Filed 12/6/16 P. v. Solis CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER ROLANDO SOLIS, Defendant and Appellant.	C075802 (Super. Ct. No. CM029834)

This is the third time this matter has reached this court. The first time, we affirmed defendant Alexander Rolando Solis's convictions, comprised of three counts of forcible rape and one count of receiving stolen property, but remanded the matter for resentencing on one of the rape counts (Count 5) because the trial court imposed a full consecutive term on that count under Penal Code section 667.6, subdivision (d)[1], and "the evidence [did] not support the trial court's implied finding that the third rape

---

[1] Undesignated statutory references are to the Penal Code.

occurred on a separate occasion." (*People v. Solis* (2012) 206 Cal.App.4th 1210, 1213.) On remand, the trial court again imposed a full consecutive term on Count 5, this time pursuant to section 667.6's discretionary subdivision (c), but did so outside defendant's presence. Defendant again appealed. We again remanded the matter for resentencing, accepting the People's concession that defendant had a right to be present during that resentencing. (*People v. Solis* (Sept. 11, 2013, C072557) [nonpub. opn.].)

On the second remand, in defendant's presence, the trial court once again imposed a full consecutive term on Count 5. The aggregate term imposed was 20 years in state prison, comprised of a consecutive middle term sentence of six years for each rape plus a consecutive middle term sentence of two years for receiving stolen property. Defendant again appealed. Thereafter, the trial court recalled the sentence for the limited purpose of considering the People's requests for a protective order under section 136.2, subdivision (i)(1), and for a modification of the victim restitution order, each of which the trial court granted. Defendant appealed from this modified judgment as well.

Defendant contends: (1) the trial court abused its discretion in imposing a full consecutive term on Count 5 because the record does not demonstrate the offense was distinctively worse than the ordinary rape; (2) the protective order must be stricken because (a) issuing such an order exceeded the scope of the remand, (b) section 1170, subdivision (d), did not authorize the trial court to recall the sentence years after defendant was originally committed to prison, and therefore, the trial court lost jurisdiction to impose the protective order when defendant filed his notice of appeal from the judgment entered following the resentencing, and (c) imposition of such an order pursuant to a statutory provision that became effective after defendant was originally sentenced amounts to an unconstitutional ex post facto application of the law; (3) the modification to the victim restitution order must be vacated because (a) it was not initiated by noticed motion affording defendant of his due process right to

notice and an opportunity to be heard, and (b) the increased amount was not supported by substantial evidence; and (4) the abstract of judgment must be corrected in two respects.

We conclude the trial court did not abuse its discretion in imposing a full consecutive term on Count 5 pursuant to section 667.6, subdivision (c). However, because section 1170, subdivision (d), did not authorize the trial court to recall defendant's sentence, his act of filing a notice of appeal from the judgment entered following resentencing divested the trial court of jurisdiction to thereafter modify the sentence to impose the challenged protective order. And while the trial court possessed continuing jurisdiction to modify the victim restitution order, we conclude the manner in which the People sought and obtained the challenged increase did not provide defendant with fair notice of, and a fair opportunity to dispute, the new amount requested.[2] We therefore affirm the judgment entered prior to the ineffective recall of defendant's sentence. The subsequent judgment is void to the extent it purported to do anything other than modify the victim restitution order and vacated to the extent it did that. The abstract of judgment shall be amended accordingly. Finally, the abstract of judgment must be corrected in the two respects pointed out by defendant.

FACTS

During much of 2008, defendant and the victim, J.B., were in a dating relationship. In May of that year, defendant assisted the victim in moving out of her dormitory room at California State University, Chico. Another student, K.S., was moving out of her dorm room around the same time. At one point, K.S. left the door to

---

[2] These conclusions render it unnecessary to address defendant's further arguments that the imposition of the protective order amounted to an unconstitutional ex post facto application of the law and the increase in victim restitution is not supported by substantial evidence.

her room open slightly while she took things to her car. Inside the room, she left a large black purse containing, among other things, a laptop computer. When K.S. returned to her room, the purse and its contents were gone. Sometime later, defendant gave the purse to the victim as a gift and sold the computer to his roommate for $500. At the time of the sale, defendant knew the computer had been stolen.

