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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.

FRANKLIN LEE CLEAVES et al.,

Defendants and Appellants.

E053526

(Super.Ct.No. SWF027005)

OPINION

APPEAL from the Superior Court of Riverside County. Jerry E. Johnson, Judge.
(Retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6
of the Cal. Const.) Affirmed with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant Franklin Cleaves.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant
and Appellant Trea Cleaves.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Sabrina Lane-Erwin and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to *People v. West* (1970) 3 Cal.3d 595, defendants and appellants Franklin and Trea Cleaves¹ pled guilty to five counts of misdemeanor animal cruelty. (Pen. Code, § 597, subd. (b).)² In return, the remaining allegations were dismissed and defendants were placed on summary probation for a period of 36 months with various terms and conditions.

On appeal, defendants contend that (1) the booking fee ordered pursuant to Government Code section 29550 must be stricken because the trial court failed to find they had the ability to pay such fee; and (2) the \$54,000 victim restitution order to animal control for the costs of caring for the neglected horses was unauthorized and must be stricken. We agree that the victim restitution order was improper, but reject defendants' remaining contention.

¹ Defendants Frank and Trea Cleaves will, hereafter, be individually referred to by their first names, not out of any familiarity or disrespect, but to ease the burden on the reader. (See, e.g., *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 803, fn. 2.)

² All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL BACKGROUND³

On March 4, 2008, Riverside County Department of Animal Services (Animal Services) Sergeant Huennekens received an animal abandonment call at an address on Los Corralitos Road in Temecula. Upon arriving at the location, Huennekens saw 10 horses and two llamas in emaciated condition. The property contained neither water nor a sufficient amount of food for the animals. After Huennekens brought in food from the county and fed and watered the animals, she left the property.

Huennekens returned to the property the following day, spoke with defendant Trea, and determined that defendants owned the animals. Upon questioning defendant Trea about the condition of her horses, defendant Trea stated that the person who owned the property had been evicted and her horses had not been fed. Defendant Trea further stated that she was getting water for the horses from a ranch across the street, and that the horses were rescue horses between seven to 25 years of age.

Sometime after March 7, 2008, Huennekens spoke to defendant Franklin and informed him that the owner of the property demanded that the horses be removed from his property because defendants were “squatting” on the property. On March 10, 2008, defendant Franklin told Huennekens that they would move the horses by the next day.

When Huennekens visited the property on March 11, 2008, with Animal Services Lieutenant Stephens, she observed that the animals were still on the property. The two llamas and most of the horses were “very thin.” In addition, there was still no water at

³ The factual background is taken from the preliminary hearing transcript.

the property. Huennekens told defendant Franklin that if the animals were not moved from the property within 24 hours, they would be impounded by Animal Services.

Defendants subsequently moved the horses.

In April 2008, Huennekens received another complaint regarding thin horses at an address on Bradford Road in Aguanga, a rural campground that had horse facilities.

When Huennekens arrived at that address, Huennekens recognized the horses as belonging to defendants. She noticed seven of the same horses and the same two llamas. Huennekens spoke with defendant Trea, who had a trailer at the property, and advised her that there was not “enough feed on the property” for all the animals. Defendant Trea only had a partial bag of hay pellets; an average feed for a horse is about seven and a half pounds of good quality hay, twice a day, and about 10 gallons of water a day. After Huennekens documented the horses’ weight and took photographs, she told defendant Trea that Animal Services would give her six weeks to put some weight on the horses.

When Huennekens checked on the animals on June 26, 2008, over six weeks later, the condition of the horses still had not improved. The horses were still thin.

Huennekens posted a notice of violation on defendants’ trailer, requiring defendants to have the animals seen by a veterinarian in regard to their weight loss and treatment plan by July 3, 2008. On July 3, defendant Franklin called Huennekens and told her that the veterinarian said the horses were “wormy” and needed to be fed diatomaceous earth. Huennekens asked defendant Franklin for a written prognosis from the veterinarian, but defendant Franklin never complied.

