a thousand dollars assessed against her for three juvenile citations. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1160–1161.) Thereafter she received multiple convictions related to driving with a suspended license, each accompanied by jail time and additional fees she could not afford to pay. (*Id.* at p. 1161.)

Following her fifth conviction arising from driving with a suspended license, and the imposition of a restitution fine and court assessments under section 1465.8 and Government Code section 70373 (the same assessments imposed on Ortega in the instant case), *Dueñas* requested the trial court hold a hearing to determine her ability to pay those costs. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1161–1163.) Despite *Dueñas's* uncontested declaration establishing her indigence, the trial court ruled that

⁶ The Attorney General argues that Ortega forfeited his appellate challenge by failing to object to the fines and fees at sentencing. Alternatively, the Attorney General argues we should evaluate Ortega's challenge under the constitutional ban against excessive fines, not due process. Because we hold Ortega's challenge lacks merit, we need not decide whether it was forfeited. We decline to address the Attorney General's excessive fines argument because Ortega did not raise that issue in his opening brief. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372, fn. 12 [declining to address issue not raised properly in opening brief].)

the assessments were mandatory and Dueñas had not shown the “ ‘compelling and extraordinary reasons’ ” required to waive the restitution fine. (*Id.* at p. 1163.)

The Court of Appeal reversed, holding that due process prohibits a trial court from imposing court assessments under section 1465.8 and Government Code section 70373, and requires the trial court to stay execution of any restitution fines, until the trial court ascertains the defendant’s ability to pay those assessments and fines. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) The court expressed concern for “the cascading consequences of imposing fines and assessments that a defendant cannot pay,” noting that Dueñas’s case “ ‘doesn’t stem from one case for which she’s not capable of paying the fines and fees,’ but from a series of criminal proceedings driven by, and contributing to, Dueñas’s poverty.” (*Id.* at pp. 1163–1164.) The court referenced “the counterproductive nature of this system and its tendency to enmesh indigent defendants in a cycle of repeated violations and escalating debt.” (*Id.* at p. 1164, fn. 1.)

In support of its due process argument, the *Dueñas* court referenced statutes waiving court costs for indigent civil litigants, and cited cases holding unconstitutional requirements that indigent criminal defendants pay costs to prosecute their appeals. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1165–1166, 1168.) The court reasoned that imposing costs on defendants who were unable to pay them constituted “additional punishment” by subjecting the defendants to a civil judgment for nonpayment and the consequences thereof. (*Id.* at p. 1168.) The court held that attempting to raise funds through assessments and fines imposed on defendants who cannot pay them “is neither procedurally fair nor reasonably related to any proper legislative goal.”

(*Id.* at p. 1171, fn. 8.) The court further noted that defendants on probation who pay their fines are entitled to have their charges dismissed under section 1203.4, subdivision (a)(1), whereas defendants who cannot pay them “[a]t best . . . can try to persuade a trial court to exercise its discretion to grant them relief,” a disparity the court deemed violative of due process. (*Dueñas*, at pp. 1170–1171.)

2. *Caceres*

In *Caceres*, a defendant convicted of criminal threats relied on *Dueñas* to claim the trial court erred by imposing a restitution fine and court assessments without determining his ability to pay them. (*Caceres*, *supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8863].) We rejected that argument, concluding that the due process analysis in *Dueñas* did not support its broad holding, and that the case was distinguishable on its facts. (*Ibid.*)⁷

In our view, the “analogy between court assessments imposed following a criminal conviction and fees that, if imposed on indigent litigants or criminal defendants, impede their access to the courts in the first place,” was inapt, because “[f]ees imposed *after* a case is completed, and judgment entered . . . do not deprive defendants of access to justice.”⁸

⁷ Two other courts have since issued opinions holding that *Dueñas* was wrongly decided. (See *People v. Hicks* (Sept. 24, 2019, B291307) ___ Cal.App.5th ___ [2019 WL 4635156 at *1]; *People v. Aviles* (Sept. 13, 2019, F073846) ___ Cal.App.5th ___, ___ [2019 Cal.App.Lexis 869 at *18–*19].)

⁸ We acknowledge that in *Caceres* and the instant case, the Attorney General in his appellate briefing took the opposite position, agreeing with *Dueñas* that nonpunitive court assessments implicated due process when imposed on those who

(*Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8864].)

