

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

JUAN CORONADO,

Defendant and Appellant.

H037153

(Santa Cruz County

Super. Ct. No. F15831)

A trial court is empowered to correct an error in its records that is clerical in nature in order to reflect the true order of the court. (*In re Candelario* (1970) 3 Cal.3d 702, 705 (*Candelario*)). This is often referred to as an order nunc pro tunc (Latin for “ ‘now for then’ ” (Black’s Law Dict. (9th ed. 2009) p. 1174, col. 2)), and it has retroactive effect upon the prior order. But this power does not extend to the correction of judicial errors. (*Candelario*, at p. 705.) In this case, the court purportedly corrected a prior order imposing a conditional sentence after discovering that it had the unintended consequence of reducing a conviction from a felony to a misdemeanor.

After defendant Juan Coronado pleaded guilty to one count of battery of a spouse or cohabitant, the court in January 2008 granted three years’ probation on condition that defendant serve 365 days in county jail. The court in 2010, pursuant to stipulation, extended the term of probation by one year to permit defendant more time to pay fines

and restitution that were included in the probation order. In a subsequent hearing in April 2011, the court terminated formal probation and imposed a conditional sentence. The next month, defendant moved to have the felony conviction reduced to a misdemeanor, his counsel arguing the imposition of a conditional sentence converted the conviction to a misdemeanor by operation of law. The court denied the motion and entered a nunc pro tunc order reinstating formal probation.

Defendant argues that the nunc pro tunc order was ineffective because it purported to correct a judicial, rather than a clerical, error. He contends that he is entitled to have his conviction deemed a misdemeanor as a result of the court's April 2011 order. He asserts further that the court should have ordered probation terminated because he had paid the fines and restitution imposed as probation conditions. We reject the latter claim. But we conclude that the court erred in attempting to correct nunc pro tunc its conditional sentence order, and that the April 2011 order had the legal effect of converting the conviction to a misdemeanor. Accordingly, we reverse.

#### FACTUAL BACKGROUND<sup>1</sup>

About 10:30 p.m. on August 24, 2007, Santa Cruz County Deputy Sheriff Grant was dispatched together with fire and ambulance personnel to the home in Freedom where defendant and his girlfriend, Melissa Rodriguez, lived. Deputy Grant heard a woman screaming and crying inside the residence. Defendant allowed the deputy to enter, and he observed Rodriguez lying on her back in the hallway. She said that she had fallen on her arm but did not describe how she had fallen. When Deputy Grant asked defendant what had happened, he responded, “ ‘She fell’ ” but would not describe what had happened. He told the deputy that he had not been home when Rodriguez fell and that she called him afterwards. After further questioning, defendant told Deputy Grant: “

---

<sup>1</sup> The facts underlying the conviction are taken from the probation report.

‘Ok, I’m going to be completely honest with you. We were fighting over dinner plans and started spitting in each other<sup>[1]</sup>s faces. I picked her up and dropped her on the floor. She started screaming and I called 911.’ ” Defendant was placed under arrest. In response to further questioning, defendant said that he broke some glass-framed pictures because he was angry and “also admitted that he picked Rodriguez up off the floor, swung her over his right shoulder and dropped her to the floor.”

Deputy Grant interviewed Rodriguez at the hospital. She confirmed that she and defendant had been arguing that evening. While in their bedroom, defendant spit in her face four times. After the fourth time, she spit back in his face. Defendant then broke several glass-framed pictures and pushed her three times. After they moved into the hallway, “he picked her up and ‘slammed’ her onto the floor.” The deputy confirmed with hospital personnel that Rodriguez had sustained “a ‘severe break’ of a bone in her upper left arm.”

#### PROCEDURAL BACKGROUND

Defendant was charged with inflicting corporal injury on a spouse or cohabitant, a felony (Pen. Code, § 273.5, subd. (a); count 1),<sup>2</sup> and battery inflicting serious bodily injury upon a spouse or cohabitant (§ 243, subd. (d); count 2). He pleaded guilty to count 1 on condition that he would not be sentenced to state prison. In January 2008, the court suspended imposition of sentence and granted three-years’ probation on the condition that he serve 365 days in county jail. It dismissed count 2.

