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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.

ANNESTA ALMONOR,

Defendant and Appellant.

B259331

(Los Angeles County
Super. Ct. No. BA339150)

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Margaret E. Maxwell, Nima Razfar and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court entered an order reducing unpaid victim restitution in a criminal case to a civil judgment against defendant and appellant Annesta Almonor. On appeal, Almonor contends the hearing at which the trial court entered its order was inadequate because it did not afford her an opportunity to contest the amount of the victim restitution. We affirm the order.

FACTS

The People filed a complaint charging Almonor with grand theft from her former employer. The preliminary hearing commenced on June 18, 2008, at which time Almonor was represented by private counsel. As the hearing progressed, the prosecution presented evidence showing that Almonor had worked as a business manager or business director at Groundlings Inc., a comedy and sketch theater and school in Los Angeles. Almonor was in charge of accounts payable, tracking income and expenses, and had a company-issued debit card in her name. During the course of her employment, Almonor made numerous unauthorized “charges” on the debit card.

Toward the end of the court day on June 18, 2008, the prosecutor began detailing a long series of unauthorized transactions with Groundlings’ executive director. At about 4:30 p.m., the magistrate interrupted and commented that it was “assuming there [was] a great deal more,” and that it might be a good idea to continue the preliminary hearing the following morning. After some further discussions, Almonor’s private counsel indicated that Almonor would be “changing her plea based on the court’s indicated[.]”

Almonor then waived her constitutional trial rights, and pleaded no contest to grand theft, indicating that she understood that she would have to make victim restitution in an amount to be determined by the probation officer, “not to exceed \$59,577.81.” She also indicated that she understood that she could request a hearing on the amount of restitution. The trial court accepted the plea, suspended imposition of sentence, and placed Almonor on probation for a period of five years. The court ordered Almonor to make restitution to the victim in a sum to be determined by the probation department not to exceed \$59,577.81, and advised her that she had the right to contest the amount of restitution at a hearing.

In September 2008, the probation officer set victim restitution at \$59,266.21. In January 2009, Almonor “agreed” to a payment plan with the probation officer. The plan required Almonor to pay \$150 per month in restitution. At a later date which we discuss below, the trial court found that Almonor eventually paid \$9,250 in restitution.¹

On March 18, 2009, Almonor appeared unrepresented for what appears to have been the first probation progress hearing after the probation officer had fixed the amount of restitution. At this time, the trial court advised Almonor that if she wanted to contest the amount of restitution, then she should “notify her counsel to appear on the next court date.”

The record shows that Almonor thereafter regularly appeared unrepresented at probation progress hearings in May 2009, August 2009, November 2009, May 2010, June 2010, September 2010, and December 2010. The record shows no challenge raised by Almonor to the amount of restitution at any of these hearings. The record is silent as to what events, if any, transpired during 2011 and 2012. But, Almonor apparently continued to make monthly payments.

In March 2013, as the end of Almonor’s five-year probation period was nearing, the probation officer submitted a report requesting that the trial court order Almonor to pay \$59,266.21 in restitution. In May 2013, the probation officer submitted a report requesting that the court enter a civil judgment for the remaining unpaid balance of victim restitution. (See Pen. Code, § 1202.4, subds. (a)(3)(B); (i).)²

At a court hearing on May 14, 2013, roughly four days before her probation was set to terminate, Almonor for the first time voiced a concern (“I have a question”) about “the amount of restitution owed.” Almonor then stated that the amount of loss claimed by the victim was “completely overblown,” that she had never been told that she could

¹ At a hearing in May 2014, discussed below, the trial court found that Almonor eventually made 43 payments totaling \$9,250, with the last payment made in May 2014, which was after her probation had already terminated.

² All further statutory references are to the Penal Code.

“negotiate the amount of restitution,” and that she had “never been given a time to come back to do that.”

Toward the end of the hearing, the trial court and Almonor engaged in the following colloquy:

“The Court: I can . . . set a hearing before this court, but you know, we’re about — a number of years post-plea and although this matter has come before me for proof of progress on several occasions, there’s never been a request for the court to calendar a restitution hearing.

