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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
MICHAEL DEAN CLEMENTS,  
Defendant and Appellant.

A130239  
(Humboldt County  
Super. Ct. No. CR044302AS)

This case comes to us on appeal for the second time. The first time we were presented with a brief under *People v. Wende* (1979) 25 Cal.3d 436, and we requested briefing as to whether the court acted without jurisdiction when it revoked defendant’s probation and imposed a previously suspended sentence after learning he was incarcerated in a different county on a subsequent crime. (*People v. Clements* (May 14, 2010) A124562 [nonpub. opn.].) We concluded the court had acted without jurisdiction because more than 60 days had passed between the probation department’s notice to the court that defendant was incarcerated and the court’s revocation of probation and imposition of sentence, in violation of Penal Code section 1203.2a, under which the court purported to act.<sup>1</sup> We remanded the case to the superior court “for a determination of its own jurisdiction to conduct further proceedings in this action.” The court determined it retained jurisdiction to proceed because probation had been summarily revoked on

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<sup>1</sup> Statutory references, unless otherwise indicated, are to the Penal Code.

independent grounds long before the notice was received about defendant's subsequent incarceration.

We begin by reciting the factual and procedural history of the case up to the point of our prior opinion. And we conclude, following an updated procedural history, the court retained jurisdiction to sentence defendant and the procedures employed did not deprive him of due process. We remand solely for a recalculation of custody credits, and otherwise affirm.

## **BACKGROUND**

### *Clements I*

On October 13, 2004, defendant was convicted by guilty plea of rape of a person known to be too intoxicated to resist, in violation of section 261, subdivision (a)(3), and the other charges were dismissed. He was granted six years' probation with one year in county jail. An eight-year sentence was imposed, with execution suspended.

In February 2005, after being released from jail, defendant met with his probation officer and registered as a sex offender. Defendant initially reported to his probation officer regularly, and on July 20, 2005, he updated his sex offender registration.<sup>2</sup> Defendant's probation officer reported to the court, however, that a compound bow (but no arrows) was found in defendant's residence on July 20, 2005, as well as DVD covers with sexually explicit content (but no DVDs). At that time, defendant was allowed to remain on probation.

Defendant also participated in sex offender treatment as a condition of probation. In December 2005, however, the treatment program reported he was not in compliance and his whereabouts were unknown. Shortly thereafter, defendant was terminated from the program, and the probation officer lost contact with him and concluded he had absconded from supervision.

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<sup>2</sup> That registration was the last form filed by defendant in Humboldt County. On February 9, 2007, the district attorney filed a complaint in docket no. CR070651S for failure to register under section 290.010, alleging the prior rape conviction as a strike prior.

On January 11, 2006, the probation department notified the court that defendant had violated probation by failing to comply with his probation officer's directions, failing to comply with the sex offender treatment program, and possessing sexually explicit material and a deadly weapon. The court summarily revoked probation and issued a no-bail warrant on January 25, 2006.

In approximately August or September 2008, Probation Officer Morris Pratton learned defendant had been arrested in Shasta County, and in November he learned defendant had been committed to state prison for failure to register as a sex offender.<sup>3</sup>

On January 14, 2009, Pratton filed a request to calendar a hearing in Humboldt County pursuant to section 1203.2a,<sup>4</sup> which also asked the court to proceed on the earlier

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<sup>3</sup> Defendant had been convicted in Shasta County on September 17, 2008. On October 1, 2008, he was sentenced to the mitigated term of 16 months in prison, doubled to 32 months, based on his prior strike conviction for rape (§ 261, subd. (a)(3)) in Humboldt County. (§ 1170.12, subd. (c)(1).)

<sup>4</sup> Section 1203.2a reads as follows:

“If any defendant who has been released on probation is committed to a prison in this state or another state for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he or she was granted probation, in the absence of the defendant, on the request of the defendant made through his or her counsel, or by himself or herself in writing, if such writing is signed in the presence of the warden of the prison in which he or she is confined or the duly authorized representative of the warden, and the warden or his or her representative attests both that the defendant has made and signed such request and that he or she states that he or she wishes the court to impose sentence in the case in which he or she was released on probation, in his or her absence and without him or her being represented by counsel.

“The probation officer may, upon learning of the defendant's imprisonment, and must within 30 days after being notified in writing by the defendant or his or her counsel, or the warden or duly authorized representative of the prison in which the defendant is confined, report such commitment to the court which released him or her on probation.

“Upon being informed by the probation officer of the defendant's confinement, or upon receipt from the warden or duly authorized representative of any prison in this state or another state of a certificate showing that the defendant is confined in prison, the court shall issue its commitment if sentence has previously been imposed. If sentence has not been previously imposed and if the defendant has requested the court through counsel or

probation revocation matter. An amended request, substantially identical in content, was filed on February 6, 2009.

