

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PATRICK MARTINEZ,

Defendant and Appellant.

H036939

(Monterey County

Super. Ct. No. SS071971)

Defendant Daniel Patrick Martinez pleaded guilty to possession of cocaine and admitted a prior strike conviction. He was granted 18-month drug treatment probation pursuant to Proposition 36. In July 2008 (eight months later), after defendant pleaded no contest to two misdemeanors, the court terminated defendant's Proposition 36 probation and placed him on formal felony probation on the same conditions that were applicable under the Proposition 36 probation. The court required defendant to serve 306 days in jail with credit for a like number of days served, but did not otherwise specify the term of this new probation order. In August 2010, a different superior court judge found defendant to have violated the terms of his probation and in May 2011 (based upon that prior finding) terminated probation and imposed a two-year prison sentence instead.

Defendant contends that his term of probation had expired in 2009 and that the court therefore lacked jurisdiction in August 2010 to find a probation violation which resulted in the court's subsequent termination of probation and imposition of a prison

sentence in 2011. We agree that defendant's term of probation had expired by no later than the latter half of 2009 and that the court had no jurisdiction to make its subsequent orders. We will therefore reverse the judgment.

FACTS¹

On June 24, 2007, after performing a traffic stop on a car in which defendant was a passenger, Salinas Police Officer Carlo Calupad performed a parole search in which cocaine was found in defendant's pants pocket and marijuana was found in his jacket.

PROCEDURAL BACKGROUND

Defendant was charged by information filed on September 18, 2007, with possession of a controlled substance (cocaine), a felony (Health & Saf. Code, § 11350, subd. (a)), and possession of 28.5 grams or less of marijuana, a misdemeanor (Health & Saf. Code, § 11357, subd. (b)). The information was filed in Superior Court case number SS071971A (the felony case). The information contained the allegation that defendant had been convicted previously of one serious felony (strike) (Pen. Code, §§ 1192.7, subd. (c)/1170.12, subd. (c)(1)).²

On November 5, 2007, defendant entered a plea of guilty to the felony cocaine possession count and admitted the strike allegation contained in the information. The guilty plea was entered on the condition that he would receive probation under Proposition 36 (§ 1210 et seq.).³ On November 19, 2007, the court suspended imposition of the sentence in the felony case and placed defendant on probation under Proposition 36

¹ Our summary of the facts underlying the current offenses is taken from the police report.

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

³ "In July 2001, Proposition 36 (Pen. Code, § 1210.1) took effect. Known as the Substance Abuse and Crime Prevention Act of 2000, its purpose is to direct nonviolent drug abusers away from incarceration and toward community-based drug treatment programs." (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1396, fn. omitted.)

for a term of 18 months. The court ordered defendant to serve 223 days in jail and gave him credit for time served of 223 days. It also dismissed the other count.⁴

A petition was filed in February 2008 alleging that defendant had violated probation by committing the offenses of driving under the influence (Veh. Code, § 23152, subd. (a)), driving with a suspended or revoked license (Veh. Code, § 14601, subd. (a)), and driving without proof of liability insurance (Veh. Code, § 16028, subd. (a)). These offenses were charged in a separate proceeding, Superior Court case number MS263351A (the misdemeanor DUI case). On March 11, 2008, defendant admitted in the felony case that he had violated probation. The court revoked, reinstated, and modified probation, and required defendant to serve three days in jail.

A second probation violation in the felony case was alleged two months later as a result of charges being filed in a separate case, Superior Court case number SS081551A, (the misdemeanor vandalism case). On May 30, 2008, defendant pleaded no contest to two counts alleged in this misdemeanor case, namely, vandalism (§ 594, subd. (b)(2)(A)) and receiving stolen property (§ 496, subd. (a)), and the court trailed both the felony case and misdemeanor case for sentencing. Thereafter, on July 9, 2008, consistently with the parties' prior understanding, the court in essence converted defendant's Proposition 36 probation to formal felony probation. It terminated defendant's probation under Proposition 36 in the felony case, placed defendant on formal probation, ordered defendant to serve 306 days, and gave him credit for having served a total of 306 days.⁵

⁴ Although the court initially suspended the sentence and granted probation on November 5, 2007, the matter was continued to allow for defense counsel to inquire concerning the status of a parole hold, and the court records reflect that the probation grant occurred on November 19, 2007.

⁵ There is a discrepancy in the court minutes of the hearing on May 30, 2008. Contrary to what appeared in the reporter's transcript that the court continued the case with the understanding that it would later terminate Proposition 36 probation and place defendant on formal felony probation, the clerk's minutes reflect: "Treatment under

(continued)

On January 22, 2010, defendant admitted three of the five claimed probation violations alleged in a petition. On February 19, 2010, the court revoked, reinstated, and modified probation, ordered defendant to serve 373 days, and credited him a total of 373 days for time served.

