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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD ALLEN PATALA,

Defendant and Appellant.

F062148

(Super. Ct. No. VCF242491)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

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**SEE CONCURRING OPINION**

Following a jury trial, Ronald Allen Patala (appellant) was found guilty of assault upon an officer (Pen. Code, § 245, subd. (c)),<sup>1</sup> receiving a stolen vehicle (§ 496d, subd. (a)) and evading a pursuing officer with willful disregard (Veh. Code, § 2800.2, subd. (a)). The trial court found true the allegation that appellant had suffered a prior conviction. He was sentenced to an aggregate term of five years eight months in state prison. As part of his sentence, he was ordered to pay \$2,537.27 in victim restitution to the Dinuba Police Department. He contends this restitution order was unauthorized and we agree. Next, we reject appellant's contention that we must make a "not true" finding or dismiss the personal use of a deadly weapon allegation attached to the charge of assault upon an officer, which was included in the information but not presented to the jury. Lastly, pursuant to appellant's request, we reviewed the sealed portion of the record pertaining to discovery of police personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) and determine that the trial court followed proper protocol and did not withhold discoverable information from the defense.

### **STATEMENT OF THE FACTS**

On September 21, 2010, Clemente Mya reported that her 1991 Honda Accord was stolen from where it was parked in the city of Dinuba. At 3 a.m. the next morning Dinuba Police Department Sergeant Reynaldo Vela was on duty, driving a marked police car, when he noticed Mya's stolen car parked in a parking lot of an apartment complex. Vela parked his patrol car 15 to 20 feet behind the stolen Honda and shined a powerful spotlight on the car to see if anyone was inside. Vela then approached the vehicle, flashlight in hand, and found appellant sleeping in the fully reclined driver's seat. All of the windows on the Honda were closed. Vela drew his sidearm, held it in his right hand, and yelled at appellant to show his hands. Appellant sat up, looked left and right, started

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<sup>1</sup> All further statutory references are to the Penal Code unless noted otherwise.

the ignition and began backing out of the parking stall. All the while, Vela commanded appellant to show his hands.

Sergeant Vela, who was standing one or two feet from the vehicle next to the rear passenger door on the driver's side, had to move to avoid being struck by the left front tire. Appellant continued to backup until he struck Vela's patrol car. Vela continued to yell for appellant to stop and show his hands, but appellant drove the Honda toward Vela, who had to move out of the way to avoid being struck.

Sergeant Vela raised his firearm and, as appellant drove past him, fired into the left rear tire of the Honda. Appellant stopped, put the vehicle into reverse, drove around the police car, again striking it and breaking off the mirror of the Honda. Appellant then drove over a curb onto a grassy area and exited the parking lot. Vela got into his police car with his lights and siren activated and pursued appellant in the Honda.

Additional officers joined the pursuit. Appellant drove approximately 80 miles per hour, in excess of the posted speed limits, and did not slow down or stop for several traffic signs and signals. At one point, appellant turned off the headlights of the Honda and accelerated to 95 miles per hour. Appellant crossed the county line and the Honda was eventually located in an RV park in Fresno. Appellant was located hiding among the trees and shrubs and was apprehended when he jumped into a nearby river.

## **DISCUSSION**

### I. IS THE VICTIM RESTITUTION UNAUTHORIZED?

Appellant argues that the \$2,537.27 restitution fine imposed was unauthorized because the Dinuba Police Department is not a "victim" within the meaning of section 1202.4, subdivisions (f) and (k). He also argues the restitution order is unauthorized because it is not tied to his conviction.