Defendant requested to be present for the proceeding, and he was transported to Humboldt County, where he first appeared on March 5, 2009. On March 18, 2009, 63 days after the court in Humboldt County was first advised of defendant's subsequent imprisonment, the court conducted a probation revocation hearing on the petition filed in 2006, as well as a hearing regarding jurisdiction under section 1203.2a, and a preliminary examination on a new complaint.<sup>5</sup>

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in writing in the manner herein provided to impose sentence in the case in which he or she was released on probation in his or her absence and without the presence of counsel to represent him or her, the court shall impose sentence and issue its commitment, or shall make other final order terminating its jurisdiction over the defendant in the case in which the order of probation was made. If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement. If the case is one in which sentence has not previously been imposed, the court is deprived of jurisdiction over defendant if it does not impose sentence and issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 30 days after defendant has, in the manner prescribed by this section, requested imposition of sentence.

“Upon imposition of sentence hereunder the commitment shall be dated as of the date upon which probation was granted. If the defendant is then in a state prison for an offense committed subsequent to the one upon which he or she has been on probation, the term of imprisonment of such defendant under a commitment issued hereunder shall commence upon the date upon which defendant was delivered to prison under commitment for his or her subsequent offense. Any terms ordered to be served consecutively shall be served as otherwise provided by law.

“In the event the probation officer fails to report such commitment to the court or the court fails to impose sentence as herein provided, the court shall be deprived thereafter of all jurisdiction it may have retained in the granting of probation in said case.”

<sup>5</sup> The revocation hearing was combined with a preliminary examination on the failure to register charge that had been filed in February 2007. (See fn. 2, *ante*.) Although defendant was held to answer on that charge, it was subsequently dismissed after defendant was sentenced on the probation revocation matter.

Defense counsel argued the court lacked jurisdiction under section 1203.2a because the probation department had failed to notify the court of defendant's imprisonment within 30 days after learning of it. After taking evidence, the court found the defendant in violation of probation, and also found the probation officer had no mandatory duty to notify the court of defendant's imprisonment because he had not received written notice from any of the sources listed in section 1203.2a (2d par.). The court revoked defendant's probation.

After defense counsel pressed the court to declare whether it was proceeding under section 1203.2a or on the earlier petition to revoke probation, the court announced it was proceeding under section 1203.2a. The court lifted the stay of execution of the eight-year sentence previously imposed and ordered that sentence to run concurrently with the Shasta County sentence. On March 23, 2009, the court granted credits totaling 314 days, as calculated by probation.

Defendant filed a timely notice of appeal, alleging as an issue "sentencing pursuant to Penal Code section 1203.2a." Defendant's appellate counsel filed a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436. We requested briefing on whether the court acted in excess of jurisdiction by sentencing defendant after the 60-day period provided under section 1203.2a, third and fifth paragraphs.

We received the requested briefing, and on May 14, 2010, we filed our unpublished opinion in *People v. Clement, supra*, A124562 reversing the order of March 18, 2009 under section 1203.2a. We remanded to the trial court to determine its own jurisdiction to proceed. We shall refer to the proceedings culminating in that opinion as "*Clements I.*"

### ***Clements II***

After the remittitur issued on July 14, 2010, the superior court's initial response was to order defendant transported from prison to Humboldt County for further proceedings. Defense counsel opposed the transport order, arguing his client waived presence for further proceedings. Attached to the defense papers was a written request by defendant dated June 9, 2010, to hold further "trial in absentia." The court complied with

the defense request and vacated its transport order, and set a briefing schedule on the jurisdictional issue and a hearing date for October 20, 2010.

At that hearing the court found jurisdiction under the petition to revoke probation had not been extinguished by the faulty procedures under section 1203.2a. “[J]urisdiction has not been [di]vested in its entirety, but would remain under these particular circumstances.” The court noted the petition was “filed for basically absconding, not participating in the programs as directed and . . . other items . . . including failing to register here. [¶] So I think at this time the petition would remain pending, Mr. Clements’ probation subject to revocation. I would assume then the next step would be [for defendant] to be returned to address the petition minus the Shasta County events that took him to prison.”

Defense counsel then argued a probation revocation hearing had already been held on March 18, 2009, the matter had been referred to probation for a supplemental report at that time, and he pressed the court to move directly to sentencing. The court set a future hearing for October 27, 2010.

On October 27, 2010, the court reviewed the petition to revoke probation filed January 27, 2006, and imposed the eight year sentence that had previously been imposed and stayed. The reasons for revoking probation were threefold: (1) “his whereabouts became unknown”; (2) “July 20th matters” (a reference to the sexually explicit material and compound bow); and (3) his failure to comply with the sexual offender program. The court then found “defendant in violation of probation, [and] commit[ted] him to the Department of Corrections for the previously ordered term, eight years, . . . that sentence to have begun October 1st, 2008, the date that the sentence from Shasta County did then begin . . . .” The abstract of judgment prepared on December 20, 2010, granted defendant a total of 314 days, the same as had been credited on the earlier abstract.