In July 2010, another petition was filed by the probation department alleging further probation violations. After a contested hearing on August 13, 2010, the court—Judge Sam Lavorato, Jr., who was not the judge who had revoked Proposition 36 probation and imposed formal felony probation in July 2008—found defendant to have violated the terms of his probation. On September 2, 2010, Judge Lavorato advised that in light of defendant’s admission of the prior strike, pursuant to the mandate of section 1170.12, subdivision (a)(2), the July 2008 order terminating Proposition 36 probation and placing him on formal felony probation constituted an unlawful sentence. The court set the matter for further hearing.

Defendant in November 2010 filed a motion to dismiss, contending that the court lacked jurisdiction because the term of probation had expired May 5, 2009 (or at the latest, August 10, 2009). After hearing argument, the court on February 11, 2011, denied defendant’s motion and concluded that the July 2008 probation order was an unlawful sentence.

In March 2011, defendant filed a request that the court exercise its discretion to dismiss the prior strike allegation under section 1385 in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). On May 10, 2011, the court granted the *Romero* motion, revoked and terminated formal felony probation, sentenced

Proposition 36 is hereby terminated and the Defendant is placed on General Formal Probation.” Where there is a conflict between the clerk’s minutes and the oral pronouncement of the court, the latter controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

defendant to the middle term of two years in prison for the cocaine possession conviction, and credited defendant for time served of 736 days.

In summary, the dates relevant to this appeal, and in particular to defendant's jurisdictional challenge to the judgment, are:

- Nov. 19, 2007: Court grants 18-month Proposition 36 probation.
- Jul. 9, 2008: Court terminates Proposition 36 probation, and grants felony probation.
- May 19, 2009: Term of felony probation expires (assuming no tolling).
- Aug. 10, 2009: Term of felony probation expires (assuming term was tolled 83 days).
- Aug. 13, 2010: Court finds defendant to have violated probation after contested hearing.
- May 11, 2011: Court terminates probation, and imposes two-year prison sentence.

Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea not affecting the validity of the plea.

DISCUSSION

I. *Probation Revocation and Imposition of Prison Sentence*

A. *Parties' Contentions*

Defendant contends that the court's May 2011 order revoking probation and sentencing him to prison was error. He argues that by the time Judge Lavorato found in August 2010 that defendant had violated probation—which finding ultimately resulted in the imposition of the challenged judgment—the term of the formal probation imposed in July 2008 had already been completed. Therefore, he argues, the court did not have

jurisdiction to correct what it believed to have been a mistake in the July 2008 probation order.⁶

The Attorney General responds that defendant's jurisdictional argument is without merit because "the record clearly shows that [defendant] was still on probation at the time the prison sentence was imposed on May 10, 2011." She asserts that at the time of the July 2008 probation order, "the court suspended imposition of sentence for three years and placed [defendant] on formal probation for three years."

Because there is a difference of opinion between the parties as to what constituted the term of the July 2008 probation order, and this factual issue is critical to a resolution of the ultimate issue on appeal, we will address that controversy first.

B. *The Term of the Probation Order*

The term of the initial order of November 19, 2007, granting probation under Proposition 36 was unquestionably 18 months. After pleading no contest to the two offenses in the misdemeanor vandalism case on May 30, 2008, the court indicated its intention to terminate Proposition 36 probation in the felony case and to impose formal probation. Defense counsel concurred that this was his understanding of the consequences of the no contest plea in the misdemeanor vandalism case, but requested a deferral of sentencing to address parole issues. The court agreed to defer sentencing in both the felony case and misdemeanor vandalism case. Apart from defense counsel indicating that it was anticipated that his client would receive "a credit-for-time-served

⁶ Defendant also contends that since the July 2008 probation order was in effect and no appeal therefrom was ever taken, a different judge of the court could not vacate it, based upon the legal principle that " 'a judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned.' [Citation.]" (*People v. Ellison* (2003) 111 Cal.App.4th 1360, 1367.) Because we conclude that defendant's jurisdictional argument has merit, we need not address his additional grounds for reversal. (*People v. Roldan* (2012) 205 Cal.App.4th 969, 985, fn. 4.)

[jail] sentence” as a new condition of probation, the record reflects no discussion at the May 30, 2008 hearing concerning the term of the formal probation that would be imposed once the court terminated Proposition 36 probation in the felony case.

