NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. DONALD RANDOLPH LAFLAMME, Defendant and Appellant.	C086930 (Super. Ct. No. 16-CR-25171)

A jury found defendant Donald Randolph LaFlamme guilty of assault with a deadly weapon by a prison inmate serving a life sentence (inmate assault conviction) and assault with a deadly weapon (assault conviction). The trial court further found true a prior strike allegation. The trial court determined it could not enhance the sentence for the inmate assault conviction and, therefore, sentenced defendant to life imprisonment without the possibility of parole (LWOP) for nine years, as provided in Penal Code

section 4500.[1] On the assault conviction, the trial court imposed and stayed an enhanced eight-year sentence. The trial court also imposed a $40 court operations assessment and a $30 court facilities assessment for each count, a $300 restitution fine, and a stayed $300 parole revocation restitution fine.

Defendant appeals the assault conviction, arguing the conviction must be reversed because it is a lesser included offense of the inmate assault conviction. The People concede and we agree the assault conviction is a lesser included offense and therefore must be reversed. The People argue, however, that the trial court erred by not enhancing the inmate assault conviction sentence as required under section 667 and request we remand the matter for resentencing. We agree the trial court erred but correct the error on appeal because it amounts to an unauthorized sentence.

In supplemental briefing, defendant raises his inability to pay the fines and assessments imposed at sentencing and requests that we remand the matter for a determination of his ability to pay, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (review on own motion declined and request for depublication denied Mar. 27, 2019, S254210) (*Dueñas*). We conclude remand is not required.

DISCUSSION[2]

1.0 The Assault

1.1 *Factual Background*

On February 10, 2016, Correctional Officer Lyle Parker was working as an observation officer at the Mule Creek State Prison when he saw defendant assault Eddie W. Eddie told Correctional Officer Nicolas Brady, who escorted him to the clinic for a medical examination, that he "th[ought he] got stuck." Officer Brady accordingly alerted

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[1] Undesignated statutory references are to the Penal Code.

[2] We set forth the pertinent factual background pertaining to each issue in the Discussion portions of the opinion.

fellow staff to a possible weapon in the area. During Eddie's examination at the clinic, Officer Brady saw "a little blood and what appeared to be a puncture wound" in the left side of the middle of Eddie's back.

Correctional Officer Daniel Navarro detained defendant and then inspected the area near the altercation; he found an "inmate manufactured weapon" inside a manila envelope, made from an eight-inch, "L shape[d]" metal rod with a sharpened point and an envelope for a handle. Defendant was subsequently charged with inmate assault and assault with a deadly weapon arising from this incident.

1.2 *The Assault Conviction Is a Lesser Included Offense*

Defendant contends and the People concede the assault conviction is a lesser included offense of the inmate assault conviction and should therefore be reversed. We agree.

As stated by our Supreme Court, "[the assault statute] is violated when the defendant commits an 'assault,' either 'with a deadly weapon or instrument,' or by 'force likely to produce great bodily injury.'[3] That language is identical to the language [for the inmate assault statute] punishing a life prisoner for committing 'an assault . . . with a deadly weapon or instrument, or by . . . force likely to produce great bodily injury.' ([The inmate assault violation] is the greater offense because the minimum sentence for a defendant who violates that section is a term of life imprisonment without the possibility of parole for nine years, whereas the maximum sentence for [the assault violation] is a four-year prison term.) Thus, every element of the crime described in [the assault statute] is also an element of the crime set forth in [the inmate assault statute], and consequently

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[3] We note the assault statute was amended in 2012 (after *People v. Milward* (2011) 52 Cal.4th 580) with the language "force likely to produce great bodily injury" moved from subdivision (a)(1) to subdivision (a)(4) of section 245. (Stats. 2011, ch. 183, § 1, operative pursuant to Stats. 2010, ch. 178, § 10.) No similar amendment was made to the inmate assault statute.

every defendant who violates [the inmate assault statute] necessarily also violates the lesser offense described in [the assault statute]." (*People v. Milward, supra*, 52 Cal.4th 580, 588-589, italics omitted.) The court further explained, "[t]he law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct" and " '[w]hen the jury expressly finds defendant guilty of both the greater and lesser offense . . . the conviction of [the greater] offense is controlling, and the conviction of the lesser offense must be reversed.' " (*Id.* at p. 589.)

Here, like in *Milward*, defendant was convicted of both inmate assault and assault with a deadly weapon arising out of the same conduct. (*People v. Milward*, *supra*, 52 Cal.4th at pp. 582-583.) We conclude the inmate assault conviction (§ 4500) is controlling and the lesser included assault conviction is prohibited. We, accordingly, reverse the assault conviction (§ 245, subd. (a)(1)) and strike the accompanying court facilities and operations assessments. The trial court is instructed to amend the abstract of judgment.