## DISCUSSION

### I. Jurisdiction after untimely sentencing under section 1203.2a

#### A. Procedural background

We are now called upon to decide the issue we bypassed in *Clements I*, namely whether the court retained jurisdiction to proceed to sentencing on the independent probation violations covered by the petition to revoke. After our remittitur issued, the parties briefed and argued in the trial court the question of its remaining jurisdiction. Defendant argued in the court below, and now argues on appeal, that section 1203.2a completely divested the court in Humboldt County of jurisdiction to act in revoking his probation. The People argued the court could proceed with sentencing, given the summary revocation of probation in 2006 and the court's subsequent finding on March 18, 2009, that defendant had violated probation on grounds independent of his subsequent commitment out of Shasta County.

The Attorney General now relies on the doctrine of law of the case, but our opinion in *Clements I* expressly declined to decide whether jurisdiction did or did not remain in the trial court. Although defendant urges us to deem this a concession of the issue, we address the merits.

#### B. Section 1203.2a

Section 1203.2a was enacted in 1941 to provide a mechanism whereby a defendant who was granted probation on one offense and who, while still on probation, was convicted of a second felony and imprisoned for it, could compel the court to sentence him expeditiously on the first offense so he could serve the two sentences concurrently if the court were so disposed. (*In re Hoddinott* (1996) 12 Cal.4th 992, 998-999 (*Hoddinott*)). The statute anticipated that the sentencing would occur in the defendant's absence and without representation by counsel. (*Id.* at p. 998; *People v. Wagner* (2009) 45 Cal.4th 1039, 1056.)

To ensure speedy disposition, the statute sets time limits requiring government participants to move promptly in the probation revocation and sentencing process.

“[S]ection 1203.2a provides for 3 distinct jurisdictional clocks: (1) the probation officer

has 30 days from the receipt of written notice of defendant's subsequent commitment within which to notify the probation-granting court (2d par.); (2) the court has 30 days from the receipt of a valid, formal request from defendant within which to impose sentence, if sentence has not previously been imposed (3d par., 4th sentence); and (3) the court has 60 days from the receipt of notice of the confinement to order execution of sentence (or make other final order) if sentence has previously been imposed (3d par., 3d sentence). Failure to comply with any one of these three time limits divests the court of any remaining jurisdiction. (5th par.)." (*Hoddinott, supra*, 12 Cal.4th at p. 999.)

**C. *In re Hoddinott* (1996) 12 Cal.4th 992**

The leading case on section 1203.2a is *Hoddinott, supra*, 12 Cal.4th 992, where the Supreme Court described the facts as follows: "On November 19, 1987, petitioner pleaded guilty in San Francisco Superior Court to possession of a controlled substance (Health & Saf. Code, § 11350). On December 30, 1987, he pleaded guilty in Marin County Superior Court to another violation of the same statute. On February 5, 1988, the Marin County Superior Court suspended imposition of sentence and placed petitioner on probation for three years. On May 31, 1988, the San Francisco Superior Court sentenced petitioner to 16 months in state prison. On July 25, 1988, petitioner wrote to his probation officer in Marin County. He informed her he was in state prison in Susanville, with an expected release date in December of 1988 or January of 1989, and expressed his hope 'to resolve (in the best way possible for *all* concerned) these matters in Marin.' The probation officer did not notify the Marin County Superior Court of petitioner's subsequent commitment. On November 22, 1988, petitioner's counsel sent a letter to the Marin County probation officer in which he asked the probation officer to notify the Marin County Superior Court of his client's subsequent state prison commitment and asked the court to impose sentence under section 1203.2a. Again, the probation officer did not notify the Marin County Superior Court of petitioner's commitment within 30 days after receiving counsel's request. Petitioner was released on parole for the San Francisco offense on December 18, 1988.

“The Marin County Superior Court summarily revoked petitioner’s probation on June 19, 1989. At that time, petitioner was in state prison serving a nine-month term for violating his San Francisco parole. On September 14, 1989, petitioner wrote to his Marin County probation officer from state prison to request that sentence be imposed in his absence pursuant to section 1203.2a. This time, petitioner’s Marin County probation officer notified the Marin County Superior Court. However, on or about October 12, 1989, petitioner was again released on parole on the San Francisco offense. Unaware petitioner had been paroled, on October 30, 1989, the Marin County Superior Court imposed a two-year sentence and ordered it served concurrently with his San Francisco term. Eventually, following his arrest for again violating parole in the San Francisco case, petitioner began serving his two-year Marin County sentence.” (*Hoddinott, supra*, 12 Cal.4th at p. 995.)

