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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MELANIE SMITH,

Defendant and Appellant.

E052146

(Super.Ct.No. RIF147155)

OPINION

APPEAL from the Superior Court of Riverside County. David B. Downing,
Judge. Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, and Gary W. Schons, Assistant Attorney General, for Plaintiff and Respondent.

Defendant Melanie Smith pleaded guilty to two counts of violating Revenue and
Taxation Code section 19706, failing to file a tax return or willfully filing a false return,
for her involvement in a large-scale prostitution ring based out of Palm Springs. She

appeals from the victim restitution order that she pay \$112,204.57 to the victim, the California Franchise Tax Board (FTB). She claims that under Proposition 9, known as the Victims' Bill of Rights Act of 2008 (Marsy's Law), any amount seized from her by the federal government based on her involvement in the prostitution ring should have been used to offset the amount she was ordered to pay in victim restitution in her criminal case prosecuted by the Riverside County District Attorney's Office.

I

FACTUAL AND PROCEDURAL BACKGROUND¹

This case involves assets seized by the federal government from the operation of a large-scale prostitution ring based in Palm Springs under the name Elite Enterprises and several other companies. A felony complaint had been filed in Riverside County Superior Court, case No. RIF131552, charging defendant with 28 counts involving loan fraud, pimping, and tax fraud.

After defendant and several of her codefendants were arrested for their involvement in the prostitution ring, the Riverside County District Attorney's Office filed a temporary restraining order pursuant to Penal Code section 186.11, subdivision (g)(1). The application sought to restrain defendant and the other codefendants from transferring, encumbering, or secreting any of the property or assets they gained from the illegal prostitution ring. The request for a restraining order stated that the assets and property

¹ The factual background is taken from the documents and exhibits filed in the trial court, and any hearings conducted.

could be used to pay restitution and fines imposed pursuant to “Penal Code Section 186.11, subdivisions (c) and (d).” The assets to be seized included numerous bank accounts and any property in the control of defendant and Boaz Benmoshe, who was defendant’s husband and a codefendant. Pursuant to a declaration, a special agent from the FTB had reviewed previous tax returns filed by defendant and Benmoshe, and they appeared to be fraudulent.

The trial court issued an order to show cause, and a temporary restraining order was granted. The order stated: “Nothing in this Order shall prevent the forfeiture of the assets under federal law.” As discussed, *post*, a grand jury indictment was filed, and case No. RIF131552 was dismissed. There is nothing that explicates what further action was taken by the Riverside County District Attorney’s Office to seize the assets.

On November 14, 2008, defendant, Benmoshe, four other men, and two women were charged in a 180-count indictment for their involvement in the prostitution ring. Defendant was charged with filing false tax returns in 2003, 2004, and 2005 in violation of Revenue and Taxation Code section 19705, subdivision (a)(1) (counts 4, 5, 6) and failing to file a tax return in 2006 in violation of Revenue and Taxation Code section 19706 (count 7). Defendant’s request to have her case severed from those of the other codefendants was granted.

On October 2, 2009, the indictment was amended to add count 181, a violation of Revenue and Taxation Code section 19706, against defendant. Defendant pleaded guilty to counts 7 and 181, both violations of Revenue and Taxation Code section 19706. The

first count was for underreporting personal income for the year 2002; the additional tax due to the FTB was \$15,483.03. The second count was for failure to file a personal tax return in 2005; the tax due to the FTB was \$64,079.09.

Defendant signed a written plea agreement. She agreed that she would receive five years' probation.

At the hearing on the plea agreement, the People stated that the agreement was that she would receive five years of formal probation and that she would be paying victim restitution. The trial court acknowledged the plea form signed by defendant. Defendant admitted she had initialed and signed the agreement. The trial court stated: "That tells me you've been advised of your rights, you understand the consequences of your plea, you're willing to give up and waive your rights plead guilty to two counts for the terms and conditions indicated?" Defendant responded that she wanted to enter a guilty plea. She was immediately sentenced and was granted probation for 60 months, with 180 days to be served on community supervised release.

The parties then discussed victim restitution. Defendant was advised that the matter of restitution was going to be sent to the Department of Enhanced Collections of Riverside County and the amount of victim restitution would be set by that department. If defendant disputed the amount, a hearing on the actual amount could be requested. The trial court advised her that if she agreed to the amount set for restitution, then a payment schedule would be set up. If she did not agree, then she was entitled to a

hearing in court during which the trial court would determine the amount owed. The restitution hearing and the amount of restitution imposed will be discussed, *post*.

On October 29, 2010, defendant filed a notice of appeal. She stated the ground for appeal was the amount of victim restitution ordered, which was a matter occurring after the plea and not affecting the validity of that plea.