2.0 Sentencing

2.1 *Factual Background*

At sentencing, the People submitted based on the probation report and recommendation. The report recommended doubling defendant's inmate assault sentence of LWOP in accordance with section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). Defendant objected to "[the probation report's] recommendation of doubling the life without parole term," arguing it was prohibited by *Smithson*. (*People v. Smithson* (2000) 79 Cal.App.4th 480.) The prosecution merely responded that, pursuant to section 4500, the appropriate sentence was life imprisonment without the possibility of parole for nine years because the victim had not died within a year and a day of the assault. The trial court imposed a sentence of "life without the

possibility of parole of nine years," explaining it would not double the term because it found *Smithson* "appropriate in this case."

2.2 *The Inmate Assault Sentence Must Be Enhanced*

The People argue the trial court erred by failing to enhance the inmate assault sentence and the abstract of judgment incorrectly reflects defendant was sentenced to LWOP rather than LWOP for nine years as orally pronounced. Because we agree with the People on the first argument and order the correction of the abstract of judgment in accordance with the appropriate enhancement, we do not address the second argument.

As to the enhancement, the People contend the trial court erred in its application of *Smithson* and in failing to enhance defendant's inmate assault sentence from LWOP for a minimum of nine years to a minimum of 18 years under sections 667, subdivision (e)(1) and 1170.12, subdivisions (a) through (d). The People request that we remand the matter for resentencing. Defendant counters that the People forfeited this argument by failing to object at sentencing. Defendant further contends the trial court's sentence is not unauthorized because the court has the discretion to strike defendant's strike allegation pursuant to section 1385, subdivisions (a) through (b)(1) and thereby not enhance defendant's sentence under section 667, subdivision (e)(1), citing *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 519-531 (*Romero*).

While the People did not file an appeal, "it is ' "well established that when the trial court pronounces a sentence which is unauthorized by the Penal Code[4] that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately

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[4] If the trial court failed to impose the enhanced sentence as required under section 667, subdivision (e)(1), as the People contend, the sentence was unauthorized. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17 [trial court imposes an unauthorized sentence when it erroneously stays or fails to stay execution of a sentence under § 654]; *People v. Miles* (1996) 43 Cal.App.4th 364, 368 [legally unauthorized sentence where trial court failed to impose 25 years to life under § 667, subd. (e)(2)].)

brought to the attention of the . . . reviewing court." [Citation.] Consequently, the People may challenge an "unauthorized sentence" even on a defendant's appeal.' " (*People v. Smithson*, *supra*, 79 Cal.App.4th at pp. 502-503.) Our Supreme Court has "deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' " (*People v. Smith* (2001) 24 Cal.4th 849, 852.) The unauthorized sentence challenge is thus properly before this court.

The inmate assault statute, section 4500, provides in relevant part that, "in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years." (§ 4500, 1st par.) The relevant enhancement provision, section 667, subdivision (e)(1), states that, "[i]f a defendant has one prior serious or violent felony conviction as defined in subdivision (d) that has been pled and proved, the determinate term or *minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.*" (§ 667, subd. (e)(1), italics added.)

Smithson explains that section 667, subdivision (e)(1) does not allow for the enhancement of an indeterminate LWOP sentence without a minimum determinate term. (*People v. Smithson*, *supra*, 79 Cal.App.4th at p. 503.) In the present case, however, defendant has been sentenced to LWOP with a minimum determinate term of nine years. The minimum determinate term therefore must be enhanced pursuant to sections 667, subdivision (e)(1) and 1170.12, subdivisions (a) through (d).

Defendant's reliance on *Romero* does not alter the outcome. The pertinent parts of section 1385, subdivision (a) through (b)(1) state, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. . . . [¶] . . . If the court has the authority pursuant to

subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)." (§ 1385, subds. (a)-(b)(1).)

While *Romero* concludes trial courts have the discretion under section 1385, subdivision (a) to strike a strike, in doing so the court "must proceed in strict compliance with section 1385[, subdivision] (a)." (*Romero*, *supra*, 13 Cal.4th at p. 530.) Here, the trial court found the prior strike allegation true and the record contains neither motion, order, nor reasons for dismissing a strike and the court's only reasoning for not enhancing the sentence was based on an erroneous application of *Smithson*. Accordingly, we vacate the judgment of LWOP for nine years. We impose a term of LWOP for 18 years. The trial court shall amend the abstract of judgment accordingly.