At the outset, respondent contends that appellant has forfeited his claim by failing to assert it in the trial court. However, appellant, based on his interpretation of section

1202.4, argues that the trial court exceeded its statutory authority in ordering restitution to the police department. As framed, his claim falls within the “‘narrow exception’ for a so-called unauthorized sentence or a sentence entered in excess of jurisdiction.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 886-887.) “[T]he ‘unauthorized sentence’ concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) “[A] sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case.” (*Ibid.*) “An obvious legal error at sentencing that is ‘correctable without referring to factual findings in the record or remanding for further findings’ is not subject to forfeiture.” (*In re Sheena K., supra*, at p. 887.) We therefore consider the issue on the merits and find that the trial court’s order of restitution was unauthorized under section 1202.4.

#### Background

As outlined above, Officer Vela stopped his police car in a parking lot and found appellant sleeping in the driver’s seat of the stolen Honda. When he woke appellant, appellant sat up, started the engine and backed out of the parking stall. In the process, he drove into the right front tire of the police car, which was parked behind appellant to block him in. Appellant then drove his vehicle toward Officer Vela, put the car in reverse, and again attempted to leave the parking stall, this time striking the front bumper of the police vehicle. Appellant then drove away and a chase ensued. A jury found appellant guilty of assault upon an officer with a deadly weapon, receiving, withholding or concealing a stolen vehicle, and reckless evading a pursuing officer. In addition to a prison sentence, appellant was ordered to pay victim restitution to the Dinuba Police Department of \$2,537.27.

#### Applicable Law and Analysis

Section 1202.4, subdivision (a)(1) provides: “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.” Subject to exceptions not relevant here, “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 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.”

(§ 1202.4, subd. (f).)

The term “victim” is specifically defined in Penal Code section 1202.4, subdivision (k) and includes any “government, governmental subdivision, agency, or instrumentality ... *when that entity is a direct victim of a crime.*” (§ 1202.4, subd. (k)(2), italics added.) “Thus, Penal Code section 1202.4, subdivision (k) permits restitution to a governmental entity only when it is a *direct victim* of crime.” (*People v. Martinez* (2005) 36 Cal.4th 384, 393.) For instance, in *People v. Crow* (1993) 6 Cal.4th 952, 957, the California Supreme Court found a welfare agency to be a direct victim for purposes of restitution when the defendant had defrauded the agency, making it the object of the defendant’s crime.

On the other hand, it is well settled that a government agency is not entitled to restitution for the costs incurred in investigating and prosecuting criminal activity. (See *People v. Torres* (1997) 59 Cal.App.4th 1, 4-5 [law enforcement agency not entitled to restitution for reimbursement for cash spent purchasing illegal drugs as part of criminal investigation]; *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1797-1798 [reimbursement for prosecution costs improper]; *People v. Baker* (1974) 39 Cal.App.3d 550, 558-560 [restitution for prosecution and rehabilitation improper].)

Another factor to consider is that courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction. Thus, when a court imposes a prison sentence following trial, section 1202.4 limits the scope of victim restitution to losses caused by the criminal conduct for which the defendant sustained the conviction. (*People v. Woods* (2008) 161 Cal.App.4th

1045, 1049 [defendant not required to pay restitution for economic loss resulting from murder when he was convicted as an accessory after the fact only]; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1249 [portion of the restitution order attributable to fraudulently obtained aid before charged period invalidated].)

“The trial ‘court’s allocation of restitutionary responsibility must be sustained unless it constitutes an abuse of discretion or rests upon a demonstrable error of law.’ [Citations.]” (*People v. Draut* (1999) 73 Cal.App.4th 577, 581-582.)

Appellant contends the restitution order is unauthorized because the damages to the police vehicle were incurred during the officer’s attempts to stop him from fleeing, citing *People v. Torres, supra*, 59 Cal.App.4th at pages 4-5. We agree. Here, the only conviction offense to which the restitution charge could arguably be tied is appellant’s conviction for evading a police officer with willful disregard for the safety of others (Veh. Code, § 2800.2, subd. (a)). That section provides, in relevant part, that a person is guilty if he or she flees or attempts to elude *a pursuing officer* and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property. As to the property damage, there was evidence that appellant hit Officer Vela’s car twice in the process of trying to flee from the officer. However, there is no evidence that Officer Vela was pursuing appellant when he struck the police vehicle; rather the officer was attempting to stop him from fleeing.