On October 18, 2008, defendant and the victim were together at her residence and got into an argument about defendant eating the rest of a banana bread she had made and calling her "a fat Arab bitch," "slut," and "whore." The victim asked defendant to leave and dropped him off at his residence. Around midnight, the victim sent defendant a text message inviting him to come over and sleep with her. Defendant responded with a message that it was "up to [her]." The victim replied, "never mind." Nevertheless, around 2:00 a.m., defendant showed up at the victim's residence and knocked on her bedroom window. She woke up and let him in. Defendant was belligerent and angry. The victim asked him to leave, but he refused. Around this time, defendant received a telephone call from his ex-girlfriend who asked where defendant had been. Defendant responded that he had "been dating a fucking slut." The victim again asked defendant to leave but he refused. Instead, he grabbed the victim's cell phone, tried to break it, and then lay down on the floor to sleep. At this point, the victim grabbed defendant's leg and began dragging him out of her room. Defendant responded by kicking her. She kicked him back. Defendant then stood up, overturned a nightstand and chair, and threatened to knock the victim out.

A week or so earlier, the victim had told defendant she might be pregnant and he appeared to be pleased at the prospect. However, the victim later learned she was not pregnant. While arguing with defendant in her room during the early morning hours of October 19, the victim told defendant if she had been pregnant, she would have aborted

the fetus. She was purposely trying to hurt him in order to induce him to leave, but he would not.

The victim eventually screamed for her roommate, J.D., who opened her bedroom door and found defendant and the victim standing nearby. The victim was crying and complained defendant had her cell phone. J.D. told defendant to give the victim back her phone and he complied. J.D. returned to her room and closed the door. The victim then attempted to call 911. Defendant grabbed her phone and took the battery out of it. The victim later went to sleep in her room and defendant slept on a couch in the common area of the residence.

The next morning, defendant knocked on the victim's door and she let him in. She returned to her bed. Defendant was still upset and she asked him to leave. He refused. The victim asked for her phone battery and defendant told her she could have it after she gave him a ride home. She refused.

Defendant then approached the victim's bed and pulled her toward the middle of it. He grabbed her foot, pushed it behind her head, and then got on the bed and lay on top of her. The victim was wearing only panties and a T-shirt. Defendant began ripping the victim's panties and eventually pulled them down over her legs, while the victim struggled to stop him. Defendant "shoved" his finger inside her vagina and said he would make it so she could not have babies. Defendant was smiling and appeared to be enjoying himself. He then removed his finger and inserted it in her anus. The victim told defendant to stop and he responded: "Shut the fuck up."

Removing his finger, defendant stood up and said: "I can put my dick in you right now." He then removed his clothes, got on top of the victim, held her legs back with his hands, and inserted his penis in her vagina. She begged him to stop and he again said: "Shut the fuck up." Defendant also asked: "How does it feel to be the first girl I raped?"

Defendant then pulled his penis out of the victim's vagina and told her to turn over. She refused. He told her she had a choice between her "ass" and her mouth. She then complied. Defendant inserted his penis inside the victim's vagina again, while holding her neck with one hand and her hair with the other.

Defendant again removed his penis and began rubbing it over her "butt," after which he again inserted his penis in her vagina. Finally, defendant removed his penis, moved up the victim's back and ejaculated on the side of her face.

Defendant got up and got dressed and the victim drove him home. When she returned to her residence, the victim met J.D. as the latter was leaving for the gym. The victim was crying and told J.D. defendant had raped her. J.D. called the police, who responded to the scene a short time later. The victim was taken to a hospital for an examination. She had a lot of bruising on her body, mostly on her legs. She also had semen in her hair. The result of the examination of the victim's vagina was consistent with her report of the incident.

While the police were at the scene, defendant arrived to retrieve his wallet he had left behind. He was detained and later taken to the police station. While there, the victim placed a pretext call to defendant and repeatedly asked him why he had done "it." Defendant professed not to know what she was talking about but eventually said: "[B]ecause I'm stupid, I'm an idiot." At one point, the victim said, "I've never seen this side of you," and defendant responded that he had "never seen this side of [himself] either." Defendant further said: "I know I was wrong. I know you know that I'm not like that."

DISCUSSION

I

Imposition of a Full Consecutive Term on the Third Rape

Defendant contends the trial court abused its discretion in imposing a full consecutive term on Count 5, i.e., the third rape described above, because the record does not demonstrate the offense was distinctively worse than the ordinary rape. We disagree.