“[Almonor]: . . . [T]hat was my fault. I didn’t know how that worked and I did come in once and ask how to do that and I didn’t really get an answer. I wasn’t quite sure how to go about that and I didn’t have an attorney anymore.

“The Court: I’ve never been asked or I would have put a note in the file. It may have been through the judge who took the plea, but it’s an obligation that you have and the financial obligation is outstanding.”

The trial court appointed the Public Defender to represent Almonor, and set a hearing “to determine the amount of restitution owed” for May 30, 2013.

On May 30, 2013, the trial court continued the hearing to June 13, 2013, with the agreement of both parties, in order to allow the court to obtain the reporter’s transcript of Almonor’s plea to assist in determining the amount of restitution owed. On June 13, 2013, the hearing was continued again as the transcript apparently had not been obtained; the hearing was re-scheduled for July 19, 2013. For reasons not clear from the record, the hearing was continued a number of times until it was set for January 22, 2014. On January 21, Almonor filed a written request to continue the hearing; it was re-scheduled for February 19, 2014. On February 19, 2014, Almonor failed to appear without excuse, and the trial court issued a bench warrant. On February 24, 2014, the court re-scheduled the restitution hearing for March 3, 2014. On March 3, 2014, the court continued the hearing to May 16, 2014; the reason is not discernible from the

record. From May 13, 2013 through May 16, 2014, Almonor did not present any submissions, argument or evidence showing her calculation of the amount of restitution which she believed was owed.

On May 16, 2014, by which time Almonor's probation had ended, the trial court conducted a hearing on the restitution issue. Almonor appeared at the hearing with her court-appointed counsel. At the outset of the hearing, the following exchange took place:

"The Court: The court is reading the probation report. Initial restitution was \$59,266. That was back in 2008. The plan was to pay \$150 a month. Defendant paid 43 payments in the amount of \$9,250. Last payment was on . . . May 14, two days ago, 150. Balance \$50,016.21.

"[¶] . . . [¶]

"[The Prosecutor]: Your Honor, before we continue. I think the probation had expired last year.

"[¶] . . . [¶]

"The Court: Let me take a look. All right. So the restitution will go per civil judgment. Anything further?

"[The Prosecutor]: Nothing further.

"The Court: All right. The court will sign the abstract."

The prosecutor then asked the trial court for permission to say something on the record. The court granted the request and the prosecutor stated: "The People would like to state on the record that the defendant's request to modify the restitution amount was untimely." Further, the prosecutor said she had someone with her from the Groundlings company who wanted to say something to the court. Rick Davis, a representative from the company, then advised the court that the company "did not sue [Almonor] in civil court" because she agreed to pay the amount "as verified by the probation department." Davis also expressed concern that the statute of limitations may have run out for a civil lawsuit.

After the trial court finished hearing from the prosecutor and Davis, it asked once again, “Anything further?” When nothing was raised, the court signed a Judicial Council standard form “Order for Restitution and Abstract of Judgment.” The form, on its face, indicates that Almonor “stipulated to the amount of restitution to be ordered.”

At no point during the hearing on May 16, 2014 did Almonor’s counsel speak a single word on the record.

On October 9, 2014, Almonor filed a motion in our court for relief from default for filing a late notice of appeal pursuant to *People v. Acosta* (1969) 71 Cal.2d 683 and similar cases. On October 29, 2014, we issued an order granting Almonor’s motion and directing the clerk of the superior court to accept Almonor’s notice of appeal for filing. Almonor filed her notice of appeal on the same date as our order.

DISCUSSION

We appointed counsel to represent Almonor on appeal. Appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), stating that he found no arguable issues, and requesting independent review of the record on appeal. We then requested supplemental briefing on the following issue:

Did the trial court retain jurisdiction to consider the amount of restitution even though probation had been terminated? (See *People v. Ford* (2015) 61 Cal.4th 282.)

