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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ALLEN MASON, Defendant and Appellant.	H036598 (Santa Clara County Super. Ct. No. EE806813)

Defendant Jeffrey Allen Mason was convicted of residential burglary and sentenced to life in prison. On appeal he challenges a $129.75 "[c]riminal justice fee" the court ordered him to pay to the City of Sunnyvale pursuant to Government Code section 29550.1. He contends that the fee cannot withstand appellate scrutiny because (1) an ability-to-pay requirement must be read into the statute to avert an equal protection challenge, and there was no evidence before the trial court of his ability to pay the fee; and (2) there was no evidence of the actual administrative costs the fee was intended to reimburse. Respondent contends that these objections are not cognizable on appeal because defendant failed to assert them below, and that they fail on the merits. We conclude that imposing this fee without finding an ability to pay does not deprive defendant of the equal protection of the laws, because he is not similarly situated to the defendants to whom he compares himself, and a conceivable rational basis exists for treating him differently. We further conclude that the statute does not require a finding

by the sentencing court of the actual costs in which the fee originated. Accordingly we will affirm the judgment.

BACKGROUND

Defendant admitted participating in two residential burglaries in Sunnyvale. He entered a no contest plea to one burglary charge and admitted six strike convictions in exchange for dismissal of a second burglary charge. The court denied a motion to dismiss strike priors and sentenced defendant to imprisonment for 36 years to life, consecutive to 30 years. After ordering defendant to pay $13,000 in victim restitution, the court assessed a number of other charges, including $129.75 described at the hearing as a "[c]riminal justice fee to the City of Sunnyvale."

Defendant filed this timely appeal.

DISCUSSION

I. *Availability of Objection on Appeal*

Defendant contends that the trial court erred by imposing the $129.75 criminal justice fee, also known as a "booking fee." (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399 (*Pacheco*).) Defendant concedes that the fee was imposed under Government Code section 29550.1 (§ 29550.1), which calls for the imposition of such a fee but does not by its terms require a finding that the defendant can pay it. Defendant contends in essence that such a requirement must be read into the statute to save it from constitutional infirmity. He also contends that the trial court was required to find that the amount imposed was based upon the actual costs incurred in booking him. He asserts that the record contains insufficient evidence to support either of these assertedly required findings.

Respondent's chief response to these contentions is that defendant forfeited them by failing to raise them in the trial court. The parties treat this question as turning on the soundness of our decision in *People v. Pacheco*, *supra*, 187 Cal.App.4th 1392, which in

turn followed our decision in *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 (*Viray*), which in turn quoted *People v. Butler* (2003) 31 Cal.4th 1119, 1126, for the rule that the absence of substantial evidence to support a challenged judicial action presents an " 'obvious exception' " to the requirement that an objection must be asserted in the trial court before it can be heard on appeal. (*Pacheco, supra*, at p. 1397.)[1] If the trial court was indeed required to find the facts asserted by defendant, then the absence of substantial evidence to support such findings would indeed point to error which could, under the cited rule, be raised for the first time on appeal. This is a sound rule of long standing. We decline respondent's invitation to repudiate it or our holding in *Pacheco*.

Respondent also asserts cursorily that defendant forfeited the legal predicate for this challenge—his *equal protection* argument—by failing to assert *it* below. The only authority cited is *People v. Alexander* (2010) 49 Cal.4th 846, 880, footnote 14. But the argument held to have been forfeited there was that the defendant's right to equal protection had been violated by the trial court's "application of [an earlier] holding" concerning the retroactive effect of a statute regulating certain evidence. (*Id.* at p. 880.) Defendant's argument here, as we understand it, is that the statute under which the booking fee was imposed is unconstitutional *on its face* unless a saving construction is supplied by reading it to require a finding of ability to pay. Such a challenge may be raised for the first time on appeal because the issue thus presented is " 'one of law presented by undisputed facts in the record before us that does not require the scrutiny of individual circumstances, but instead requires the review of abstract and generalized legal concepts—a task that is suited to the role of an appellate court.' " (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 885;

[1] The Supreme Court has granted review in a case declining to follow *Pacheco* and distinguishing *Viray*. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted Jun. 29, 2011, S192513.)

see *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323, citations omitted ["appellate courts have discretion to address constitutional issues raised on appeal . . . , particularly where the issue presented is 'a pure question of law' turning on undisputed facts . . . or when ' "important issues of public policy are at issue" ' "]; *In re Sheena K.*, *supra*, at p. 888 [facial challenge to probation condition not forfeited where, among other things, claimed error raised "a pure question of law, easily remediable on appeal by modification of the condition"].)

Even if it appeared that appellant had otherwise failed to preserve his equal protection challenge for review, we would exercise our discretion to entertain it because it represents an issue which has been arising frequently but on which we find no published authority. To lay that issue to rest, at least in the present factual setting, we will reach the merits of defendant's argument.

II. *Equal Protection*

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted; see *People v. Olague* (2012) ___ Cal.App.4th ___ [2012 WL 1571201, *2] ["To succeed on an equal protection claim, a defendant must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner."].) Such a showing requires two subsidiary conditions: that the challenged law distinguishes between two or more classes of persons; and that it results in their being treated unequally.