Section 667.6, subdivision (c), provides in relevant part: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion." Rape is the first offense specified in subdivision (e). (§ 667.6, subd. (e)(1).)

The decision to impose full consecutive terms under section 667.6, subdivision (c), "is a 'sentence choice' for which reasons must be stated" on the record at the time of sentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 347, quoting § 1170, subd. (c).) "In deciding whether to sentence consecutively or concurrently, and if consecutively, whether to do so under section 1170.1 or under the harsher full term provisions of subdivision (c) of section 667.6, the [trial] court is obviously making separate and distinct decisions. A decision to sentence under section 667.6, subdivision (c) is an additional sentence choice which requires a statement of reasons separate from those justifying the decision merely to sentence consecutively." (*Ibid.*, fn. omitted.) "The ideal method of proceeding would be for the trial court first to decide generally between concurrent and consecutive terms, following the criteria listed in rule [4.425 of the California Rules of

Court[3]]. Once the court has decided to sentence a defendant to consecutive terms and has stated its reasons therefor, it then must decide whether the consecutive terms should be under the principal/subordinate scheme of section 1170.1 or under the full and separate term scheme of section 667.6, subdivision (c). If the latter is chosen, the reasons therefor should be stated for the record." (*Id*. at p. 348.) While the same reasons may be used to justify each decision, the record must "reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c)." (*Ibid*.)

Here, during the resentencing hearing, the trial court described the foregoing rules, thereby revealing its understanding that sentencing under section 667.6, subdivision (c), constituted a separate sentencing choice. The court then stated its reasons for imposing a full consecutive sentence on Count 5: "The Court finds the following criteria applicable to Count 5. To wit, Count 5 involved a separate act of violence against the victim apart

---

3 Undesignated rule references are to the California Rules of Court. Rule 4.425 provides: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Criteria relating to crimes [¶] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) Other criteria and limitations [¶] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences." This rule incorporates rules 4.421 and 4.423, which delineate circumstances in aggravation and mitigation, respectively. As relevant here, one aggravating factor listed in rule 4.421 is: "The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness." (Rule 4.421(a)(1).)

from the acts which constituted Count 1 and/or Count 4. [¶] Going to Rule of Court 4.421, the Court finds that the crime committed in Count 5 involved acts exposing a high degree of cruelty and callousness. In other words, after the acts constituting Count 4, according to my recollection and . . . the District Court of Appeal's factual recital, the Defendant rubbed his penis against the victim's butt, and . . . then again inserted his penis in the victim's vagina. And that was for the third time. Thereafter, he removed his penis from her vagina and ejaculated on her face. So that's the justification for my finding that the crime involved cruelty -- a high degree of cruelty and callousness. [¶] The Court also finds under Rule of Court 4.421 that each of the violent sex crimes, including Count 5, came about after the Defendant, who had spent the previous night on a couch in the victim's residence, knocked on her bedroom door, and she allowed him to enter, after which . . . the three violent rapes occurred. That is indicative of a breach of trust." The trial court also acknowledged defendant did not have a criminal record at the time he committed the rapes, but found that mitigating factor to be "overwhelmingly outweighed by the aforementioned aggravating circumstances."

Relying on *People v. Price* (1984) 151 Cal.App.3d 803 (*Price*), defendant argues the foregoing factors cited by the trial court "did not show that the crime (Count 5) was 'distinctively worse' than the ordinary sexual assault case involving multiple rapes." In *Price*, the defendant robbed a liquor store and committed four separate sex acts against a customer of the store while holding her at knifepoint. (*Id*. at p. 810.) In addition to two counts of robbery, the defendant was convicted of one count of forcible rape, one count of forcible sodomy, and two counts of forcible oral copulation, with personal knife use allegations found true as to each count. With respect to the sex crimes, the trial court sentenced the defendant to serve full consecutive upper term sentences of eight years each pursuant to section 667.6, subdivision (c), plus three years for the knife use enhancement attached to the rape count. (*Id*. at p. 809.) The Court of Appeal

