Filed 2/13/13 P. v. Nicholson CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAVID M. NICHOLSON, Defendant and Appellant.	D060667 & D061840 (Super. Ct. No. SCD225506)

APPEALS from a judgment and order of the Superior Court of San Diego County, Charles R. Gill and Desiree A. Bruce-Lyle, Judges. Affirmed.

David M. Nicholson pleaded guilty to five counts of grand theft of personal property (Pen. Code,[1] § 487, subd. (a), counts 1, 3-6), one count of theft from an elder person (§ 368, subd. (d), count 2), and four counts of failure to file tax returns (Rev. & Tax. Code, § 19706, counts 7-10). All counts alleged Nicholson committed two or more

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1 Further statutory references are also to the Penal Code except when otherwise specified.

related felonies by fraud and embezzlement that involved a taking of more than $500,000 (§ 186.11, subd. (a)(2)), as well as other enhancements not relevant here. The trial court sentenced Nicholson to a total of five years in prison, including the lower-term of two years for count 2, and a three year enhancement under section 186.11, subdivision (a)(2). The court imposed concurrent two year terms on each of the remaining counts.

Nicholson appeals the judgment, contending the court abused its discretion by not granting his new attorney's request for a continuance of the preliminary hearing to allow preparation time.[2] He also appeals an order imposing $323,928.32 in restitution, contending the People did not present evidence of any actual victim. We affirm the judgment and the order.

FACTS[3]

Counts 1 and 2

In 2005 Lorraine Cutri (Lorraine), then 73 years of age, invested $300,000, her life savings, with Nicholson, who had a business called MTS Equity, LLC (MTS Equity). They agreed the investment would be secured by deeds of trust on specified residential properties he intended to purchase with the money, he would pay her $3,000 in monthly interest for a year, and then he would repay the principal. Nicholson, however, had

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2 Nicholson obtained a certificate of probable cause from the trial court. (§ 1237.5.)

3 We take the facts from the preliminary hearing transcript, which for purposes of the appeals are undisputed.

already acquired the properties. He made only four interest payments and did not repay the principal.

Counts 3 and 4

In 2006 Bryan Ficarra (Bryan) and his son Jason Ficarra (Jason) invested $330,000 with Nicholson, to be secured with deeds of trust on real properties Nicholson planned to buy with the money. Nicholson promised them monthly interest payments totaling 15 percent for one year. After making $7,000 in interest payments Nicholson paid no additional interest or the principal. Bryan and Jason eventually got notice that MTS Equity had filed for bankruptcy.

Count 5

Carol Mann had dated Nicholson's uncle. Mann told Nicholson she had inherited $85,000 and she wanted to invest it, but she was an inexperienced investor. He offered to assist her through a new company, North American Financial. She agreed and in 2009 she wired the money to an account he accessed. He promised her $2,300 per month in interest for a year, and the return of principal. Nicholson made only two monthly interest payments and did not repay the principal.

Count 6

In 2005 Fremont Investment & Loan (Fremont) provided two loans, totaling $620,000, ostensibly to John Cutri (John) for his purchase of real property. The loans were unpaid and Fremont's successor in interest eventually foreclosed on the property. John, who was acquainted with Nicholson, did not apply for the loans or supply any of

the information on the paperwork. The phone numbers on the loan applications were for Nicholson's company, MTS Equity.

Counts 7 through 10

In 2005 and 2006 Nicholson failed to file state tax returns for himself or MTS Equity.

DISCUSSION

I

Denial of Continuance Request

The granting or denial of a continuance of the preliminary hearing rests within the trial court's broad discretion. (§§ 859b, 1050; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) Here, at the preliminary hearing on May 2, 2011, the trial court denied the request of Nicholson's new appointed counsel, Troy Britt, for a continuance on the ground he had insufficient time to review the discovery and prepare. The court explained that the presiding judge had already "made a determination that . . . Nicholson is trying to delay and manipulate with continuances and going pro per, then back to counsel." Britt conceded there had been several continuances at Nicholson's request, and the presiding judge had recently denied Britt's request for another continuance.[4]

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[4] On November 3, 2010, the court granted Nicholson's request for appointed counsel. On January 5, 2011, the court held a *Marsden* hearing and denied his request for the appointment of new counsel. On February 23, 2011, the court granted his request for self-representation and relieved his counsel. On March 30, 2011, the court granted his request for appointed counsel. On April 7, 2011, the court denied him another *Marsden* motion. On May 2, 2011, Britt appeared with Nicholson at the preliminary hearing and stated the public defender had reassigned the case to him.

Nicholson contends the court's ruling effectively denied his constitutional right to effective assistance of counsel and coerced his guilty plea. He asserts, "[w]ithout counsel fully prepared for the adversarial preliminary hearing, [he] had no reasonable grasp of how a jury would perceive the case, and thus chose not to take a chance." He also asserts "[i]t is likely if the prosecution's evidence had come under rigorous testing by a fully prepared attorney, [he] would not have made the decision to plead guilty."

"Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] 'It is well settled that where ineffective assistance of counsel *results in the defendant's decision to plead guilty*, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' " (*In re Resendiz* (2001) 25 Cal.4th 230, 239, italics added, abrogated on another ground in *Padilla v Kentucky* (2010) ___ U.S. ___, ___, [130 S.Ct. 1473, 1484].)