Because appellant was not granted probation in this case, victim restitution must be a direct consequence of appellant’s criminal conduct supporting the crime of which he was convicted, in this case evading a pursuing officer. (*People v. Lai, supra*, 138 Cal.App.4th at p. 1247.) Because appellant was convicted of evading a police officer with willful disregard for the safety of others, and the property damage to the police car did not occur during the commission of that crime, the restitution order in favor of the police department is therefore unauthorized and must be stricken.

II. MUST A “NOT TRUE” FINDING BE ENTERED OR DISMISSED REGARDING THE ALLEGATION OF PERSONAL USE OF A DEADLY WEAPON?

Appellant requests that this court enter a not true finding or dismiss the allegation in the information that he personally used a deadly or dangerous weapon within the meaning of section 969f, making the offense a strike within the meaning of the three strikes law. Respondent counters that a deletion to the abstract of judgment is appropriate, but that nothing further is required of this court. For reasons we explain below, we find no action is necessary.

Background

By way of information, appellant was charged, in count 1 with assault upon an officer with a deadly weapon (§ 245, subd. (c)), which “is a serious felony within the meaning of Penal Code Section 1192.7(c).” The information also alleged a special allegation attached to that count that, in the commission of the assault, appellant personally used a dangerous and deadly weapon (§ 969f) within the meaning of sections 667 and 1192.7.

At trial, the jury was instructed on the elements of assault on a peace officer with a deadly weapon (CALCRIM No. 860), as well as the lesser included offenses of assault with a deadly weapon or by means of force likely to produce great bodily injury (CALCRIM No. 875), simple assault on a peace officer (CALCRIM No. 900), and simple assault (CALCRIM No. 915). The jury was not instructed with CALCRIM No. 3145, or any other instruction defining personal use of a deadly weapon. Consequently, the personal use issue was not submitted to the jury.

The jury found appellant guilty of assault upon an officer with a deadly weapon. Because the personal use issue was not submitted to the jury, the jury made no finding on that issue. The sentencing triad for section 245, subdivision (c) is three, four, or five years. (§ 245, subd. (c).) The trial court sentenced appellant to the statutory midterm of four years on that count; no mention was made of the special allegation attached to that

count. The minute order for sentencing states, as to count 1: “Mid term of FOUR (4) Years, Special Allegation PC 1192.7 – changes the sentence range.”<sup>2</sup> The abstract of judgment states a middle term of four years on count 1. There is no mention in the abstract of judgment pertaining to any special allegation.

Applicable Law and Analysis

The purpose of an accusatory pleading is to provide the accused with reasonable notice of the charges. (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 132.) Here, the notice provision in the information pursuant to section 969f, informing appellant that personal use of a deadly weapon was a strike, was extraneous because the substantive offense charged (assault on an officer) was already an enumerated strike offense. (§§ 245, 1192.7, subd. (c).) The presence of this notice provision therefore had no legal effect on the verdict.

Nonprejudicial defects of pleading are not reversible and must be disregarded. (Cal. Const., art. VI, § 13 [“No judgment shall be set aside ... in any cause ... for any error as to any matter of pleading ... unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice”].) “Defects in the form of an accusatory pleading are not a ground to reverse a criminal judgment in the absence of significant prejudice to a defendant. [Citation.]” (*People v. Sandoval, supra*, 140 Cal.App. at p. 132.)

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<sup>2</sup> The minute order originally listed the special allegation as “969f” which was crossed out and “1192.7” inserted. Section 969f provides, in relevant part, that, “[w]henever a defendant has committed a serious felony as defined in subdivision (c) of Section 1192.7, the facts that make the crime constitute a serious felony may be charged in the accusatory pleading.” Section 1192.7 lists the various crimes considered serious felonies, including assault upon a peace officer with a deadly weapon in violation of section 245 (§ 1192.7, subd. (c)(31). Respondent makes the argument that this reference, which respondent incorrectly argues is in the abstract of judgment, not the minute order, should be deleted. We find no reason to do so.