affirmed the convictions and remanded the matter for resentencing because the trial court provided an inadequate statement of reasons for utilizing the alternative sentencing scheme of section 667.6, subdivision (c). The court explained the trial court's apparent attempt to invoke the "high degree of cruelty, viciousness or callousness" factor by referring to the crimes as "violent, vicious," "[r]eprehensible," and "repugnant" (internal quotation marks omitted) was "too general to pass muster" because these statements, "while obviously true, failed to specify in what respect any one or more of the instant sex crimes was 'distinctively worse' than the 'average' violent sex crime committed at the same time as other such offenses." (*Id.* at pp. 813-814.) The court also explained that while the trial court's reference to the threat of great bodily injury did invoke a valid aggravating factor, "to the extent the threat was based on [the defendant's] knife use, this factor could not be used as to [the rape count] where a knife use enhancement was imposed." (*Id.* at p. 814.) Finally, the court concluded the evidence did not support the other aggravating factor used by the trial court, i.e., the victim's particular vulnerability. (*Ibid.*)

Unlike *Price*, the trial court provided "specific reasons" the third rape in this case was distinctively worse than the average case in which a consecutive rape is committed against the same victim on the same occasion. First, as the trial court described, in between the second and third rapes, defendant withdrew his penis and rubbed it over the victim's buttocks. While this interval of time was not sufficient to support the trial court's initial conclusion that the third rape occurred on a separate occasion, as we previously held, it does evidence defendant's intent to prolong the amount of time he could spend controlling and abusing the victim. Then, after committing the third rape, defendant added the distinct indignity of ejaculating in her face. Citing a number of cases, defendant argues, "[i]t would have been more cruel and callous for him to ejaculate inside of her, which would have posed the risk of pregnancy, which is considered great

bodily injury, or at least substantial or significant injury." Even if we were to agree with this assessment, the fact defendant did not attempt to impregnate the victim does not negate the fact ejaculating in her face was more callous than ejaculating someplace that would neither have impregnated her nor degraded her above and beyond the acts of rape themselves, such as on the bed. In other words, the fact a worse rape can be imagined does not mean the rape that actually occurred was not worse than an average rape committed against the same victim on the same occasion.

Finally, we also agree with the trial court that defendant breached the victim's trust. He and the victim were dating. And viewing the evidence in the light most favorable to the judgment, there was no confusion over whether the victim consented. Defendant forcibly raped her, three times, the morning after a fight, while defendant was still upset, and apparently because she refused to drive him home. While taking advantage of a position of trust is a separate aggravating factor (see rule 4.421(a)(11)), we need not determine whether this aggravating factor was independently satisfied because we conclude the breach of trust added to the high degree of callousness exhibited by defendant. The word "callous" means "feeling or showing no sympathy for others." (Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 176, col. 1.) It required a special kind of callousness for defendant to forcibly rape someone he supposedly cared about, three times, prolonging the experience for her, and then finish the ordeal by ejaculating in her face.

Sentencing defendant to serve a full consecutive term for the third rape under section 667.6, subdivision (c), was not an abuse of discretion.

II

Imposition of the Protective Order

Defendant also claims the protective order must be stricken because (1) issuing such an order exceeded the scope of the remand, (2) section 1170, subdivision (d), did not

authorize the trial court to recall the sentence years after defendant was originally committed to prison, and therefore, the trial court lost jurisdiction to impose a protective order when defendant filed his notice of appeal from the judgment entered following the resentencing, and (3) imposition of such an order pursuant to a statutory provision that became effective after defendant was originally sentenced amounts to an unconstitutional ex post facto application of the law. We agree with defendant's second line of argument.

A.

Additional Background

Defendant was originally sentenced in December 2009. In September 2012, on remand following our first decision in this matter, the trial court resentenced defendant, but did so outside his presence. In January 2014, on remand following our second decision, the trial court again resentenced defendant. The sentence imposed each time was 20 years in state prison, comprised of a consecutive middle term sentence of six years for each rape plus a consecutive middle term sentence of two years for receiving stolen property.