The statutory scheme at issue here provides for payment orders and probation conditions effecting the reimbursement of counties for at least part of their costs in booking persons arrested by their own officers and the officers of other entities such as municipalities and the state. (Gov. Code, § 29550-29550.2.) It classifies defendants

according to the identity of the entity whose employees arrest them. Section 29550.1, which furnishes the authority for the fee imposed on defendant, applies to persons arrested by an officer or agent of a "city, special district, school district, community college district, college, university, or other local arresting agency." Section 29550, subdivision (d) (§ 29550(d)), applies to defendants arrested by officers of a county.[2] Section 29550.2 applies to arrests by a "governmental entity not specified in Section 29550 or 29550.1," i.e., neither a "local arresting agency" nor a county, and thus probably in most or all cases a *state* agency such as the Highway Patrol.

The three classes of prisoners thus created may be roughly characterized as local arrestees, county arrestees, and state arrestees. Defendant's challenge rests on the fact that on the face of the statutes, a local arrestee may be required to pay a booking fee without any showing that he is able to pay it, whereas state and county arrestees, or at least some of them, may only be subjected to such a fee if shown to possess such ability.[3]

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[2] This at any rate is how we read section 29550(d), which has defied our attempts to divine a meaning that is both literal and logical. The most glaring of its several anomalies is its introductory reference to a "criminal justice administration fee" that is "due the *agency*." We asked the parties to brief the question of what "agency" is meant; not surprisingly, they offer sharply differing analyses, and neither analysis really makes sense of the statute. The term "agency" appears elsewhere in the statute only in reference to local arresting agencies, which would appear at first glance to be the intended referent. But nowhere in the preceding provisions is any fee made *due to* these agencies; rather the gravamen of the statute, up to this point, is to obligate local agencies to reimburse the *county* for one-half of *its* expenses in booking their arrestees. (See § 29550, subd. (a)(1).) And while subdivision (d)(1) is inexplicit as to the identity of the payee agency, subdivision (d)(2) quite explicitly provides for a fee payable *to the county*. Obviously it would make no sense to empower the county to collect a fee "due the [local arresting] agency." After considerable head-scratching we are forced to conclude that the term "agency" in the preamble is a drafting error and that this subdivision is really intended to effectuate the *county's* entitlement to fees, which is declared in the preceding subdivision. (§ 29500, subd. (c).)

[3] Section 29550.2 clearly requires ability to pay when the fee is imposed in the form of an order for payment accompanying a judgment of conviction, but is arguably

Having determined that the statutes create three classes of affected persons, we must decide whether they are "similarly situated" for purposes of equal protection analysis. "The 'similarly situated' prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) The question "is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court, supra,* 29 Cal.4th 228, 253, quoting *People v. Gibson* (1988) 204 Cal.App.3d 1425, 1438.)

We have concluded that for purposes of the statutes challenged here, local arrestees are not "similarly situated" to state and county arrestees. The lack of similarity arises from the fact that under section 29550.1, a local arrestee is only liable for the fee "imposed by a county." The quoted phrase is manifestly a reference to the charge described in section 29550, subdivision (a)(1) (§ 29550(a)(1)), which entitles a county to "impose a fee" on a local arresting agency "for reimbursement of county expenses incurred with respect to the booking or other processing of persons arrested by an employee" of that agency. The county may collect this charge simply by "submit[ting] an invoice" to the arresting agency. (§ 29550(a)(1).) And it is this charge which is passed on to the local arrestee by section 29550.1.

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ambiguous with respect to requiring payment as a condition of probation. Section 29550(d), in contrast, quite clearly requires an ability-to-pay finding before making payment a condition of probation (§ 29550(d)(2)), but omits any such requirement for an order for payment (§ 29550(d)(1)). Further complicating matters, the latter provision—alone of those imposing such fees—uses the permissive construction "may impose," which would seem to suggest a discretionary power of undetermined breadth.

The statutes provide no comparable mechanism for reimbursing the county's expenses when the arrest is not made by a local agency. When the county itself makes the arrest, it obviously cannot reimburse itself; it must recover its expenses from the arrestee, or not at all. Nor is any provision made for reimbursement of county expenses when the arrest is made by the state or other unenumerated entity. In both of these situations the county is left holding the whole bag, except insofar as it can obtain recompense from the defendant. Thus, whereas sections 29550(d) and 29550.2 operate to reimburse a county for its own expenses, section 29550.1 operates to reimburse the arresting agency for sums it has already paid to, or at least been charged for by, the county.

Of course it scarcely matters to the defendant whose account the proceeds go into. A difference of far greater significance to him is the amount he may be required to pay. And under the statutes as we read them, an arrest by a local agency has the automatic effect of cutting in half the arrestee's potential liability for booking expenses. This is because section 29550.1 empowers a local arresting agency to recover only the fee "imposed by a county," i.e., imposed on the arresting agency pursuant to section 29550(a)(1), which limits the county's recovery to "*one-half*" of the county's "actual administrative costs . . . incurred in booking or otherwise processing arrested persons." (§ 29550(a)(1), italics added.) This means that a local arrestee's potential liability is exactly half what it would have been if he had been arrested by a state or county agency, i.e., the county's "actual administrative costs . . . incurred in booking or otherwise processing arrested persons." (§ 29500, subd. (c) (§ 29500(c)), 29550.2.)

