Filed 12/20/19 P. v. Crown CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHAD EDWARD CROWN, Defendant and Appellant.	B292301 (Los Angeles County Super. Ct. No. PA089391)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Terrell, Judge. Affirmed with directions.

Andrea Ilana Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Chad Crown appeals the judgment entered following a jury trial in which he was convicted of possession of a controlled substance (methamphetamine) while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 1), possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 2), and possession of a controlled substance (methamphetamine) for sale (Health & Saf. Code, § 11378; count 3). The trial court sentenced appellant to four years in state prison.[1] The court also imposed a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $300 parole revocation fine, stayed pending successful completion of parole (Pen. Code, § 1202.45), $120 in court operations assessments (Pen. Code, § 1465.8, subd. (a)(1)), $90 in criminal conviction assessments (Gov. Code, § 70373), a $50 lab fee pursuant to Health and Safety Code section 11372.5, subdivision (a), and a $10 fine pursuant to Penal Code section 1202.5 or section 1465.7.[2]

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[1] The abstract of judgment incorrectly states that appellant was sentenced to three years on count 1.

[2] The court's minute order reflects the imposition of a $10 criminal fine surcharge pursuant to Penal Code section 1465.7, while the abstract of judgment shows the $10 fine imposed under Penal Code section 1202.5. The reporter's transcript of the court's oral pronouncement of judgment does not reflect the imposition of any $10 fine under any statute. In the case of a discrepancy between the oral pronouncement of judgment and the minute order and/or the abstract of judgment, the oral pronouncement controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mitchell* (2001) 26 Cal.4th 181, 185–186; *People v. Mullins* (2018) 19 Cal.App.5th 594, 612.) Accordingly, the August 27,

Appellant contends: (1) by excluding certain hearsay statements that qualified as declarations against penal interest, the trial court denied appellant due process and the right to present a complete defense, requiring reversal of his convictions; and (2) the case should be remanded to the trial court to conduct an ability to pay hearing pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We disagree and affirm.

FACTUAL BACKGROUND

While on patrol on July 8, 2017, approximately 9:00 p.m., Los Angeles Police Officers Oliver Olano and Eriverto Montano came across a car without a handicap placard parked in a handicap parking space at the Emerson Motel. The car was registered to appellant. The area was known for gang and drug activity, and both officers had previously made arrests at the Emerson Motel for crimes involving firearms, drug use, and drug sales.

The officers parked, and as they approached appellant's car, they observed appellant in the driver's seat and his girlfriend, Sara Keef, sitting in the front passenger seat. Officer Montano saw appellant place a black and white object into a black gym bag on the rear seat. Appellant produced two expired handicap placards, neither of which belonged to him. The officers noted that appellant appeared "nervous" and "fidgety," and "his hands were shaking."

As Officer Olano was speaking to appellant, Officer Montano signaled to his partner there was something suspicious

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2018 minute order and the abstract of judgment must be amended to strike the $10 fine.

inside the vehicle. When Officer Olano ordered appellant out of the car, appellant became irate and clenched his fists. Officer Olano handcuffed him and appellant began shouting profanities, screaming at Keef not to allow the officers to search the vehicle. As appellant was placed in the back of the police car, the officers asked Keef to exit the vehicle. Keef was then detained by another police unit that had arrived on the scene.

The officers searched appellant's car. In the gym bag on the back seat, Officer Montano recovered a black and white nine-millimeter Smith and Wesson semiautomatic firearm with nine rounds in the ten-round magazine. Also in the gym bag were handcuffs, a plastic scale, a set of keys, and male clothing. A pair of men's cargo shorts was on the seat next to the gym bag. In one of the pockets of the shorts Officer Olano found two baggies of methamphetamine inside a larger plastic bag. One of the baggies contained 16.04 grams of methamphetamine, and the combined total net weight of the bags was 25.99 grams, representing approximately 260 single doses. Police found no paraphernalia that could be used to ingest methamphetamine in the car.

After appellant was arrested, Officer Olano allowed Keef to retrieve her belongings from the car and she took her purse. Officer Olano questioned Keef and, determining she was "not involved," released her.

Los Angeles Police Detective Ramiro Capa, testifying as an expert, opined that the methamphetamine was possessed for sale. The detective based his opinion on the quantity of narcotics recovered, the manner of packaging, the lack of any drug paraphernalia in the car, the fact that the arrest took place in an area known for a high rate of narcotics activity, and appellant's possession of a scale and the firearm.

Donnie Chambers, a security guard at the Emerson Motel, testified that appellant and Keef were frequent weekend guests at the motel. On July 8, 2017, Chambers saw appellant and Keef park in the motel's parking lot and later return to the car. The police arrived as appellant's vehicle began to back out of the parking space. The officers jumped out of the patrol car and told appellant to "put [his] fucking hands up" and to get out of the car. Calling appellant "a piece of shit," the officers took appellant out of his car and "slammed him against the hood." Chambers did not recall seeing appellant reach toward the back seat of his car, and although appellant asked what was going on, he did not yell at or threaten the officers.

