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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. CHRIS DEVON RICHARDSON, Defendant and Appellant.	A146873 (Sonoma County Super. Ct. No. SCR612099)

Chris Devon Richardson (appellant) appeals from an order denying his petition for dismissal (Pen. Code, § 1203.4[1]) of his misdemeanor conviction for battery (§ 242). He contends the trial court erred in denying his petition because: (1) he had fulfilled the terms and conditions of his probation; and (2) the prosecutor engaged in an ex parte communication with the court, thereby depriving him of the opportunity to respond to the prosecutor's position. We reject the contentions and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On December 13, 2012, an amended information was filed charging appellant and a co-defendant with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); counts 1 & 2), mayhem (§ 203; count 3), obstructing a peace officer in the execution of his duties (§ 69; count 4), and battery (§ 242 [misdemeanor]; count 5). The same day, appellant and his co-defendant pleaded no contest to misdemeanor

[1]All further statutory references are to the Penal Code unless otherwise stated.

[2]The facts of the underlying offenses are not at issue. We therefore set forth only the facts and procedures that relate to denial of appellant's petition for dismissal.

violations of counts 4 and 5, and the remaining counts were dismissed. In his written plea form, appellant acknowledged he would receive 45 days of electronic home detention, two years of probation, with "fines and fees, stay away from [the victims]. Restitution reserved."

At the hearing at which appellant entered his plea, the prosecutor stated, "defendants [appellant and his co-defendant] acknowledge in the *Tahl* waiver [*In re Tahl* (1969) 1 Cal.3d 122] that restitution is reserved. I anticipate there will be some hospital bills that the People will be requesting restitution on behalf of the victims." Appellant's attorney said he agreed with the prosecutor's representation. Thereafter, appellant entered his plea on the record, and the trial court stated it was going to place appellant on two years of probation with various conditions, including 43 days (45 days less two days of credit) of electronic monitoring, staying away from the victims, warrantless search and seizure, and "restitution . . . reserved." The court reiterated, "Also, as I said, restitution is reserved. If you receive—just to let you know that if you do find out that there's a certain amount of restitution owing, you have 90 days to submit a written request for a hearing on that. Do you understand that, Chris?" Appellant responded, "Yes." On April 17, 2013, the court confirmed appellant had successfully completed his electronic monitoring, "and so my understanding is that he would then be sentenced pursuant to his misdemeanor plea to two years of informal court probation with the stay away orders and the standard fees and fines with restitution reserved."

A restitution hearing was scheduled for July 5, 2013, then continued to September 6, 2013. On September 4, 2013, appellant's counsel filed a request for a continuance of the restitution hearing on the ground he needed more time to review the 37 pages of documents he had received the previous day. The court granted the request to October 4, 2013. Thereafter, the hearing was continued multiple times while records were being subpoenaed, and was then scheduled for October 22, 2014, after all records were received. According to the courtroom minutes of October 22, 2014, appellant's counsel appeared, a motion for a continuance was heard and granted, and the hearing was once again continued to December 17, 2014.

After two more continuances, the restitution hearing commenced on March 19, 2015. The amount of restitution owed by appellant was highly contested, with multiple witnesses and documentary evidence, and motions in limine filed by appellant. The matter was heard over the course of several court days and the presentation of evidence concluded on April 7, 2015. At that point, the trial court noted it did not have time to hear closing arguments that day. Due to the parties being unavailable at various times during the few weeks after April 7, 2015, the parties agreed—and the court ordered the parties—to submit written closing summaries on or before May 22, 2015. The court stated it would issue a ruling after receiving the parties' pleadings.

Appellant's two-year probation term ended on April 17, 2015. On May 22, 2015, the parties submitted written points and authorities regarding the amount of restitution owed. On June 25, 2015, the trial court issued an order holding appellant and his co-defendant jointly and severally liable for victim restitution in the amount of $32,235.29, with payments to be made through probation.

On July 24, 2015, appellant filed a petition under section 1203.4 for dismissal of his misdemeanor battery conviction asserting he had "fulfilled the conditions of probation for the entire period thereof." The People recommended the petition be denied, stating: "Defendant has an outstanding amount of restitution owed approx. $32,235.29; he has not successfully completed conditions of probation and if 1203.4 is granted may compromise victims ability to collect restitution See P v. Covington (2000) 82 CA4th 1263, 1271." The trial court denied the petition on September 25, 2015.