Almonor thereafter filed a supplemental brief arguing that the trial court did retain jurisdiction to consider the amount of restitution, and that the court erred in not holding an evidentiary hearing on the amount of restitution.

The People filed a supplemental brief arguing that we should dismiss the appeal as untimely because it “bypasses an appeal from the 2008 restitution order which [Almonor] never appealed.” The People agreed with Almonor that the trial court had “fundamental jurisdiction to hear [the restitution issue],” but that it “properly declined to consider the amount of restitution in 2014 because the request to do so was untimely.” As stated by the People: “[T]he trial court did not have authority to grant an untimely [request for a]

hearing and reduce restitution.” Finally, the People argued that the trial court’s order denying an untimely request for a hearing was not an appealable order.

I. Appealability

We find the trial court’s order of May 16, 2014, ordering restitution and reducing the amount of unpaid restitution to a civil judgment is an appealable order. (Cf. *People v. Ford, supra*, 61 Cal.4th 282 [a restitution order is an appealable post-judgment order].)

We reject the People’s argument that Almonor had to appeal in 2008, and having not done so, could not appeal from the May 16, 2014 order. The trial court did not enter a restitution order in 2008. The probation officer determined the amount of restitution in 2008, but the court did not issue a formal restitution order until May 16, 2014.

II. Almonor Forfeited the Right to Contest the Amount of Restitution

Almonor argues she is entitled to remand for an evidentiary hearing on the amount of restitution. We disagree.

Section 1202.4 governs restitution. Under section 1202.4, subdivision (a)(3)(B), the trial court shall order restitution to the victim, “which shall be enforceable as if the order were a civil judgment.” Section 1202.4, subdivision (f), provides: “If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court.” It has long been an accepted procedure for trial courts to direct the probation officer to determine the amount of restitution, subject to review by the court. (See, e.g., *People v. Hyatt* (1971) 18 Cal.App.3d 618, 626-627.) Section 1204, subdivision (f)(1), provides: “The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. . . .”³

³ Neither section 1202.4, nor the California Rules of Court prescribe specific time limits for a defendant to request his or her right to a hearing to dispute the determination of the amount of restitution, or for the court to conduct such a hearing. In *People v. Ford, supra*, 61 Cal.4th 282, the Supreme Court ruled that a trial court retains jurisdiction to issue restitution orders after a defendant’s probation period has expired where the facts show that the defendant is estopped from objecting to the hearing.

We find the issue has been waived for two reasons. First, Almonor was untimely in her request for a restitution hearing. Second, when Almonor was given a restitution hearing, she did not object to the amount imposed.

At the plea on June 18, 2008, the court advised Almonor that the amount of victim restitution would be no more than \$59,577.81. The court also informed Almonor that she could move to set a restitution hearing should she not agree with the amount set for restitution. In September 2008, the probation officer determined the amount of restitution to be \$59,266.21, and set it out in the probation report. The probation report is considered sufficient notice of the amount of restitution recommended. (*People v. Cain* (2000) 82 Cal.App.4th 81, 86.) At the same time, Almonor “agreed” to make payments toward that amount of \$150 per month.

In March 2009, the court again advised Almonor that she could contest the amount of restitution and, if she wanted to do so, she should notify her counsel to appear on the next court date. She appeared on the next court date and did not request a restitution hearing. In the ensuing four years, she appeared a number of times, as outlined above. Almonor did not contest the amount of restitution at those hearings. Instead, she paid restitution pursuant to the agreed upon payment plan of \$150 per month for about 60 months. It was not until May 2013 that Almonor first let the court know she was not pleased with the amount of restitution imposed. When the trial court questioned Almonor about the delay in her request for a hearing, she admitted it “was [her] fault.” Under these facts, we find she waived her right to contest the amount of restitution. (Compare *People v. O’Neal* (2004) 122 Cal.App.4th 817, 820 (*O’Neal*); *People v. Gillard* (1997) 57 Cal.App.4th 136, 165, fn. 18; *People v. Zito* (1992) 8 Cal.App.4th 736, 742; and *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1160.)

