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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LEIVA,

Defendant and Appellant.

B214397

(Los Angeles County
Super. Ct. No. PA035556)

APPEALS from orders of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Reversed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster and Karen Nash, Deputy Public Defenders, for the Public Defender of Los Angeles County as Amicus Curiae.

This matter was remanded by our Supreme Court. Consistent with that opinion, we conclude that defendant's probation had expired by operation of law and reverse the trial court's findings that he was in violation following two separate hearings.

FACTUAL AND PROCEDURAL BACKGROUND

We take the following from the Supreme Court's opinion.

"In March 2000, defendant Jose Leiva was charged with breaking into several cars and stealing property from them. Pursuant to a plea agreement, he pleaded no contest to three counts of burglary of a vehicle. ([Pen. Code,] § 459.) On April 11, 2000, the trial court suspended imposition of sentence and placed defendant on formal probation for a period of three years, which meant that probation would expire on April 11, 2003. Included in the terms and conditions of probation were orders that defendant report to his probation officer within one business day of his release from custody and not reenter the country illegally if he left voluntarily or was deported. Because defendant was not a legal resident of the United States, he was deported to El Salvador on the day he was released from jail.

"On September 21, 2001, defendant failed to appear at a scheduled probation violation hearing based on an allegation that he had failed to report to the probation department. The trial court summarily revoked defendant's probation based on the failure to report and issued a bench warrant for defendant's arrest. It appears that neither the probation department nor the trial court knew that the reason defendant had failed to report or to appear in court was that he had been deported.

"Seven years later, on November 10, 2008, defendant appeared in the trial court after his arrest on the outstanding warrant, following a traffic stop. The trial court re-called the warrant and ordered that probation remain summarily revoked and that defendant be remanded into custody. It calendared a formal probation violation hearing for February 13, 2009.

“Before that date, the trial court received a supplemental probation report that indicated defendant had been unable to report for probation supervision because he was not a legal resident of the United States and had been deported. The report included defendant’s statement that he illegally had returned to the United States in February 2007.

“At the February 13, 2009 formal violation hearing, the district attorney, after acknowledging that the trial court could not find defendant in violation of probation unless the violation was willful, conceded the People could not prove that defendant’s failure to report in 2001 had been ‘willful.’ Defendant’s counsel contended ‘probation must be terminated’ because the court had no authority to reinstate defendant’s probation as of 2007 when there was no evidence of a ‘willful failure to report,’ or any other probation violation, before ‘the termination of the natural period of probation.’

“The trial court found defendant had violated probation. It did not rely on the allegation that had led to the summary revocation on September 21, 2001, nor did it find any other violation of probation during the three-year probationary period imposed on April 11, 2000. Instead, the court found defendant violated his probation in 2007 when he failed to report to probation following his return to the United States. It relied on defendant’s statement that he had been back in the United States since February 2007.^[1] The court reinstated probation and ordered it extended until June 6, 2011. It additionally ordered that, if defendant voluntarily left the country again or was deported, he must report to his probation officer within 24 hours of his return to the United States and present proof that he was in the country legally. Defendant appealed the order reinstating and extending probation.

“Defendant was deported again, this time in March 2009. On May 14, 2009, during the period of probation challenged on appeal in case No. B214397, the trial court calendared a violation hearing based on a supplemental probation report stating that

¹ “Although the People urged the trial court to find a violation of probation on the basis that defendant ‘was in [the] country illegally,’ the trial court chose not [to] rely on defendant’s ‘citizenship status since I think more would be required to establish that.’”

defendant had not reported to his probation officer and had been deported to El Salvador. Defendant was not present, but the court considered his letter to the probation department explaining that he had been deported in March 2009, and that he was trying to contact his probation officer by telephone. At the June 9, 2009 hearing, after noting that defendant had been deported, the court summarily revoked defendant's probation based on his failure to report to his probation officer, and a bench warrant issued for his arrest.

"Thereafter, defendant returned to California and was arrested on the outstanding warrant. On September 17, 2009, he appeared in the trial court. His counsel argued the court lacked the authority to reinstate or terminate probation because defendant's probationary term had expired three years after it began on April 11, 2000, and defendant had not willfully violated any condition of probation during those three years. Assuming its prior order reinstating and extending probation was valid pending appeal, the court ordered that probation remain summarily revoked and that defendant remain in custody.

"On October 9, 2009, the trial court held a formal probation violation hearing and found that defendant had violated his probation 'for re-entering the country illegally' in 2009. On November 9, 2009, the court ordered that probation remain revoked and sentenced defendant to two years in state prison based on one of the burglary counts to which defendant had pleaded no contest in 2000. Defendant filed a timely appeal from this order." (*People v. Leiva* (2013) 56 Cal.4th 498, 502-504.)

In our original opinion, a majority of this court found that the tolling provision in Penal Code section 1203.2, subdivision (a) (section 1203.2 (a)) served to suspend the running of defendant's probationary period.² Thus, we held the trial court had the jurisdiction to reinstate and extend defendant's probation in 2009 because the 2001 summary revocation tolled the running of the probationary period. The Supreme Court granted defendant's petition for review.

² Section 1203.2(a) provides in pertinent part: "The revocation, summary or otherwise, shall serve to toll the running of the period of supervision."

DISCUSSION

The Supreme Court examined the statutory language of section 1203.2(a) and the legislative history and concluded “summary revocation of probation preserves the trial court’s authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period.” (*People v. Leiva, supra*, 56 Cal.4th at p. 515.) As a result, “a trial court can find a violation of probation and then reinstate and extend the terms of probation ‘if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation.’ [Citation.]” (*Id.* at p. 516.)

As discussed above, defendant’s original probationary term ran from April 2000 to April 2003. Defendant’s probation was originally reinstated and extended following a 2009 violation hearing, during which the court found defendant had illegally entered the country in 2007. However, because the trial court did not find defendant had violated probation during the original three-year term, it was without jurisdiction to reinstate probation in 2009. Probation had already expired by operation of law six years earlier. It stands to reason, the court also lacked jurisdiction to find defendant in violation during the November 2009 hearing as well.

DISPOSITION

The trial court’s orders finding defendant in violation of probation in February 2009 and November 2009 are reversed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.