DISCUSSION

Conditions of Probation

Appellant contends the trial court erred in denying his section 1203.4 petition because he had fulfilled the terms and conditions of his probation. We disagree.

There are three circumstances in which a defendant may apply for relief under section 1203.4: (a) he has fulfilled the conditions of his probation for the entire period; (b) he has been discharged before the termination of the period of probation; or (c) in any case in which a court, in its discretion and the interests of justice, determines he should be

granted relief. " 'The expunging of the record of conviction [under section 1203.4] is, in essence, a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation.' " (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788–789.) " 'When such an order has been entered there is no further criminal prosecution pending against the defendant. He has then, without any further showing of rehabilitation on his part, received a statutory rehabilitation and a reinstatement to his former status in society insofar as the state by legislation is able to do so.' " (*Id.* at p. 787.) Under the first scenario—which is the scenario under which appellant sought relief—a defendant who has " 'fulfilled the conditions of probation for the entire probationary period' " " 'is entitled as a matter of right to have the plea or verdict of guilty changed to one of not guilty, to have the proceedings expunged from the record, and to have the accusations dismissed.' " (*People v. Covington* (2000) 82 Cal.App.4th 1263, 1266 (*Covington*).)

In *Covington*, *supra*, 82 Cal.App.4th at page 1265, the defendant was placed on five years of probation with various conditions, including $99,473.48 in victim restitution, for which she consistently made $150 monthly payments—the amount probation had determined she could afford. After her probation was successfully terminated, she filed a section 1203.4 petition asserting she had complied with all of her probation conditions. (*Id*. at p. 1265.) The trial court denied her petition on the ground she had not finished paying the full restitution amount. (*Id*. at p. 1265.) On appeal, she acknowledged she had not yet paid the full amount but stated she was still entitled to relief because she had complied with the probation conditions by making all court-ordered payments during the probationary period. (*Id*. at p. 1266.) The Court of Appeal disagreed, holding that, "for purposes of section 1203.4, a defendant has not fulfilled a restitution condition of probation unless he or she has made all court-ordered payments 'for the entire period of probation' *and* has paid his or her obligation in full." (*Id.* at p. 1271.) Noting that restitution not only makes the victim whole but also " 'serves valid, punitive, deterrent, and rehabilitative objectives by . . . helping him appreciate the harm done to the victim,' " the Court of Appeal concluded that the

rehabilitative purposes of probation and the constitutional right[3] of a victim to restitution "would be ill served if the defendant could have his or her conviction expunged without having made up for the victim's losses." (*Id*. at p. 1270.)

Appellant asserts that *Covington* is distinguishable because there, the trial court ordered her to pay $99,473.48 as a condition of probation, whereas the court in this case did not order restitution as a condition of probation. The record, however, shows otherwise. As noted, appellant agreed when he entered his plea that the issue of restitution would be reserved. The prosecutor indicated his intent to seek restitution for "hospital bills . . . on behalf of the victims," and appellant, through counsel, acknowledged this. The court asked appellant if he understood his right to request a hearing to contest the amount of restitution sought, and appellant responded that he did. At sentencing, the court reiterated that appellant was being "sentenced . . . to two years of informal court probation . . . with restitution reserved." Thus, although the amount of restitution had not yet been determined, it was clear, at the time appellant entered his plea and was sentenced, that he was responsible for paying victim restitution as a condition of his probation, in an amount to be determined at a later date. (§ 1202.4, subd. (m) [in every case in which probation is granted, all restitution orders must be made conditions of probation].)

Appellant also argues that his obligation to pay $32,235.29 could not have been a condition of his probation because the trial court issued the order on June 25, 2015, *after* his probation period had expired on April 17, 2015. He relies on *People v. Waters* (2015) 241 Cal.App.4th 822, 829 (*Waters*), for his position that a court lacks jurisdiction to

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[3]Victims of crime have a constitutional right to restitution under article I, section 28, subdivision (b) to the California Constitution, which provides that "[i]n order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled . . . [¶] . . . [¶] (13) To restitution. [¶] (A) It 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. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss."

