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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. CHRISTOPHER MONTRAVIS FRANKLIN, Defendant and Appellant.	E071072 (Super.Ct.No. FMB17000590) OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed in part, reversed with directions in part.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Christopher Montravis Franklin broke into a residence and stole multiple items. Following a negotiated plea agreement, defendant pleaded no contest to first degree residential burglary (Pen. Code, § 459).[1] Defendant also admitted that he had suffered one prior prison term (§ 667.5, subd. (b)). In return, the remaining prior prison term allegations were dismissed, and defendant was sentenced to a stipulated term of five years in state prison with victim restitution reserved at a later date. After a contested restitution hearing, the trial court ordered defendant to pay victim restitution in the amount of $16,472.87.

On appeal, defendant argues the victim restitution order should be reversed because (1) there is insufficient evidence to support the court's finding defendant caused the victim's $10,000 bank loss; and (2) defendant was not provided with proper notice the People were seeking victim restitution for the $10,000 bank loss in violation of his federal and state due process rights. The People acknowledge that defendant did not receive proper notice of the $10,000 portion of the restitution order, and request this court vacate the restitution order and remand the matter to the trial court for a new restitution hearing. We agree with the parties. Accordingly, we reverse the restitution order, and remand the matter for a new restitution hearing.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

On September 9, 2017, while the victim was out of town, defendant entered the victim's house through a window in the rear of the home. A friend of the victim was watching the home and saw defendant exit the victim's residence through the front door. When the victim's friend confronted him, defendant held his cellular phone up to his ear and pretended that he was talking to the owner of the house. Defendant then left the residence in a silver sedan.

When the victim returned home, he noticed that several items in his home were missing. These included a television, a World War I style bayonet, a BB gun, and some household items.

Defendant was apprehended on September 25, 2017. During an infield lineup, the victim's friend identified defendant as the person he saw coming out of the victim's residence.

On October 24, 2017, a felony complaint was filed charging defendant with one count of first degree residential burglary (§ 459). The complaint also alleged that defendant had suffered four prior prison terms (§ 667.5, subd. (b)).

On January 17, 2018, pursuant to a negotiated disposition, defendant pleaded no contest to first degree residential burglary, and admitted he had suffered one prior prison term. In return, the remaining prior prison enhancement allegations were dismissed, and

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[2] The factual background is taken from the police reports.

defendant was immediately sentenced to the stipulated term of five years in state prison. Defendant was awarded 233 days of credit for time served. The amount of victim restitution was reserved for determination at a later date. The court set a future date for the restitution hearing and referred the matter to the probation department for preparation of a restitution memorandum.

On February 12, 2018, the probation department contacted the victim regarding victim restitution. The victim reported that he wished to seek restitution. On February 15, 2018, the victim submitted his restitution claim to the probation department for his losses in the total amount of $4,244.96. On March 16, 2018, the probation department filed a victim restitution memorandum, noting total victim restitution of $4,244.96.

On August 6, 2018, the trial court held a contested restitution hearing. The victim, who was 82 years old at the time, testified as to his losses, including the loss of his money clip, cash, BB gun, bayonet, solar spotlights, air compressor, and miscellaneous household items. The victim claimed that the cash was missing from his wallet but that his wallet and credit cards were there. He did not believe his credit cards were compromised. However, later the victim asserted that during the burglary, defendant compromised his credit card numbers without physically taking them, and sought $10,000 in bank loss. The victim explained that he had bank losses in the amount of $30,000, $20,000 of which was reimbursed by his bank, and that third parties (defendant's girlfriend and her mother), not defendant, had obtained some or all of the

$30,000. The victim believed the bank loss occurred within two or three months after the September 9, 2017 burglary.

In response to the question of what made him believe the losses from his bank account were directly tied to the burglary, the victim stated: "Well, until that, my wallet was compromised, nothing was ever taken out. And it was, like 3 weeks after the wallet, the money was stolen. They evidently had the card numbers. He didn't take the cards. My social security was gone. I didn't notice that right away. But the credit cards were there, so I thought I was home free, but I wasn't. And the banks have been really good in working it out. It's been stressful to me." The victim also asserted that someone had forged two of his checks that were stolen by someone.

There was no testimony that defendant had personally taken any of the $30,000 from the victim's bank accounts or that defendant had personally forged the victim's checks. The victim also, at one point, testified that he does not have credit or credit cards and that he "pa[ys] cash for everything." Specifically, the victim stated: "Unfortunately, I have absolutely no credit. Therefore, when they applied for the banks, they turned them down 'cause I've never—I've always paid cash for 82 years. I've paid cash for everything. I've never financed a house, or car, or anything, refrigerator."