After more fully tracing the history of the statute, *Hoddinott* identified its purpose as follows: “section 1203.2a was intended to provide a mechanism by which the probationary court could consider imposing a concurrent sentence, and to ‘preclude[] inadvertent imposition of consecutive sentences by depriving the court of further jurisdiction over the defendant’ when the statutory time limits are not observed.” (*Hoddinott, supra*, 12 Cal.4th at p. 999.) It then held, contrary to *People v. Willett* (1993) 15 Cal.App.4th 1, that the probation officer’s failure to notify the court within 30 days of being informed in writing that defendant was incarcerated constituted a jurisdiction-divesting act. (*Hoddinott, supra*, at p. 999, 1001-1002.) It was in this context that the court held the Marin County court had been divested of jurisdiction to sentence *Hoddinott* by clarifying that any one of three time limits discussed above may cause loss of jurisdiction. (*Id.* at p. 999.) In our case jurisdiction was lost by the court’s delay, not the probation officer’s.

The opinion in *Hoddinott* does not specify whether the revocation of probation in June 1989 in Marin County was based on defendant’s conduct leading to his imprisonment out of San Francisco County, or whether it was based on some other misconduct by defendant, but we infer from the lack of explanation that it was based on

the same conduct. (*Hoddinott, supra*, 12 Cal.4th at p. 995.) Perhaps more importantly, it appears Marin County lost jurisdiction to sentence Hoddinott 31 days after the first notice to the probation officer that was not acted upon. Thus, jurisdiction had already been lost before Marin County acted to revoke Hoddinott’s probation. We deal with a different situation in that probation had been summarily revoked *before* defendant was sentenced in Shasta County, and long before the probation officer notified the court of defendant’s incarceration and requested sentencing under section 1203.2a.<sup>6</sup>

#### **D. Retention of jurisdiction based on pre-existing summary revocation**

*Hoddinott* does not directly answer the question before us. However, its treatment of *Willett, supra*, 15 Cal.App.4th 1, gives us some insight as to how the question might be answered. *Hoddinott* rejected the reasoning of *Willett* (which held violation of the 30-day deadline for the probation officer to notify the court of defendant’s incarceration did not defeat jurisdiction) but also distinguished *Willett* on grounds of a preexisting summary revocation of probation: “the facts of *Willett* are distinguishable because, . . . unlike the instant case, in *Willett* the probation-granting court had already revoked probation in the first case before the defendant was committed to state prison for the subsequent offense. Thus, in *Willett*, the court that granted probation could, in fact, take no further action until the defendant sent proper waivers and a formal request for imposition of sentence. The *Willett* court may have arrived at its erroneous interpretation of the statute in part because this factual anomaly allowed the court to ignore one of the primary purposes of section 1203.2a, paragraph two—namely, permitting prompt revocation of probation and thereby allowing an opportunity for concurrent sentencing.” (*Hoddinott, supra*, 12 Cal.4th at p. 1002.)

This dictum suggests that a summary revocation of probation, because it triggers the right to a hearing, is to be treated as requiring the same express waiver of hearing rights that is described in paragraph 3 of section 1203.2a for a defendant who has not

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<sup>6</sup> Defendant himself never requested sentencing under section 1203.2a. Pratton learned from a parole agent that defendant was in prison and notified the court, citing section 1203.2a.

been previously sentenced before the court may proceed to disposition under section 1203.2a. In other words, it is questionable whether a defendant has a right to speedy sentencing under that section if he also insists on being present for and having legal representation at a formal probation revocation hearing. In *People v. Wagner, supra*, 45 Cal.4th at pp. 1046, 1054, the Supreme Court held a prisoner who had been incarcerated for a second offense before probation revocation proceedings were later filed on an earlier offense has the right to insist either on speedy sentencing within the timeframes established under section 1203.2a or else the right to be brought to hearing within 90 days under section 1381.<sup>7</sup> That rationale suggests he may choose between a speedy hearing under section 1381<sup>8</sup> or an even speedier disposition under section 1203.2a, but he may not insist on both his presence at the hearing and the jurisdictional deadlines of section 1203.2a.

We view the court's summary revocation of probation before the section 1203.2a notice had been given as an assertion of jurisdiction separate from, and independent of, the section 1203.2a proceedings. Because Humboldt County had summarily revoked defendant's probation *before* he was incarcerated out of Shasta County based on

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<sup>7</sup> Section 1381 provides in pertinent part as follows: "Whenever a defendant has been convicted, in any court of this state, of the commission of a felony or misdemeanor and has been sentenced to and has entered upon a term of imprisonment in a state prison . . . , and at the time of the entry upon the term of imprisonment or commitment there is pending, in any court of this state, any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced, the district attorney of the county in which the matters are pending shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment or commitment and his or her desire to be brought to trial or for sentencing . . . . In the event that the defendant is not brought to trial or for sentencing within the 90 days the court in which the charge or sentencing is pending shall . . . dismiss the action."