Nicholson, however, does not specify how Britt's conduct failed to meet the applicable standard of conduct. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.) He relies merely on Britt's argument he was insufficiently prepared for the preliminary hearing. Moreover, Nicholson did not enter his guilty pleas until July 12, 2011, more than two months after the continuance ruling at the preliminary hearing. During the interim, Britt had additional time to prepare, and there is no suggestion of a causal relationship between Britt's representation of Nicholson at the preliminary hearing and his subsequent

evaluation of the case or advice to Nicholson pertaining to his plea.[5] We find no abuse of discretion or ineffective assistance.

II

Restitution

In a February 29, 2012 order, the trial court ordered Nicholson to pay $323,928.32 in restitution to Greenwich Capital Company (Greenwich), Fremont's successor in interest, arising from count 6. Nicholson challenges the sufficiency of the evidence to support the order, claiming the People did not identify any actual victim on count 6.[6]

"[W]hen a defendant is convicted of a crime involving a victim who 'has suffered economic loss as a result of defendant's conduct' [citation], the court must require the defendant to pay full restitution directly to the victim or victims of the crime 'unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.' [Citation.] A 'defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.' " (*People v. Giordano* (2007) 42 Cal.4th

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[5] On the plea form, Britt signed a statement that read he "personally read and explained to the defendant the entire contents of this plea form," "discussed all charges and possible defenses with the defendant, and the consequences of this plea," and concurred in the plea. Additionally, at the plea hearing Nicholson stated he had sufficient time to speak with Britt, and they went over the plea form together. Also, Britt advised the court he was satisfied with the plea.

[6] At the sentencing hearing, the prosecutor advised the court that with the exception of count 6, Nicholson had "no quarrel with the restitution to the victims." The court ordered him to pay the restitution amounts identified in the probation report for Lorraine, $300,000; Jason, $132,000; Brian, $198,000; Mann, $85,000; and the Franchise Tax Board, $433,601.

644, 651-652.) "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." ' " (*People v. Cain* (2000) 82 Cal.App.4th 81, 86.) "We review the trial court's restitution order for abuse of discretion." (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1173.)

Here, the court ordered a supplemental probation report detailing any claim for restitution by lender Fremont or its successor in interest on count 6. The deputy district attorney on the matter provided the probation officer with a list of questions he wanted answered by a Fremont representative.

The supplemental report was issued on February 29, 2012, the same day as the restitution hearing. The probation officer reached a former employee of Fremont, Margaret Susan Keenum. She advised the officer that Fremont's successor in interest was Signature Group Holdings, Inc. In her current position with another company she "conduct[ed] research of the legacy operations of what used to be Fremont," "specifically loan information."

Keenum confirmed that in 2005 Fremont made two loans, ostensibly to John, secured by the same real property and both loans went into default. The property eventually went into foreclosure, but by that time Fremont had sold the loan to Greenwich. Greenwich, however, had hired Fremont to service the mortgage and in 2007 Fremont foreclosed on the property on Greenwich's behalf. Fremont also resold the

property for Greenwich. Fremont had prepared forms that showed the loss for both loans totaled $323,928.32. Keenum advised that Greenwich was the victim, as it took the loss on the foreclosure. She also advised that Greenwich had become RBS Securities, Inc. (RBS Securities), and she had no contact information for that company.

The probation officer located Kay Lackley, who was "Head of Litigations and Regulatory Investments" for RBS Securities, and she confirmed that the company was formerly Greenwich. The probation officer related the facts of Nicholson's offense to Lackley and she said, "[S]he would have [to] conduct research . . . to know if they were the actual victims," and the research would take some time because the information was old. Lackey believed RBS Securities "probably placed the loan on a 'Mortgage Loan Trust,' which is a separate entity." She "indicated she would be able to answer any questions the District Attorney's office would have in regards to the two loans."

At the hearing, the court noted, "there still seems to be a question as to who the victim is." The prosecution argued the court should order restitution for RBS Securities, but if it believed there was insufficient evidence to do so, it should order restitution in favor of Greenwich, as it was undisputed that Greenwich bought the loans from Fremont before the foreclosure. In the prosecutor's view, Greenwich and RBS Securities could "sort it out." The court agreed, and ordered restitution for Greenwich, explaining "it would be up to them to contractually determine who the proceeds need to go to or the restitution needs to go to. But they are the victims that are evident to the court. [¶] Defense has the burden of showing that the restitution recommended by the probation report is inaccurate. And no such evidence has been shown."

On this record, we cannot say the trial court abused its discretion. Nicholson does not dispute that the total loss on the two loans totaled $323,928.32. Contrary to Nicholson's position, the evidence amply supports the court's finding that Greenwich was a victim and it also reasonably found that Greenwich and its successor, RBS Securities, could determine who had entitlement to the restitution. Nicholson cites no authority for the proposition that a crime against a lender is victimless when the lender has a successor in interest.

DISPOSITION

The judgment and order are affirmed.

MCCONNELL, P. J.

WE CONCUR:

MCINTYRE, J.

IRION, J.