Following the victim's testimony, the prosecutor requested the court order defendant to pay $14,728.86 in victim restitution. Defense counsel objected, noting there was no evidence to suggest defendant had cashed the stolen checks or had caused the bank losses. Defense counsel also noted that it appeared that some of the victim's losses

were attributable to a subsequent burglary but not to the September 9, 2017 burglary to which defendant had pleaded guilty to. The trial court ordered victim restitution in the amount of $16,472.87, comprising of $14,975.34 plus a 10 percent collection fee. The total amount included $10,000 for "the bank loss." This appeal followed.

III

DISCUSSION

Defendant argues the victim restitution order should be reversed because there is insufficient evidence to support the court's finding defendant caused the victim's $10,000 bank loss. He also asserts that his federal and state due process rights were violated when he was not provided with adequate notice for the $10,000 bank loss portion of the restitution ordered. The People concede defendant was not provided with proper notice, and believe "the restitution order should be vacated and the matter remanded for a new restitution hearing where [defendant] will be able to contest the restitution amount with adequate notice."[3] We agree that defendant was not afforded adequate notice of the $10,000 bank loss portion of the restitution ordered, and that the restitution order therefore must be reversed and the matter remanded for a new restitution hearing.

"Restitution in criminal proceedings is mandated by article I, section 28, subdivision (b) of the California Constitution, and that mandate has been carried out by our Legislature in section 1202.4, which provides in part: '(f) [I]n every case in which a

[3] The People do not concede defendant's first claim of error but note, when the evidence is viewed in the light most favorable to the court's order, the evidence was sufficient to tie the bank losses to defendant through his girlfriend.

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 or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.'" (See *People v. Riddles* (2017) 9 Cal.App.5th 1248, 1251; *People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) A defendant "has the right to a hearing before a judge to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).) The right to a hearing "is a crucial part of the overall statutory scheme, necessary to satisfy due process, and ensure fundamental fairness in the determination of the restitution ultimately ordered." (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1391.)

It has been held that a defendant in a restitution hearing is entitled to fewer due process protections than in civil proceedings or at a criminal trial because restitution hearings are sentencing proceedings. (See, e.g., *People v. Prosser* (2007) 157 Cal.App.4th 682, 692; *People v. Cain* (2000) 82 Cal.App.4th 81, 86; *People v. Goulart* (1990) 224 Cal.App.3d 71, 82; *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1160-1161; *People v. Baumann* (1985) 176 Cal.App.3d 67, 79-82; cf. *People v. Giordano* (2007) 42 Cal.4th 644, 662, fn. 6.) Courts in a number of cases have held that due process is satisfied when a defendant is given prior notice of the restitution sought in a presentence probation officer's report and a meaningful opportunity to contest the issue. (See, e.g ., *People v. Thygesen* (1999) 69 Cal.App.4th 988, 993; *People v. Blankenship* (1989) 213 Cal.App.3d 992, 997; *Rivera*, at p. 1161; *Baumann*, at pp. 79-80; see also

People v. Carbajal (1995) 10 Cal.4th 1114, 1125 ["the defendant must be permitted to dispute the amount or manner in which restitution is to be made"]; *Cain*, at pp. 86-87.) Prior notice of the nature and amount of restitution sought is critical because the defendant bears the burden of proof at the hearing to contest the items of loss and amounts claimed by the victim. (See *People v. Collins* (2003) 111 Cal.App.4th 726, 734; *In re S.S.* (1995) 37 Cal.App.4th 543, 546; *People v. Foster* (1993) 14 Cal.App.4th 939, 946-947, superseded by statute on other grounds as stated in *People v. Birkett* (1999) 21 Cal.4th 226, 238-245.)

In *People v. Resendez* (1993) 12 Cal.App.4th 98), for example, the probation officer's report recommended that the trial court order the defendant to pay a restitution fine of $9,000. At the sentencing hearing, however, the trial court ordered the defendant to pay direct victim restitution of $100,000. (*Id*. at p. 111.) The defendant did not object to the restitution order or request a hearing at the time the restitution order was made. On appeal, the defendant argued that, having received notice only of the probation officer's recommendation of a $9,000 restitution fine, he was denied a meaningful opportunity to contest the order requiring him to pay $100,000 in direct victim restitution. (*Id*. at p. 112.) The Court of Appeal agreed and vacated the restitution order. (*Id*. at p. 115.) The court stated, "We conclude . . . the trial/sentencing court's absolute refusal to accept the restitution recommendations of the probation report, coupled with that court's peremptory imposition of a restitution order totally at odds with the recommendations of the probation report, all without affording defendant a reasonable opportunity to

challenge the accuracy/validity of the restitution order which was made, denied defendant his constitutional right to the due process of law." (*Id*. at p. 114.)