<sup>8</sup> Though the record reflects that defendant specifically requested of his own counsel that he be brought to Humboldt County for the probation revocation hearing, there is nothing in the record to suggest he made a demand on the district attorney so as to trigger the 90-day hearing deadline of section 1381. In any case, the hearing occurred within 90 days after the section 1203.2a notice was given by the probation officer.

misconduct unrelated to that which led to his subsequent imprisonment, the Humboldt County court continued to have jurisdiction to proceed with formal probation revocation proceedings irrespective of its failure to abide by the time requirements of section 1203.2a.

The present circumstances are materially different from *Hoddinott* because there were two bases for the court's exercise of jurisdiction: the preexisting summary revocation under section 1203.2 based on events prior to his Shasta County incarceration, and the notice of subsequent incarceration under section 1203.2a. We conclude that loss of subject matter jurisdiction under section 1203.2a did not divest the court of jurisdiction to proceed on its independent path under section 1203.3 based on events unrelated to the Shasta County matter.

**1. *People v. Murray* (2007) 155 Cal.App.4th 149**

As we said in *Clements I*, *People v. Murray* (2007) 155 Cal.App.4th 149 (*Murray*) is similar to this case in that the defendant had violated probation even before he committed the crime that led to his subsequent commitment. Convicted of a drug offense in Fresno County, Murray was sentenced to prison for seven years, with execution suspended during a five-year period of probation. Murray entered a drug rehabilitation program (evidently as a condition of probation) and, like defendant here, was terminated from the program. He also failed to appear for an appointment with his probation officer shortly thereafter. (*Id.* at p. 152.)

Though the Fresno County probation department was aware of this probation-violating conduct, it had not filed a petition to revoke probation before Murray committed another drug offense in Los Angeles County and was imprisoned for it. (*Murray, supra*, 155 Cal.App.4th at pp. 152-153.) Even after the Fresno County probation officer was advised in writing by a prison official of Murray's subsequent incarceration, he neglected to inform the court while Murray was still in prison, mistakenly believing he was required to report a subsequent prison commitment only if the written notice complied with the waiver requirements of section 1203.2a, paragraph one. (*Id.* at pp. 153-154.)

After Murray was released from prison, the Fresno probation officer filed a petition for revocation of probation based on Murray's failure in the drug treatment program and his subsequent conviction. (*Murray, supra*, 155 Cal.App.4th at p. 153.) After a contested hearing, the court revoked probation and lifted the prior stay of execution on the sentence originally imposed. (*Id.* at p. 154.)

The Court of Appeal had no choice but to reverse the commitment order, as it was clear the Fresno County probation officer had received written notice of the Los Angeles County conviction and prison commitment well over 30 days before reporting it to the court. (*Murray, supra*, 155 Cal.App.4th at pp. 156-157.) The opinion therefore focused primarily on the appropriate remedy. (*Id.* at p. 158.) And distinguishing *Hoddinott* on grounds that it dealt with a probationer who had not previously been sentenced, *Murray* reversed the commitment order, but reinstated the original sentence, with execution stayed and probation granted. (*Ibid.*) In other words, it restored the parties to the status quo ante.

*Murray* distinguished cases in which imposition of sentence had been suspended in the first case, where a violation of section 1203.2a would result in the court's loss of jurisdiction " 'to impose sentence on the original offense,' " from those in which sentence had originally been imposed with execution suspended, as here. (*Murray, supra*, 155 Cal.App.4th at p. 158, quoting *Hoddinott, supra*, 12 Cal.4th at p. 998.) In the latter category of cases, "[w]hen it imposed sentence but suspended execution and placed appellant on probation, the superior court possessed the requisite jurisdiction. It follows that its subsequent divestiture of jurisdiction, pursuant to section 1203.2a, rendered its order directing execution of the previously suspended . . . prison term void, but did not affect the original sentence. That sentence is, in effect, reinstated." (*Murray, supra*, 155 Cal.App.4th at p. at p. 158.)

Since the parties had not briefed the question of jurisdiction, *Murray* declined to decide "what, if any, jurisdiction the superior court retains over appellant with respect to the original terms of the reinstated sentence." (*Murray, supra*, 155 Cal.App.4th at

p. 158.) In *Clements I* we also declined to determine whether jurisdiction was lost by the court's failure to meet the 60-day sentencing deadline.