Appellant testified that on the night of his arrest, there was no black bag in the car, he had no clothing of any kind in the vehicle, he had no narcotics on him, nor did he have any knowledge of methamphetamine in his car, and before trial he had never seen the firearm or the scale police claimed to have found in the vehicle. He had no idea how any of these items ended up in his car. Appellant asserted that the keys had been in his pocket, and the handcuffs, which had been in the center console, belonged to his brother, who sometimes drove appellant's car. Appellant admitted he was stopped by police in April 2018 while this case was pending with a large quantity of methamphetamine in his car. But he claimed that the officers "pinned [the] methamphetamine" under his dashboard to "make this case look better," and he had the video to prove it.

DISCUSSION

I. The Denial of the Defense Motion to Admit Keef's Hearsay Statement as a Declaration Against Penal Interest

Appellant contends the trial court erroneously excluded a hearsay statement by appellant's girlfriend that qualified as a declaration against her penal interest under Evidence Code[3] section 1230. According to appellant, the error resulted in the violation of his constitutional right to present a complete defense and his right to due process, requiring reversal of appellant's convictions on counts 1 and 3. However, appellant's failure to make an appropriate offer of proof in the trial court resulted in an inadequate record on appeal, thereby precluding appellate review of the issue.

A. *Relevant background*

When called as a defense witness, Keef asserted her Fifth Amendment right against self-incrimination and did not testify. Thereafter, defense counsel sought to introduce a statement Keef purportedly made to a district attorney investigator: "Now that Ms. Sara Keef is unavailable, I believe, I had received a statement that she had admitted that the drugs that were found in the car were hers and I would seek to admit that statement, perhaps, through a witness who assisted in taking the statement pursuant to Evidence Code 1230 as a declaration against her penal interest."

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[3] Undesignated statutory references are to the Evidence Code.

The prosecutor objected on the ground that the statement was hearsay, and the People's right to cross-examine the witness should not be frustrated by the introduction of an unexplained statement made to an investigator from the district attorney's office. The trial court sustained the objection on the ground that "[t]he hearsay . . . exception that [defense counsel] is referring to, in the court's view, doesn't apply in this scenario. Typically it comes in where a witness is on the stand and the witness says, person 'X' said something contrary to that person's interest, and then there can be some examination, cross-examination about the circumstances of that and the like. [¶] I don't believe the exception applies to some out-of-court statement that was made in this context that applies to this scenario. So I'm going to sustain the objection."

B. ***The absence of an offer of proof regarding the purported declaration against interest precludes consideration of the issue on appeal***

Hearsay, an out-of-court statement offered for the truth of the matter stated, is generally inadmissible, unless it is subject to some exception. (§§ 1200, 1220 et seq.) Section 1230 provides one such exception, allowing for the admission of an extrajudicial declaration that "so far subjected [the declarant] to the risk of civil or criminal liability, . . . that a reasonable [person] in his [or her] position would not have made the statement unless he [or she] believed it to be true." (§ 1230.) " ' "The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's . . . interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' " [Citation.] "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining

whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." ' " (*People v. Masters* (2016) 62 Cal.4th 1019, 1055–1056 (*Masters*), quoting *People v. Geier* (2007) 41 Cal.4th 555, 584; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1108 (*McCurdy*).) In considering the totality of circumstances in which the statement was made, the trial court must " ' "apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception." ' " (*People v. Duarte* (2000) 24 Cal.4th 603, 614; *People v. Tran* (2013) 215 Cal.App.4th 1207, 1216–1217 (*Tran*).)

A trial court's decision to exclude evidence under section 1230 " ' " 'will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " ' " (*Masters*, *supra*, 62 Cal.4th at p. 1056; *People v. Grimes* (2016) 1 Cal.5th 698, 711.) However, the question of whether the trial court correctly construed section 1230 is one of law which is subject to de novo review. (*Grimes*, at p. 712; *Tran*, *supra*, 215 Cal.App.4th at p. 1217 ["When a trial court bases its ruling on a conclusion of law, or a mistake of law, we review de novo"].) In any event, the appellate court must be presented with an adequate record from which to determine error and assess prejudice. Here, because appellant made no offer of proof regarding Keef's alleged declaration against interest, there is nothing in the record to support appellant's claim of reversible error.

An appellate court may not reverse a judgment based on the erroneous exclusion of evidence unless the "substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (§ 354, subd. (a); *People v. Livaditis* (1992) 2 Cal.4th 759, 778.) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice. (*People v. Whitt* (1990) 51 Cal.3d 620, 648.) To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.)

Here, although Keef's assertion of her privilege against self-incrimination established her unavailability as a witness (see *Masters*, *supra*, 62 Cal.4th at p. 1056; *McCurdy*, *supra*, 59 Cal.4th at p. 1109), appellant both failed to present the court with the exact substance of the declaration and laid no foundation regarding the trustworthiness of the statement. Under these circumstances, appellant's failure to make an appropriate offer of proof in the trial court resulted in an inadequate record on appeal from which to evaluate reversible error based on the exclusion of the evidence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176; *In re Mark C.* (1992) 7 Cal.App.4th 433, 445 ["Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made"]; see *People v. Miller* (2014) 231 Cal.App.4th 1301, 1308, fn. 5 [party's failure to "identify what specific statements were excluded by the trial court" made it impossible "to determine whether the court abused its discretion"]; *Gutierrez v. Cassiar Mining Corp.* (1998) 64

Cal.App.4th 148, 161 [party's failure to make an offer of proof at trial rendered it unable to establish reversible error].)

