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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CASSIDY,

Defendant and Appellant.

C078543

(Super. Ct. No. 62-104504)

Defendant Michael Cassidy challenges the trial court’s adjudication of alleged probation violations occurring after the court-imposed probation period. The People concede that the trial court lacked authority to adjudicate the alleged violations, and further note a miscalculation in the probation expiration date. We will accept the People’s concession, reverse the court’s order, and remand to the trial court for further proceedings.

PROCEDURAL BACKGROUND¹

Defendant was charged by criminal complaint with receipt of stolen property. (Pen. Code, § 496d.)² The complaint alleged defendant suffered two prior felony convictions for which he served two prison terms. (§ 667.5, subd. (b).)

On February 18, 2011, defendant entered a plea of no contest to the charge of receiving stolen property and admitted a misdemeanor Vehicle Code violation in an unrelated case. The trial court suspended imposition of sentence and placed defendant on three years of formal probation (to expire on Feb. 17, 2014) subject to specified terms and conditions including that he serve 120 days in county jail.

On January 22, 2013, the probation department filed a petition for revocation of probation alleging that, on October 12, 2012, defendant violated section 496, subdivision (d) and Vehicle Code section 10851.

On February 11, 2013, the trial court entered an order summarily revoking defendant's probation.

A bench warrant was issued after defendant failed to appear for his scheduled court date of March 21, 2013.

Defendant was subsequently arrested on the bench warrant in Contra Costa County, but released on July 16, 2013, at which time he promised to appear in court in Placer County on August 12, 2013. When he failed to appear on that date, the court summarily revoked probation and issued another bench warrant.

¹ A recitation of the facts underlying defendant's convictions is unnecessary for the disposition of this appeal.

² Undesignated statutory references are to the Penal Code.

Defendant was again arrested in Contra Costa County on the outstanding warrant, and again released on August 26, 2013, at which time he promised to appear in court in Placer County on October 7, 2013. Again, he failed to appear and the court issued another bench warrant.

On March 11, 2014, defendant was arrested in Contra Costa County on the outstanding warrant and released on his own recognizance, promising to appear in court in Placer County on April 7, 2014. He failed to do so, and another bench warrant issued.

On April 18, 2014, defendant was arrested in Placer County on the outstanding warrant and released with his promise to appear in court on May 12, 2014. Again, he failed to appear and the court issued yet another bench warrant for his arrest.

On July 22, 2014, defendant was arrested in Contra Costa County on the outstanding warrant. Again, he was released with his promise to appear in court in Placer County on August 18, 2014.

Defendant appeared in court on August 18, 2014, at which time the court set a pretrial conference for September 4, 2014.

Defendant appeared in court on September 4, 2014. However, he did not appear at the continued pretrial conference on October 2, 2014, and the court issued another bench warrant.

On October 15, 2014, defendant was arrested in Contra Costa County on the outstanding warrant and released with his promise to appear in court in Placer County on November 10, 2014.

On November 10, 2014, defendant appeared as promised and was remanded into custody where he remained until November 28, 2014.

On November 19, 2014, the probation department filed a first amended petition for revocation of probation adding an allegation that, on June 17, 2014, defendant violated section 148.

On December 23, 2014, the probation department filed a second amended petition for revocation of probation adding an allegation that, on August 14, 2014, defendant violated section 466.

On January 9, 2015, defendant admitted all four of the alleged probation violations. The trial court revoked and reinstated defendant's probation and put the matter over to February 6, 2015, for judgment and sentencing on the probation violations.

On February 6, 2015, the court again revoked and reinstated probation subject to the previous terms and conditions and ordered that defendant serve 90 days in county jail, minus 60 days of presentence custody credit. The following colloquy took place between counsel and the court:

“[PROSECUTION]: Your Honor, I would just bring to the Court's attention two things. One, my notes indicate that the deal was that [defendant] was going to go into custody today. Second thing I want to make sure we take care of, we need to add some additional time on probation. Looks like [defendant] essentially has been in abscond for the last two and a half, three years. Probation was set to terminate last February. So if we can just make sure the record is clear that we pick a new date for his probation to terminate. [¶] . . . [¶]

“[DEFENSE COUNSEL]: I understand the need to extend probation. I don't—I'd be uncomfortable about picking a date longer than say a year from today.

“THE COURT: What would be the People's position about, just to nail it down, indicating that it would terminate one year from today unless it was otherwise revoked or tolled again between now and then?