Defendant now argues *Murray, supra*, 155 Cal.App.4th 149, is not controlling and in any event was wrongly decided. He correctly distinguishes *Murray* in that *Murray*'s probation had not been revoked prior to the prison's notice to Fresno County, which cited section 1203.2a, that he had suffered a subsequent prison commitment. (*Id.* at pp. 152-153.) But unlike *Hoddinott, supra*, 12 Cal.4th at p. 995, in which there was no mention of a probation violation that preceded the loss of jurisdiction under section 1203.2a, *Murray* had violated probation independently of the grounds for his subsequent imprisonment before the court lost jurisdiction under section 1203.2a. (*Murray, supra*, 155 Cal.App.4th at p. 156.)

Defendant also fairly criticizes the reasoning of *Murray* on grounds that it made a false distinction between cases in which sentence was never imposed on the first offense and cases in which it was imposed but stayed. (*Murray, supra*, 155 Cal.App.4th at p. 158.) The statute appears to be intended to cover both situations, as it creates different deadlines for the court to act in the two circumstances. (§ 1203.2a, 3d par.) Therefore, while we look to *Murray* for its factual similarity and its result, we do not entirely accept its rationale.

## **2. *People v. Willett* (1993) 15 Cal.App.4th 1**

Our case is also similar to *Willett, supra*, 15 Cal.App.4th 1, overruled on other grounds in *Hoddinott, supra*, 12 Cal.4th at p. 1005. In that case defendant was convicted as an accessory to assault in San Bernardino County in June 1987. (*Willett, supra*, at p. 4.) Imposition of sentence was suspended and she was placed on three years' probation. In July 1989 she was arrested and held to answer on a felony charge in Sacramento County. In June 1990, days before her probationary period would have expired, the court in San Bernardino County summarily revoked probation on the basis of that arrest. She was arraigned on the petition and denied the allegations. The hearing on the petition was set for some six weeks later, when *Willett* failed to appear because she was in custody in Sacramento County. (*Ibid.*) In September 1990 defendant wrote to her

probation officer in San Bernardino County informing her she was in prison in Chowchilla. (*Id.* at p. 6.)

In January 1992, Willett, incarcerated for the Sacramento County offense, sent a notice to the court requesting sentencing under section 1203.2a. (*Willett, supra*, 15 Cal.App.4th at p. 4.) The court sentenced her to two years in prison on February 7, 1992, less than 30 days after her request. The sentence was ordered to run concurrently with the Sacramento County case, to commence on the same date Willett was sentenced on the Sacramento County case. (*Ibid.*)

On appeal Willett claimed the court lacked jurisdiction to sentence her because of the probation officer's failure to notify the court of the subsequent prison commitment within 30 days of being notified in writing of her incarceration in September 1990. (*Willett, supra*, 15 Cal.App.4th at p. 4.) The Court of Appeal held Willett was properly sentenced because a delay by the probation officer did not operate to deprive the court of jurisdiction where the notice to probation did not comply with the waiver requirements of paragraph 1 of section 1203.2a. Because there had been no written waiver of her right to a hearing on the probation revocation petition until January 1992, the Fourth District held jurisdiction had not been lost. (*Id.* at pp. 7-9.)

On that point *Willett* was overruled by *Hoddinott, supra*, 12 Cal.4th at p. 1005. As noted above, however, the Supreme Court expressly distinguished *Willett* on grounds that "the probation-granting court had already revoked probation in the first case *before* the defendant was committed to state prison for the subsequent offense." (*Hoddinott, supra*, at p. 1002; *Willett, supra*, 15 Cal.App.4th at p. 4.)

Defendant correctly points out that *Willett* did not discuss the point here under review and therefore is not authority for the position that the court retains jurisdiction. That may be, but we cite *Willett* for its subsequent history rather than its reasoning. *Hoddinott* seemed to find noteworthy the fact that probation had already been summarily revoked in *Willett*. The prior revocation is all the more compelling a distinguishing factor here, for the summary revocation was based on acts preceding and distinct from the conduct that led to defendant's Shasta County conviction.

### 3. *Pompi v. Superior Court* (1982) 139 Cal.App.3d 503

Noting neither *Murray* nor *Willett* provides controlling authority, defendant suggests our analysis should follow that of *Pompi v. Superior Court* (1982) 139 Cal.App.3d 503, 508 (*Pompi*), which he claims is “directly on point.”

In *Pompi, supra*, 139 Cal.App.3d 503, the defendant had been convicted in 1975 of violating sections 459 and 288a in California. A seven-year prison sentence was imposed with execution suspended during a five-year probationary period, with one year in county jail as a condition of probation. In 1978 *Pompi* was convicted of attempted burglary in New York. He then became a fugitive until March 1981, when he was apprehended by New York authorities. Apparently after the New York conviction—and while his whereabouts were unknown—his probation in California was summarily revoked in November 1978 for failure to appear, and a bench warrant issued. (*Pompi, supra*, at p. 506.)