3.0 Defendant's Ability to Pay

3.1 *Factual Background*

As explained *ante*, at sentencing, the prosecution submitted on the probation report and recommendation and defendant objected only to the report's recommendation for sentence enhancement. The probation report stated defendant "elects to have the [c]ourt determine his ability to pay any fines/fees regarding this case." The trial court imposed a $40 court operations assessment and $30 court facilities assessment per conviction, and the mandatory minimum $300 restitution fine, and stayed the mandatory minimum $300 parole revocation restitution fine. The trial court did find that defendant was unable to reimburse the county for defense costs.

3.2 *Defendant is Not Entitled to a Remand*

Defendant asserts due process requires that we remand the matter to the trial court to conduct an ability to pay hearing for the court facilities and operations assessments and the restitution fines. He cites *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168, 1172, which held it is improper to impose a court operations assessment, a criminal conviction assessment (identified in *Dueñas* as a facilities assessment), or restitution fine that is not

stayed without first determining defendant's ability to pay. Anticipating the People's forfeiture argument, defendant asserts he did not forfeit the ability to pay challenge because *Dueñas*, decided after defendant's sentencing, was an unforeseeable change in the law and contends reviewing courts generally excuse failure to raise futile challenges based on what a competent lawyer would perceive the law to be at the time of the trial.

Although it is defendant's burden to establish an inability to pay (accord, *People v. Kopp* (2019) 38 Cal.App.5th 47, 96 (*Kopp*) review granted Nov. 13, 2019, S257844;[5] *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154, review den. July 17, 2019, S255714), defendant neither objected to these fines generally nor asserted his inability to pay them (to refute the presumption that defendants capable of working who are serving a lengthy prison term will be able to pay assessments from prison wages (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139, review den. Aug. 14, 2019, S256281)). (The defendant in *Dueñas* had in fact sought a hearing on her ability to pay on constitutional grounds. (*Dueñas, supra*, 30 Cal.App.5th at pp. 1162-1163.)) As a result, existing authority would hold that defendant has forfeited the issue on appeal (*Frandsen*, at pp. 1154-1155), although as the People appropriately recognize, there is also authority to the contrary (*Johnson*, at pp. 137-138; *People v. Castellano* (2019) 33 Cal.App.5th 485, 489, review den. July 17, 2019, S255551). There is also settled law that failure to object to the *amount* of a restitution fine on the ground of inability to pay forfeits that issue on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033, (*Gutierrez*) review den. Sept. 18, 2019, S256881 [failure to object to maximum restitution fine on ground of inability to pay forfeits *Dueñas* issue].) The People contend *Frandsen*, "is the better reasoned decision and should be followed here." Rather than decide the issue of forfeiture, we will address the merits.

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[5] We may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

Subsequent published authority has called the reasoning of *Dueñas* into question. As digested in *People v. Hicks* (2019) 40 Cal.App.5th 320 (review granted Nov. 26, 2019, S258946) (*Hicks*),[6] *Dueñas* is premised on authority involving a right under due process of access to the courts, and a bar against incarceration for an involuntary failure to pay fees or fines. (*Hicks*, at p. 325.) However, a *postconviction* imposition of fees and fines does not interfere in any respect with the right of access to either the trial or appellate court. (*Id.* at p. 326.) The *postconviction* imposition of fees and fines also does not result in any *additional* incarceration, and therefore a liberty interest that due process would protect is not present. (*Ibid.*) Since the stated bases for the conclusion in *Dueñas* do not support it, the question is whether due process generally otherwise compels the same result. (*Hicks,* at p. 327.) The People have a fundamental interest in punishing criminal conduct, as to which indigency is not a defense (otherwise, defendants *with* financial means would suffer discrimination). It would also be contrary to the rehabilitative purpose of probation if a court were precluded at the outset from imposing the payment of fees and fines as part of educating a defendant on obligations owed to society. (*Id.* at pp. 327-328.) "For the reasons set forth above, we conclude that due process does not [generally] speak to this issue and that *Dueñas* was wrong to conclude otherwise." (*Id.* at p. 329.) *Kingston*, *supra*, 41 Cal.App.5th at page 279, agreed with *Hicks*.

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[6] The analysis of *Dueñas* in *Hicks* is adopted in *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281 (*Kingston*), and is paralleled in *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1068-1069, review denied December 11, 2019, S258563 (*Aviles*), *People v. Caceres* (2019) 39 Cal.App.5th 917, 927, review denied January 2, 2020, S258720, and in the opinions of individual justices in *People v. Santos* (2019) 38 Cal.App.5th 923, 937-938 (dis. opn. of Elia, J.), and *Gutierrez*, *supra*, 35 Cal.App.5th at pages 1038-1030 (conc. opn. of Benke, J.).