In a hearing in March 2010 before Judge Michael Barton, the probation department advised the court that it was unlikely that defendant would be able to complete all restitution during the term of probation as required under the court’s order. Judge Barton advised: “I’ll make you an agreement or a deal. I’ll extend [probation] for

---

<sup>2</sup> Further statutory references are to the Penal Code unless otherwise stated.

12 months. As soon as it's all paid off, then probation will terminate so if it's done by January [2011], it's done. If it's not<sub>[,]</sub> then you have [an] additional 12 months to work on it." The court therefore ordered the term of probation extended until January 10, 2012.

Approximately a year later, the court set a hearing on the probation officer's application for early termination of probation, based upon defendant's having "paid all fines/restitution in full." At the hearing on April 5, 2011, Judge Ariadne Symons acknowledged that probation had been extended "in order [for defendant] to pay [his] fines and . . . restitution, and I'm informed all of that has been paid." Defendant, appearing without counsel, confirmed that he had fulfilled his obligations. The court terminated formal probation and imposed a conditional sentence, effective until January 10, 2012. Judge Symons stated: "So the Court's gonna transfer this. I'm going to end formal probation and make this a conditional sentence and that will extend until January 10, 2012. [¶] You don't have a probation officer. You don't have to report. Nothing like that, sir."

Defendant, through counsel, filed a motion to reduce the felony conviction to a misdemeanor pursuant to section 17, subdivision (b),<sup>3</sup> and to terminate probation, contending that he had successfully fulfilled his terms of probation and had been "a model probationer." The matter was initially heard by Judge Paul Marigonda on May 13, 2011. After some discussion between counsel and the court concerning Judge Symons's

---

<sup>3</sup> "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor. . . ." (§ 17, subd. (b).)

prior order, Judge Marigonda continued the hearing so that the matter could be heard by Judge Symons.<sup>4</sup>

The case was heard by Judge Symons on May 18, 2011. The victim spoke, indicating her objection to the motion to reduce the conviction to a misdemeanor; she also stated that only “some of the restitution” had been paid by defendant. After defense counsel argued that the prior conditional sentence order resulted in the conviction being reduced to a misdemeanor, Judge Symons indicated: “No. [¶] . . . [¶] That was not the intent of the Court’s order. That was not raised by either side. That was not the intent.”<sup>5</sup> The prosecution argued, inter alia, that based upon the severity of the crime, the conviction should not be reduced to a misdemeanor. It argued further that the victim had not received full restitution. It denied the motion to reduce the conviction to a misdemeanor pursuant to section 17, subdivision (b). The court also ordered that defendant be returned to formal probation, indicating again that in making the April 2011 order, “it had no intent to, effectively or unconsciously, reduce this to a misdemeanor by its actions on 4-5-11. So that was an error.” There is a further handwritten notation on the minute order of April 5, 2011: “[R]eturned to formal probation 5/18/11 nunc pro tunc. This decision was not meant to effectively reduce case under [section] 17, [subdivision b)].”

Defendant filed a timely notice of appeal of the denial of the motion to reduce conviction to a misdemeanor pursuant to section 17, subdivision (b), and the motion to

---

<sup>4</sup> Judge Marigonda indicated that he believed that Judge Symons’s prior order imposing a conditional sentence resulted in the reduction of the conviction to a misdemeanor “because conditional sentence[s] at this time are only authorized in misdemeanors under Penal Code Section 1203.”