Similarly, in *People v. Sandoval* (1989) 206 Cal.App.3d 1544, the probation report contained a statement by an employee of Southern California Edison (SCE) that the company had sustained $4,000 in damages as a result of the defendant's crime. (*Id*. at p. 1550.) The probation report, however, did not recommend direct victim restitution to SCE. Rather, the probation report recommended that defendant be required to pay a restitution fine of $1,000. (*Ibid*.) At the sentencing hearing, the trial court ordered the defendant to pay $5,000 in restitution, of which $4,000 was to be paid to SCE. (*Id*. at p. 1546.) The Court of Appeal reversed the restitution order. The appellate court stated, "[A]lthough the probation report recommended defendant be ordered to 'pay $1,000.00 to the State Restitution Fund,' it did not recommend defendant be ordered to make restitution to [SCE]. Thus, when asked at the sentencing hearing if he wanted 'to address the report and recommendation, defendant had no reason to contest the amount of damages claimed or to expect such an assessment. The unexpected order then being made as part of the sentence, defendant was denied the opportunity to contest the validity of the $4,000 figure. Because defendant was denied a reasonable opportunity to contest the accuracy of the amount of damages claimed, the order for restitution to the victim must be reversed and the cause remanded to allow defendant an opportunity to be heard on this issue.'" (*Id*. at p. 1550.)

In this case, there is no indication in the record that defendant was given notice at the sentencing hearing or in the probation department's restitution memorandum of any losses related to identity theft for bank losses of the restitution ordered. Defendant also had no notice of any losses related to checks having been forged by his girlfriend. The probation department's restitution memorandum listed a total restitution amount of $4,244.96, which was comprised of various items that were taken from the victim's home during the burglary and made no mention of any bank losses. The victim's restitution claim to the probation department also made no mention of any bank losses. The bank losses were also not referenced in the police reports or in the felony complaint. In addition, no bank losses were referenced in the plea agreement or agreed upon in the plea bargain, or during the change of plea hearing.

In fact, as the People point out and as the record indicates, it appears that all of the parties were first made aware of the bank losses during the course of the victim's testimony. During her initial direct examination of the victim, the prosecutor went through the various items contained in the restitution memorandum with the victim. Thereafter, when the direct examination appeared nearing conclusion, the victim volunteered the additional bank losses. Specifically, in response to the prosecutor's question of "[w]as there anything else that you can think of that was missing that you've had to replace or was broken that you had to fix," the victim initially asserted "Not that I can think of." After the prosecutor stated "All right" and thanked the victim, the victim exclaimed: "I'm not sure what the restitution would come to. I was broke just before

that happened. I've sold some property since then, so I'm not broke anymore. But my main interest is, he took the credit cards. He used those credit cards to pay people's bills. Can't we figure out whose bills that were paid? [¶] His girlfriend is Tiffany Hall. You have a check there, $500, forged by Tiffany Hall. It also—there was money transferred to her while she was in jail. She had to sign for that. Can't they compare that? Her mother said that she's broke and couldn't pay the utility bills. Two weeks later, $700 in utility bills were paid by Edison for somebody. Can't we figure out who it was paid to? [¶] Those are my interests. I want to know who these people are and who—they're compromising me. I keep getting applications for credit cards. Now it is pretty well straightened out. But those people I would like—more than the restitution, I'd like to see these people incarcerated." The victim thereafter recounted the bank losses he incurred, and his reasons for believing they were related to defendant's burglary conviction.

The record here clearly indicates defendant was not provided with adequate notice of the victim's bank losses. Defendant was thus denied a meaningful opportunity to defend against the bank losses portion of the restitution ordered. Under these circumstances, the restitution order must be vacated, and the matter remanded to the trial court for a new restitution hearing in accordance with section 1202.4, subdivision (f)(1).[4]

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[4] Because we reverse the restitution order on due process grounds and remand for a new restitution hearing, we do not reach defendant's first contention that the restitution order was not supported by substantial evidence.

IV

DISPOSITION

The restitution order is reversed and the case is remanded for a hearing on the amount of restitution to be ordered. In all other respects, the judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.