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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RENAYE ANN LAURENCE,

Defendant and Appellant.

F068376

(Super. Ct. No. F09000549)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. David A. Gottlieb, Judge.

Linda J. Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J. and Detjen, J.

INTRODUCTION

Appellant Renaye Ann Laurence contends the trial court lacked substantial evidence and abused its discretion when it revoked her conditional plea of no contest to a violation of Welfare and Institutions Code section 10980, former subdivision (c)(2) and imposed formal probation on the basis of a willful failure to pay restitution. We agree and will reverse the judgment. Consequently, the additional issues raised by Laurence are moot.

FACTUAL AND PROCEDURAL SUMMARY

Laurence received public assistance during the period of June 2005 through February 2006. During that time she did not correctly report her household income and consequently received an overpayment of public assistance.

On June 3, 2009, Laurence entered a conditional plea of no contest to a violation of Welfare and Institutions Code section 10980, former subdivision (c)(2) pursuant to a plea agreement. The plea agreement provided that if Laurence obeyed all laws, attended a fraud prevention class, submitted to booking at the local jail, and paid restitution in full, her plea could be withdrawn and the case would be dismissed. As of June 3, 2009, Laurence had made a payment of \$100 toward the amount owed; the balance owed as of the date of the hearing was \$2,334. The trial court did not specify any amount of payment to be made, only that “regular monthly payments” should be made.

On February 2, 2011, Laurence was present in court for a conditional settlement review hearing. As of that date the balance owing was \$1,564. Laurence had been unemployed since June 2010 and had been “surviving” with help from her mother and friends; she had no benefits of any kind. In January 2011 she had obtained employment as a truck driver and was being paid a percentage of the loads. The matter was continued to May 4, 2011. Laurence was instructed to make payments on the outstanding balance before the next hearing.

At the May 4, 2011, hearing, it was reported that Laurence had made monthly payments of \$20 per month, leaving an outstanding balance of \$1,466. Laurence informed the trial court that she would be undergoing chemotherapy and radiation treatments for the next six months, and she expected to be on disability. The trial court instructed her to continue to make her regular monthly payments of \$20.

Another conditional settlement review hearing was held on November 2, 2011. At the time of the hearing, all of the conditions of the plea agreement had been met, except that restitution was still owing. The amount outstanding at that time was \$1,464. Defense counsel provided the trial court with a note from Laurence's doctor stating that on May 3, 2011, Laurence had been informed her breast cancer had spread to her bones; she would require major surgery; and followup treatment would last for six months. Laurence's counsel argued that because of her cancer and the treatments, she was unable to work and unable to make payments. Upon receiving the detailed information about Laurence's cancer diagnosis and treatment, the trial court stated, "that's a sufficient excuse."

Laurence told the trial court she had had surgery, had started chemotherapy two weeks after surgery, had had two blood transfusions, was receiving weekly chemotherapy treatments, and was going in on other days of the week for shots to boost her white blood cell count. She also would be starting radiation treatments and had regular doctor visits. The trial court stated it would be giving Laurence "a pretty long extension" and that "this is a very serious medical condition and she's documented it." The trial court wanted Laurence to "put her efforts" into her medical treatments "rather than this."

The trial court told Laurence, "You don't have to worry about this." The trial court also stated it would be giving "a pretty long extension on it to come back and see me, so when you get your treatments done." The trial court put the matter over to June 6, 2012; there was no requirement to make any payments.

On June 6, 2012, Laurence was not in court. The trial court noted that Laurence had a “really serious” medical condition—cancer. Defense counsel noted that Laurence had breast cancer and had been undergoing radiation treatments. The trial court wanted to give defense counsel “time to find out where she’s at” and ordered a warrant to preserve jurisdiction but held off on issuance.

All hearings through June 6, 2012, had been held before the Honorable Gregory T. Fain. Thereafter, all subsequent hearings, including the hearing on September 6, 2012, were held before the Honorable David A. Gottlieb.

At the September 6, 2012, hearing, the trial court commenced with the comment that “there is still a sizable remaining balance.” Defense counsel informed the court that Laurence had been undergoing breast cancer treatments and only recently had received a release from her doctor enabling her to return to work. The outstanding balance as of the hearing date was \$1,464, and the trial court was concerned that “we’ve been at that for almost a year.”