<sup>5</sup> Later in the hearing, Judge Symons reiterated: “There was certainly no discussion of reduction to a misdemeanor. It was not discussed in any way. It was not the intent of the Court to have that effect.”

terminate probation. These orders following the grant of probation are properly the subjects of an appeal. (§ 1237, subd. (b); *People v. Douglas* (1999) 20 Cal.4th 85, 90, fn. 4 [order reducing conviction from felony to misdemeanor]; *In re Bine* (1957) 47 Cal.2d 814, 817 [order modifying probation]; *People v. Chandler* (1988) 203 Cal.App.3d 782, 787 [order denying motion to dismiss charges after fulfilling conditions of probation].)

## DISCUSSION

### I. *Order Purportedly Correcting Prior Conditional Sentence Order*

#### A. *Contentions*

Defendant argues that the court’s April 2011 order terminating probation and imposing a conditional sentence had the legal effect of reducing the conviction to a misdemeanor. He asserts that the offense of which he was convicted—a violation of section 273.5—is one that may be alleged as a felony or a misdemeanor (or a “wobbler” offense).<sup>6</sup> Further (defendant argues), because a conditional sentence is one reserved for misdemeanor offenses, Judge Symons’s April 2011 order terminating probation and imposing a conditional sentence reduced the conviction to a misdemeanor by operation of law. He cites *People v. Glee* (2000) 82 Cal.App.4th 99 (*Glee*), and *People v. Taylor* (2007) 157 Cal.App.4th 433 (*Taylor*) in support of his position. Defendant claims that once the conditional sentence had been imposed, Judge Symons could not convert the conviction back to a felony as she attempted to accomplish in her May 2011 nunc pro tunc order reinstating probation. Because an order correcting a prior order may be utilized to correct clerical errors, and the error involved here was a judicial one,

---

<sup>6</sup> “An alternative felony/misdemeanor, also known as a ‘wobbler,’ is deemed a felony unless charged as a misdemeanor by the People or reduced to a misdemeanor by the sentencing court under Penal Code section 17, subdivision (b). [Citation.]” (*People v. Statum* (2002) 28 Cal.4th 682, 685.)

defendant argues that the purported nunc pro tunc order had no effect on the April 2011 order.

The Attorney General concedes that the April 2011 order terminating probation and imposing a conditional sentence “effectively and automatically reduced appellant’s felony conviction to a misdemeanor. [Citing *Taylor, supra*, 157 Cal.App.4th 433 and *Glee, supra*, 82 Cal.App.4th 99.]” But she contends that Judge Symons acted properly by issuing the May 2011 order reinstating probation and this order effectively operated to correct her inadvertent reduction of the conviction to a misdemeanor.

In *Glee, supra*, 82 Cal.App.4th 99, the court considered whether the defendant’s prior conviction constituted a serious felony under the Three Strikes law. In connection with that prior conviction, the defendant had pleaded guilty to assault with a firearm based upon the promise of “ ‘a grant of probation, with a year in the county jail, with probation to terminate at the end of that year.’ ” (*Id.* at p. 101.) There (as here), the offense of which the defendant pleaded guilty was a “wobbler” (*id.* at p. 102), and the court granted summary probation (*id.* at p. 104). The appellate court concluded: “[S]ummary probation is not authorized in felony cases. A grant of informal or summary probation is a ‘conditional sentence.’ [Citations.] Conditional sentences are authorized only in misdemeanor cases. [Citations.]” (*Ibid.*; accord, *Taylor, supra*, 157 Cal.App.4th at p. 437.)<sup>7</sup> It therefore held that “when the court suspended proceedings, granted

---

<sup>7</sup> The court in *Glee, supra*, 82 Cal.App.4th at page 104, relied on, among other authorities, section 1203. Subdivision (a) of section 1203 provides in relevant part: “As used in this code, ‘conditional sentence’ means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.” Subdivision (d) of the same statute provides in relevant part: “If a person is convicted of a misdemeanor, the court may either refer the matter to the probation officer for an investigation and a report or summarily pronounce a conditional

summary probation, ordered appellant to serve one year in the county jail and directed that probation be terminated upon completion of the jail term, it automatically rendered the crime a misdemeanor pursuant to Penal Code section 17, subdivision (b)(1).