Appellant has failed to show any prejudice and we reject his claim to the contrary.

### III. INDEPENDENT REVIEW OF THE SEALED RECORD

Appellant contends, and respondent agrees, that we should conduct an independent review of the sealed records on the *Pitchess* proceedings to determine whether the trial court inquired about the completeness of the records produced for inspection, whether the court administered the oath to a custodian of records, and whether the trial court abused its discretion in ruling there was no discoverable information. (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531.)

Prior to trial, appellant filed a *Pitchess* motion. In it, he sought discovery of police personnel records of Officer Vela regarding any citizen complaints relating to dishonesty and use of excessive force. The city opposed the motion, alleging that it was untimely. The court then conducted an in camera review and determined that there was “[n]othing in a discoverable nature.”

In *Pitchess, supra*, 11 Cal.3d 531, the California Supreme Court held that a criminal defendant is entitled to discovery of officer personnel records if the information contained in the records is relevant to the defendant’s ability to defend against the charge. Later enacted legislation implementing the court’s rule permitting discovery (Pen. Code, §§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043-1047) balanced the accused’s need for disclosure of relevant information against a law enforcement officer’s legitimate expectation of privacy in his or her personnel records. The Legislature concluded that a defendant, by written motion, may obtain information contained in a police officer’s personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) When presented with such a motion, the court rules as to whether there is good cause for disclosure. (Evid. Code, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer’s records brings to court all the potentially relevant personnel records and, in camera, the court determines whether any of the records are to be disclosed to the defense. “A trial court’s ruling on a motion for access to law

enforcement personnel records is subject to review for abuse of discretion.” (*People v. Hughes* (2002) 27 Cal.4th 287, 330; see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086, citing *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

We ordered the trial court to provide us with the sealed documents it reviewed in conducting its *Pitchess* analysis. Having obtained those documents, we note first that the trial court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present, and the custodian of records was sworn prior to testifying. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228, 1229, fn. 4; *People v. White* (2011) 191 Cal.App.4th 1333, 1339-1340.) The custodian of records complied with the requirement to bring all the records and submit them for the court to review and determine which documents were relevant. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

We also have reviewed the sealed documents and find no reversible error with regard to nondisclosure of those records. (*People v. Hughes, supra*, 27 Cal.4th at p. 330; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **DISPOSITION**

The matter is remanded to the trial court to strike from the abstract of judgment the restitution order in the amount of \$2,537.27 to the Dinuba Police Department. An amended abstract of judgment shall be forwarded to the appropriate authorities. In all other respects, the judgment is affirmed.

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Franson, J.

I CONCUR:

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Wiseman, Acting P.J.

**Poochigian, J., Concurring.**

A police officer approached a parked, occupied vehicle which he reasonably believed to have been stolen. He lawfully commanded the occupant to show his hands. Ignoring the command, the occupant, apparently to evade arrest, started the engine and abruptly backed the car into the officer's patrol vehicle, causing damage. He nearly struck the officer as he alternatively drove recklessly in forward and reverse gear before escaping apprehension. A high speed chase by the officer ensued.

The conviction upon which the majority bases its analysis of the issue of the propriety of the victim restitution award is under Vehicle Code 2800.2, subdivision (a). Vehicle Code section 2800.2 states, in relevant part: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of [Vehicle Code] Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year..." While Vehicle Code section 2800.2 does not expressly describe a police vehicle in pursuit of a fleeing person, Vehicle Code section 2800.1 refers to a police officer operating a motor vehicle (or bicycle). Thus, there is no arguing that the "pursuit" in the context of the facts of this case could be construed to cover the period before the vehicular chase. It is notable that had the defendant been charged under Vehicle Code section 2800, a general statute that makes it "...unlawful to willfully fail or refuse to comply with any lawful order..." there would be little question of the court's authority to order victim restitution.