We questioned the proposition in *Dueñas* that subjecting indigent defendants to civil judgments for nonpayment of fines and fees “constitute[d] ‘punishment’ rising to the level of a due process violation,” noting that the authorities upon which *Dueñas* relied “involved defendants who, because of their poverty, were exposed to additional *criminal* penalties.” (*Id.* at p. 8865.) We also questioned *Dueñas*’s position that the fact that *some* defendants would be unable to pay their fines and fees rendered the entire statutory scheme allowing imposition of those costs “ ‘neither procedurally fair nor reasonably related to any proper legislative goal.’ ” (*Ibid.*) “By holding that trial courts must tailor the imposition of costs to each defendant’s ability to pay, *Dueñas* in effect proposes a ‘less drastic remedial alternative’ ” to the current statutory scheme, which is more than what due process requires.” (*Ibid.*)

Given our concerns with the due process analysis in *Dueñas*, we “decline[d] to apply its broad holding requiring trial courts in all cases to determine a defendant’s ability to pay before imposing court assessments or restitution fines.” (*Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8865].)

We also held that the facts as characterized in *Dueñas* were not present in *Caceres*’s case. (*Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8865].) We noted that “in the *Dueñas* court’s view, *Dueñas* lost her driver’s license because she was too poor to pay her juvenile citations, then continued to offend because the aggregating criminal conviction assessments and fines prevented

cannot pay them. (See *Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8866].)

her from recovering her license. The *Dueñas* court described this as ‘cascading consequences’ stemming from ‘a series of criminal proceedings driven by, and contributing to, [a defendant’s] poverty.’” (*Ibid.*)

“In contrast,” we reasoned, “Caceres’s offense, criminal threats, on its face is not a crime either ‘driven by’ poverty or likely to ‘contribut[e] to’ that poverty such that an offender is trapped in a ‘cycle of repeated violations and escalating debt.’ [Citation.] A person may avoid making criminal threats regardless of his or her financial circumstances, and the imposition of \$370 in fees and fines will not impede Caceres’s ability to avoid making criminal threats in the future.” (*Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8865].) “[T]o the extent Caceres cannot pay the imposed costs and is subject to a civil judgment, we are not persuaded that such a consequence violates due process.” (*Ibid.*)

3. Analysis

Like Caceres’s conviction for criminal threats, Ortega’s conviction for vandalism “on its face is not a crime either ‘driven by’ poverty or likely to ‘contribut[e] to’ that poverty such that an offender is trapped in a ‘cycle of repeated violations and escalating debt.’” (*Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8865].) As in *Caceres*, “[a] person may avoid [committing vandalism] regardless of his or her financial circumstances, and the imposition of \$370 in fees and fines will not impede [Ortega’s] ability to avoid [committing vandalism] in the future.” (*Ibid.*) *Dueñas* therefore is inapplicable to the facts of this case, and the trial court did not violate due process in imposing the fine and assessments without determining Ortega’s ability to pay.

In *Caceres* the trial court did not grant *Caceres* probation, and thus we did not address the holding in *Dueñas* that it violated due process to deny probationers unable to pay their fines an automatic right to have their charges dismissed under section 1203.4, subdivision (a)(1). (See *Caceres, supra*, ___ Cal.App.5th ___ [2019 D.A.R. 8864 & fn. 10, 8866]; *Dueñas, supra*, 30 Cal.App.5th at pp. 1170–1171.) The trial court placed Ortega on probation, thus arguably distinguishing the instant case from *Caceres* on that point.

Unlike the *Dueñas* court, however, we do not think the issue ripe at this stage of the proceedings. It is possible Ortega will pay the required costs by the time he completes probation, or, if he is unable to, the trial court nonetheless may “in its discretion and the interests of justice” grant the relief available under section 1203.4, subdivision (a)(1). It is also possible Ortega fails to complete probation for some reason other than his inability to pay the required costs. Under any of those scenarios, there would be no need to consider the constitutional ramifications of denying relief under section 1203.4, subdivision (a)(1) because of Ortega’s inability to pay assessments or fines. We therefore leave that question for another day.

DISPOSITION

The judgment is affirmed.

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BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.*

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