[Citations.]” (*Glee*, at pp. 105-106.)

Based upon this authority, we agree that the April 2011 order operated to reduce defendant’s conviction to a misdemeanor. It remains for us to determine whether the May 2011 order was effective to correct the court’s error nunc pro tunc, thereby restoring the conviction to a felony.

B. *Nunc Pro Tunc Orders Generally*

As our high court has explained, “[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] . . . The court may correct such errors on its own motion or upon the application of the parties. [Citation.] ¶ Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is ‘whether the error was made in rendering the judgment, or in recording the judgment rendered.’ [Citation.] Any attempt by a court, under the guise of correcting clerical error, to ‘revise its deliberately exercised judicial discretion’ is not permitted. [Citation.]” (*Candelario, supra*, 3 Cal.3d at p. 705.) Stated otherwise, a court may correct the record to reflect the order actually entered, but may not alter the prior order to make an order different from the one made previously. “‘The function of a nunc pro tunc order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to

---

sentence.” And section 1203b provides in part: “All courts shall have power to suspend the imposition or execution of a sentence and grant a conditional sentence in misdemeanor and infraction cases without referring such cases to the probation officer.”

enter now for then an order previously made. The question presented to the court on a hearing of a motion for a nunc pro tunc order is: What order was in fact made at the time by the trial judge?’ ” (*In re Eckstrom’s Estate* (1960) 54 Cal.2d 540, 544.)

Numerous instances exist in which nunc pro tunc orders have been held to be proper to correct clerical errors. A few examples include orders correcting (1) an abstract of judgment which erroneously showed sentences were to run concurrently when the order in fact was that they were to run consecutively (*People v. Flores* (1960) 177 Cal.App.2d 610, 613-614); (2) a judgment where the court found defendant guilty of a particular offense but cited a code section that did not correspond with the offense (*People v. Shirley* (1970) 10 Cal.App.3d 268, 275; *People v. Schultz* (1965) 238 Cal.App.2d 804, 807-808); (3) an order committing the defendant based upon his current insanity (under § 1368), where the court erroneously cited to the statute (§ 1026) under which a court may issue a commitment order after a finding that the defendant was insane when the offense was committed (*People v. Anderson* (1976) 59 Cal.App.3d 831, 839); and (4) a judgment where there has been an incorrect calculation of presentence credits (*People v. Jack* (1989) 213 Cal.App.3d 913, 915-918). But in other cases, courts have rejected attempts to correct judicial errors by subsequent nunc pro tunc orders. (See, e.g., *Candelario, supra*, 3 Cal.3d at pp. 706-707 [failure of oral pronouncement of judgment, judgment, and abstract to contain judicial finding that prior felony conviction allegation was true could not be corrected by amendment to abstract]; *In re Wimbs* (1966) 65 Cal.2d 490, 498 [purported correction of sentence to run concurrently, rather than consecutively as originally pronounced, improper]; *People v. Drake* (1981) 123 Cal.App.3d 59, 63-64 (*Drake*) [court sentence of six years based upon application of middle term could not be later corrected nunc pro tunc to apply upper term in order to impose 10-year aggregate sentence intended]; *Albori v. Sykes* (1937) 18 Cal.App.2d 619, 622 [court’s express

declination to order two sentences to run either concurrently or consecutively could not be later corrected nunc pro tunc to have sentences run concurrently].)

C. *Whether Nunc Pro Tunc Order Was Proper*

The May 2011 order was made for the purpose of restoring probation and thereby restoring the conviction to a felony. It was indicated in the minute order that defendant's motion under section 17, subdivision (b) was denied and "[c]onditional [s]entence is modified to [f]ormal [p]robation." Judge Symons recited repeatedly at the hearing that she had not intended by her April 2011 order terminating probation and imposing a conditional sentence that defendant's conviction be reduced to a misdemeanor. She explained candidly, "I [had] thought we did them [conditional sentences] in both felonies and misdemeanors . . . So I've just been mistaken about my impression of that matter." And the minute order of April 5, 2011 reflected that defendant was "returned to formal probation 5/18/11 nunc pro tunc."