All these statutes rest on the general premise that an arrestee, if convicted or placed on probation, should generally be obligated to absorb these costs. To that extent all arrestees are similarly situated. But beyond that point, a local arrestee's situation differs from that of a state or county arrestee in two respects. First, part of his "debt" to

the county has been already been defrayed by someone else—the arresting agency—which, in relation to him, stands in something like the position of a guarantor or subrogee. Second, and far more critically, the debt has been cut in half. For these reasons, when a local arrestee stands before the court at sentencing, he is not situated similarly to state and county arrestees " 'for purposes of the law challenged.' " (*Cooley v. Superior Court*, *supra*, 29 Cal.4th 228, 253.)

Even if defendant could satisfy the "similarly situated" test, the foregoing considerations would establish a rational basis for the differential treatment of which he complains. Section 29550.1 denies him a benefit granted to other arrestees, i.e., the possibility of avoiding an assessment because he lacks the ability to pay it. But in conjunction with section 29550(a)(1), it also grants him a benefit denied to other arrestees: in effect, automatic forgiveness of half of his debt. This arrangement grants advantages as well as disadvantages to two of the three principals: The county receives a sure source of reimbursement in exchange for writing off half its expenses; the defendant receives the benefit of the write-off but give up the opportunity to avoid all liability on grounds of inability to pay. Even the local agency receives the benefit of an evident compromise, i.e., it does not assume the county's whole burden but only half of it, and it is granted the right to reimbursement without having to prove the defendant's ability to pay. The Legislature could rationally conclude that this arrangement justifies withholding an ability-to-pay condition as to this class of arrestees because other arrestees are exposed to a potential debt of twice the size. A statutory classification "must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' [Citation.]" (*People v. Olague, supra,* ___ Cal.App.4th at p. ___ [2012 WL 1571201, *2].)

We conclude that the statutory scheme does not violate defendant's equal protection rights. Accordingly, no finding of ability to pay was required and the claimed insufficiency of the evidence to sustain such a finding is immaterial.

III. *Actual Cost of Booking*

Defendant also contends that the booking fee is unsound because "[t]here is no evidence in this record of the actual cost of appellant's booking." In his reply brief he asserts that respondent has conceded this point by failing to address it. As authority, however, he cites a civil appeal in which an *appellant's* silence with respect to one basis for an adverse judgment "effectively concede[d] that issue and render[ed] its remaining arguments moot." (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529, fn. omitted.) Here, in contrast, we cannot allow ourselves to be led into error by an "improvident concession by the Attorney General" (*People v. Vaughn* (1989) 209 Cal.App.3d 398, 401)—especially a tacit and possibly inadvertent one. Although an express concession by the state's attorney is entitled to "appropriate deference," an appellate court cannot be bound by it. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021.) Thus, to the extent respondent has conceded error on this point, we decline to accept the concession because we find defendant's claim of error clearly unsound. (See *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1074.)

Defendant's argument depends on the legal premise that the trial court had to find that the fee represented "the actual cost of appellant's booking." As we have observed, the correct formula is *one-half* of that cost. But nothing in the statute requires that this calculation be made, or supported, at sentencing. The only authority defendant cites for the contrary conclusion is *Pacheco*, *supra*, 187 Cal.App.4th at page 1400. But *Pacheco* was concerned with a booking fee imposed under either section 29550.2 or 29550(c). (*Ibid*.) Both of those provisions expressly declare that the fee "shall not exceed the actual administrative costs . . . incurred in booking or otherwise processing arrested persons."

(§ 29550(c); 29550.2.) Section 29550.1, under which the present fee was imposed, contains no such language. We do not suppose this omission to be inadvertent. The county is limited to its "actual administrative costs" in all of these situations, but in the present circumstance the limitation is imposed by the statute obligating the local agency to pay half of the county's expenses. (§ 29550(a)(1) ["the fee imposed by a county pursuant to this subdivision shall not exceed one-half of the actual administrative costs . . . incurred in booking or otherwise processing arrested persons"].) The Legislature might reasonably suppose that in situations governed by section 29550.1, where the county was expected to invoice the arresting agency for its costs, any tendency to overcharge would be sufficiently inhibited by the risk that local agencies would resist. In contrast, when the county seeks reimbursement from the defendant, as in *Pacheco*, there is no intermediate payor and no other avenue by which a temptation to overcharge might be inhibited than by providing for consideration of the issue at sentencing. Defendant offers no basis for importing a similar provision into section 29550.1.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

Trial Court:	Santa Clara County Superior Court No.: EE806813
Trial Judge:	The Honorable David A. Cena
Attorney for Defendant and Appellant Jeffrey Allen Mason:	Syda Kosofsky under appointment by the Court of Appeal for Appellant
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