In the *O’Neal* case, Division Six of this District found waiver in a much shorter time frame. There, the defendant did not object to the restitution order at the sentencing hearing. Instead, counsel indicated she needed to review the issues regarding restitution and the trial court granted her request to have another hearing on restitution when counsel was ready to do so. Approximately six months later, defendant’s appellate counsel

attempted to challenge the amount of restitution. Our colleagues said defendant's "motion did not explain the reason for the long delay or why he did not file it prior to his appeal. He waived this issue. [Citation.]" (*O'Neal, supra*, 122 Cal.App.4th at p. 820.)

Here, the trial court informed Almonor she could contest the amount of restitution on June 18, 2008, when she entered his plea. After the probation officer set the amount of restitution in September of 2008, and Almonor started making payments toward that amount, she was again informed by the trial court on March 18, 2009, that she could contest the amount of restitution if she wished. She did not do so until May 14, 2013, more than four years later. As a result, we find the issue waived.

The finding of waiver is particularly compelling in this case. As noted above, a representative of the victim company came in on the day the restitution was set per civil judgment and was quite displeased that Almonor was going to contest the amount of restitution at that late date. He told the prosecutor "that because she (Almonor) had initially agreed to pay this amount as verified by the probation department, they did not sue her in civil court. . . . And he believes that the statute of limitations had also run out to now bring an action against her in civil court." In sum, the victim forewent suing Almonor in civil court because, as the probation report indicates, Almonor agreed to make payments on the amount set.

A victim's right to file a civil tort action based on conduct amounting to a crime, and the state's right to impose a restitution order on a criminally convicted defendant, are independent matters. (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1132.) A restitution order reimburses only for economic losses, not noneconomic losses available in a civil action. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 879.) Had Almonor objected earlier, the victim could have filed a civil suit and sought reimbursement for its monetary losses, and perhaps more. Because Almonor had been in a position of trust and acted intentionally, it may well be that the victim could have stated a claim for punitive damages in a civil case. The statute of limitations for filing a civil action based on events occurring before 2008 has long since passed. The victim forewent filing a civil action

because Almonor *never* raised an objection until she became aware she might still have to pay the victim after her probation ended.

We also find that Almonor has forfeited any right to contest the amount of restitution because she never proffered or even attempted to proffer any evidence challenging the amount of restitution fixed by the probation officer when the court granted her a hearing. Almonor agreed to make monthly payments, and did so for a period of years without ever chirping a peep about the amount of gross restitution. After she requested a hearing in May 2013, the trial court appointed the Public Defender to represent her and set a restitution hearing. That hearing was finally afforded to Almonor on May 16, 2014. Meanwhile, during the entire ensuing year, Almonor submitted no evidence to show that the amount of restitution fixed by the probation officer was incorrect. At the hearing on May 16, 2014, her counsel remained mute throughout the entire proceedings.

In summary, Almonor forfeited her right to a hearing by failing to timely request one. A new judge who did not take the plea was overly gracious and still gave her a hearing on the amount. No evidence was offered by Almonor at any time in the trial court on the issue of the amount of victim restitution. Accordingly, we find she has forfeited any objection on appeal to the amount of restitution. Had Almonor requested a hearing earlier or objected at the May 16, 2014 hearing, and proffered any evidence to refute the probation officer's determination of the amount of restitution, the trial court could have exercised its fact-finding discretion, and determined whether or not the probation officer's figures were correct. Having failed to do so, she has forfeited any objection on appeal.

Victim restitution under the criminal law is a matter of constitutional dimension. Since the passage of Proposition 9 in 2008 — The Victim's Bill of Rights — , California Constitution, article I, section 28(b), has provided that “[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 for causing the losses they suffer.” We decline to undermine this

constitutional intent by remanding for a new hearing on the amount of restitution, when Almonor did nothing to assert her right to a hearing and failed to object to the amount imposed when she was granted a hearing late in the game.

DISPOSITION

The trial court's order for victim restitution and reducing the restitution to a civil judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.