The subsequent order by Judge Symons was not made to correct a clerical error. As the high court has stated, a nunc pro tunc order modifying a prior order or judgment or materially altering the parties' rights is ineffective "under [a court's] authority to correct clerical error . . . unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion. [Citations.]" (*Candelario, supra*, 3 Cal.3d at p. 705.) Here, the court " 'deliberately exercised [its] judicial discretion' " (*ibid.*) in terminating formal probation and imposing a conditional sentence. Thus, the error was judicial, and was not subject to correction "under the guise of correcting a clerical error." (*Ibid.*; see also *People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1153 [retroactive modification of probation condition from 365- to 364-day jail term to avoid immigration consequences constituted "legal fiction" that was legally ineffective].)

In *Candelario*, a criminal defendant—who later brought a petition for habeas corpus—was charged with selling heroin, and the information included the allegation that

he had suffered a prior felony conviction of marijuana possession. (*Candelario, supra*, 3 Cal.3d at p. 704.) Although he admitted the prior conviction at arraignment and a jury convicted him of the current offense, the court’s judgment and abstract of judgment reflected only that conviction and was silent on the prior-conviction allegation. (*Ibid.*) About one month later, the court filed an amended abstract, adding the enhancement and thereby aggravating the defendant’s sentence. (*Id.* at pp. 704, 705-706.) The Supreme Court agreed with petitioner that the purported correction of the abstract was legally ineffective. It held that there was nothing in the record suggesting the omission of the prior felony conviction in the judgment and abstract was a clerical error that could be corrected nunc pro tunc. (*Id.* at p. 706.) Because it was required that the prior conviction be included in the pronouncement of judgment, its absence, without evidence to the contrary, would result in the inference that the omission was an act of leniency and “operate[d] as a finding that the prior conviction was not true.” (*Id.* at p. 706, fn. omitted.)

*Drake, supra*, 123 Cal.App.3d 59 is also instructive. In that case, after the defendant pleaded guilty to 14 robbery counts, the court selected the middle term of the base sentence for the conviction on count 7 and imposed consecutive sentences for seven other convictions. (*Id.* at pp. 61-62.) As a result, the aggregate prison term was limited to six years by operation of law. (*Id.* at p. 63.) But two weeks later, the sentencing judge selected the upper term for count 7, thereby imposing an aggregate 10-year sentence. (*Id.* at p. 62.) The judge explained that when he had originally sentenced the defendant, he had intended to impose a 10-year sentence but had mistakenly imposed a six-year term. (*Ibid.*) The appellate court reversed. Citing *Candelario, supra*, 3 Cal.3d at page 705, the *Drake* court held that the resentencing was legally ineffective as a purported correction of a clerical error. “[T]he trial court exercised its discretion to impose the middle term. Insofar as this resulted in an aggregate term, which, by operation of law, was different

from what the court intended, the error was judicial in nature. [Citations.] . . . In purporting to revise its judgment by imposing the upper term of imprisonment, the trial court acted in excess of its jurisdiction under the common law. [Citations.]” (*Drake*, at pp. 63-64.)

And *People v. Borja* (2002) 95 Cal.App.4th 481 (*Borja*) presents another example of the circumstance with which we are faced here: a nunc pro tunc order that is ineffective in correcting judicial error. There, the defendant had been initially granted probation conditioned in part on a jail sentence of 365 days. (*Id.* at p. 484.) Nearly six years later and after the defendant had completed his probation, he asked the court to modify the probation condition to a 364-day jail sentence; this change was important to prevent the defendant’s deportation for an aggravated felony under federal immigration laws. (*Id.* at pp. 483-484.) The court granted the defendant’s request and made the modification “nunc pro tunc to the date of the original sentencing.” (*Id.* at p. 484.) The court in *Borja* reversed, concluding that the nunc pro tunc order did not address a clerical error. (*Id.* at p. 485.) Rather the order the defendant sought and obtained was “a retroactive change in his sentence . . . . [H]e sought imposition of a sentence different from the one that had been intended, imposed and served.” (*Ibid.*; see also *People v. Mendoza, supra*, 171 Cal.App.4th at p. 1153 [same].)