By late October 2008, defendants had failed to respond to several other notices of violation. Lieutenant Stephens, at the request of Huennekens, thereafter telephoned defendants in October and spoke to defendant Franklin about the circumstances.

Defendant Franklin said he did not believe there was a problem. When Lieutenant Stephens informed defendant Franklin that the county may impound the animals at some point, defendant Franklin told him to “fuck off” and hung up the telephone.

On November 11, 2008, Huennekens saw the horses on a property located on Reservation Road. Huennekens described the condition of the horses as “[s]hocking, appalling, incredibly, incredibly thin animals.” She further explained that many of the horses “looked like skin stretched over bone.” The horses appeared to have lost between 100 to 200 pounds. Due to the exigent situation, Animal Control removed the horses from the Reservation Road property. The horses were seen by a veterinarian; two days later, Animal Services had to euthanize one of the horses.

DISCUSSION

A. *Booking Fee Order Pursuant to Government Code Section 29550*

Defendants contend that the \$414.45 booking fee imposed under Government Code section 29550 must be stricken because the trial court did not make an assessment of their ability to pay as required by the statute.

Defendants here were presumably arrested by a Riverside County Sheriff’s deputy, after Huennekens, who worked for Riverside County Animal Services, filed declarations in support of their arrest. At the time of sentencing, the trial court ordered defendants to pay the booking fee, but did not enunciate an amount, pursuant to

Government Code section 29550. The trial court's minute orders note the amount of \$414.45 under Government Code section 29550.

1. Waiver Issue

When the trial court imposed the \$414.45 booking fee under Government Code section 29550, there was no objection by defendants. The People maintain that defendants forfeited any objection to the booking fee by failing to object in the lower court because the resulting sentence is not an unauthorized sentence, citing *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469. Defendant Franklin argues that he can raise the issue on appeal for the first time, as the determination of booking fee presents an insufficient-evidence claim that cannot be forfeited, citing *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1398 (*Pacheco*).

We note that there is conflicting authority on the issue of whether the failure to object to an imposed fee, based on the trial court's failure to make a determination of an ability to pay said fee, forfeits the issue on appeal. On one hand, courts have found, "[B]ecause the appropriateness of a restitution fine is fact-specific, as a matter of fairness to the People, a defendant should not be permitted to contest for the first time on appeal the sufficiency of the record to support his ability to pay the fine. Otherwise, the People would be deprived of the opportunity to cure the defect by presenting additional information to the trial court to support a finding that defendant has the ability to pay. [Citations.]" (*People v. Gibson, supra*, 27 Cal.App.4th at p. 1468; see also *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357.)

However, other courts have found that a challenge to a defendant's ability to pay attorney fee reimbursement need not be raised below because it is essentially a challenge to the sufficiency of the evidence supporting the trial court's order. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1217-1218; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537.) Recently, in *Pacheco, supra*, 187 Cal.App.4th 1392, the court considered whether the imposition of a booking fee, probation supervision fee, and other fees are forfeited without an objection in the trial court. It concluded, "[T]hese claims are based on the insufficiency of the evidence to support the order or judgment. We have already held that such claims do not require assertion in the court below to be preserved on appeal. [Citations.] Respondent offers nothing to convince us otherwise." (*Id.* at p. 1397.)⁴

We need not determine whether *Pacheco* was wrongly decided. Under the circumstances of this case, the forfeiture rule is inapplicable here because, as defendant Franklin points out in his reply brief, the trial court never stated the amount of the booking fee and, therefore, there was no reason for defendants to object that they did not have the ability to pay the \$414.45 booking fee. Defendants were not placed on any notice of the amount of the booking fee, since they were immediately sentenced following their guilty pleas and the record does not contain a probation report. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Phillips* (1994) 25 Cal.App.4th 62, 74.) Further, out of an abundance of caution, we consider the merits of defendants'

⁴ We note that the Supreme Court has recently granted review in *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513. *McCullough* disagreed with *Pacheco's* substantial evidence waiver exception. (*McCullough*, at p. 871.)

substantial evidence challenge to the trial court's implied finding that they had the ability to pay the \$414.45 booking fee.

