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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH KARL PATUKA,

Defendant and Appellant.

D060740

(Super. Ct. No. SCD230333)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed as modified.

In August 2011, Joseph Karl Patuka entered a negotiated guilty plea to inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a))¹ and admitted a strike prior conviction (§ 667, subs. (b)-(i)). In September, the court sentenced him to eight years in prison: twice the four-year upper term. Patuka appeals, contending the reference

¹ Further statutory references are to the Penal Code.

to a continued criminal protective order should be stricken from the abstract of judgment. The People concede the point.

PROCEDURAL BACKGROUND

At arraignment on November 2, 2010, Judge David M. Szumowski issued a Criminal Protective Order—Domestic Violence (Judicial Council of California, form CR-160; § 136.2) prohibiting Patuka from contacting or coming within 100 yards of the victim. The order states: "2. This order expires on (*date*):_____[,] If no date is listed, this order expires three years from the date of issuance." No date was listed.

In August 2011, this case was assigned to Judge Brown. At the change of plea hearing,² Judge Brown ruled the protective order would remain in effect. The minute order for that hearing states Patuka was not to have any face-to-face contact with the victim or members of her family.

Judge Brown presided at the September 21, 2011, sentencing hearing. At the end of the hearing, Judge Brown asked, "Now, do I have to sign some 10-year stay-away order?" The prosecutor responded, "Perhaps we can take care of that via ex parte order, and I'll get with [defense counsel] regarding that." The minute order for the sentencing hearing states: "Defendant may have contact with victim's mother." The abstract of judgment states: "8. Other orders . . . : Defendant's Protective Order remains in effect

² The reporter's transcript lists the hearing date as August 17, 2011, while the clerk's transcript lists the date as August 18.

per Court. Defendant's phone privileges have been reinstated. Defendant may have contact with victim's mother."

The record on appeal initially filed in this case did not include a copy of the protective order mentioned in the abstract of judgment. Patuka's appellate counsel filed a motion to augment the record with a copy of the order. On February 14, 2012, this court granted the motion. Because the deputy clerk of the superior court was unable to locate the requested order in the case file, she contacted the district attorney's appellate division. On February 22, a deputy district attorney told the deputy clerk "that an order was not done but [the deputy district attorney] would try to get Judge Brown to sign one." At that time, Judge Brown was on vacation and scheduled to retire. On March 15, Judge Timothy R. Walsh, the supervising criminal judge, held a hearing regarding the augmentation order. After a short discussion with the deputy district attorney and a deputy public defender, Judge Walsh assigned the matter to Judge George Clarke "for procedural review of the case and any further action if required." On March 15, the deputy clerk executed a certificate stating the only protective order in the file was the November 2, 2010, order. The record on appeal does not include transcripts of any proceedings before Judge Clarke or any proceedings after March 15, 2012.

DISCUSSION

The authority in section 136.2 for a protective order exists only during the pendency of a criminal case. (*People v. Ponce* (2009) 173 Cal.App.4th 378.) This is consonant with the purpose of section 136.2, " 'to protect victims . . . in connection with

the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal.' " (*Ponce*, at p. 383.) Thus, the November 2, 2010, protective order in this case was no longer in effect upon sentencing.

Section 273.5 provides for the issuance of a protective order extending beyond the pendency of a case. That section states: "Upon conviction under subdivision (a), the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order 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. This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation." (§ 273.5, subd. (i).) At sentencing in this case, Judge Brown mentioned a 10-year protective order, but did not issue one, and there is nothing to indicate another judge issued the order. Thus, the reference to a protective order in the abstract of judgment does not reflect the judgment. Accordingly we strike the language concerning the restraining order from the abstract of judgment. (*People v. Ponce, supra*, 173 Cal.App.4th at p. 386; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183 ["[T]he abstract of judgment . . . cannot add to or modify the judgment which it purports to summarize."].)

DISPOSITION

The sentence "Defendant's Protective Order remains in effect per Court" is stricken from the abstract of judgment. The judgment is affirmed as so modified.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.