II

ANALYSIS

Defendant contends, relying upon Marsy's Law, that the assets seized by the federal government due to her involvement in an illegal prostitution ring should have gone to pay victim restitution rather than going to the Riverside County District Attorney's Office and sheriff's department to offset the amount she was ordered to pay in victim restitution to the FTB.

A. *Additional Factual Background*

As set forth, *ante*, defendant pleaded guilty, and the issue of the amount of victim restitution that was to be imposed was to be decided by the Department of Enhanced Collections of Riverside County.

Defendant contested the amount, and on September 21, 2010, she filed a brief regarding victim restitution. According to the brief, the People were seeking restitution for the "victim," the FTB. The total taxes that defendant had not paid were \$79,562.12. The People were also seeking penalties, interest, cost of prosecution, and a 10 percent trust administration fee. The total amount sought for restitution was \$210,675.77.

Defendant argued that the “government” had already seized money and assets from her in the asset forfeiture proceeding. The amount owed by her should be offset by the amount seized from her.

Defendant claimed her plea agreement included that if she disputed the restitution amount set, a restitution hearing could be held for her to dispute the amount. According to defendant, the People were ordered on March 15, 2010, to provide documentation of the assets seized from Benmoshe and defendant, but she had not received documentation.

According to the brief, on November 27, 2006, the United States, through the United States Attorney’s Office, brought a claim against defendant and the other codefendants to seize their money and assets by filing a complaint for forfeiture in rem. The forfeiture action was based upon Elite Enterprises’s adult entertainment businesses. Eventually, consent decrees for judgment of forfeitures were entered on August 10, 2007, and October 11, 2007. In the first consent of forfeiture, assets totaling \$93,169.70 were taken from defendant and Benmoshe. Defendant claimed a community property interest in several other accounts in the names of Elite Enterprises and Benmoshe that totaled \$155,423.01. The total amount seized by the federal government was \$198,592.71, with the consent of defendant and Benmoshe.

Initially, defendant argued that penalties could not be imposed in victim restitution. Further, relying on the voter-approved Marsy’s Law, she argued the law requires that any funds collected by a court or law enforcement from a person ordered to

pay restitution must go to pay restitution before being used to pay any other fines, penalties, assessments, or obligations that an offender may legally owe.

The People filed opposition to defendant's restitution brief. They agreed with defendant's recitation of the facts but criticized defendant for referring to the "government" as one entity; rather, the issue was the federal government's seizure of assets and a state criminal case brought by the Riverside County District Attorney's Office. The assets were seized under the authority of Title 18 United States Code section 981(a)(1)(A) and (C), which gives the United States government authority to seize proceeds traceable to a violation of any offense, such as money laundering or tax evasion. Although there was a preliminary injunction filed in state court in October 2006 by the district attorney's office, the federal government seized the assets in 2007.

Attached to the People's response was the asset seizure done by the federal government. According to the warrant of seizure, \$740,285.65 in bank account funds were seized. These amounts came from bank accounts in the name of Elite Enterprises, defendant's and Benmoshe's names, and the other codefendants' names. The home bought by defendant and Benmoshe used funds that were illegally obtained through prostitution funds. The home was searched, and cash was found throughout the premises. Jewelry and paintings were taken. Also included was a breakdown of the income reported by defendant and Benmoshe in 2002, 2003, 2004, and 2005, and what their true income was when the money from Elite Enterprises was included.

Defendant filed a response. Defendant received documentation that Riverside and San Bernardino Counties had received money back from the federal government that had been obtained in the asset forfeiture proceeding. According to the documentation, both the Riverside and San Bernardino County District Attorney's Offices received \$56,936.32. The Riverside County Sheriff's Department received \$341,618. None of the money was turned over to the FTB. Defendant again relied upon Marsy's Law to support that this money should be turned over to the FTB.

At the hearing on the matter held on October 29, 2010, the trial court noted that it had read defendant's motion, the opposition, and reply. It also had reviewed the plea agreement. The parties agreed that penalty assessments could not be part of victim restitution.

The trial court understood that the victim was the FTB. It recognized that the federal government seized assets, but the question was whether the restitution amount should be offset by the amount returned to the "state coffers."

Paul Murphy from the FTB testified. He investigated tax returns filed by defendant and Benmoshe. No income tax return was filed in 2005. Murphy determined that defendant and Benmoshe had received money from the prostitution ring in 2002 and 2005 that they had not reported. Defendant was jointly and severally liable for the unreported income with Benmoshe. The parties stipulated that the amount for taxes in 2002 and 2005 amounted to \$112,204.57, which included interest but not penalties. The

only issue was whether the amount owed should be offset by any monies collected from defendant and Benmoshe.