Article I, section 28, of the California Constitution, which was adopted by the voters as part of Proposition 8 in June 1982 (popularly known as the "Victims' Bill of Rights"), provides in pertinent part: "(A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons *convicted of the crimes*

causing the losses they suffer. [¶] (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a *crime victim suffers a loss.*” (Cal. Const., art. I, § 28, subd. (b)(13)(A), italics added.)

Penal Code section 1202.4, subdivision (a) provides 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.*” (Italics added.) The court must enter a victim restitution order in every case “in which a victim has suffered economic loss *as a result of the defendant’s conduct ...*” (Pen. Code § 1202.4, subd. (f), italics added; *People v. Percelle* (2005) 126 Cal.App.4th 164, 178). In *People v. Lai* (2006) 138 Cal.App.4th 1227, 1249, the court held that “when a defendant is sentenced to state prison, [Penal Code] section 1202.4 limits restitution to losses caused by the criminal conduct for which the defendant was convicted.”

In the instant case, a question arises as to whether the restitution law may be applicable to damages suffered by a police officer or to a police agency’s property. Penal Code section 1202.4, subdivision (k)(2) does hold that “ ‘victim’ ” in the restitution statute includes, among other things, “[a]ny corporation, business trust, estate, trust, partnership, association, joint venture, *government, governmental subdivision, agency, or instrumentality*, or any other legal or commercial entity when that entity is a *direct victim* of a crime.” (Italics added).

The majority focuses on whether the governmental agency that owned the damaged vehicle was a *direct victim*, determines that it is not, and thus concludes the victim restitution order was an unauthorized sentence. Yet, the authorities cited for such a conclusion involve facts distinct from the instant case (e.g., costs of prosecution and investigation). (Maj. opn., *ante*, at pp. 3-6.) Another factor raised is the issue of whether the victim restitution claim is related to “criminal conduct for which the defendant

sustained the conviction” under section 1202.4. (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1050.)

I would not narrowly construe the officer’s or police department’s victim status under Penal Code section 1202.4, subdivision (k)(2) because damage to the subject vehicle occurred at the commencement of the criminal conduct that led to the conviction under Penal Code section 1202.4, subdivision (a). The monetary damages to the department were not associated with post arrest investigation or evidence gathering or some attenuated connection to criminal conduct. The damage to the police vehicle was a very direct result of the criminal conduct of the appellant, albeit during the appellant’s initial activities in evasion of arrest but before the technical “pursuit” under the statute of conviction.

We must reconcile the particular facts herein with case law under article I of the California Constitution and the statutes adopted in furtherance of its intent and purpose. The appellant was engaged in a continuous course of criminal activity over a relatively short period of time. In contrast to case law applying a less restrictive rule pertaining to cases involving probation, victim restitution awards in criminal sentencing are strictly limited to losses directly sustained under the statute of conviction. No matter how elusive the premise of the distinction, the precedent is firmly established. A sounder approach would be to recognize, under the unique facts of this case involving a course of criminal conduct and undoubted economic loss associated with that conduct, that a victim – whether an individual or tax-supported governmental agency – should not suffer the loss by virtue of the fortuity of the choice of statute under which the conviction obtains.

Although I would hold that the police agency does have victim status under Penal Code section 1202.4, subdivision (k)(2), as described *ante*, the inability of obtaining restitution as a result of the rule requiring losses directly related to the conviction statute renders the point inconsequential.

In conclusion, I must concur. Any inadequacies in the law of victim restitution must be left to the wisdom of the Legislature. It is up to the legislative branch, if it chooses to do so, to clarify and fulfill the expectations of the public by removing barriers to awarding victims compensation for losses they suffer as the result of criminal activity.

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Poochigian, J.