2. Implied Finding of Ability to Pay

The finding of an ability to pay may be express or implied, and it must be supported by substantial evidence. (*Pacheco, supra*, 187 Cal.App.4th at p. 1400.) Under the substantial evidence test, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence, solid, contradicted or uncontradicted, to support the judgment below and will include every fact that can reasonably be deduced from the evidence. (*People v. Phillips, supra*, 25 Cal.App.4th at pp. 71-72.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

The record here supports the implied finding that defendants had the ability to pay the nominal booking fee. On December 17, 2009, in a collateral civil proceeding, Riverside County Counsel, on behalf of Animal Services, filed a motion with supporting documents to have the animals deemed abandoned.⁵ Defendants thereafter filed their opposition and supporting exhibits. Defendants claimed that an individual conspired with Heunnekens to seize the horses, and that that individual had stolen the "plenty" of food they had provided for the horses. Defendants further stated that defendant Franklin had

⁵ We note that the collateral case was filed as a criminal case under Penal Code section 597.1 et seq.; however, the trial court referred to it as a civil matter and would not allow defendant Franklin's trial counsel to participate in that collateral case. For clarity, we will refer to the collateral matter as a civil case.

paid this individual and two others to feed and care for the horses until he could move the horses.

At the January 19, 2010 hearing on the abandonment motion, defendant Trea informed the trial court that she and her husband are “very good horse professionals,” and that the horses were rescue horses that had been boarded with someone else for four months. She further stated that defendant Franklin was at the Del Mar Racetrack when he received the notice of violation; that they work with many veterinarians; and that defendant Franklin is a veterinary technician. She further noted that there was a book being written about their horses. Defendant Franklin informed the trial court that he was a “licensed trainer at the racetrack.” At the conclusion of the hearing, the trial court found that the horses were abandoned under Penal Code section 597.1, and ordered defendants to pay the costs for the seizure and care of the animals.

Subsequently, at a January 18, 2011 hearing on the criminal matter, defendant Trea represented that she and defendant Franklin owned a ranch. Specifically, she stated “our horses were wonderful before our ranch burned.” Later, at the May 2, 2011 sentencing hearing, defendant Trea informed the trial court that she owns a horse and the horse is at a stable, “not at our ranch.”

The record supports the trial court’s implied finding that defendants had the ability to pay the \$414.45 booking fee. Based on the statements of defendants, defendants own a ranch and boarded their horses for four months. In addition, defendant Franklin is a veterinary technician and/or a licensed trainer at a race track. And, at the time of the sentencing hearing, defendants owned a ranch and a horse, which they housed at a stable.

We note that the “[a]bility to pay does not necessarily require existing employment or cash on hand.” (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.)

There is sufficient evidence to support the implied finding of defendants’ ability to pay the \$414.45 booking fee.

B. *Victim Restitution Order*

Defendant Trea argues that the probation condition requiring payment of \$54,000 in victim restitution pursuant to section 1203.1, subdivision (a)(3), to Animal Services is unauthorized because it was a collateral civil restitution order and must be stricken.

Defendant Franklin asserts that the victim restitution order was improper because Animal Services is not a “direct victim” within the meaning of section 1202.4, subdivision (k)(2); rather, the horses were the direct victims.

The People respond that defendants waived these issues for failing to object to the restitution order in the court below; and, in the alternative, argue defendants’ contentions lack merit.