Defendant appealed from the latter judgment on February 4, 2014. Thereafter, the People invited the trial court to recall the sentence on its own motion under section 1170, subdivision (d), requesting that the trial court impose a 10-year no-contact order under section 136.2, subdivision (i)(1)[4], and modify the amount of victim restitution already

---

[4] This subdivision provides in relevant part: "In all cases in which a criminal defendant has been convicted of . . . a violation of Section 261, 261.5, or 262, or any crime that requires the defendant to register pursuant to subdivision (c) of Section 290, the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with the victim. The order may be valid for up to 10 years, as determined by the court. This protective order may be issued by the court regardless of whether the defendant is sentenced to the state prison or a county jail or subject to mandatory supervision, or whether imposition of sentence is suspended and the defendant

imposed (direct victim restitution in the amount of $24,156.33 was ordered in favor of the victim and her parents during the initial sentencing hearing).

A hearing on the motion was held on February 11, 2014. Because the sentencing judge (Honorable Thomas Kelly) had retired, a different judge (Honorable James Reilley) heard the matter and granted both requests. We describe the modification of victim restitution in greater detail later in this opinion. With respect to imposition of the no-contact order, defendant argued (1) the requested order was "outside the scope of the [remittitur], which only dealt with resentencing on [Count 5]," (2) the trial court may not have jurisdiction because defendant "already filed a Notice of Appeal," (3) it would not be appropriate to use section 1170, subdivision (d), to "add things to," rather than "modify," the sentence already imposed, and (4) because section 136.2, subdivision (i)(1), "was not in place when [defendant] was originally sentenced" in 2009, using it to impose the requested no-contact order may amount to an unconstitutional ex post facto application of the law.

In response, the People argued the trial court possessed jurisdiction to recall the sentence, despite the filing of the notice of appeal, because the court was acting "well within the 120 days" set forth in section 1170, subdivision (d), as the jurisdictional time limit.

The trial court agreed with the People, recalled the sentence, and after "reaffirming the 20-year sentence imposed by Judge Kelly," imposed the requested 10-year no-contact order and also modified the victim restitution order as requested. Defendant also appealed from the modified judgment.

---

is placed on probation. It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

B.

Analysis

"Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun. [Citation.] And, '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [Citations.] This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. [Citations.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial court while the appeal is pending is null and void. [Citation.]" (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.)

One exception to these rules divesting the trial court of jurisdiction is found in section 1170, subdivision (d), which provides the trial court with "jurisdiction for a period of 120 days to recall a defendant's sentence for reasons rationally related to lawful sentencing and to resentence a defendant as if he or she had not been sentenced previously." (*People v. Scarbrough*, *supra*, 240 Cal.App.4th at pp. 923-924; see *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455 [section 1170, subdivision (d), creates "an exception to the common law rule that the [trial] court loses resentencing jurisdiction once execution of sentence has begun"]; see also *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1835-1836 [filing of notice of appeal does not divest trial court of "limited jurisdiction" provided by section 1170, subdivision (d), which sets forth "specific scheme for the trial court to exercise jurisdiction for a limited time after it normally would have lost jurisdiction"].)

Moreover, despite the fact a defendant has begun serving his or her sentence during the pendency of an appeal, where the appellate court remands the matter for

resentencing, the trial court obviously regains jurisdiction to do so. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1257.)

With these principles in mind, we turn to defendant's arguments regarding imposition of the 10-year no-contact order in this case.

1. *Scope of the Remittitur*

Acknowledging the trial court regained jurisdiction to resentence him following issuance of the remittitur, defendant argues imposing the 10-year no-contact order was "beyond the scope of the remand and remittitur" and therefore outside the scope of the trial court's reinstated jurisdiction. In so arguing, he relies on "the generally applicable rule that '[t]he order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled." ' [Citation.] On remand, the lower court may act only within these express jurisdictional limits." (*People v. Lewis* (2004) 33 Cal.4th 214, 228.) However, as the Attorney General correctly observes: " 'When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. . . .' " (*People v. Burbine*, *supra*, 106 Cal.App.4th at p. 1258, quoting *People v. Hill* (1986) 185 Cal.App.3d 831, 834.) This is because "California's determinate sentencing law presents an 'interlocking' whole," with " 'the judgment or aggregate determinate term . . . to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms.' [Citation.]" (*People v. Rosas* (2010) 191 Cal.App.4th 107, 117.)

