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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.

PEDRO RAMIREZ SALAS,

Defendant and Appellant.

B237003

(Los Angeles County  
Super. Ct. No. BA284803)

APPEAL from the orders of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Reversed and remanded.

Jolene Larimore, 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, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Pedro Ramirez Salas appeals from the execution of a suspended sentence on a 2005 robbery conviction following a probation revocation hearing in 2011. Defendant contends the summary revocation of probation in 2006 on the ground he had absconded was unlawful since he had been deported and did not willfully fail to report to probation. Since the summary revocation of probation was unlawful, he claims, the probationary period was not tolled. He further argues his 2011 assault conviction, suffered after his return to this country, occurred after probation expired in the 2005 case, so the court lacked jurisdiction to execute sentence on the 2005 robbery conviction solely on the basis of that new conviction. In his opening brief before this court, defendant principally relies on *People v. Tapia* (2001) 91 Cal.App.4th 738 (*Tapia*) and its interpretation of the tolling provision contained in Penal Code section 1203.2, subdivision (a).<sup>1</sup>

We initially affirmed, declining to follow *Tapia* and concluding the tolling provision in section 1203.2, subdivision (a) operated to toll the expiration of the 2005 probationary term, preserving the court's jurisdiction in 2011 to execute the suspended sentence. Subsequent to our decision, the Supreme Court issued its decision in *People v. Leiva* (2013) 56 Cal.4th 498 (*Leiva*) in which it held the tolling provision in section 1203.2, subdivision (a) "preserves the trial court's authority to adjudicate, in a subsequent formal probation violation hearing, whether the probationer violated probation during, but not after, the court-imposed probationary period." (*Leiva*, at p. 502.)

We reject defendant's contention the summary revocation of probation was unlawful. The court had authority to summarily revoke probation and issue a bench warrant on the grounds that defendant never reported to probation and never made arrangements to pay the court-ordered fees, fines and restitution. However, it does not appear that the court executed the suspended sentence on those grounds. The court executed the suspended sentence because of the violent 2011 assault which inflicted serious brain injury on the victim. Since *Leiva* holds that the suspended sentence cannot

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<sup>1</sup> All further undesignated section references are to the Penal Code.

be executed for conduct that occurred after expiration of the initial five-year term of probation, we now reverse.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In June 2005, defendant was charged with one count of second degree robbery (§ 211). It was also specially alleged defendant personally used a knife in the commission of the robbery (§ 12022, subd. (b)(1)). The charges arose from an incident in which defendant confronted a man, threatened him with a knife, and forcibly took money and a necklace from him. Defendant pled no contest to the robbery charge and admitted the personal use of a dangerous weapon allegation. The court, in accordance with the plea agreement, imposed a sentence of four years in state prison, consisting of the mid-term of three years on the substantive offense, and a consecutive one-year term for the special allegation. The court then suspended execution of sentence and granted defendant five years' probation on the condition, among others, that he serve 180 days in county jail. The court also imposed the standard terms of probation requiring defendant to report to probation within 48 hours of release from custody and to keep probation informed at all times of his home and work addresses and telephone numbers. The court ordered defendant to pay various fines and restitution. Defendant was awarded custody credits and remanded to serve the time remaining on the county jail sentence.

In January 2006, the probation officer assigned to defendant's case reported to the court that defendant had never reported to probation, had never paid any of the fees, fines or restitution, and had apparently been deported to Guatemala about six weeks after defendant's scheduled release from custody. The court summarily revoked defendant's probation and issued a bench warrant for defendant's arrest.

Defendant returned to the United States, and new charges were filed against him arising from an incident in May 2011 in which defendant assaulted two brothers outside of a liquor store. Defendant pushed one of the brothers to the ground with such force that he struck his head on the pavement and suffered severe brain injury. Following defendant's arrest on the new charges in the 2011 case, the court recalled and quashed the bench warrant issued in 2006, and set a formal probation revocation hearing to follow

trial in the 2011 case. Defendant was convicted by jury of assault on one of the brothers (§ 240) and acquitted of the other charges. The court sentenced defendant to 180 days in county jail and imposed various fines and penalties. Defendant was awarded custody credits and released in the 2011 case for time served. At the continued probation revocation hearing, the court found defendant was in violation of probation. The court revoked probation and executed the suspended four-year sentence with custody credits. This appeal followed.

In a published decision, we affirmed. Defendant petitioned the Supreme Court for review. Following issuance of its decision in *Leiva*, the Supreme Court issued an order in this case, on June 19, 2013, transferring the matter back to this court with directions to vacate our decision and to reconsider the case in light of *Leiva*. We invited the parties to submit supplemental briefing. Defendant filed a supplemental brief arguing that *Leiva*, which approved of the analysis in *Tapia*, mandates a reversal in this case. Respondent filed a brief arguing this case is factually distinct from *Leiva* on the grounds the court below found defendant had failed to report, failed to notify his probation officer of his whereabouts and failed to pay any fines or restitution during the original probationary term, thus rendering revocation of probation and imposition of sentence in 2011 proper.

