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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.

ROGER LOPEZ,

Defendant and Appellant.

B295156

(Los Angeles County  
Super. Ct. No. LA076902)

APPEAL from an order of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Reversed and remanded with directions.

Laura R. Vavakin, 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, Senior Assistant Attorney General, Michael C. Keller, Acting Supervising Deputy Attorney General and John Yang, Deputy Attorney General for Plaintiff and Respondent.

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## **INTRODUCTION**

Roger Lopez appeals from an order revoking his probation and sentencing him to the upper term of four years in state prison. Lopez contends that, in sentencing him on his probation violation, the trial court improperly considered conduct by Lopez while he was on probation. Lopez also contends the court erred in imposing certain fines, fees, and assessments without determining whether he had the ability to pay. Because both contentions have merit, we reverse the order and remand for resentencing and for a hearing on Lopez's ability to pay the fines, fees, and assessments the trial court imposed.

## **FACTUAL AND PROCEDURAL HISTORY**

In February 2014 the People charged Lopez with assault with a deadly weapon. Lopez pleaded no contest. The trial court stayed imposition of sentence and placed Lopez on formal probation for three years on condition he serve 365 days in county jail with credit for time served. The terms of Lopez's probation included paying the victim \$3,000 in restitution. The court extended Lopez's probation to September 17, 2019 for him to pay the balance of the victim restitution.

On August 7, 2018 police responded to a call reporting an incident of domestic violence. When they arrived at the scene, Lopez ran out of the apartment complex. The officers pursued Lopez and took him into custody. When they spoke to the victim, Mira, one of the officers observed and photographed "a bump on the right side of her forehead and . . . bruising on her lower lip." Mira said Lopez struck her on the head and "pushed her lips with his finger." The officer also observed the apartment was in disarray: There were multiple items on the floor, "blinds had

been removed from the wall,” and there was a couch blocking the front door, making it hard to get into the apartment.

On August 9, 2018 the court revoked Lopez’s probation and set a probation violation hearing. The court also issued a protective order prohibiting Lopez from having any contact with Mira. Jail records showed, however, Lopez violated the protective order on August 20, 2018 by calling Mira.

On September 5, 2018 the People charged Lopez with one count of corporal injury on a cohabitant and one count of burglary. On January 2, 2019, after a probation violation hearing, the trial court found Lopez violated the terms and conditions of his probation by calling Mira. The court terminated probation, sentenced Lopez to the upper term of four years in prison, and dismissed the new charges for failure to prosecute. The court also ordered Lopez to pay a \$30 court facilities assessment under Government Code section 70373, a \$40 court operations assessment under Penal Code section 1465.8, and two \$300 restitution fines. Lopez timely appealed.

## DISCUSSION

### A. *The Trial Court Erred in Considering Lopez’s Conduct During His Probation*

When the court revokes and terminates probation and determines it will commit the defendant to prison, 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.” (Cal. Rules of Court, rule 4.435(b)(1);<sup>1</sup> see *People v. Jones* (1990) 224 Cal.App.3d 1309,

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<sup>1</sup> Citations to rules are to the California Rules of Court.

1316, fn. 4; *People v. White* (1982) 133 Cal.App.3d 677, 681 [“events subsequent to the original grant of probation cannot be considered in determining the *length* of the sentence”]; *People v. Colley* (1980) 113 Cal.App.3d 870, 873 [probation violation sentence ““must reflect the circumstances existing at the time of the offense””]; see also *People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163 [“a defendant’s bad acts while on probation [cannot] influence his sentence upon revocation of probation”].)

After the trial court found Lopez had violated the terms of his probation, the court sentenced him to the upper term of four years. The court stated: “The court selects the high term of four years in state prison. The defendant was already convicted of a [violation of Penal Code section] 245(a)(1) in the prior case. This is more of the same conduct. And so that’s why the court is selecting the high term.” The court stated it was imposing the upper term because “the allegations in the probation violation were of a domestic violence nature” and the aggravating circumstances outweighed any mitigating circumstances.

