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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES CONTRERAS,

Defendant and Appellant.

B240066

(Los Angeles County  
Super. Ct. No. TA119321)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Ricardo R. Ocampo, Judge. Reversed in part, affirmed in part, and remanded with  
directions.

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne and Shira B.  
Seigle, Deputy Attorneys General, for Plaintiff and Respondent.

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Andres Contreras appeals from the judgment entered upon his conviction of assault with intent to commit rape (Pen. Code, § 220, subd. (a)) by plea of no contest. Pursuant to the plea agreement, the trial court sentenced appellant to the middle term of four years in state prison. It also imposed a \$40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Govt. Code, § 70373),<sup>1</sup> a \$20 Deoxyribonucleic Acid (DNA) fine (§ 76104.7),<sup>2</sup> a \$240 restitution fine (Pen. Code, § 1202.4, subd. (b)), and imposed and stayed an equal parole revocation fine (Pen. Code, § 1202.45). Appellant contends that the DNA fine is improper because it is not a “stand-alone fee” and thus may only be imposed when there are other properly imposed fines to which the DNA fine can attach.”

### **DISCUSSION<sup>3</sup>**

Appellant’s sole contention on this appeal is that the DNA fine contained in section 76104.7 was not properly imposed. He argues that that fine can only be assessed in conjunction with other specified fines and assessments, none of which was imposed here. The People agree with appellant. We do also.

At the time of sentencing, section 76104.7 provided in pertinent part: “(a) Except as otherwise provided in this section, *in addition to the penalty levied pursuant to Section 76104.6*, there shall be levied an additional state-only penalty of three dollars (\$3) for every ten dollars (\$10), or part of ten dollars (\$10), in each county upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal

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<sup>1</sup> All further statutory references are to the Government Code unless otherwise indicated.

<sup>2</sup> Though not discussed by the parties, the oral pronouncement of judgment states only that the trial court was imposing “a DNA Fee of \$20.” It did not specify if that penalty was being imposed under section 76104.6 or 76104.7, though the abstract of judgment and minute order of the sentencing indicate that it was imposed under the latter code section. Given our analysis, we find no basis for a DNA penalty under either code section.

<sup>3</sup> We do not recite the underlying facts as the issue raised by appellant and its resolution are not dependent upon those facts.

offenses . . . [¶] . . . [¶] This additional penalty does not apply to the following: [¶]

(1) Any restitution fine.”<sup>4</sup> (Italics added.)

The trial court appears to have imposed a section 76104.7, subdivision (a)(1) DNA penalty. That penalty is only imposed “in addition to” the similar penalty imposed pursuant to section 76104.6, subdivision (a). This “in addition to” language suggests that the penalty in section 76104.7 can only be imposed if the DNA penalty in section 76104.6 is also imposed. Thus, if the trial court’s oral pronouncement of judgment is construed to impose the section 76104.7 penalty, it cannot be imposed here because the section 76104.6, subdivision (a)(1) penalty was not imposed. (*People v. Valencia* (2008) 166 Cal.App.4th 1392, 1395.)

Even if the trial court’s oral pronouncement of judgment intended to impose the DNA penalty in section 76104.6, no DNA penalty under that section or section 76104.7 can be imposed. All of the nonDNA penalties and assessments imposed in this case specifically provide that the DNA penalties are inapplicable to them. (Pen. Code, § 1465.8, [court operations assessment provides in subdivision (b) that, “The penalties authorized by Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code . . . do not apply to this assessment”]; § 70373 [criminal conviction assessment provides in subdivision (b) that, “The penalties authorized by Chapter 12 (commencing with Section 76000) . . . do not apply to this assessment”]; Pen. Code, § 1202.4, subd. (b) [restitution fine provides in subdivision (e), “The restitution fine shall not be subject to penalty assessments authorized in . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code”]; Pen. Code, § 1202.45 [parole revocation fine provides, “This additional parole revocation restitution fine shall not be

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<sup>4</sup> The amount of the penalty in section 76104.7 has increased over time. Effective June 27, 2012, the penalty in that section was increased to four dollars for every \$10 or part of \$10. We need not decide which version of section 76104.7 would apply to appellant’s conviction because we conclude that penalty is not properly imposed in this case.

subject to penalty assessments authorized by . . . Chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, . . .”].)

As a result there are no fines or penalties that have been imposed against appellant to which the DNA penalty in sections 76104.6 or 76104.7 can apply. Therefore, the DNA penalty in section 76104.7 must be stricken.

**DISPOSITION**

The DNA penalty within section 76104.7 is stricken, and the judgment is otherwise affirmed. On remand the trial court is directed to correct the abstract of judgment accordingly.

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\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, Acting P. J.  
DOI TODD

\_\_\_\_\_, J.  
CHAVEZ