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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.

JULIO ALBERTO MARTINEZ,

Defendant and Appellant.

B293206

(Los Angeles County  
Super. Ct. No. VA141613)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed and remanded with directions.

Katherine E. Hardie, 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, Scott A. Tarlye and David E. Madeo, Deputy Attorneys General for Plaintiff and Respondent.

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A jury convicted Julio Alberto Martinez of second degree robbery for stealing a pair of shoes. The trial court sentenced Martinez to 11 years in prison, consisting of the middle term of three years, doubled under the three strikes law, plus five years under Penal Code section 667, subdivision (a)(1),<sup>1</sup> for a prior serious felony conviction. The court did not impose or strike one-year enhancements under section 667.5, subdivision (b). Martinez appealed, arguing the trial court denied him his right to be present at the sentencing hearing. We agreed and remanded the matter to the trial court with directions to hold a new sentencing hearing, with Martinez having the opportunity to be present, and to impose or strike the one-year enhancements under section 667.5, subdivision (b).

On remand, the trial court resentenced Martinez to 11 years in prison, again consisting of the middle term of three years, doubled under the three strikes law, plus five years under section 667, subdivision (a)(1), for the prior serious felony conviction. The court struck the one-year enhancements under section 667.5, subdivision (b).

In this appeal Martinez argues we should remand the matter again with directions (1) to give the trial court the opportunity to exercise discretion whether to strike the five-year enhancement under section 667, subdivision (a)(1), (2) to recalculate Martinez's custody credits, and (3) to determine whether Martinez has the ability to pay \$370 in fines, fees, and assessments the court imposed. The People concede, and we agree, Martinez is entitled to relief on issues (1) (see *People v. Kopp* (2019) 38 Cal.App.5th 47, 92-93; *People v. Garcia* (2018) 28

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Cal.App.5th 961, 971, 973) and (2) (see *People v. Buckhalter* (2001) 26 Cal.4th 20, 29; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1290).

The People appear to concede Martinez is entitled to some relief on issue (3), stating that this court “need not direct the superior court to determine, without a request, whether [Martinez] has an ability to pay the fines, fees and assessments before imposing them again” and that Martinez “may make this contention on remand to the sentencing court.” We agree with the People that Martinez is entitled on remand to request a hearing on his ability to pay. As we held in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), a trial court cannot impose a court operations assessment under section 1465.8 or a court facilities assessment under Government Code section 70373 without first determining the defendant’s ability to pay, and 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.) The People also argue, however, somewhat inconsistently, that Martinez is not entitled to relief on issue (3) because he forfeited the argument and because there is no evidence in the record Martinez did not have the ability to pay, or would suffer adverse consequences if he had to pay, the fines, fees, and assessments.

Martinez 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 Martinez, “*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. Santos* (2019) 38 Cal.App.5th 923, 931-932; *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. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.)

Nor does *Dueñas* require the defendant to demonstrate adverse consequences from imposition of the fines, fees, and assessments. "[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.) Thus, on remand Martinez 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

Martinez's ability to pay, including any wages Martinez may earn during his incarceration. (See *Castellano*, at p. 490.)

Disposition: The conviction is affirmed, but the matter is remanded for the trial court to exercise discretion whether to strike the five-year enhancement under section 667, subdivision (a)(1), to recalculate Martinez's custody credits, and to give Martinez the opportunity to request a hearing on his ability to pay the fines, fees, and assessments the trial court imposed. If Martinez 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 fine. If Martinez fails to demonstrate his inability to pay, the court may enforce the fines, fees, and assessments the court previously imposed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.