On July 9, 2008, the court conducted a combined hearing in three cases: the felony case in which the challenged judgment was entered, the misdemeanor vandalism case, and the misdemeanor DUI case. The record reflects that in the felony case, the court declined defendant’s request that Proposition 36 probation be reinstated; it imposed formal felony probation upon the condition that defendant serve 306 days in jail for which he received the same number of days’ credit for time served. The court further indicated that “all conditions previously imposed under Prop 36 would still be conditions of [the formal felony] probation.” The court’s minute order signed by the judge likewise reflects that “[a]ll previously ordered terms and conditions of probation to remain in effect.” There is no reference at all in either the reporter’s transcript or in the signed minute order to the imposition of any specific probationary term for the felony case.⁷

At the same July 9, 2008 hearing, turning to the misdemeanor vandalism case, the court indicated: “Then Mr. Martinez, in that case, SS081551A, this is [the case] where you admitted to the misdemeanor[s of] receiving stolen property [and vandalism ¶] Imposition of sentence will be suspended for three years. So for the next three years you’ll be on non-reporting probation under the condition[] that you obey all laws of every

⁷ We note from the record that there are statements in two petitions alleging separate violations of probation filed in January 2010 and July 2010 that defendant was placed on probation in the felony case on May 30, 2008, for three years. We also observe that the court, in revoking and reinstating probation on February 19, 2010, stated that “probation is set to expire July 14, 2011.” These references are of no consequence in establishing the term of probation ordered by the court on July 9, 2008. (Cf. *In re Daoud* (1976) 16 Cal.3d 879, 882-883 [order finding probation violation and continuing probation on its original terms could not be modified by subsequent nunc pro tunc order adding one year to probationary term].)

kind.” The court also imposed a jail sentence of 84 days, with a credit of the same number of days for time served. The court’s minute order for the misdemeanor vandalism case signed by the judge is consistent with its oral pronouncement suspending sentence and granting probation: “Imposition of sentence suspended, and defendant placed on probation for a period of 3 yrs; 0 months; 0 days and obey all laws. Type of probation: Conditional.”⁸

Plainly, the court did not impose a three-year probationary term in the felony case on July 9, 2008, when it revoked Proposition 36 probation and imposed formal probation. There is no reference in the proceedings to a three-year term—or to any other term—in connection with the imposition of probation in the felony case. The record is clear that the three-year probationary term was specifically ordered *in the misdemeanor vandalism case only*. And the fact that the court, in both the reported proceedings and in its signed minute order, indicated that “all conditions previously imposed under Prop 36 would still be conditions of [the formal felony] probation” is compelling evidence that the court intended the 18-month probationary term imposed in November 2007 to remain in effect for the new formal felony probation. We therefore reject the Attorney General’s assertion that the court imposed formal felony probation in July 2008 for a term of three

⁸ The court at the same hearing on July 9, 2008, revoked, reinstated, and modified probation in the misdemeanor DUI case, imposed a jail sentence of 86 days, and granted a credit of 86 days for time served. The clerk’s minutes are consistent with this oral pronouncement.

On July 9, 2012, on its own motion pursuant to Evidence Code section 459, subdivision (a), this court took judicial notice of the respective May 30, 2008 clerk’s minutes and July 9, 2008 signed minute order filed in Monterey County Superior Court case number SS081551A (the misdemeanor vandalism case), and of the clerk’s minutes of May 30, 2008, and July 9, 2008, in Monterey County Superior Court case number MS263351A (the misdemeanor DUI case).

years, and find that the 18-month term established in November 2007 was incorporated into the court's order of felony probation in July 2008.

C. *Discussion of Claim of Error*

Under section 1203.3, subdivision (a), the court is empowered “*at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence.*” (Italics added.)⁹ Additionally, section 1203.2, subdivision (a) provides that “[*a*]t any time during the period of supervision of a person, released on probation under the care of a probation officer . . ., 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, issue a warrant for his or her rearrest. . . .” (Italics added.) As our high court has explained, the jurisdiction of a sentencing court to revoke or modify a probation order is limited by the terms of the statute: “The cases have consistently taken the view announced in *People v. O'Donnell* (1918) 37 Cal.App. 192, 196-197, that ‘the statute itself furnishes the measure of the power which may thus be exercised’ and ‘the court loses jurisdiction or power to make an order revoking or modifying the order suspending the imposition of sentence or the execution thereof and admitting the defendant to probation after the probationary period has expired.’ [Citations.] Habeas corpus lies to review and correct action in excess of the jurisdiction defined by section 1203.3. [Citations.]” (*In re Griffin* (1967)

⁹ “The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held. . . .” (§ 1203.3, subd. (a).)

67 Cal.2d 343, 346; see also *Fayad v. Superior Court* (1957) 153 Cal.App.2d 79, 81; *People v. Brown* (1952) 111 Cal.App.2d 406, 408.)

Thus, for instance, in *Ex parte Slattery* (1912) 163 Cal. 176, 177, the petitioner received a suspended sentence and six months' probation that expired in October 1911. In December 1911, after being arrested for another offense, the court pronounced judgment on the sentence previously suspended. (*Ibid.*) The high court held that the sentence imposed was unlawful: “[B]y the provisions of the probation law, when a defendant has fulfilled the conditions of his probation for the entire period thereof, . . . the power of the court to enforce its original judgment is at an end. [Citation.]” (*Id.* at p. 178.)