After his apprehension and imprisonment in New York (beginning in September 1981), *Pompi* wrote to his probation officer and the California court requesting disposition of the probation matter. (*Pompi, supra*, 139 Cal.App.3d at p. 506.) The district attorney’s office unsuccessfully sought to have the defendant returned from New York. Thereafter, in May 1982, the public defender sought to have probation terminated based on the failure of the probation officer to timely report to the court defendant’s subsequent confinement. (*Ibid.*)

When the request was denied based on *Pompi*’s failure to comply with the formal requirements of section 1203.2a, first paragraph, *Pompi* filed a petition for writ of mandate in the Court of Appeal. (*Pompi, supra*, 139 Cal.App.3d at p. 506.) Because he had been sentenced with execution suspended (as in our case), Division One of this court held that the formal requirements of notice and waiver of hearing rights under section 1203.2a, first paragraph, did not apply (see *id.*, 3d par.). (*Pompi, supra*, 139 Cal.App.3d at p. 507.) Therefore the notice of subsequent prison commitment under section 1203.2a was sufficient to trigger the probation officer’s duty to report the incarceration to the court, and his delay ousted the court of jurisdiction. (*Id.* at pp. 507-508.) It issued a

peremptory writ requiring the superior court to vacate its earlier order of commitment, requiring it to enter an order terminating probation, and ordering the court “to undertake such further proceedings as may be appropriate and consistent with the views expressed herein.” (*Id.* at p. 508.) What those further proceedings might have entailed is unclear.

*Pompi, supra*, 139 Cal.App.3d 503, does support defendant’s position in that it involved a defendant upon whom a sentence had originally been imposed with execution suspended, whose probation had also been summarily revoked before the section 1203.2a request was made. (*Id.* at p. 506.) It differs from our circumstances in that probation had not been summarily revoked *before* the conduct leading to the subsequent conviction, and the reason for summary revocation, though stated as failure to appear, may well have been related to the criminal conduct and conviction in New York. (*Ibid.*) And finally, the Court of Appeal in *Pompi* did not discuss what impact, if any, the previous revocation of probation had on its analysis. From all appearances, the argument was not made. Therefore, for the same reason that defendant claims *Willett* does not provide authority to resolve the issue before us, *Pompi*, too, is not dispositive.

#### **4. Our conclusion**

None of the foregoing case authority is directly on point. As one treatise observes, “If the time period for the court to act [under section 1203.2a] expires, such that the trial court loses jurisdiction to impose the previously suspended prison term, the original sentence of the grant of probation with execution of sentence suspended is actually reinstated. However, it is an open question as to what jurisdiction the court retains with respect to the original terms of the reinstated sentence.” (Erwin et al., California Criminal Defense Practice (2011) § 90.23[2], p. 90-94.)

As we noted in *Clements I*, one of the underlying assumptions of section 1203.2a seems to be that the reason for revoking probation is the subsequent felony misconduct resulting in imprisonment. Where, as here, the court had already summarily revoked probation on independent grounds prior to the commission of the second offense, we conclude the court was not divested of jurisdiction to proceed on the preexisting petition

to revoke probation and did not act in excess of jurisdiction in proceeding with that action.

Section 1203.2a purports to apply to “any defendant who has been released on probation . . . .” Here, probation had been summarily revoked in January 2006. From that time until October 1, 2008, defendant was not “released on probation” but rather had absconded, his whereabouts unknown to the authorities in Humboldt County, and his probation had been summarily revoked. Whatever may be said about its general applicability to one in defendant’s position, this fact distinguishes defendant’s circumstance from that of the typical defendant under section 1203.2a, whose subsequent prison commitment would be the triggering event for probation revocation under that statutory regime. We conclude the statute’s jurisdiction-divesting provision does not apply to a defendant who was not free on probation at the time of his subsequent prison commitment, but rather whose probation had already been summarily revoked for unrelated misconduct, and who insists on personal presence for a probation revocation hearing.

Section 1203.2a provides that a court which fails to comply with the relevant time deadlines “shall be deprived of jurisdiction over defendant” (*id.*, 3d par.) and specifically is deprived of “all jurisdiction it may have retained in the granting of probation.” (*Id.*, 5th par.) In the present situation the court no longer purports to exercise jurisdiction based solely on having “retained” such authority “in the granting of probation” but rather exercises the continuing jurisdiction it had asserted in January 2006 by summarily *revoking* probation. In such circumstances, section 1203.2a does not divest the court of its continuing jurisdiction to proceed with the previously initiated revocation proceedings.

## **II. Due process**

Defendant also argues that the trial court committed various errors amounting to a due process violation because it (1) failed to hold a new probation revocation hearing, (2) failed to order a new probation report, and (3) purportedly failed to exercise its

discretion to possibly allow defendant to remain on probation with the same or modified terms. We find no merit in these arguments.