## DISCUSSION

The tolling provision, set forth in the last sentence of section 1203.2, subdivision (a), provides that “[t]he revocation [of probation], summary or otherwise, shall serve to toll the running of the probationary period.”<sup>2</sup> In *Leiva*, our Supreme Court explained the plain language of the tolling provision appears unambiguous on its face, but contains a latent ambiguity. (*Leiva, supra*, 56 Cal.4th at p. 510.) Endeavoring to construe the

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<sup>2</sup> The quoted language is the version of the statute in effect at the time of the challenged order. Effective June 27, 2012, the tolling provision was amended to read that the revocation “shall serve to toll the running of the period of supervision.” (Stats. 2012, ch. 43, § 30.) The amendment was part of the 2011 Realignment Legislation and is immaterial to our analysis and disposition. All further references to the tolling provision at section 1203.2, subdivision (a) shall be to the version of the statute in effect before the 2012 amendment.

language in its statutory context and in a manner to avoid doubts as to the provision's constitutional validity, the Supreme Court concluded the procedures for summary revocation of probation operate "in conjunction with section 1203.2(a)'s tolling provision to allow the trial court to retain the authority to adjudicate a claim that the defendant violated a term of probation *during* the court-imposed period of probation," but not after. (*Leiva*, at p. 518.)

Defendant's five-year probationary term began in September 2005 and ended in September 2010. The summary revocation of defendant's probation in January 2006 was based on defendant's failure to report to probation and failure to pay the court-ordered fees, fines, and restitution. The record reflects defendant was deported to Guatemala on November 30, 2005, several weeks after his scheduled release from state custody. Although the court had discretion to summarily revoke probation for these reasons in 2006, we are persuaded the court did not execute the four-year prison sentence for defendant's failure to report or pay the court-ordered funds, but because defendant violently assaulted and catastrophically injured a victim in 2011.

After the jury returned the assault conviction in 2011, counsel brought to the court's attention that the probation violation hearing was still pending in the 2005 robbery case. Sentencing on the 2011 assault conviction and the probation violation was continued so the court could consider the sentencing factors. The court observed that "even though it's a simple assault, we have someone that's pretty seriously injured, and I've got the robbery that I want to take a look at." The court inquired whether, at sentencing, the defense wanted to offer evidence regarding the probation violation, saying "I would find the defendant in violation based on his conviction, but certainly you have an opportunity to put something on if you want."

Before the sentencing hearing, the prosecution submitted a six-page sentencing memorandum asking the court to execute the four-year prison sentence for the probation violation. In reciting the aggravating factors and lack of mitigating factors, the sentencing memorandum focused entirely on the circumstances of the 2011 assault and the catastrophic injury the defendant caused the victim to suffer. In a second brief, the

prosecution submitted authorities and argument to support the position that probation had been validly revoked in 2006 for defendant's failure to report to probation and failure to pay the court-ordered fees, fines, and restitution.

But the prosecution never argued the court should execute the suspended prison sentence for defendant's failure to report or to pay the court-ordered funds. The prosecution submitted no evidence or argument concerning whether defendant was immediately transferred to immigration authorities upon his release from county jail, or whether he was free of custody for some days or weeks during which time he could have timely reported to the probation department or otherwise contacted his probation officer. The prosecution submitted no evidence or argument concerning whether defendant illegally re-entered this country, nor whether defendant re-entered before the original five-year term of probation expired in September 2010. The prosecution submitted no evidence or argument concerning whether defendant willfully failed to pay the court-ordered fines, fees and restitution. In other words, the prosecution submitted no evidence or argument to prove that defendant willfully violated probation during the unexpired original five-year term so as to justify execution of the suspended sentence.

As *Leiva* explained, the purpose of a formal revocation hearing is to provide the defendant with “ ‘an opportunity to require the prosecution *to prove the alleged violation occurred and justifies revocation.*’ [Citation.]” (*Leiva, supra*, 56 Cal.4th at p. 515.) The court went on to state that if the prosecution had proved the defendant had illegally re-entered the United States during the original probationary period, or had shown that the defendant had the ability to pay restitution but willfully refused to pay during the probationary period, then a revocation of probation would have been proper. (*Id.* at p. 516, fn. 6, 517.) Respondent attempts, in its supplemental brief, to distinguish *Leiva*, arguing the court in this case revoked defendant's probation based on his failure to pay restitution and notify his probation officer of his whereabouts during the original probationary term. But at the probation revocation hearing, the prosecution did not present any evidence proving defendant willfully failed to report or had the ability to pay the fines, fees and restitution. We are persuaded the reason the court executed the

suspended sentence was not based on the failure to report or pay his financial obligations during the original period of probation, but on the violent assault defendant committed in 2011, after expiration of the original period of probation.<sup>3</sup> We are not persuaded by respondent's attempt to distinguish *Leiva*.

The record plainly shows defendant willfully engaged in illegal conduct in 2011 upon his return to this country, resulting in his subsequent conviction for assault. However, in light of *Leiva*, execution of the suspended sentence in the 2005 case could not be based on conduct occurring after expiration of the original probationary term. (*Leiva, supra*, 56 Cal.4th at pp. 517-518.)

### **DISPOSITION**

The orders finding defendant in violation of probation and executing the suspended sentence are reversed and vacated. The case is remanded to the superior court for further proceedings consistent with this opinion.

GRIMES, J.

We concur:

RUBIN, Acting P.J.

FLIER, J.

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<sup>3</sup> At the sentencing hearing, before revoking probation and executing the suspended sentence, the court stated, "The defendant is in violation of his probation and, in addition to that, I am considering his conduct in [the 2011 assault case] in addition to the violation." We also recognize that the minute order of proceedings on October 5, 2011 (the day the jury returned its verdict in the assault case) states: "The court finds the defendant in violation of his probation based upon the conviction in [the 2011 assault case] and the defendant's absconding in this case." However, the reporter's transcript of proceedings that day shows the court never made that statement; the only reference to defendant having "absconded" was a statement by the prosecutor. The sentencing court is an experienced jurist with many years presiding over felony cases, and we do not believe that, under the circumstances described here, the court would have sent defendant to prison without proof of a willful violation of probation.