“[PROSECUTION]: He was sentenced on February 2011 and went into—first alleged violation was October of 2012. I believe he essentially has been in abscond since then. In this case the People wanted probation just to be terminated and [defendant] to be sentenced on the felony [section] 496. The Court indicated 90 days. The People believe if he is going to be placed on probation, he be placed on probation for at least two years.

“THE COURT: Does probation records show how long a period of time he was tolled that—

“[PROBATION]: No. It looks like there—would you like a tolled time memo?

“[DEFENSE COUNSEL]: Your Honor, of course, as you know, my understanding about what tolling does, certainly this is a situation where tolling can go past the natural termination date of probation, but I’d also state that I don’t believe he can be sentenced past five—five years total. Sounds like he was put on probation on—

“[PROSECUTION]: 2011.

“[DEFENSE COUNSEL]: So it would be 2016 would be the most I think you could extend probation to. Again, I’d be uncomfortable putting probation past February of 2016.

“[PROSECUTION]: I’m unaware of any authority from any—the five years’ probation when he has been in abscond for the vast majority of probation.

“[DEFENSE COUNSEL]: I have the case right here actually.

“THE COURT: First of all, I don’t have my notes on this whether—if part of the agreement was he was going to go into custody today—

“[DEFENSE COUNSEL]: I don’t know if that’s necessarily something that’s been part of the agreement.

“[PROSECUTION]: My notes indicate that defendant will go into custody on February 6th.

“THE COURT: Why shouldn’t your client finish out the 30 days today? Two weeks to go.

“[DEFENSE COUNSEL]: He indicates to me he has belongings, all the things that he owns in the world, that he needs to get those out of where they are right now and put them in storage. If he doesn’t, there is a possibility those things could be lost.

“THE COURT: Has he been reporting since the last violation?

“[PROBATION]: Yeah. He is a telephone person. He reports via telephone. Looks like he has been doing that.

“THE COURT: [Defendant], I’m going to order that you report to the county jail in two weeks. That’s going to be on February 25th, [2015,] Wednesday, 7:30 p.m., up here at the front counter to finish out the last 30 days. Further, I’m going to order that probation will be extended. The term that had been tolled. Probation can calculate whatever that is, but that will be the Court’s order.

“THE CLERK: How long are we extending it to?

“THE COURT: It is going to be extended the amount of time it has been tolled. Put that in the minutes and probation will calculate it.

“[PROBATION]: You want us to do a memo then?

“THE COURT: Yes. Calculate it.

“[DEFENSE COUNSEL]: Your Honor, I would just object to that based on *People v. Leiva* (2013) 56 Cal.4th 498 [(*Leiva*)].

“THE COURT: Objection noted. That will be the Court’s order.”

In response to the court's request, the probation department filed a memorandum on February 23, 2015, stating defendant was granted three years of formal probation on February 18, 2011, his probation was revoked on February 11, 2013, and probation was reinstated on February 6, 2015. The memorandum stated, "defendant has 371 days remaining of supervision," and calculated a new expiration date of February 10, 2016.

Defendant filed a timely notice of appeal of the court's February 6, 2015 order.

DISCUSSION

Defendant contends, and the People agree, that the trial court lacked authority to adjudicate two of the four alleged probation violations (i.e., those occurring on June 17, 2014, and Aug. 14, 2014) because those allegations were based on conduct occurring after February 17, 2014, the date his original period of probation expired. We agree.

Section 1203.2, subdivision (a) provides that "revocation [of probation], summary or otherwise, shall serve to toll the running of the period of supervision." "[T]he Legislature intended the tolling provision in section 1203.2[, subdivision] (a) to preserve the trial court's jurisdiction to determine whether a defendant violated probation during the court-imposed period of probation" (*Leiva, supra*, 56 Cal.4th at pp. 517-518, disapproving *People v. DePaul* (1982) 137 Cal.App.3d 409 ["to the extent it suggests a probation violation can be based solely on conduct that occurs after the expiration of a court-imposed period of probation"].)

"[U]pon proof that a defendant did violate probation before the expiration of the probationary period, probation may be reinstated or a new term may be granted. (§§ 1203.2, subd. (e), 1203.3.)" (*Leiva, supra*, 56 Cal.4th at p. 518, fn. 7.)

Here, the trial court placed defendant on formal probation on February 18, 2011, for a term of three years. As such, the original term of probation expired on February 17, 2014. Thus, the court's finding that defendant violated probation based on conduct

