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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.

DAVIE DAMIEN ACOSTA,

Defendant and Appellant.

E055857

(Super.Ct.No. RIF146508)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Davie Damien Acosta appeals from an order revoking his probation. He contends that the trial court had lost jurisdiction to revoke probation because the probationary period had expired. We affirm.

FACTS AND PROCEDURAL HISTORY

Defendant was charged in a felony complaint with one count of residential robbery (Pen. Code, §§ 211, 212.5) and one count of misdemeanor battery of a spouse or cohabitant (Pen. Code, § 243, subd. (e)(1)). On December 17, 2008, the prosecutor added a charge of felony grand theft. (Pen. Code, § 487, subd. (a).) On the same day, defendant pleaded guilty to the misdemeanor battery and the felony grand theft charges. The robbery charge was dismissed.

Under the terms of the plea agreement, defendant was admitted to a three-year term of probation. That term would ordinarily have naturally expired on December 16, 2011. Among other terms of probation, defendant was ordered to serve 150 days in custody (with credit for 85 days already served), to perform 20 hours of community service, and to enroll in and complete a 52-week (one-year) domestic violence program.

In February 2011, the third year of his probation, a petition was filed alleging that defendant had violated his probation. Defendant had never started the domestic violence program, and he had not performed his community service. On February 14, 2011, defendant admitted the violation and his probation was revoked. Probation was reinstated the next day. The order reinstating probation ordered defendant to complete his domestic violence program by June 15, 2012, a time beyond the original expiration date of defendant's probationary period.

On December 20, 2011, a new petition was filed alleging that defendant again failed to enroll in the domestic violence program. On December 28, 2011, defendant was to be arraigned on the probation violation petition, but he filed a peremptory challenge to the trial judge. (Code Civ. Proc., § 170.6.) The matter was assigned to a new judge on the next day, and calendared for a new arraignment hearing on January 5, 2012.

Defendant then moved to terminate probation, contending that the trial court lacked jurisdiction over him, because the three-year probationary period had expired. In March 2012, defendant admitted the probation violation, but reserved his right to file an appeal on the ground that probation had already terminated.

Defendant filed a timely notice of appeal, and obtained a certificate of probable cause from the trial court on the issue whether the trial court lacked jurisdiction to revoke, modify, or extend his probation after December 28, 2011.

ANALYSIS

I. The Trial Court Had Jurisdiction to Revoke Defendant's Probation on December 29, 2011

Penal Code section 1203.2, subdivision (a),¹ provides that the trial court may revoke probation when a probation officer or other officer has probable cause to believe

¹ Penal Code section 1203.2, subdivision (a), provides in relevant part: “(a) At any time during the period of supervision of a person (1) released on probation under the care of a probation officer pursuant to this chapter . . . if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court or the court may, in its discretion,
[footnote continued on next page]”

the probationer has violated a term or condition of probation, and initiates the procedure for revocation. The last sentence of subdivision (a) provides for tolling of the probationary period while probation is revoked: “The revocation, summary or otherwise, shall serve to toll the running of the [probationary] period” (Pen. Code, § 1203.2, subd. (a).)

Penal Code section 1203.2, subdivision (b),² provides that the trial court may modify, revoke or terminate probation, either on its own motion, or by petition of the probationer, the probation officer, or the district attorney. However, the court must exercise its power to revoke, modify or terminate probation within the probationary period. “It is also settled that an order revoking probation, to be valid, must be made within the period fixed in the order of probation. If not revoked within that period, the probation terminates automatically on the last day. [Citations.]” (*People v. Smith* (1970) 12 Cal.App.3d 621, 625.)

[footnote continued from previous page]

issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. . . . The revocation, summary or otherwise, shall serve to toll the running of the period of supervision.”

² Penal Code section 1203.2, subdivision (b)(1), provides in part: “(b)(1) Upon its own motion or upon the petition of the supervised person, the probation or parole officer or the district attorney of the county in which the person is supervised, the court may modify, revoke, or terminate supervision of the person pursuant to this subdivision, except that the court shall not terminate parole pursuant to this section. . . .”

