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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(El Dorado)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
DON HAROLD LEE,  
  
Defendant and Appellant.

C069843  
  
(Super. Ct. No.  
P08CRF0372)

Defendant Don Harold Lee appeals from the trial court's order modifying his probation to add the requirement that he pay \$500 to El Dorado County Animal Services (EDCAS) for services it provided in connection with his crimes.

Defendant makes multiple claims regarding the perceived improprieties of the order to pay. Characterizing the payment to EDCAS as "victim restitution," he first argues that the order violated his plea agreement; he later adds that EDCAS was not a direct victim of his crimes, therefore not entitled to restitution in any event. He argues that the trial court

declined to retain jurisdiction over restitution and that he was entitled to appear before the same sentencing judge for any further proceedings in connection with his original sentence.

The People counter that the order to pay was not a *direct victim* restitution order, but was a proper (collateral) restitution order issued as a modification of defendant's probation due to changed circumstances. The People do not address defendant's remaining contentions, arguing that they are mooted by his failure to properly classify the order to pay. However, noting correctly that the record shows a prosecutor and trial court seemingly confused regarding "the purpose of the \$500 order," the People observe that the resulting modification of defendant's probation was accomplished without proper notice or probation report.

Agreeing with the People as to the intended character of the order and the flaws in the procedure, we shall remand for a probation modification hearing.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *Offense Conduct*

In August 2008, as 78-year-old Mildred Grant walked to her mailbox, two dogs owned by defendant attacked Grant, took her to the ground, and bit her multiple times.

In January 2009, the People filed an information charging defendant with felony negligent ownership of an animal resulting

in injury. (Pen. Code,<sup>1</sup> § 399, subd. (b).) The information included two related charges and a great bodily injury allegation.

*Plea Agreement*

At an August 2010 hearing, the parties resolved the case by oral plea agreement and informed the trial court (Bailey, J.) in relevant part that "No restitution will be ordered. It would be deferred to the civil case, a civil judgment, if any."<sup>2</sup>

In exchange for defendant's plea to a misdemeanor (section 399, subd. (b)), the trial court dismissed the remaining counts and allegation. The court suspended imposition of sentence and placed defendant on summary probation for a term of four years.

*Payment to EDCAS*

In July 2011, EDCAS sought reimbursement in the amount of \$500 for "investigation and rabies testing for dog attack causing extensive harm to a person." In September 2011, the

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

<sup>2</sup> We remind the parties and trial court that section 1202.4 provides that the trial court shall impose victim restitution in every case in which the victim suffered economic loss as a result of the defendant's conduct unless the court finds compelling and extraordinary reasons for not doing so, and states them on the record. (§ 1202.4, subd. (f).) "[V]ictim restitution is mandatory and a sentence without such an award is invalid. The trial court does not have discretion over issuance of the award itself. The only element over which the court retains discretion—and to which the 'clear and compelling reasons' language applies—is the amount of the award." [Citation.] (People v. Hudson (2003) 113 Cal.App.4th 924, 929-930.)

prosecutor requested a hearing to "address the issue of reimbursement to" EDCAS. Defendant filed written opposition to the request.

At an October 2011 hearing, the trial court (Saint-Evens, J.) ordered defendant to pay \$500 to EDCAS. During the hearing, the court stated: "Under [section] 1203.1[, subdivisions] (e) and (1), the Court may, as a condition of probation, order restitution to a public agency for costs incurred due to a response to an emergency." At the conclusion of the hearing, the court indicated it would order "restitution in this case at \$500" under section 1203.11. However, the minutes of the hearing and corresponding probation modification order classified the payment as "victim restitution" pursuant to section 1202.4 and added an administrative fee pursuant to section 1203.1, subdivision (1).

*Further Litigation and Appeal*

In November 2011, defendant filed a motion to clarify the plea agreement and the terms of his probation.

In December 2011, defendant appealed to this court. In January 2012, the trial court (Bailey, J.) examined the transcript of the August 2010 plea and concluded it had not retained jurisdiction over victim restitution. It stayed the order to pay \$500 to EDCAS pending appeal.

## DISCUSSION

I

### *The Order*

#### A. *Classification*

The record reveals considerable confusion as to the classification of the payment request and authority for the resulting order. At the October 2011 hearing, identified as a restitution hearing by the trial court orally and in its minute order, the following colloquy ensued:

"THE COURT: What is the statute that the county is relying on for reimbursement of costs in this matter?

"[THE PROSECUTOR]: I don't know if there's a specific statute.

"THE COURT: There's tons of statutes that may be applicable. I really think I need to know which one it is.

"[THE PROSECUTOR]: May I have a moment?

"THE COURT: Under [section] 1203.1[, subdivisions] (e)[] and (1), the Court may, as a condition of probation, order restitution to a public agency for costs incurred due to a response to an emergency.