For the same reason, appellant's constitutional claim also fails because, in the absence of an adequate record, appellant cannot show that the excluded statement was vital to his defense. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

II. *Appellant Is Not Entitled to a Hearing to Determine His Ability to Pay the Restitution Fine and Assessments*

Appellant contends he is entitled to a remand to the trial court for a hearing on his ability to pay the restitution fine and court assessments under *Dueñas*, *supra*, 30 Cal.App.5th 1157.[4] We reject the claim.

In *People v. Hicks* (2019) 40 Cal.App.5th 320, 322, 329 (*Hicks*),[5] we concluded *Dueñas* was wrongly decided and rejected its holding that "due process precludes a court from 'impos[ing]'

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[4] Appellant does not appear to challenge the $300 parole revocation fine (Pen. Code, § 1202.45) or the $50 lab fee (Health & Saf. Code, § 11372.5, subd. (a)).

[5] The California Supreme Court has granted review in *Hicks* and ordered briefing deferred pending its decision in *People v. Kopp*, S257844, of the following issues: "(1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?" (*People v. Hicks*, S258946 <https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2302457&doc_no=S258946&request_token=NiIwLSIkTkg9WyAtSCM9WE9JQEg0UDxTJiBeIz5SUCAgCg%3D%3D&bck=yes> [as of Dec. 18, 2019], archived at <https://perma.cc/3TMF-EYE4>.)

certain assessments and fines when sentencing a criminal defendant absent a finding that the defendant has a 'present ability to pay' them." (Accord, *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067–1068 ["*Dueñas* was wrongly decided"]; *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 926–927 [*Dueñas*'s due process analysis does not justify extending its "broad holding" beyond its "extreme facts"]; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279–282 (*Kingston*) [no due process violation in imposition of assessments and restitution fine without first ascertaining defendant's ability to pay them]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 96–97, review granted Sept. 5, 2019, S257844 ["there is no due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it"].)

In *Kingston*, our colleagues in Division One of this district agreed with our opinion in *Hicks* that, contrary to *Dueñas*'s analysis, "due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant's incarceration." (*Kingston*, *supra*, 41 Cal.App.5th at p. 279, citing *Hicks*, *supra*, 40 Cal.App.5th at p. 329.) Here, as in *Kingston* and *Hicks*, the "imposition of the [restitution fine,] assessments and fees in no way interfered with [appellant's] right to present a defense at trial or to challenge the trial court's rulings on appeal . . . . And their imposition did not result in [appellant's] incarceration." (*Kingston*, at p. 281; *Hicks*, at p. 329.) Moreover, due process does not deny appellant the opportunity to try to satisfy these obligations. (See *Hicks*, at p. 327.)

Further, we agree with the People that appellant's failure to object to the imposition of the restitution fine or assessments

and his failure to assert any ability to pay them (unlike the defendant in *Dueñas*) forfeited the issue on appeal. Generally, where a defendant has failed to object to a restitution fine or court fees based on an inability to pay, the issue is forfeited on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 ["defendant's failure to challenge the fees in the trial court precludes him from doing so on appeal"]; *People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight that this general rule applies here to the restitution fine and the assessments imposed under the Penal and Government codes. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 488.)

Finally, even if appellant had not forfeited his argument, we decline to extend *Dueñas*'s broad holding beyond the extreme facts in that case, which are not present here. Dueñas was a disabled, unemployed, and often homeless mother of two young children. Over the course of several years she served jail time because she could not pay the fines imposed in connection with various misdemeanor vehicle offenses. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160–1162.) Applying a due process analysis to the particular facts before it, the appellate court concluded that "[b]ecause the only reason Dueñas cannot pay the fine and fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional." (*Dueñas*, at p. 1160.) By contrast, the situation in which appellant finds himself—subject to a four-year state prison sentence for a felony conviction of possession of a controlled substance with a firearm—simply does not implicate the same due process concerns at issue in the factually unique *Dueñas* case. Appellant, unlike Dueñas, does not face incarceration because of an inability to pay court-imposed fines,

fees, and assessments. Instead, appellant is in prison because he was found in possession of a large quantity of methamphetamine along with a gun—a gun he was prohibited from possessing because of a prior felony conviction. Even if appellant does not pay the fines and assessments, he will suffer none of the cascading and potentially devastating consequences that Dueñas faced. (See *Dueñas*, at p. 1163.)

DISPOSITION

The judgment is affirmed. The superior court is directed to amend the August 27, 2018 minute order of sentencing to strike the $10 criminal fine surcharge imposed under Penal Code section 1465.7 and the abstract of judgment to strike the $10 fine imposed pursuant to Penal Code section 1202.5. The court is further directed to correct the abstract of judgment to reflect the imposition of the upper term of four years on count 1. The court is ordered to forward a corrected copy of the abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.