Defendant argued that the offset amount should include money returned to both district attorney's offices and the Riverside County Sheriff's Department and the money seized by the federal government. She argued that the state initially seized all of the assets and asked for the emergency restraining orders but then let the federal government take care of the asset forfeiture.

The trial court noted that the United States Secret Service was involved in the investigation from the beginning of the case. There was nothing in the record as to why the federal government decided to start the asset forfeiture proceeding but then failed to file charges. However, the trial court noted that defendant and Benmoshe entered into consent decrees to forfeit the money.

Defendant argued that under Marsy's Law, any money seized from defendant and returned to the district attorney's office and the sheriff's department should be used to offset the restitution because it required payment of victim restitution first. Defendant forfeited \$156,000 to the federal government and only a portion of that amount was returned to Riverside County.

The People argued that Riverside County had no control over the money seized by the federal government and that the only persons who could have disputed the seizure were defendant and Benmoshe. The People explained that after the asset forfeiture, the federal government transferred the case back to the state for prosecution. Defendant

provided no evidence that she had an inability to pay the victim restitution and the FTB had received no money.

The trial court, in ruling on restitution, first noted that according to Penal Code section 1202.4² and Marsy's Law, victims are entitled to restitution. It awarded \$112,204.57 to the FTB. It noted that money had been returned in the amount of \$500,000 to Riverside and San Bernardino Counties from the federal government, but none had been given to the FTB. The trial court did not order an offset of the victim restitution from these funds.

The trial court stated in support of its ruling as follows: "My focus was a narrow one. My focus was: Is the Franchise Tax Board a victim? The answer is 'yes.' Are they entitled to be made whole? The answer is 'yes.' And you all stipulated that amount involved was \$112,204.57, and that's the order, that I will order that your client, [defendant], pay to the Franchise Tax Board. [¶] Now, having said that, [defendant] has been sentenced already, and she has signed off on terms and conditions of probation. I did advise her at the time of the plea that she very well may end up in a restitution hearing, and I told her that she might, and so she has, and this is what we've done today." The order of the amount of restitution was stayed pending appeal.

² Penal Code section 1202.4, subdivision (a)(1) provides as follows: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime."

B. *Analysis*

Defendant relies on Marsy's Law to support her claim that her due process right was violated by the trial court's refusal to offset the amount of victim restitution by the amount that Riverside County received from the federal government after they seized defendant's assets.³

"[C]alifornia voters, on November 4, 2008, passed Proposition 9, also known as the Victims' Bill of Rights Act of 2008: Marsy's Law. This initiative added or enhanced several state constitutional rights of victims, including rights relating to restitution." (*People v. Smith* (2011) 198 Cal.App.4th 415, 437.) According to the new law, "[t]he victim has the right (1) to be notified of and to be present at all public proceedings, (2) to be heard at any proceeding, including the sentencing hearing, and (3) to receive restitution. (Cal. Const., art. I, § 28, subd. (b)(7), (8) & (13).) The victim has the right to 'seek and secure restitution' (Cal. Const., art. I, § 28, subd. (b)(13)(A).)" (*Id.* at p. 439.) In addition, "[a]ll monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." (Cal. Const., art. I, § 28, subd. (b)(13)(C).)

Here, the FTB was awarded victim restitution in the amount of \$112,204.57.

Defendant was ordered to pay that amount directly to the FTB. Under Marsy's Law, the

³ Defendant references the fact that she was deprived of property without due process of law. However, defendant agreed to forfeit the assets to the federal government and had no right to such property. The state cannot be faulted with taking away property in violation of defendant's due process rights when she no longer possessed that property.

victim was granted victim restitution, and its rights were protected. Here, defendant's claim is that the amount of restitution should have been offset by the monies received by Riverside County from the federal government. However, Marsy's Law protects *victims* and affords them the right to restitution. It provides for a victim's, not a defendant's, bill of rights. (Cal. Const., art. I, § 28, subd. (a)(3) ["The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b)".] Defendant cannot raise on appeal a right held by the FTB. If the FTB wants to pursue its rights to be paid from money seized from defendant and handed over to the County of Riverside, it holds that right. Defendant cannot step into the shoes of the victim to escape her obligation to pay victim restitution by arguing that she can enforce the victim's right to be paid first from assets seized from her. Defendant had already consented to the forfeiture of the money and had no legal ownership of the cash and property. She does not argue the amount was improperly calculated or that victim restitution could not be imposed against her.

We simply cannot grasp how defendant can claim a right possessed by the victim as support for her ground for reversal of the restitution order on appeal. Moreover, it must not be forgotten that these were funds that were illegally obtained by defendant. Accordingly, she cannot contest the refusal of the trial court to offset the victim restitution ordered by relying upon a victim's right embodied in Marsy's Law.

III

DISPOSITION

We affirm the victim restitution order.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.