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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN SCHWARTZ,

Defendant and Appellant.

B233631

(Los Angeles County
Super. Ct. No. BA267012)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Anne H. Egerton, Judge. Affirmed.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Schwartz appeals a trial court action in June 2011 which embodies either a “finding [he was] still on probation” – as stated in his notice of appeal – or an order “reinstating probation” – as stated in his opening brief on appeal. Schwartz’s overriding claim is that his probationary period expired in April 2011, so that any probation order issued after that is void for lack of jurisdiction. We affirm.

FACTS

On April 6, 2006, pursuant to plea agreement, Schwartz waived his constitutional trial rights and pled no contest to grand theft of personal property, and admitted the truth of an allegation that the property loss exceeded \$150,000. (Pen. Code, § 487, subd. (a), former § 12022.6, subd. (a)(2).)¹ The plea agreement included the following arrangement as described by the trial court: “[S]entencing will be put over for two weeks. If prior to that date Mr. Schwartz has made partial restitution of at least \$100,000, then the sentence will be . . . five years probation. He would be given credit for time served. There would be the standard conditions of probation. [¶] If, on the other hand, he has not made at least \$100,000 in restitution . . . , it becomes an open plea to the court. It could mean that you could be sentenced to up to five years in state prison.” The record indicates that Schwartz paid \$100,000 to the victim by checks dated April 11 and April 13, 2006.

On April 14, 2006, the trial court suspended imposition of sentence, and placed Schwartz on formal probation for a period of five years, subject to conditions, among others, that he serve 365 days in county jail, and pay restitution to the victim in the sum of \$497,380.71. (§ 1202.4, subd. (f).)² Further, the court ordered Schwartz to report to the probation department upon his release from custody to make arrangement for paying restitution. Thereafter, the probation department directed Schwartz to begin making restitution payments in the amount of \$25 per month.

¹ All further statutory references are to the Penal Code. The record indicates that Schwartz perpetrated some form of fraud-related theft involving real estate transactions. The victim as to the grand theft charge was First American Title Company.

² Schwartz stipulated to the amount of restitution.

Over the next few years, the probation department submitted regular progress reports to the trial court concerning Schwartz's compliance with the condition that he make restitution to the victim. In a May 2010 report, the department recommended that Schwartz "undergo a more thorough financial evaluation,"³ and, at a hearing on May 7, 2010, the trial court ordered Schwartz to meet with the "financial evaluator."

On June 28, 2010, the trial court summarily revoked Schwartz's probation for his failure to cooperate with the financial evaluator. The court ordered Schwartz to "meet with [the financial evaluator], to bring all documents that he wants you to bring, to fill out the questionnaire, [and] to cooperate with him fully." The court set a probation violation hearing for August 30, 2010.⁴

At the probation violation hearing on August 30, 2010, the parties, counsel and the trial court discussed the status of Schwartz's financial evaluation. The financial evaluator also appeared at the hearing, and advised the court that Schwartz still had not turned over all of the records needed to complete the evaluation. The court ordered Schwartz to submit the additional documentation for the evaluation, and set the matter over to October 7, 2010. On October 7, 2010, the parties, counsel and the court discussed Schwartz's failure to turn over documentation necessary for a financial report. Specifically, Schwartz did not turn over escrow documentation concerning a \$780,000 real estate transaction. The court ordered Schwartz to provide the financial evaluator

³ The record indicates that Schwartz may have then sold a residence for \$780,000, and may have realized gains that would be available for victim restitution.

⁴ Schwartz's opening brief on appeal seems to suggest there is a question whether a formal probation violation hearing was ever set. We have no question a hearing was set. At the hearing on August 30, 2010, the trial court stated: "Next day is 10/7/10. We're going to call it, technically, P.V. Hearing setting." At a hearing on October 7, 2010, the court stated: "The next date is 11/15/10. I think we're technically calling this a P.V. Hearing setting." At a hearing on February 16, 2011, the court stated: "We're going to put this over to 3/15/11. I think we're technically calling this P.V. Hearing setting." On June 6, 2011, the court stated: "I think this was — we were sort of trailing it for a P.V. Hearing."

with escrow documents, as well as documents concerning his father's will. The matter was put over to November 15, 2010.

In November 2010, the probation department submitted a report recommending the court find Schwartz in violation of probation.

On November 15, 2010, the trial court denied defense counsel's request to "reinstate" probation. Based upon information in the probation department's reports indicating that the financial evaluator needed more time to complete the evaluation, the court set the matter over to January 10, 2011. On January 10, 2011, the court again ordered Schwartz to remit documentation for the financial evaluation. The matter was put over to February 16, 2011. On February 16, 2011, the court set the matter over to March 15, 2011. The same occurred on March 15, 2011, and, in May 2011; the hearing was then put over until June 6, 2011.

On June 6, 2011, the trial court denied defense counsel's oral motion to terminate probation. The court ordered probation "reinstated on the same terms and conditions with the modification that [Schwartz] pay \$100 a month."