Lopez argues the trial court violated rule 4.435(b)(1) by relying on events subsequent to the grant of probation in imposing the upper term of four years. Lopez is correct. The only reason the trial court gave for sentencing Lopez to the upper term was Lopez’s conduct while on probation. That was error, and the People do not argue otherwise. Instead, the People, citing *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), argue Lopez forfeited the argument because he did not object when the court relied on Lopez’s conduct during probation to sentence Lopez to the upper term.

In *Scott* the California Supreme Court held that “the right to challenge a criminal sentence on appeal is not unrestricted. In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing

courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim.” (*Scott, supra*, 9 Cal. 4th at p. 351.) The forfeiture doctrine applies to “claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices,” including “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.” (*Id.* at p. 353; accord *People v. Scott* (2015) 61 Cal.4th 363, 406; see *In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 [“In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law.”].)

Lopez contends he did not forfeit his argument because rule 4.435(b)(1) is a “nondiscretionary rule.” He argues rule 4.435(b)(1) is nondiscretionary because it reads: “The length of the sentence must be based on circumstances existing at the time [probation] was granted . . . .” It is true rule 4.435(b)(1) contains the word “must.” But in this context, the terms discretionary and nondiscretionary apply to sentencing choices, not rules. (See, e.g., *People v. Ruiz* (2018) 4 Cal.5th 1100, 1119; *People v. Scott, supra*, 61 Cal.4th at p. 406.) And a sentencing choice or decision is not nondiscretionary merely because the rule governing that choice states the trial court “must” take a particular action or make a particular finding. The trial court here made a sentencing choice, imposing the upper term rather than the middle or lower term, but the reasons the court gave for that choice were improper. By failing to object when the court stated those reasons, Lopez forfeited the argument the court erred in sentencing him on the probation violation. (See *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511 [“by failing to

object, [the defendant] forfeited his claim the upper terms are improper because the trial court did not state its reasons for selecting those terms”]; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042 [failure “to object to the reasons for the sentencing choice” forfeited the issue on appeal because “the use of improper circumstances for a sentencing decision is not a jurisdictional error”]; *In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1685, fn. 8 [“where there has been a meaningful opportunity to do so, a defendant who fails to object to a court’s failure to state reasons for a sentencing choice cannot raise the claim for the first time on appeal”].)

The forfeiture exception Lopez may be invoking is the exception for an unauthorized sentence. “[T]he ‘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.” (*People v. Scott, supra*, 9 Cal.4th at p. 354.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*; accord, *People v. Rivera* (2019) 7 Cal.5th 306, 348.) The trial court, however, sentenced Lopez to four years in state prison on his conviction for assault with a deadly weapon, which is authorized under Penal Code section 245, subdivision (a)(1), as the upper term for this offense. Thus, the unauthorized sentence exception to the forfeiture rule does not apply. (See *People v. Wall* (2017) 3 Cal.5th 1048, 1075 [“a defendant forfeits on appeal any ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ in the absence of objection below”]; *Scott*, at p. 354 [forfeited arguments “involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner”].)

Lopez argues for the first time in his reply brief that, if his trial counsel should have objected at the sentencing hearing, counsel's failure to do so was ineffective assistance. By not raising this argument in his opening brief, however, Lopez forfeited it as well. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219 [defendant forfeits an argument not raised until the reply brief]; *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [defendant forfeited an ineffective assistance of counsel argument by raising it for the first time in his reply brief]; *People v. Bona* (2017) 15 Cal.App.5th 511, 517 ["ineffective assistance claim is forfeited because it was not raised in the opening brief"].)