The common theme in *Candelario*, *Drake*, and *Borja* is that the error being corrected was judicial. In each instance, rather than attempting to correct a clerical error to make the prior order conform to what was actually decreed, the court sought to enter retroactively an order entirely different than the one it actually made. Likewise, here there was nothing in the record indicating that when the court imposed a conditional sentence in April 2011, it did not intend to do so, or that the minute order did not accurately reflect the court’s oral pronouncement terminating formal probation and imposing a conditional sentence. Instead, the court was attempting to correct nunc pro

tunc the judicial mistake it discovered after having made the April 2011 order, namely, that the imposition of a conditional sentence had had the unintended consequence of reducing defendant's conviction to a misdemeanor.

“ ‘The court can only make the record show that something was actually done *at a previous time*; a nunc pro tunc order cannot declare that something was done which was not done.’ [Citation.]” (*Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 256.) The court in this instance was attempting by its nunc pro tunc order to declare that it had not imposed a conditional sentence in April 2011 when in fact that is precisely what it had done. The May 2011 was ineffective in its purported correction of the April 2011 order, and therefore the conditional sentence operated to reduce defendant's conviction to a misdemeanor. (*Glee, supra*, 82 Cal.App.4th 99 at pp. 105-106; *Taylor, supra*, 157 Cal.App.4th at p. 437.)

## II. *Denial of Request to Terminate Probation*

Defendant contends that at the hearing on April 5, 2011, the court should have terminated probation effective as of that date because he had satisfied the probation conditions with respect to the payment of fines and restitution. He asserts that because the term of his probation was extended in 2010 for the express purpose of giving him additional time to satisfy these conditions and with the understanding that it would terminate once he had made the payments, the “[f]ailure to terminate probation was in contradiction to the deal made by Judge Barton.” The Attorney General responds that on the state of the present record, defendant is not entitled to an appellate finding that his term of probation should have terminated on April 5, 2011. She asserts further that if defendant can make a showing to the trial court that he “owed no further restitution, and indeed had satisfied all of his restitution obligations on or before April 5, 2011, he [would be] entitled to an order that his probation should be deemed completed as of that date.

We agree with the Attorney General’s position. The probation department requested the April 5, 2011 hearing, noting “Defendant paid all fines/restitution in full.” But there is no further information on this subject beyond this brief notation. And at the hearing on May 18, 2011, the victim, Rodriguez, indicated that there were still medical bills—including apparently some that had been previously presented to the court<sup>8</sup>—that remained unpaid and that she had been “in collections” as a result of their nonpayment. Based upon Rodriguez’s statements, Judge Symons was unwilling to terminate probation and asked that the probation department investigate the matter to determine whether restitution was still owing. Under these circumstances, defendant has failed to show error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appellant’s burden to present adequate record and affirmatively demonstrate error]; *People v. Carter* (2010) 182 Cal.App.4th 522, 531, fn. 6 [same].)

#### DISPOSITION

The order of May 18, 2011, denying defendant’s motion to reduce his conviction to a misdemeanor pursuant to section 17, subdivision (b) is reversed. The court is directed to enter an order (1) vacating its nunc pro tunc order restoring formal

---

<sup>8</sup> Rodriguez stated, “I am still in collections because of some of the bills that were brought in. I mean, I heard that some of the restitution was paid, and he can pay them directly if he’d like.”

probation, and (2) granting defendant's motion to reduce his conviction to a misdemeanor.

---

Duffy, J.\*

I CONCUR:

---

Rushing, P.J.

---

Premo, J.

---

\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.