#### **A. Procedural background**

At the hearing on October 20, 2010, the defense attorney (who also represented defendant at the March 2009 proceeding) specifically pointed out that a revocation hearing had been held previously: “On March 18th we had a probation revocation hearing on the very petition that the Court is suggesting still exists. I would suggest that any further proceedings have already been conducted and the matter was referred to the probation department for a report.” Based on that representation the court said, “I don’t think that we need anything from probation at this juncture . . . .”

On October 27, 2010, defense counsel summarized: “[A]s I understand what the Court is doing here, is finding that you have jurisdiction premised on [the 2006] petition, finding that there was a hearing that was conducted and he was determined to be in violation of that petition and then sentencing him on that finding . . . . [¶] Is that what you’re doing?” The court responded, “Yes.”

The court initially expressed the intent to lift the stay on the previously imposed sentence, saying “I don’t know any other sentence that he would have received.” Defense counsel then argued, “He could have been reinstated on probation. [¶] What happened was at the conclusion of the probation hearing, was remanded for sentencing, but the only report—because it was remanded under 1203.2(a) [*sic*], the only report that came back was a calculation of credits.”

After further arguments by counsel as to sentencing, the court concluded it would sentence defendant “based on the violations in the petition . . . [a]ssumedly proven at the hearing that was held on or about 3/18/09.”

#### **B. Failure to hold a new probation revocation hearing**

As defense counsel reported to the court, a probation revocation hearing was held on March 18, 2009, and defendant was found to be in violation of probation. Defendant was present for that hearing. His original probation officer on the rape conviction

testified regarding his failure to report, his absconding, and his failure in the sexual offender treatment program.

After his appeal and our remand in *Clements I*, defendant expressly waived in writing his right to be present during the postremand proceedings. His attorney thereafter reasserted defendant's willingness to proceed in absentia and repeated that a probation revocation hearing had already been conducted. Whatever right defendant may have had to different or additional procedures was thereby waived. We see no need for a duplicative proceeding. Although we reversed the commitment order in *Clements I*, we did not reverse the court's findings on the probation violations. We discern no due process violation.

**C. Failure to obtain a new probation report**

Again, with respect to the need for a probation referral, defense counsel first informed the court on October 20, 2010, that a probation report was prepared in March 2009. On October 27, 2010, defense counsel informed the court the probation report related only to credits. The assurances by counsel that a report had been prepared appear to have lulled the court into believing no further report was necessary. Indeed, defendant conceded in his reply brief that his attorney's conduct and words, described above, constituted a waiver of any right he may have had to a supplemental probation report. We cannot find the court erred in failing to refer the case for a probation report.

**D. Failure to exercise sentencing discretion**

Nor did the court fail to exercise discretion in sentencing. On October 27, 2010, defense counsel expressly pointed out that defendant could be reinstated on probation. The prosecutor argued the previously imposed sentence with execution stayed should be ordered into execution. The defense attorney argued, if defendant was not reinstated on probation, he should be sentenced to time served. These arguments show the court was aware of its sentencing discretion and decided to impose the previous sentence on which execution had been stayed.

**III. Custody credits**

Finally, defendant contends he was entitled to additional custody credits so as to allow him full credit during his prior appeal and remand proceedings. He moved for inclusion of these credits as a clerical correction after the judgment was pronounced. The record shows no action taken on this request, with the notation, “waiting decision on appeal” appearing in the clerk’s minutes.

The abstract of judgment filed in *Clements I* included a custody credit calculation up to March 23, 2009, when defendant was committed to prison in Humboldt County. The abstract of judgment filed December 20, 2010, shows exactly the same number of credits, with no additional award following our remand.

We agree with defendant that he was entitled to additional credits from March 24, 2009, after he was sentenced under section 1203.2a, to October 27, 2010, when he was sentenced following our remand. Section 2900.1 provides: “Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.”

The purpose of section 2900.1 is to avoid penalizing a defendant for taking an appeal. The actual custody credits applicable to this time period are to be treated as if no appellate relief had been sought. (*People v. Chew* (1985) 172 Cal.App.3d 45, 51, overruled on another ground in *People v. Buckhalter* (2001) 26 Cal.4th 20, 40.) Although the March 2009 sentencing order was void, that should not deprive appellant of actual custody credits during the pendency of his appeal and the remand proceedings. The question of eligibility for conduct credits during that period is not before us. (Cf. *People v. Buckhalter, supra*, 26 Cal.4th at p. 31; *People v. Donan* (2004) 117 Cal.App.4th 784, 792.)

**DISPOSITION**

The judgment is affirmed, but the case is remanded to the superior court for a recalculation of custody credits. An amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

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Richman, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.