Aviles also found *Dueñas* to be wrongly decided, finding the only proper limit on fees and fines is the constitutional prohibition against excessive fines under the Eighth Amendment to the federal Constitution. (*Aviles*, *supra*, 39 Cal.App.5th at pp. 1061, 1067, 1069-1072; accord, *Kopp*, *supra*, 38 Cal.App.5th at p. 96, rev.gr.)

Therefore, we conclude defendant is not entitled to a remand for the trial court to consider his ability to pay these financial obligations as a matter of constitutional due process. We therefore reject this argument.

DISPOSITION

We affirm the inmate assault conviction (count I) and enhance the sentence to LWOP for 18 years. We reverse the assault conviction (count II) and strike the accompanying court facilities and court operations assessments. The court clerk is ordered to amend the abstract of judgment accordingly and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

Butz

Butz, J.

I concur:

Hoch

Hoch, J.

ROBIE, J., Concurring and Dissenting.

I concur in all parts of the Discussion except section 3.0 relating to the imposition of the restitution fines and assessments regarding defendant's ability to pay. Defendant believes *Dueñas* calls into question the imposition of a Penal Code section 1202.4 $300 restitution fine, a Penal Code section 1202.45 $300 parole revocation restitution fine, a Penal Code section 1465.8 $80 assessment, and a Government Code section 70373 $60 assessment without a determination of his ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157.) I agree with *Dueñas* that principles of due process would preclude a trial court from imposing the fines and assessments at issue if the defendant demonstrates he or she is unable to pay them. (*Id.* at p. 1168.) I do not find the analysis in *Hicks* to be well-founded or persuasive and believe the majority has it backwards -- it is *Hicks* that was wrongly decided, not *Dueñas*. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946.)

Defendant has not forfeited the argument, as the People contend. I agree that, as stated in *Castellano*, a trial court is required to determine a defendant's ability to pay only if the defendant raises the issue, and the defendant bears the burden of proving an inability to pay. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490.) In the absence of authority invalidating the challenged fines and assessments on inability to pay at the time the trial court imposed them, however, defendant could not have reasonably been expected to challenge the trial court's imposition thereof. (*People v. Welch* (1993) 5 Cal.4th 228, 237 ["[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"].)

I believe a limited remand under *Dueñas* is appropriate to permit a hearing on defendant's ability to pay the challenged fines and assessments because his conviction and sentence are not yet final. (See *People v. Castellano*, *supra*, 33 Cal.App.5th at pp. 490-491.)

Robie, Acting P. J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

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C086930
Amador County
No. 16CR25171

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Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Melissa J. Lipon
Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244

Donald Randolph LaFlamme
CDC #: C52818 DOB: 04/21/1963
California State Prison, Sacramento
P.O. Box 290066
Represa, CA 95671

John Schuck
Attorney at Law
885 N. San Antonio Road, Suite A
Los Altos, CA 94022

Central California Appellate Program
2150 River Plaza Drive, Suite 300
Sacramento, CA 95833

✓ Honorable Steve Hermanson
Judge of the Amador Superior Court
500 Argonaut Lane
Jackson, CA 95642

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IN AND FOR THE

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THE PEOPLE,
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REMITTITUR TO TRIAL COURT CLERK

I, ANDREA K. WALLIN-ROHMANN, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached opinion or order, previously provided to the parties, is a true and correct copy of the original opinion or order entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 2nd day of April 2020.

ANDREA K. WALLIN-ROHMANN
Clerk

By: Bart Dalangin
Assistant Deputy Clerk III

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

Trial Court Clerk

By:
Deputy Clerk

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IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

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Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Melissa J. Lipon
Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244

✓ Donald Randolph LaFlamme
CDC #: C52818 DOB: 04/21/1963
California State Prison, Sacramento
P.O. Box 290066
Represa, CA 95671

John Schuck
Attorney at Law
885 N. San Antonio Road, Suite A
Los Altos, CA 94022

Central California Appellate Program
2150 River Plaza Drive, Suite 300
Sacramento, CA 95833

✓ Amador Superior Court
500 Argonaut Lane
Jackson, CA 95642

Court of Appeal, Third Appellate District - No. C086930

S260516

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DONALD RANDOLPH LaFLAMME, Defendant and Appellant.

The petition for review is denied without prejudice to any relief to which defendant might be entitled after this court decides *People v. Kopp*, S257844.

CANTIL-SAKAUYE
Chief Justice

Additional material from this filing is available in the Clerk's Office.