The People maintained that they had been “compassionate in regards to [Laurence’s] condition,” but Laurence had not made any payments and “a minimum amount of payments still would not have interfered” with what Laurence was going through medically. Defense counsel reminded the trial court of the extent of Laurence’s treatments, including weekly chemotherapy treatments, and that now treatments had stopped and Laurence expected to be able to find employment. The trial court responded, “I’m sure that this same statement has been made or similar statement has been made each time she comes here. I just can’t fathom that there hasn’t been a single payment, not one.” Laurence replied, “I have no job, sir.”

The trial court then stated:

“Let me explain this to you. Each time you come here, you’re told to make payments. You tell us that you’re going to find a way to make payments. And there—I’d say 75 percent of the people—ma’am, you need to pay attention. Seventy-five percent of the people in this audience don’t have a job. While I sympathize with you—I definitely sympathize with you. This is an obligation that you have and you’re not making it a priority. Hold on. Hold on. You have a felony pending against you. I don’t know if you understand the seriousness of that—that will keep you from working for the rest of your life.”

After these comments, the trial court stated it was going to schedule a sentencing date and if Laurence was “serious, you will do something about it. If you’re not, you will be sentenced.” The People claimed they had no medical documentation validating Laurence’s condition. The trial court stated, “You know what I’m going to do is I’m going to schedule it for a sentencing and I will put it back in this department and that way we will have control over it and we will see what happens between now and then and maybe that will grab Ms. Laurence’s attention that she needs to deal with this appropriately.”

Laurence was ordered to report to the probation department after the September 6, 2012, hearing, and Laurence did as instructed. The probation report noted that Laurence was homeless and living in a tent. The report also noted that she had undergone a mastectomy and cancer treatments, which affected her ability to work.

On November 1, 2012, Laurence was in court for what was described as sentencing. Laurence had made payments of \$60 in the month of October, which reduced the balance to \$1,384. The trial court reminded Laurence that at the last hearing there had “been no payments for a long period of time,” and the trial court “felt that there was no progress being made.” And despite any medical conditions, progress needed to be made “in order to continue on the diversion program.”

The trial court indicated it was willing to postpone sentencing for a few months and asked Laurence for an amount she could pay each month; Laurence stated she could pay \$40 per month. The trial court indicated it would postpone sentencing for four months and that Laurence was to make payments. The trial court admonished Laurence that if it found there was a “willful or intentional nonpayment on those months, then I’ll just go forward with Sentencing.”

When the trial court asked about Laurence’s current living conditions, defense counsel stated Laurence was living in a trailer that had no power or running water. The trailer belonged to an acquaintance, who was not charging Laurence rent. The trial court instructed Laurence to maintain contact with her attorney and to return to court on March 7, 2013.

At the March 7, 2013, hearing, it was noted that Laurence had made payments and had reduced the outstanding balance to \$1,224. The trial court noted that Laurence had “done all the things that we asked you to do.” Defense counsel indicated Laurence had received something indicating her balance was \$714. The trial court stated, “We will figure out the discrepancy.” Laurence was told to “Keep up the good work with your payments” and to make payments of \$40 per month. The matter was put over for six months for a continued sentencing hearing.

At the continued sentencing hearing on September 5, 2013, the People stated that the last monthly payment of \$40 received from Laurence had been in June 2013; however, tax refunds owing to Laurence of \$209.75 and \$112.94 had been intercepted and applied to the balance. The People set the outstanding balance at \$861.30. After receiving this information, the trial court stated, “it seems as though we should go forward with sentencing on this case.”

Laurence asked to address the trial court; she indicated she had received a notice that taxes for 2009 had been overpaid; she thought the refund would be \$800. She stated

she thought the “offset of \$339 ... would take care of me and then I—I got a job this past week. I’m working for Snider Trucking and I get paid on Friday.”

Defense counsel argued that with the payments Laurence had made and the amount of the tax intercepts, Laurence was in compliance. With Laurence’s new job, she would be able to pay the balance. Laurence stated she had paperwork with her and receipts showing the balance was much less than claimed by the People.