1. *Waiver Issue*

We disagree with the People’s argument that defendants forfeited this issue. At the conclusion of the sentencing hearing, defendant Trea sought to address the trial court in regard to the restitution order. The trial court stated, “No, ma’am. That’s to be made part of the condition of probation. That’s all.” Defendant Trea thereafter asserted, “[t]hey assessed us \$54,000 for taking care of five old rescue horses for 16 months. And it’s four times the legal amount, and they litigated it in the criminal case. And that was crazy. I mean the whole thing has been crazy, your Honor.” Later, defendant Trea

argued, “[t]hat wasn’t restitution. That was punishment.” We decline to find waiver under the circumstances of this case.

2. Restitution Order

Section 1203 et seq. grants trial courts “broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof.” (*People v. Lent* (1975) 15 Cal.3d 481, 486.) When restitution is imposed as a condition of probation under section 1203 et seq., rehabilitation of the criminal is the primary goal of restitution. (*People v. Richards* (1976) 17 Cal.3d 614, 620, overruled on other grounds in *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126.) “Implicit in the concept of rehabilitation is the need to first deter criminal activity. Courts have generally found an order requiring the defendant to compensate the victim to be a deterrent to future criminal activity. [Citation.]” (*People v. Goulart* (1990) 224 Cal.App.3d 71, 78, fn. 4.)

The California Constitution provides that crime victims have a right to restitution when they suffer losses as a result of criminal activity. (Cal. Const., art I, § 28, subd. (b)(13)(A), (b)(13)(B); see *People v. Giordano* (2007) 42 Cal.4th 644, 652 [discussing former Cal. Const., art. I, § 28, subd. (b)].) This constitutional mandate is implemented by section 1202.4 (see *Giordano*, at p. 656), which provides in pertinent part: “in 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 . . . in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court.” (§ 1202.4, subd. (f).)

A trial court's restitution order is ordinarily reviewed for abuse of discretion. (*People v. Giordano, supra*, 42 Cal.4th at p. 663.) A court has broad discretion in making a restitution award, especially when restitution is a condition of probation. (*People v. Anderson* (2010) 50 Cal.4th 19, 28 (*Anderson*).)

However, "an appellate court's consideration of a claim that a trial court abused its discretion in awarding restitution because the lower court applied an incorrect legal standard is tantamount to independent or de novo review." (*People v. Brunette* (2011) 194 Cal.App.4th 268, 276.) "Accordingly, the standard of an appellate court's review of the ultimate question when the legal basis for a restitution award is under challenge is de novo or independent review. To summarize, in such circumstances we apply the abuse-of-discretion standard to the trial court's determination of predominantly factual matters regarding restitution and independent review to the legality of the restitution award in light of the applicable statutes and any relevant decisional law." (*Id.* at p. 277.)

Defendant Franklin argues that the restitution order was improper because Animal Services is not a "direct victim" within the meaning of section 1202.4, subdivision (k)(2). We agree that Animal Services was not a "direct victim" here.

Our Supreme Court has stated that only the "direct victim" of a crime is entitled to restitution from the perpetrator of the offense. (*People v. Birkett* (1999) 21 Cal.4th 226, 246.) Commenting on the pertinent legislative history, the Supreme Court explained, "the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his [or her] crime had caused, and that such reparation should go entirely to the individual or entity the offender had*

directly wronged, regardless of that victim’s reimbursement from other sources.”

(*Birkett*, at p. 246; see also *People v. Duong* (2010) 180 Cal.App.4th 1533, 1537.)

Recently, the Sixth District Court of Appeal in *People v. Brunette, supra*, 194 Cal.App.4th at pages 277-280, following a lengthy analysis of section 1202.4, determined that because the defendant had committed “no crime against the Animal Services Authority,” “it was not a direct victim eligible for restitution under section 1202.4.” (*Brunette*, at p. 280.)