Defendant contends that the regular period of probation expired automatically on December 28, 2011, so that it was beyond the trial court's jurisdiction to revoke his probation on December 29, 2011.³

The People respond, however, that defendant's contention is incorrect. Defendant had an earlier violation of probation in February 2011. At that time, less than one year remained of defendant's original three-year probationary term. There would therefore have been insufficient time for defendant to complete the probation requirement to attend a 52-week program on domestic violence. For that reason, the probation report recommended an extension of defendant's probation to allow defendant to enroll in and complete the program. Accordingly, at defendant's probation revocation hearing in February 2011, the court ordered defendant to complete the program by June 15, 2012. This completion date was beyond the time of the original probation period, but within the maximum period that defendant could be supervised on probation. (See Pen. Code, § 1203.1.) Defendant accepted these modified terms of probation. The power to modify the terms of probation includes the power to extend the probationary period. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.)

³ Defendant originally pleaded guilty on December 17, 2008. Three years from that date would expire at the close of December 16, 2011. On February 3, 2011, the trial court summarily revoked defendant's probation for alleged violation of the conditions of probation. Defendant admitted the violation of probation on February 14, 2011. The court reinstated probation the next day, February 15, 2011. This represented 12 days of tolling (Feb. 3 to Feb. 15) on defendant's probationary period. This tolling extended defendant's probationary period until the end of the day on December 28, 2011.

Defendant was given notice of the plan to extend his probation, because the request was included in the probation report prepared for the probation violation hearing. He was afforded a hearing and an opportunity to be heard. (See *People v. Minor* (2010) 189 Cal.App.4th 1, 21-23 [due process required in a hearing to extend probation].) He presented no arguments why his probationary period should not be extended; instead, he accepted the new terms and conditions of probation, including completion of the 52-week domestic violence program by June 15, 2012.

Defendant responds that the People have waived the right to rely on this argument on appeal, because the court's retention of jurisdiction was not argued below on the ground of extension by means of the February 15, 2011 order. Rather, the matter was argued below on the ground that defendant had accepted a one-day continuance, from December 28, 2011 to December 29, 2011. Defendant urges that the record does not support the claim that he requested or accepted such a one-day continuance. Indeed, defense counsel objected, at the hearing of February 3, 2012, that the minutes incorrectly reflected a defense request for a continuance. Counsel stated, "I'm requesting that the minutes from the December 28th, 2011 hearing be corrected *nun[c] pro tunc*. At this point, the minutes are reflecting that [defense counsel] requested a continuance to the 29th, and, in fact, the Court has a copy of the transcript. The Court continued it to the 29th on its own motion, so I would just ask the Court to correct that minute order that's been erroneously entered."

We disagree with defendant's waiver argument. The extension of probation by means of the reinstatement order of February 15, 2011, was addressed by the parties

below. Defense counsel argued that the trial court at the violation of probation hearing in February 2011 had merely ordered defendant to re-enroll in the domestic violence program by May 5, 2011, and to begin the 52-week program again. He was required to submit proof of enrollment in the program to the probation department by June 15, 2011. Defense counsel urged that the court's oral pronouncements, that defendant must enroll by May 5, 2011, and show proof of enrollment by June 15, 2011, was "not enough to extend [defendant's] probation on this matter without having an opportunity to be heard regarding extension."

The People responded that defendant was clearly informed, by the program referral form if nothing else, that he was required to complete the terms of the domestic violence program by June 15, 2012, "which, as the Court has pointed out, would be an impossibility if it expired in December of [2011]."

The court itself also expressly relied on the extension in February 2011: "[W]e sentenced him [in February 2011] by reinstating, so we reinstated his probation and gave him two terms, which couldn't have been done in the time left. He was ordered to reenroll in the 52-week program. He was ordered to do community service. ¶ . . . ¶ And so based on the fact that he couldn't have possibly done what the Court ordered him to do, and he accepted doing what the Court ordered him to do and defense didn't object to it at the time, I find the Court still retains jurisdiction. . . ."

The trial court's assessment was correct. The revocation and reinstatement proceedings in February 2011 at least implicitly, if not explicitly, extended the term of defendant's probation until June 15, 2012. Defendant was given express notice, in the

probation report on the violation of probation, that the People were requesting an extension of probation. The specific orders defendant was given could not have been completed in the time remaining on defendant's original probation. Defendant was represented by counsel at the violation and reinstatement hearing, and made no objection to the requirement that he perform the terms and conditions of his probation beyond the original period.

Because defendant's probation had been validly extended until at least June 15, 2012, the trial court had the power to revoke defendant's probation on December 29, 2011.

DISPOSITION

The trial court's order revoking defendant's probation on December 29, 2011, was proper and occurred within the properly extended period of defendant's probation.

Affirmed.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

KING
J.