On June 7, 2011, Schwartz filed a notice of appeal.

DISCUSSION

I. Appealability

Schwartz's notice of appeal stated he was appealing "from a finding" made on June 6, 2011, that he was "still on probation." We requested letter briefs addressing whether a finding that a defendant is still on probation constituted an appealable order. After reviewing letter briefs from Schwartz and the People, we find that the court's order of June 6, 2011, is appealable. The order of June 6, 2011, modified the terms of Schwartz's probation, in that it increased the monthly amount of restitution he was required to pay. We are satisfied that such an order is appealable. (*People v. Lazlo* (2012) 206 Cal.App.4th 1063, 1067, fn. 3, petn. for review pending, S203829.)

II. Jurisdiction to Reinstate Probation

Schwartz contends the trial court was “without jurisdiction to reinstate probation on June 6, 2011.” This is so, argues Schwartz, because the five-year term of probation which commenced on April 14, 2006, had expired on April 14, 2011, without a finding, prior to April 14, 2011, that he had violated his probation. Schwartz’s argument relies entirely on *People v. Tapia* (2001) 91 Cal.App.4th 738 (*Tapia*). We reject Schwartz’s argument.

Our starting point is section 1203.2, subdivision (a), which reads: “The revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period.” This tolling provision was added by a 1977 statutory amendment. (Stats. 1977, ch. 358, § 1, p. 1330.) Before the 1977 statutory amendment, nothing in section 1203.2, subdivision (a), prevented a defendant’s probationary period from continuing to run, even when there had been a period of time during which probation had been revoked. (*People v. DePaul* (1982) 137 Cal.App.3d 409, 413.) Section 1203.2, subdivision (a), has been interpreted to mean that “a revocation of probation suspends the running of the probationary period and if probation is reinstated the period of revocation cannot be counted in calculating the expiration date.” (*DePaul, supra*, at p. 415.)

Applying this rule in Schwartz’s current case, the summary revocation of his probation on June 28, 2010, suspended the running of the probationary period. Thus, the probationary period had not expired on June 6, 2011, when the trial court revoked and reinstated his probation. To defeat this result, Schwartz relies on *Tapia*’s interpretation of section 1203.2, subdivision (a), to mean that a revocation of probation tolls the probationary period only if a violation occurs before the expiration of the original probationary term. In other words, *Tapia* holds that the running of the probationary period is tolled upon summary revocation only until the expiration of the original probationary period; if a violation does not take place before the expiration of the original probationary period, then the probationary period expires as it normally would. *Tapia* thus places the burden on the People to prove a probation violation occurred prior to the expiration of the probationary period, or the probationary period expires on its original

date. We see nothing in the language of section 1203.2, subdivision (a), to support *Tapia*'s tolling interpretation.

If statutory language is unambiguous, the plain meaning of the statute governs. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) In our view, *Tapia* reads language into section 1203.2, subdivision (a), that is not there. If the Legislature intended to limit the tolling allowed by section 1203.2, subdivision (a), so that tolling ended upon the date of expiration of the original probationary period unless a finding of a violation occurred prior to the expiration of the original probationary term, then it could have used language expressing that intent. In our view, the language of the tolling provision is unambiguous. It states that a revocation of probation, summary or otherwise, tolls the running of the probationary period until probation is reinstated.

Our interpretation of the tolling provision comports with the purpose of probation. A grant of probation is intended to afford a defendant an opportunity to demonstrate over the probationary period that he or she has reformed to such a degree that punishment may be waived. (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.) Accordingly, a probationer is required to comply with the terms of probation *during the probationary period*. (*People v. Lewis* (1992) 7 Cal.App.4th 1949, 1952-1956.) Where, as here, a trial court has found a probationer was in violation of probation for a period of time during the probationary period, an equivalent period of tolling of the probationary period is a reasonable result.

Here, under section 1203.2, subdivision (a), the trial court's summary revocation of Schwartz's probation on June 28, 2010, began tolling the running of his probationary period until the court took further action either reinstating probation, or sentencing him to state prison, or discharging him from the obligations of his probationary grant. This interpretation gives full effect to the plain language of the tolling provision.⁵

⁵ The issue presented by Schwartz is currently pending in the Supreme Court. (See *People v. Leiva*, review granted June 15, 2011, S192176.) Although we may not cite *Leiva* because review has been granted (Cal. Rules of Court, rule 8.1115), we note that we agree with the result and reasoning in *Leiva* as articulated by our colleagues in Division Four of this court.

As presented in his opening brief on appeal, Schwartz's arguments do not require us to address the issue of when he will be relieved of his obligation to abide by the terms and conditions of his probation. Our ruling is limited to a finding that Schwartz was not relieved of his obligation to abide the terms and conditions of his probation as of June 6, 2011, when the trial court entered the order challenged on this appeal.

DISPOSITION

The trial court's order dated June 6, 2011, is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

SORTINO, J.*

*

Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.