Thus, contrary to defendant's argument on appeal, the trial court had jurisdiction to reconsider all sentencing choices. And while this case is not precisely governed by the cases cited by the Attorney General, in that here we are dealing with the trial court's imposition of an order that was not imposed previously, rather than, for example, altering sentences already imposed in order to reimpose the same aggregate prison term after

one of the defendant's convictions was reversed on appeal (see *People v. Burbine*, *supra*, 106 Cal.App.4th at p. 1253), we conclude imposition of a no-contact order under section 136.2, subdivision (i)(1), falls within the jurisdictional power of a trial court on remand for resentencing. Had the trial court imposed such an order at the original sentencing, and on remand decided the order was no longer supported and declined to reimpose it, the case would be similar to *People v. Rosas*, *supra*, 191 Cal.App.4th 107, in which the trial court imposed $10,000 restitution and parole revocation fines at the original sentencing and lowered these amounts to $5,000 at resentencing. (*Id*. at p. 112.) Rejecting the Attorney General's argument the trial court lacked jurisdiction to reduce the fines on remand, the Court of Appeal concluded the imposition of such fines was part of the nonseverable and interlocking judgment, all of which the trial court was entitled to reconsider. (*Id*. at p. 120.) Similar to imposition of a restitution or parole revocation fine, imposition of a protective order under section 136.2, subdivision (i)(1), is done "at the time of sentencing." The statute also requires the trial court to "consider" imposing such an order at that time. (*Ibid*.) Just as a decision to impose a protective order under this subdivision would be considered a sentencing choice within the meaning of the rule the trial court is entitled to reconsider all sentencing choices on remand for resentencing, we conclude the decision not to impose such an order may also be reconsidered.

2. *Loss of Jurisdiction Following the Resentencing*

However, as defendant points out, the trial court did not impose the protective order immediately upon remand for resentencing. Instead, after resentencing defendant to serve 20 years in prison, and *after defendant filed a notice of appeal from that judgment*, the trial court recalled the sentence on its own motion under section 1170, subdivision (d), and then imposed the challenged protective order. Defendant argues this was not authorized by the terms of section 1170, subdivision (d), and, therefore,

the filing of the notice of appeal divested the trial court of jurisdiction to impose the belated order.

As previously explained, section 1170, subdivision (d), is an exception to the general rule the trial court loses jurisdiction when either the defendant's sentence commences or when a notice of appeal is filed. It provides in relevant part: "When a defendant . . . has been sentenced to be imprisoned in the state prison . . . and has been committed[,] . . . the [trial] court may, *within 120 days of the date of commitment* on its own motion, . . . recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." (§ 1170, subd. (d)(1), italics added.)

Defendant argues the "date of commitment" triggering the 120-day jurisdictional time limit for recalling a sentence under this provision is the date of "the original commitment" to prison that in this case occurred in December 2009. Because he "was committed to prison only once, and he is still serving that sentence," defendant continues, "[t]he remand for resentencing on Count 5 did not result in a new prison commitment, but was merely a continuation of the existing prison term." The Attorney General disagrees, arguing section 1170, subdivision (d), was satisfied because the recall occurred within 120 days of the date defendant was resentenced following the remand, although she does not offer any argument as to why "date of commitment" should be interpreted to mean "date of resentencing." We conclude defendant's interpretation is correct.

In *Dix v. Superior Court*, *supra*, 53 Cal.3d 442, our Supreme Court explained: "Cases under both section 1170[, subdivision](d) and [its] predecessor . . . have held that the court loses 'own-motion' jurisdiction if it fails to recall a sentence within 120 days of the original commitment." (*Id*. at p. 464, italics omitted; see also *People v. Chlad* (1992)

6 Cal.App.4th 1719, 1724-1725 [trial court without jurisdiction to recall the defendant's sentence more than "120 days after the original sentence was imposed"].) While these cases do not address what effect, if any, a remand for resentencing might have on the "date of commitment" language in section 1170, subdivision (d), we conclude such a remand does not change the plain meaning of the provision. As relevant here, Black's Law Dictionary defines "commitment" to mean: "The order directing an officer to take a person to a penal . . . institution." (Black's Law Dict. (8th ed. 2004) p. 288, col. 2.) The date of that order was December 22, 2009. The fact we have twice remanded the matter for resentencing does not change the date of commitment.