modify the terms of probation once the probationary period is over. There, despite the prosecutor's statement that as part of a plea agreement the defendant was to pay victim restitution in an amount to be determined, the court issued only a $200 restitution fine and made no mention of victim restitution. (*Id*. at p. 825.) The prosecution did not seek restitution, and probation was successfully terminated. (*Ibid*.) Over two years later, after the defendant filed a section 1203.4 petition seeking dismissal of her conviction, probation noted that victim restitution had never been ordered even though the file contained a victim impact statement seeking $20,800. (*Ibid*.) The court issued a $20,800 restitution order and said it would not grant the section 1203.4 petition until restitution was paid in full. (*Ibid*.) The Court of Appeal reversed, holding the court acted in excess of jurisdiction in ordering restitution long after the probationary period had ended; otherwise, "a trial court that fails to consider victim restitution in the first instance, could order a defendant to pay such restitution decades after probation expires. . . ." (*Waters*, *supra*, 241 Cal.App.4th at p. 829.) Noting that the defendant "played no role in delaying the order of restitution," the *Waters* court held she was not estopped from challenging the court's exercise of jurisdiction. (*Id*. at p. 831.)

Waters, *supra*, 241 Cal.App.4th 822, is distinguishable in important ways. First, here, the trial court *did* mention victim restitution at the plea hearing and at sentencing and reserved jurisdiction on the issue. The court then scheduled an initial restitution hearing for July 5, 2013, and held multiple hearings to determine the amount of restitution. Thus, appellant was aware that victim restitution would be ordered as part of his probation; the only issue was what the amount would be.

Second, unlike the defendant in *Waters*, appellant did play a role in causing the delays that resulted in the trial court issuing its order after the probationary term had ended. The Supreme Court has held in at least three cases that defendants can be estopped from challenging the court's authority to modify their probation after the probationary period has ended. In *People v. Ford* (2015) 61 Cal.4th 282, 285–286, for example, the trial court at sentencing reserved restitution as to the victim's lost wages and did not issue a restitution order for the lost wages until after the probationary term had

ended. The Supreme Court held the defendant was estopped from contesting jurisdiction because his own actions played a role in delaying the proceedings and he did not object to a continuance of the restitution hearing to a date beyond his probationary term. (*Id.* at p. 286; see *In re Griffin* (1967) 67 Cal.2d 343, 347 [the defendant was estopped from contesting jurisdiction where he requested a continuance to a date that went beyond the probationary period; *In re Bakke* (1986) 42 Cal.3d 84, 89 [same].) Similarly, here, appellant fully participated in the extensive and protracted restitution proceedings without objection, requested continuances, and ultimately agreed to a briefing schedule that would allow the parties to submit points and authorities—and the court to rule on the restitution amount—after the probation period had expired. Thus, appellant is estopped from challenging the restitution order on the ground it was not made until after his probationary term was over.

Because the record supports the conclusion that the trial court ordered victim restitution as a condition of probation, and because the June 25, 2015 order setting the amount of restitution was valid, the court could properly deny appellant's section 1203.4 petition on the ground that he had not yet paid the restitution in full.

Ex Parte Communication

In his reply brief, appellant contends the prosecutor engaged in an ex parte communication with the court when it submitted a document recommending to the court that the section 1203.4 petition be denied.[4] As noted, the prosecutor stated in full: "Defendant has an outstanding amount of restitution owed approx. $32,235.29; he has not successfully completed conditions of probation and if 1203.4 is granted may compromise victims ability to collect restitution See P v. Covington (2000) 82 CA4th 1263, 1271." Noting that he is entitled to be represented by counsel " 'at all critical stages of the prosecution,' " appellant argues that because this document was never provided to his trial counsel, he was deprived of the opportunity to present a defense to the prosecutor's

[4]Appellant asserts his trial counsel never received the document. He explains he was unable to raise this argument in his opening brief because the record had not yet been augmented to include this document.

argument. Assuming, without determining, that appellant never received the document, we conclude the error was harmless beyond a reasonable doubt because appellant has not shown he was prejudiced. (*People v. Jennings* (1991) 53 Cal.3d 334, 383–384 [applying *Chapman* standard to court's ex parte communication with jury].) He does not state what evidence or argument he would have presented in opposition had he been given the opportunity to do so. In light of our conclusion that the restitution order was valid, and the fact that appellant has not shown he fulfilled that condition of probation, we do not see how receipt of the document would have changed the result.

DISPOSITION

The order denying appellant's petition is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

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