The trial court stated, “I think we’ve been really, really patient,” but noted the case dated to 2009. The trial court indicated it was ready to proceed with sentencing. Laurence stated, “I will pay it off with my first paycheck next week.” The trial court responded, “[Y]ou know, what you should have done is that you should have borrowed from somebody and say, hey, look. I’m in—you know, I got these dire situations and I need to get this paid.” Laurence responded, “I just started working. I just started working.” The trial court then stated, “I’m sorry,” to which Laurence responded, “Give me one more chance. I will give you all my pay check on Friday.” The trial court replied, “It’s always something different.”

The trial court went on to state, “So since September 2012, I found you not in compliance.... I said ... you will come and see me in November. That gave you two months.... [¶] In November, you came back and there was some other issues I’m sure and other promises and assurances that you would have things paid.... We put it over until March. And then come March, we’re here again and there were other excuses and other issues, I’m sure. Well, six months. At some point in time it has to stop and today’s the day it has to stop.”

Defense counsel argued that the tax refunds “went a long way to bring this down somewhat. She has been homeless the entire time. I don’t believe someone in the homeless community has people that she can depend on to help her out in a situation. She has a job now. It’s a truck driving job. If she has a record, she will lose that job.”

Defense counsel asked for a “short continuance”; he also suggested the matter trail so the People could contact the employer to verify Laurence’s information.

The trial court denied the request for a continuance or to trail the matter, stating “No, that’s not going to change anything. I don’t think. There is just one excuse right after another. We need to get this case done.”

The trial court proceeded to impose sentence, placing Laurence on formal probation for two years and imposing various terms and conditions of probation. The trial court ordered that Laurence be “decertified from the Food Stamp Program as well as [the] Cal Works Program. The Court also will order that you be ineligible for employment with [the In-Home Supportive Services program] for a period of ten years.”

Laurence filed a timely notice of appeal and an amended notice of appeal.

DISCUSSION

Laurence raises multiple issues. She contends the trial court lacked sufficient evidence to revoke her conditional plea and impose formal probation. In a related argument, Laurence contends the trial court abused its discretion in revoking her conditional plea and imposing formal probation. Laurence also contends defense counsel rendered ineffective assistance at the sentencing hearing. Finally, she contends the written terms of probation do not comport with the trial court’s oral pronouncement.

I. Revocation of Conditional Plea

Laurence contends there was not sufficient evidence to support the trial court’s decision to revoke her conditional plea and that the decision was an abuse of discretion. We agree.

Penal Code section 1203.2 requires that before a trial court can revoke a conditional plea on the grounds of failure to pay restitution, the trial court first must “determine[] that the defendant has willfully failed to pay and has the ability to pay.” (*Id.*, subd. (a).) In order to make this determination, a trial court must have some

information regarding the defendant's income and expenses for necessary living expenses. (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1129 (*Quiroz*.) The determination to revoke a conditional release must be made based upon the facts before the trial court. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 378.) The evidence before the trial court must support a conclusion, by a preponderance of the evidence, that the defendant's conduct amounted to a willful violation. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*.)

In revoking the conditional plea for willful nonpayment of restitution, the trial court stated: "So since September 2012, I found you not in compliance.... I said ... you will come and see me in November. That gave you two months.... [¶] In November, you came back and there was some other issues I'm sure and other promises and assurances that you would have things paid.... We put it over until March. And then come March, we're here again and there were other excuses and other issues, I'm sure. Well, six months. At some point in time it has to stop and today's the day it has to stop." These statements reflect the trial court's rationale for finding a willful failure to pay restitution and for revoking the conditional plea. The trial court's comments, however, are not supported by the record.

At the November 2, 2011, hearing, Judge Fain excused Laurence from making any restitution payments while she was undergoing chemotherapy and other treatment for breast cancer, as she was unable to work during that treatment. At the September 6, 2012, hearing, where the amount of restitution owing was next addressed, the hearing was before Judge Gottlieb. Judge Gottlieb assumed, erroneously, that Laurence was not in compliance with the condition to pay restitution simply because no payments had been made between the November 2011 and the September 2012 hearings.