This conclusion is bolstered by our Supreme Court's decision in *People v. Buckhalter* (2001) 26 Cal.4th 20 that held, "a convicted felon who has been sentenced, committed, and delivered to prison, who received all credits for confinement prior to the original sentencing, and who remains behind bars pending an appellate remand solely for correction of sentencing errors, is not eligible to earn additional credits for good behavior as a presentence detainee." (*Id*. at p. 29.) Instead, the court explained, such a felon "remains, pending a remand solely on sentencing issues, a prisoner in the custody of the Director [of the Department of Corrections] under the original commitment, even during periods when he [or she] is temporarily housed away from state prison to permit his [or her] participation in the remand proceedings." (*Id*. at pp. 29-30.) Here, through three appeals and two remands for resentencing, defendant has remained a prisoner under the original commitment. Just as the two prior remands did not reset his status as a presentence detainee entitling him to additional presentence custody credits, neither did they alter the date of his commitment to prison providing the trial court with recall jurisdiction under section 1170, subdivision (d), for 120 days following each resentencing.

Because the trial court did not have authority under section 1170, subdivision (d), to recall the sentence imposed during resentencing, defendant's act of filing a notice of appeal from that judgment divested the trial court of jurisdiction to thereafter modify the sentence to impose the challenged protective order.

III

Modification of the Victim Restitution Order

Defendant further asserts the trial court's modification of the victim restitution order must be vacated because it was not initiated by noticed motion affording defendant of his due process right to notice and an opportunity to be heard. We agree.

A.

Additional Background

As previously mentioned, at the initial sentencing hearing, the trial court ordered defendant to pay $24,156.33 in victim restitution, "reserving jurisdiction, out of [an] abundance of caution, to modify that amount upward or downward." This amount was the total sum requested on behalf of the victim and both of her parents and was supported by a spreadsheet submitted by the victim's mother that was attached to the probation report. On appeal, defendant did not challenge the victim restitution order. (See *People v. Solis*, *supra*, 206 Cal.App.4th at p. 1212.)

After we remanded the matter for resentencing as to Count 5, the trial court reimposed a full consecutive middle term sentence on that count, this time under section 667.6, subdivision (c), but did so outside defendant's presence. There was no mention of victim restitution at this hearing. After we again remanded the matter for resentencing to be conducted in defendant's presence, the trial court again reimposed a full consecutive middle term sentence on Count 5. Again, there was no mention of victim restitution at this hearing. However, the abstracts of judgment prepared following each resentencing hearing listed the amount originally imposed, i.e., $24,156.33, as the victim restitution

amount. Defendant did not challenge this amount in his second appeal (*People v. Solis, supra,* C072557), nor does he do so in this appeal.

After defendant filed his notice of appeal from the judgment entered following the second resentencing hearing, the trial court purported to recall the sentence and then imposed the protective order, discussed above, and also modified the victim restitution amount to (1) provide a per-victim breakdown of the $24,156.33 amount ($413.24 for the victim, $3,736.94 for the victim's father, and $20,006.15 for the victim's mother), and (2) provide for an additional $9,780.16 in restitution "for the Victim's Compensation Board." At the hearing, for the first time, defendant objected to "the amount that was previously ordered $24,156.33," arguing, "there's no documentation that was submitted with these," specifically with respect to certain mileage amounts claimed by the mother and father. Defendant then argued, "the parents are not appropriate victims" and repeated: "I'm objecting that there is a lack of documentation to support the numbers that are being requested." In response, the People offered brief testimony from a representative of the county's victim/witness program regarding that program's breakdown of mileage amounts. Defendant did not specifically object to the additional $9,780.16 amount.

B.

Analysis

Section 1202.4, subdivision (a)(1), provides: "It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." In addition to a "restitution fine" to be imposed pursuant to subdivision (b) of this section, the trial court "shall order the defendant to pay" direct victim restitution "in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment." (*Id.*, subd. (a)(3)(B).) Subdivision (f) provides, in relevant part: "[I]n every case in which a

victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. 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. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record. . . . [¶] (1) *The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant*." (*Id*., subd. (f)(1), italics added.)

Section 1202.42 "confers continuing jurisdiction to modify an order for victim restitution." (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207, italics omitted; see also § 1202.42, subd. (d) [providing "income deduction order" that must accompany an order for direct victim restitution, "shall be effective so long as the order for restitution upon which it is based is effective *or until further order of the court*," italics added].)