Similarly, in *People v. Slattery* (2008) 167 Cal.App.4th 1091, the court held that it was error to require a defendant, who had been convicted and sentenced to prison for inflicting injury upon an elderly person, to pay restitution to a hospital for the cost of medical services it provided to the victim. (*Id.* at p. 1097.) Citing *Birkett*, the court reasoned, “Diverting the restitution due [to the victim] to a third party, such as [a hospital], violates the statute because it fails to make [the victim] whole.” (*Ibid.*)

The Supreme Court recently approved of *Slattery’s* holding that “section 1202.4’s *mandatory* requirement for restitution to a legal or commercial entity is expressly limited to situations in which that entity was the direct victim of a defendant’s criminal conduct.” (*Anderson, supra*, 50 Cal.4th at p. 31.) Therefore, because Animal Services was not the direct victim of defendants’ criminal conduct, restitution in its favor was not permitted under section 1202.4, subdivision (k)(2).

We now address the claim of whether the \$54,000 restitution order was proper as a condition of probation. As previously noted, restitution may generally be ordered as a condition of probation “under the broader, discretionary authority of section 1203.1.”

(*Anderson, supra*, 50 Cal.4th at p. 31.) Specifically, “section 1203.1, subdivision (j) authorizes the imposition of reasonable conditions of probation: ‘The court may impose and require . . . [such] reasonable conditions . . . as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer’ (§ 1203.1, subd. (j).)” (*Anderson*, at p. 33.)

While the standards and purposes for ordering restitution under the two provisions are similar, they are not the same. “In both sections 1203.1 and 1202.4, restitution serves the purposes of both criminal rehabilitation and victim compensation. But the statutory schemes treat those goals differently. When section 1202.4 imposes its mandatory requirements in favor of a victim’s right to restitution, the statute is explicit and narrow. When section 1203.1 provides the court with discretion to achieve a defendant’s reformation, its ambit is necessarily broader, allowing a sentencing court the flexibility to encourage a defendant’s reformation as the circumstances of his or her case require.” (*Anderson, supra*, 50 Cal.4th at p. 29.)

Here, the trial court ordered defendants to pay restitution in the amount of \$54,000 to Animal Services. However, as defendant Trea argues, the trial court merely added the restitution order “based solely on the People’s reference to an earlier” court order from the collateral civil matter brought by Riverside County Counsel. At the conclusion of the sentencing hearing, the trial court stated, “One condition that I did not include that we discussed was the restitution order, if any, made by—what department?” The prosecutor

responded, “It’s the—I believe that Judge Bermudez, your Honor, made it a court order in favor of Animal Control Services.” The trial court later asserted, “All right. That will be the order. Thank you.” The clerk thereafter said, “We need to put that specific amount in here [presumably referring to a preprinted sentencing memorandum or the minute order]. Victim restitution, is that what we’re doing? You guys need to fix the terms.” Defendant Trea responded, “You’re agreeing to pay that?” The trial court replied, “Whatever the restitution order was.” Although the sentencing memorandums and the minute orders show victim restitution in the amount of \$54,000 pursuant to section 1203.1, subdivision (a)(3), the trial court never orally pronounced the restitution amount under any code section. The record discloses that the trial court did not make an independent restitution order under section 597.1, subdivision (k), or exercise its discretion to impose victim restitution under section 1203.1, subdivision (a)(3); it merely incorporated the existing judgment from the collateral civil matter.

Moreover, the payment of the prior judgment imposed in the collateral civil matter cannot be imposed as a condition of probation, but only the subject of a separate order enforceable civilly. (See, e.g., *Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 321; *People v. Hart* (1998) 65 Cal.App.4th 902, 907; *People v. Bennett* (1987) 196 Cal.App.3d 1054, 1056-1057; *People v. Wilson* (1982) 130 Cal.App.3d 264, 268-269.) Hence, neither contempt nor revocation of probation may be utilized as a remedy for failure to pay. (See *Hart*, at pp. 906-907.)

For all of the reasons stated above, we conclude the trial court erred in ordering defendants to pay victim restitution in the amount of \$54,000 as a condition of probation.

DISPOSITION

The trial court is directed to amend the minute orders of the sentencing hearing, the sentencing memorandums, and orders of probation by striking the \$54,000 victim restitution as a condition of probation, and to forward a copy of the corrected documents to the probation authority. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.