A review of the transcripts of the hearings on February 2, May 4, and November 2, 2011, indicate that Laurence was at all times in compliance with the trial court's instructions on payment of restitution. Laurence was not cleared by her doctor to look for

work until the time of the September 2012 hearing and had been excused from making any payments at the November 2011 hearing until further instructed by the trial court.

Laurence was not in violation of any order to pay restitution at the time of the September 2012 hearing, and the trial court's finding to the contrary is wholly unsupported by the evidence.

At the November 1, 2012, hearing, Laurence was in compliance with the trial court's order from the September 2012 hearing requiring her to make monthly payments. At the continued hearing on March 7, 2013, Laurence was in full compliance with the trial court's order to make payments. As the trial court noted, Laurence had "done all the things that we asked you to do."

The September 5, 2013, hearing, when the conditional plea was revoked, was the first hearing at which Laurence could have been found to have been out of compliance with the obligation to make monthly payments on the outstanding restitution. Laurence had made one monthly payment between March and September 2013, but had not made other monthly payments because she thought the obligation to make those monthly payments had been satisfied by the intercept of her 2009 tax refunds, which far exceeded the fixed amount of her monthly obligation toward restitution.

While the trial court did not wish to accept Laurence's explanation for the failure to make the missed monthly payments, the record does not reflect that the trial court considered Laurence's income and living expenses as it was required to do before concluding Laurence had the ability to pay and willfully refused to do so. (*Quiroz, supra*, 199 Cal.App.4th at p. 1129.) The uncontroverted evidence provided by Laurence was that her breast cancer, her chemotherapy and radiation treatments, and her resulting inability to work and unemployment affected her ability to earn income and pay restitution.

Laurence's tax refunds from 2009 in the amount of \$322.69, which had been taken on an intercept and applied toward the restitution, had significantly reduced the

restitution obligation, and Laurence had been unemployed until the week prior to the September 2013 hearing. Laurence told the trial court, “I got a job this past week. I’m working for Snider Trucking and I get paid on Friday.” Defense counsel argued that with the payments Laurence had made and the amount of the tax intercepts, Laurence was in compliance. Her monthly obligation had been to pay \$40. With Laurence’s new job, she would be able to pay the balance.

Laurence had been unemployed since June of 2010 at the inception of the conditional plea proceedings and had been “surviving” with help from her mother and friends; she had no benefits of any kind. As of September 6, 2012, she was homeless and living in a tent. Shortly after Laurence entered into the plea agreement, she was diagnosed with breast cancer and was not cleared to seek employment until September 2012. She reported obtaining gainful employment the week before her September 2013 hearing.

The trial court’s comment that Laurence simply should have “borrowed” the funds with which to pay the amount of restitution is an inadequate analysis of Laurence’s financial ability to pay. In fact, it implicitly acknowledges that Laurence did not have the financial means with which to pay restitution. Without an analysis of Laurence’s financial “ability to pay,” the trial court cannot revoke a conditional plea on the basis of nonpayment of restitution. (§ 1203.2, subd. (a); *Quiroz, supra*, 199 Cal.App.4th at p. 1129.)

Laurence was not in violation of any provisions of her conditional plea as of the March 7, 2013, hearing. At the next hearing on September 5, 2013, the evidence before the trial court was insufficient to demonstrate that Laurence had the financial ability to pay the restitution and had willfully failed to pay the restitution. (*Galvan, supra*, 155 Cal.App.4th at p. 982.)

When the trial court has based its decision in large part on an erroneous understanding of the facts and inadequate information, as the trial court did here, there is an abuse of discretion. (See *People v. Coleman* (1975) 13 Cal.3d 867, 873-874.)

II. Other Issues

In light of our conclusion that there was insufficient evidence to revoke the conditional plea, and that the trial court abused its discretion in revoking the conditional plea, we will vacate the judgment. Consequently, we need not address Laurence's contention that counsel rendered ineffective assistance or the challenge to the terms of formal probation.

DISPOSITION

The September 5, 2013, judgment is vacated. Laurence is reinstated on conditional release pursuant to the plea agreement. On remand, the trial court shall determine whether Laurence has satisfied the terms of her conditional plea.