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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSIAH MARLON MILLER,

Defendant and Appellant.

A131163

(Del Norte County  
Super. Ct. No. CRF089725)

In re JOSIAH MARLON MILLER,

on Habeas Corpus.

A133334

Appellant Josiah Miller was sentenced to 11 years in prison after entering a negotiated plea of no contest to a reduced charge of voluntary manslaughter in exchange for dismissal of an arson charge and weapon enhancement. Miller was awarded 828 days credit for time served. Additionally, the court imposed various fines and fees, including \$18,063.11 in victim restitution.

Miller challenges the victim restitution order as well as the calculation of his presentence custody credit. We conclude that the challenge to victim restitution is without merit. We agree, however, with the parties that Miller should be awarded presentence credit for time served in Oregon stemming from the same conduct for which he was convicted in this case.

Miller's petition for habeas corpus raises his challenge to presentence custody credit. We deny the writ as moot because we resolve the presentence custody credit in

this appeal. Accordingly, we remand to the trial court for recalculation of Miller's presentence credits to reflect the time he was in custody in Oregon, but in all other respects affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Following a detailed investigation, Miller was arrested and booked into Del Norte County Jail on July 24, 2008 on charges of murder, enhanced for use of a weapon, and arson.

Miller met his victim, Michelle Dickson, late on July 15, 2008 to purchase marijuana. At about 4:58 a.m. on July 16, Miller was captured on a surveillance camera buying gasoline in Crescent City. Approximately 22 minutes later, emergency crews responded to reports of a fire in Crescent City and discovered Michelle's car ablaze. Several days later, authorities discovered Michelle's body at the base of Thomas Creek Bridge just north of Brookings, Oregon. The autopsy report confirmed that she died from multiple stab wounds.

Following his arrest, Miller was extradited from California to Oregon to face murder charges. After a thorough investigation, officials determined Del Norte County, California was the proper jurisdiction for the charges, so Miller was extradited back to California and the Oregon charges were dropped.

Miller knowingly and voluntarily entered a negotiated plea of no contest to the lesser included crime of voluntary manslaughter in exchange for dismissal of the weapon enhancement as well as the arson charge. At a hearing on October 28, 2010, Miller requested a copy of the probation investigation report at least five days prior to his sentencing hearing, then set for November 12, 2010. The probation investigation report was filed November 5. It described Miller's custody credits as of the date the report was filed and reserved victim restitution findings pending a formal request from the victim's parents. A supplemental probation investigation report detailing specific victim restitution requests and supporting documentation was filed on November 8.

At sentencing on December 22, Miller raised issues regarding the probation officer's recommendation of the aggravated term of 11 years in prison, renewed an objection to viewing a memorial video of the victim, and contested the amount of presentence custody credit. Miller did not comment when the court asked if there was any reason why victim restitution should not be imposed in the manner recommended in the November 8 supplemental probation report. The issues were submitted to the court.

The court ordered an aggravated prison term of 11 years, played the victim's video montage at sentencing, and refused to award pre-trial credits for the time Miller served in Oregon. The court also imposed victim restitution payable to the victim's parents in the amount of \$18,063.11 as recommended in the probation officer's report. Miller timely appeals.

## **DISCUSSION**

### *A. Victim Restitution*

Even though Miller did not object in the trial court to the amount of victim restitution, we will address the merits of his challenge to restitution in this appeal because he raises it in the guise of a claim of ineffective assistance of counsel.

Article I, section 28, subdivision (b)(13)(A), of the California Constitution provides “[I]t is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.” Victim restitution is governed by statute under Penal Code<sup>1</sup> section 1202.4, which states in part, “in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise noted.

shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” (§ 1202.4, subd. (f).)

In *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*), our Supreme Court held that in the absence of an agreement, the facts underlying a count dismissed pursuant to a plea bargain may not be considered in determining an appropriate sentence. (*Id.* at p. 758.) The *Harvey* rule has since by statute been applied to restitution considerations. (See § 1192.3, subd. (b).) But the application of the *Harvey* rule has a significant exception that applies in this case. The sentencing court may consider all facts that are transactionally related to the conviction offense. (*Harvey*, at p. 758.) Miller says that killing Michelle and burning the car are not transactionally related unless “it can be inferred that some action on the defendant’s part giving rise to the dismissed count also played a part in the admitted count.” In making this argument, Miller cuts the *Harvey* exception too narrowly. We are aware of no case that holds the act causing restitution must play a part in the crime for which the defendant is convicted. (See *People v. Beagle* (2004) 125 Cal.App.4th 415, 421-422; *People v. Berry* (1981) 117 Cal.App.3d 184, 193–198 [reviewing cases].) The only requirement is that there be a transactional nexus between the act giving rise to restitution and the crime. (See *People v. Bradford* (1995) 38 Cal.App.4th 1733, 1738–1739.)

Miller contests \$13,638.69 of the \$18,063.11 award that represents reimbursement for the amount needed by Michelle’s parents to satisfy the loan against their car that Miller set on fire the night she was killed.<sup>2</sup> We conclude that in context, Miller’s setting fire to the car was transactionally related to the manslaughter. Perhaps the best way to highlight the relationship between Michelle’s killing and the car fire is to ask whether it is likely Miller would have set the car on fire had he not killed Michelle.

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<sup>2</sup> It makes no difference that the loan was satisfied by proceeds of insurance that Michelle’s parents had on the car. The amount of restitution is not affected by indemnification or subrogation rights of any third party. (§ 1202.4, subd. (f)(2).)

It seems obvious to us that the answer is “no.” Miller set the car on fire to destroy evidence of Michelle’s killing and not as a separate and isolated act of arson. The court could properly consider his setting the car on fire as a factor in aggravation of his crime to the extent it showed planning or sophistication, just like it did with his attempt to dispose of her body. (Cal. Rules of Court, rule 4.421.) In the circumstances, it seems clear that Michelle’s killing caused the loss for which her parents sought restitution. A defendant is liable in restitution for losses caused by the crime for which he was convicted. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246.) The court did not err when it awarded Michelle’s parents the amount required to satisfy the loan against their destroyed car as restitution.

#### *B. Presentence Custody Credits*

Miller argues, and respondent concedes, that the trial court erred in its calculation of presentence custody credits as governed by section 2900.5. We agree. “Everyone sentenced to prison for criminal conduct is entitled to credit against his term for all actual days of confinement solely attributable to the same conduct.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Under section 2900.5, subsection (b), “credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.”

Miller was extradited to Oregon and held on charges of murder and abuse of a corpse.<sup>3</sup> Miller was later extradited back to California and held on charges of murder and arson prior to sentencing as a result of his negotiated plea agreement. The trial court found that because Miller was held in Oregon for a charge that does not exist in California, namely, abuse of a corpse, the time served in Oregon was attributed to wholly separate conduct and not applicable to the California action. We disagree. The confinement in each location was attributable to the same underlying conduct.

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<sup>3</sup> The murder charge was added in the second amended information on September 15, 2008.

At sentencing, the trial court exercises no discretion when computing presentence custody credits but instead performs what amounts to a ministerial duty by applying mathematical calculations. (*People v. Jack* (1989) 213 Cal.App.3d 913, 917.) Thus, we direct the trial court to correct the presentence custody credit in accordance with this opinion.

### **DISPOSITION**

The matter is remanded to the trial court for correction of the abstract of judgment to reflect the proper number of days of presentence credit including the days Miller was in Oregon custody. In all other respects, the judgment is affirmed. The petition for writ of habeas corpus is summarily denied as moot.

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Siggins, J.

We concur:

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Pollak, Acting P. J.

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Jenkins, J.