More recently, *People v. Tapia* (2001) 91 Cal.App.4th 738 (*Tapia*) applied this jurisdictional principle to reverse an order purportedly extending the probationary term after the term imposed had expired. There, the defendant in 1996 received a suspended sentence and three years' probation, resulting in a probationary term that would expire in July 1999. (*Id.* at pp. 739-740.) His probation was summarily revoked in 1997 after he was deported and the court was advised that he failed to report to the probation department. (*Id.* at p. 740.) After the defendant returned to this country and was arrested in September 2000, he admitted that he had violated probation by failing to report that he had returned to the country. (*Ibid.*) Based upon this admission, the trial court found defendant had violated the terms of his probation, revoked and reinstated probation, and extended its term to March 2003. (*Ibid.*) The appellate court held that the order was invalid because the trial court had no jurisdiction to extend the probationary term. The Court of Appeal reasoned that the alleged violation in 1997 was neither admitted nor proved, and by the time defendant reentered the country in 2000, his probation had expired (in July 1999). (*Ibid.*) The court concluded: “Just as the restoration of probation erases the summary revocation, so too does the court's failure to find a violation within the period of probation. Put another way, the jurisdiction retained by the court is to

decide whether there has been a violation during the period of probation and, if so, whether to reinstate or terminate probation. When the court finds there has been no violation during the period of probation, there is no need for further jurisdiction. And where, as here, the term of probation has expired, the defendant is also entitled to an order discharging him from probation. [Citation.]” (*Id.* at pp. 741-742.)¹⁰

Here, it is plain that defendant’s term of probation had expired over a year before the court found a violation which ultimately resulted in the order purportedly revoking probation and imposing a prison sentence. Since defendant’s probation was not revoked prior to the expiration of its term—and that expiration took place no later than August 10, 2009¹¹—“the probation terminate[d] automatically on the last day.” (*People v. Smith* (1970) 12 Cal.App.3d 621, 625; see also § 1203.3, subd. (b)(3).)

Based upon the foregoing, we conclude that the court was without jurisdiction when it found in August 2010 that defendant had violated the terms of his probation and

¹⁰ *Tapia, supra*, 91 Cal.App.4th 738, was disapproved on another ground in *People v. Wagner* (2009) 45 Cal.4th 1039, 1061, fn. 10.)

¹¹ “Under section 1203.2, subdivision (a), if a trial court summarily revokes probation during the probationary period, the summary revocation ‘serve [s] to toll the running of the probationary period.’ Because of this tolling, the hearing on the violation, the court’s ruling, and the imposition of sentence may all occur even after the probationary period would otherwise have expired.” (*People v. Burton* (2009) 177 Cal.App.4th 194, 199.) Here, there were two separate instances of probation violations occurring after the initial November 19, 2007 Proposition 36 probation order and prior to the July 2008 order terminating Proposition 36 probation and imposing felony probation. Thus, there were periods of time that the probationary term was tolled under section 1203.2, subdivision (a). Defendant acknowledged below that the term may have been tolled until August 10, 2009; the People, arguing that a new three-year probation term was established in July 2008, did not refute defendant’s position concerning tolling. We need not determine the precise date upon which the 18-month probationary term, with tolling, expired, since it is clear that such expiration occurred approximately one year or more *prior to* the court’s August 2010 order finding that defendant had violated probation, and its May 2011 order revoking and terminating probation and imposing sentence, which orders are at issue here.

when it, in May 2011, based upon such determined violation, revoked and terminated probation and imposed a two-year prison sentence. (*In re Griffin, supra*, 67 Cal.2d at p. 346; *Tapia, supra*, 91 Cal.App.4th at pp. 741-742.)¹²

DISPOSITION

The judgment is reversed.

Márquez, J.

WE CONCUR:

Rushing, P.J.

Premo, J.

¹² Defendant also argues on appeal that the court committed error with respect to the imposition of a restitution fine, a court security fee, and a criminal conviction assessment fee. He also contends that he is entitled to have time credits in excess of the two years imposed in the sentence credited to a fine or to the term of his parole. These issues all stem from the May 2011 judgment sentencing defendant to prison which we determine to have been unlawful because the court had no jurisdiction to impose it. We therefore need not address these additional appellate contentions, which have been rendered moot as a result of our reversal of the judgment. (See *People v. Bolton* (2008) 166 Cal.App.4th 343, 347, fn. 1 [because court prejudicially erred in relieving counsel on eve of trial, mandating reversal of judgment and a remand for new trial, it was unnecessary to decide the defendant's sentencing error claim].)