However, as defendant points out, the foregoing statutes contemplate a "motion" for modification of the amount of victim restitution and a "hearing," so as to provide him with notice of the amount requested and an opportunity to "dispute the determination of [that] amount." (§ 1202.4, subd. (f)(1).) "The scope of a criminal defendant's due process rights at a hearing to determine the amount of restitution is very limited: ' "A defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing." ' [Citations.]" (*People v. Cain* (2000) 82 Cal.App.4th 81, 86.)

Here, defendant does not challenge the original victim restitution order. Nor would such a challenge be either cognizable or meritorious. The probation report advised defendant of the amount requested ($24,156.33), he was afforded an opportunity to dispute that amount during the initial sentencing hearing, he did not do so then, and he has not challenged that amount in any of his appeals to this court. Instead, defendant challenges the modified judgment entered after the trial court purported to recall the sentence imposed following our remand for resentencing that increased the victim restitution order by $9,780.60, arguing, "[t]he People's request to recall the sentence was not the equivalent of a motion to modify the restitution award." In response, the Attorney General argues defendant "forfeited this issue on appeal by failing to object in the trial court." Ordinarily, she would be correct. (See *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 ["amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is excessive"].) However, "a criminal defendant's silence at the time a direct victim restitution order is made will not act as a [forfeiture] of the defendant's right to challenge the validity of that restitution order for the first time on appeal if the sentencing court rejects the recommendations in the probation report . . . and summarily orders direct payment of restitution to the victim(s) in a certain amount . . . without setting a hearing thereon or, at the least, obtaining an express waiver of such a hearing from the defendant—precisely because such conduct by the sentencing court would violate a defendant's fundamental right to the due process of law (most particularly, to the 'fair notice' aspect of due process)." (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113.)

Thus, if defendant is correct that the People's invitation to the trial court to recall his sentence under section 1170, subdivision (d), did not adequately inform him as to the People's intention to seek an increase in the victim restitution order of $9,780.60, then his

failure to specifically object to that increase cannot be relied upon to declare his due process claim forfeited. The record contains no indication defendant was informed of this intention prior to the hearing, during which the trial court stated, in addition to the requested protective order, the People sought a "break down" of the $24,156.33 amount already imposed. Then, the prosecutor stated, "we're asking that the Court impose that necessary break down, *as well as increase the amount* . . . because $9,780.60 is requested for the Victims' Compensation Board." (Italics added.) There is no "motion" in the record requesting this increase, or anything revealing defendant was placed on notice regarding the new amount sought. On these facts, we cannot conclude defendant forfeited his due process claim and further conclude it has merit.

Defendant simply was not given fair notice of the requested increase prior to the hearing. For this reason, we must vacate the modified victim restitution order. (*People v. Resendez*, *supra*, 12 Cal.App.4th at p. 115 [vacating restitution order imposed in violation of due process].)

IV

Correction of the Abstract of Judgment

We also agree with defendant's final claim the abstract of judgment must be corrected in two respects.

First, as the Attorney General concedes, we previously ordered stricken a "no visitation" order that was erroneously imposed pursuant to section 1202.05, but this provision remains included in the abstract of judgment. Failure to delete the provision appears to be a clerical error that we order corrected.

Second, as the Attorney General also concedes, the abstract of judgment must be corrected to reflect, as of February 11, 2014, defendant had spent 1,606 actual days in custody (94 days of presentence custody and 1,512 days of state custody), with 14 days of local conduct credit, for a total of 1,620 days of credit.

DISPOSITION

Defendant's convictions, having previously been affirmed, are not before us in this appeal. The judgment entered on January 31, 2014, is affirmed. The subsequent judgment entered on February 11, 2014, is void to the extent it purported to do anything other than modify the victim restitution order and vacated to the extent it did that. The trial court is directed to amend and correct the abstract of judgment to reflect (1) the victim restitution order remains $24,156.33, (2) the protective order imposed pursuant to Penal Code section 136.2 is stricken, (3) the "no visitation" order imposed pursuant to Penal Code section 1202.05 is stricken, and (4) defendant is entitled to 1,620 total days of credit as delineated above. The trial court is further directed to forward a certified copy of the amended and corrected abstract of judgment to the Department of Corrections and Rehabilitation.

/s/
HOCH, J.

We concur:

/s/
ROBIE, Acting P. J.

/s/
BUTZ, J.