Nevertheless, we exercise our discretion to reach the issue and correct the trial court's sentencing error. "[T]he fact that a party may forfeit a right to present a claim of error to the appellate court if he or she did not raise the issue in the trial court does not mean the appellate court is deprived of authority to reach the merits of the issue." (*People v. Young* (2017) 17 Cal.App.5th 451, 463; see *People v. McCullough* (2013) 56 Cal.4th 589, 593 ["neither forfeiture nor application of the forfeiture rule is automatic," and "[c]ompeting concerns may cause an appellate court to conclude that an objection has not been forfeited"].) Indeed, in *People v. Williams* (1998) 17 Cal.4th 148 the Supreme Court explained: "In *Scott*, we held only that *a party* cannot raise a 'complaint[ ] about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons . . . for the first time on appeal.' [Citation.] We did not even purport to consider whether *an appellate court* may address such an issue if it so chooses. Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[ ]' or 'correct[ ]' the claimed error in the trial court [citation] does not compel the conclusion that,

by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.” (*Id.* at p. 161, fn. 6.) Here, because Lopez will be able to raise in a habeas petition the issue whether his trial and appellate counsel provided ineffective assistance by (doubly) forfeiting the issue and, as we will discuss, we must remand the case to give the trial court the opportunity to consider Lopez’s ability to pay the fines, fees, and assessments the court imposed, it is appropriate and in the interest of judicial economy to give the court the opportunity to correct its sentencing error as well.

B. *Remand Is Appropriate To Give Lopez the Opportunity To Request a Hearing On His Ability To the Pay Fines, Fees, and Assessments*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held that a trial court cannot impose a court operations assessment under Penal Code section 1465.8 or a court facilities assessment under Government Code section 70373 without first determining the defendant’s ability to pay and that the court must stay execution of a restitution fine until the court determines the defendant has the ability to pay. (*Dueñas*, at pp. 1168, 1172.) Lopez argues in a supplemental brief that under *Dueñas* we should reverse the \$30 court facilities and \$40 court operations assessments the trial court imposed and stay execution of the two \$300 restitution fines the court imposed under Penal Code sections 1202.4, subdivision (b), and 1202.45. The People argue that Lopez forfeited this issue by failing to raise it in the trial court and that the record does not establish Lopez is unable to pay these assessments.



Lopez did not forfeit the argument. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), at the time the trial court sentenced Lopez, “*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court’s consideration of a defendant’s ability to pay. Indeed . . . in the case of the restitution fine, Penal Code section 1202.4, subdivision (c), expressly precluded consideration of the defendant’s inability to pay. When, as here, the defendant’s challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture.” (*Castellano*, at p. 489; see *People v. Jones* (2019) 36 Cal.App.5th 1028, 1033; see generally *People v. Brooks* (2017) 3 Cal.5th 1, 92 [“[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”]; but see *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.)

The People also contend we should not remand the matter for an ability to pay hearing because Lopez failed to show in the trial court that he did not have the financial ability to pay the fines, fees, and assessments and that he lacked the future earning capacity to pay, including any wages he may earn while in prison. The People also argue Lopez has not demonstrated any adverse consequences from imposition of the fines, fees, and assessments. However, “*Dueñas* does not support that conclusion in the absence of evidence in the record of a defendant’s inability to pay. . . . [¶] . . . [A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees

and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.”

(*Castellano, supra*, 33 Cal.App.5th at p. 490; see *Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169.)

Therefore, a remand under *Dueñas* is appropriate to allow Lopez to contest the court’s imposition of the fines, fees, and assessments and to present evidence at a hearing of his inability to pay them. Lopez, however, does not need to present evidence of potential adverse consequences beyond the amount of the assessments or fines, and the trial court should consider all relevant factors in determining Lopez’s ability to pay, including any wages Lopez may earn during his incarceration. (See *Castellano, supra*, 33 Cal.App.5th at p. 490.)

## **DISPOSITION**

The order revoking and terminating probation is reversed. The matter is remanded for resentencing on the probation violation and to give Lopez the opportunity to request a hearing on his ability to pay the fines, fees, and assessments imposed by the trial court. If Lopez demonstrates he does not have the ability to pay, the trial court must strike the court facilities and

court operations assessments and stay the execution of the restitution fines. If Lopez fails to demonstrate his inability to pay, the court may enforce the fines, fees, and assessments the court previously imposed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.