"[THE PROSECUTOR]: Okay."

Section 1203.1, subdivision (e), provides: "The court shall also consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an emergency response pursuant to Article 8 (commencing with Section 53150) of Chapter 1 of Part 1 of Division 2 of the

Government Code.” (See generally *Allende v. Department of California Highway Patrol* (2011) 201 Cal.App.4th 1006, 1014.)

Section 1203.11 imposes additional requirements on the public agency, probation department, and defendant where any of these entities is seeking an “emergency response reimbursement order” or modification thereof. (§ 1203.11, subd. (d).)

By invoking section 1203.1, subdivision (e), and section 1203.11, the trial court effectively identified the proceeding as a restitution hearing. However, the trial court’s reliance on section 1203.1 here also signaled that it was not ordering *victim* restitution (pursuant to section 1202.4 et seq.) This is the case even though the resulting minute order incorrectly classified the restitution order as “victim restitution” pursuant to section 1202.4, and compounded the confusion by adding an administrative fee pursuant to section 1203.1, subdivision (1), which applies only to *victim* restitution.<sup>3</sup>

*B. Jurisdiction*

Section 1203.3 provides in relevant part: “The court shall have the authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.” (§ 1203.3, subd. (a).) This authority exists notwithstanding any expressed intent to relinquish jurisdiction. Aside from the notice issue, which we

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<sup>3</sup> This error appears to have stemmed from the trial court’s reliance on section 1203.11 at the hearing, in connection with section 1203.1, subdivision (e).

discuss *post*, the modification of probation which occurred when the trial court made its restitution order was a valid exercise of the court's continuing jurisdiction over its probationer. (§ 1203.3, subd. (a).)

## II

### *Effect of Plea Agreement*

As set forth *ante*, the oral recitation of defendant's plea agreement included the clause: "No restitution will be ordered. It would be deferred to the civil case, a civil judgment, if any."

Viewed in context, this language clearly applies to direct victim restitution pursuant to section 1202.4, subdivisions (a) and (f). There is no evidence that, *at the time of the plea*, anyone other than Ms. Grant was pursuing a civil action against defendant.

We conclude that the order to pay EDCAS, which, as we have explained *ante*, was not direct victim restitution despite its misclassification as such in the minute order, was not precluded by the terms of defendant's plea.

## III

### *Probation Modification*

Upon sufficient notice, a trial court may modify probation conditions where the modification results from a change of circumstances. (§ 1203.3; *People v. Cookson* (1991) 54 Cal.3d 1091, 1095 (*Cookson*).) A change of circumstances may be found in a fact "'not available at the time of the original order.'" (*Cookson, supra*, 54 Cal.3d at p. 1095.)

When the trial court originally sentenced defendant to probation, the only person or entity to whom restitution arguably was owed was Ms. Grant. Then, at the October 2011 hearing, the People presented evidence of the costs EDCAS had incurred in responding to defendant's crime--costs of which the People had been unaware at the original sentencing. The trial court's reliance on section 1203.1, subdivision (e), shows that, due to the change in circumstances--that is, facts not available at the time of the original order--the court modified defendant's probation to include a condition that he pay restitution of \$500 to EDCAS. (*Cookson, supra*, 54 Cal.3d at p. 1095.)

However, because the present modification originated with EDCAS and the People, the law requires notice to both the probationer and the probation officer. (§ 1203.2, subd. (b).) Upon receipt of a written report from the probation officer, the trial court must read and consider the report before modifying probation. (*Ibid.*) Section 1203.3 provides: "No order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order." (§ 1203.3, subd. (b)(2).)

Further, section 1201.11 also imposes requirements on orders made pursuant to section 1203.1, subdivision (e), which were not adhered to in this case due to the confused nature of the People's request for payment to EDCAS.

The People concede that statutorily required procedures were not followed in this case and that remand is appropriate. Defendant's only objection to a remand is that the court did not retain jurisdiction to order victim restitution. Because, as we explained *ante*, victim restitution is not at issue and, by statute, the court retains jurisdiction over grants of probation (§ 1203.3, subd. (a)), we shall vacate the October 14, 2011, order and remand for proper probation modification proceedings.<sup>4</sup>

**DISPOSITION**

The October 14, 2011, order modifying defendant's probation is vacated and the matter is remanded for further proceedings consistent with this opinion.

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DUARTE, J.

We concur:

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BUTZ, Acting P. J.

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MURRAY, J.

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<sup>4</sup> Defendant's remaining argument, that the original sentencing judge must preside over all subsequent proceedings involving defendant's sentence, apparently including probation modification hearings, is unsupported by relevant authority as presented by defendant. (See *People v. Martinez* (2005) 127 Cal.App.4th 1156, 1159 [defendant not entitled to the same judge that accepted the plea preside over probation revocation hearing][citing cases].)