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

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN MOLINA,

Defendant and Appellant.

H037416

(Santa Clara County

Super. Ct. No. C1105122)

1. INTRODUCTION

In this appeal we will order correction of three apparent clerical errors in the abstract of judgment, two misstating court orders and one the defendant's date of birth.

Accepting a sentencing offer from the court, defendant Juan Molina waived a preliminary hearing and entered no contest pleas to seven counts of aggravated lewd touching of his two daughters. (Pen. Code, § 288, subd. (b)(1).)¹ Counts one through four of the first amended complaint involved a daughter who was 6 and 7 years old between August 4, 2009 and April 21, 2011. Counts five through seven involved an older daughter who was 12 and 13 years old during the same time period. The charges arose from the older daughter's report to middle school personnel of defendant's sexual

¹ Unspecified section references are to the Penal Code.

assaults on her and her younger sister, including touching over and under clothing, oral copulation, and attempts at intercourse, all occurring in the family home.²

The court imposed sentence of 42 years in prison (seven fully consecutive six-year terms) and a \$10,000 restitution fine. The court did not order payment of attorney fees, finding no ability to pay. The court also orally issued “a[n] order prohibiting visitation” between the defendant and the child victims “pursuant to section 1202.05 of the Penal Code.”³

In contrast to the court’s oral pronouncement, the clerk’s minutes form for the sentencing hearing includes a checked box for “PC 1202.05,” another checked box for “No Contact,” and a third checked box for “Stay away from” with the names of the victims written in. The abstract of judgment shows the year of defendant’s birth as 1991, rather than 1971. A section titled “Other orders” states in part: “PC 1202.05 ordered. No contact. Stay away from [child victims]” “Atty fines/fees,” giving no amount.

On appeal defendant asks that the abstract of judgment be amended to reflect his correct birth year, the fact that no attorney fees were ordered, and that the court prohibited “visitation,” not “contact.” The Attorney General argues that no appellate correction is necessary, urging that the terms “visitation” and “contact” be viewed as interchangeable in this context. The Attorney General also argues that requests for

² Given the narrow scope of the errors asserted in this appeal, we include only an abbreviated factual summary.

³ Section 1202.05 provides in pertinent part: “(a) Whenever a person is sentenced to the state prison on or after January 1, 1993, for violating Section . . . 288, . . . and the victim of one or more of those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim. The court’s order shall be transmitted to the Department of Corrections, to the parents, adoptive parents, or guardians, or a combination thereof, of the child victim, and to the child victim. If any parent, adoptive parent, or legal guardian of the child victim, or the child victim objects to the court’s order, he or she may request a hearing on the matter. Any request for a hearing on the matter filed with the sentencing court shall be referred to the appropriate juvenile court pursuant to Section 362.6 of the Welfare and Institutions Code.”

correction of errors such as defendant's date of birth should be addressed to the trial court.

2. THE NEED FOR CORRECTION OF CLERICAL ERRORS IN THE ABSTRACT ON APPEAL

In *People v. Scott* (2012) 203 Cal.App.4th 1303 (*Scott*), this court recently ordered corrections to an abstract of judgment when the superior court erroneously recorded an oral order of no visitation under the same section 1202.05 as a no contact order in the minute order and abstract of judgment. *Scott* stated that such entries “cannot properly be characterized as orders of the court. In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error. (*Ibid.*) Likewise, the abstract of judgment “cannot add to or modify the judgment which it purports to digest or summarize.” (*Ibid.*, quoting *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) As with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal. (*People v. Mitchell, supra*, 26 Cal.4th at p. 188 [*Mitchell*].)

“For this reason alone the references to ‘contact’ must be stricken from the abstract of judgment. In pronouncing sentence, the court made no order prohibiting, or otherwise referring to, ‘contact.’ The clerk’s entry of such a prohibition must be deemed a case of clerical error, requiring correction by this court.” (*Scott, supra*, 203 Cal.App.4th at p. 1324.)⁴

We will follow *Scott*, rather than adopting the Attorney General’s suggestions of construing “contact” to mean “visitation” or finding the objection forfeited by

⁴ Our opinion, filed two days before defendant’s opening brief in this case, is cited in his reply brief.

defendant's failure to raise it in the trial court. This kind of clerical error cannot be forfeited, as it is subject to correction on appeal on the court's own motion without a request from either party. (Cf. *Mitchell, supra*, 26 Cal.4th 181, 187.)

The Attorney General does not dispute that the other entries are clerical errors, but asserts that “[n]o action by [the] court is required. Purported minor errors such as these must be called to the attention of the trial court, or they are waived.” None of the cases cited by the Attorney General involved an apparent clerical error. (*People v. Jarvis* (1982) 135 Cal.App.3d 154, 157-158 [trial court mischaracterized the defendant's prior convictions at sentencing hearing]; *People v. Shea* (1995) 39 Cal.App.4th 1257, 1275-1276 [custody credits]; *People v. Walton* (1996) 42 Cal.App.4th 1004, 1020 [custody credits], disapproved on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

In *Mitchell, supra*, 26 Cal.4th 181, the Supreme Court questioned an appellate court's conclusion that it would serve judicial economy for appellate courts as a matter of policy to redirect original requests to correct abstracts of judgment to the sentencing courts. “We conclude that at the very least, the Court of Appeal's judicial economy rationale is questionable and does not justify discontinuing the practice of having appellate courts order correction of clerical errors in abstracts of judgment, whether raised by the Attorney General or otherwise. Of course, a trial court may sometimes be in a better position than an appellate court to correct a particular error. For example, appellate courts have held that because trial courts have the duty (see § 2900.5) and are better suited to calculate presentence custody credits, criminal defendants must ask trial courts to correct alleged errors in computing those credits. (See *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1557.) Section 1237.1 now codifies this division of labor. Other instances may also arise in which an appellate court concludes a trial court is better able to correct a certain type of error. But where, as here, the Attorney General identifies an evident discrepancy between the abstract of judgment and the judgment that the reporter's transcript and the trial court's minute order reflect, the appellate court itself should order the trial court to correct the abstract of judgment.” (*Mitchell, supra*, 26

Cal.4th 181, 187-188.) The Supreme Court’s reasoning applies equally when a defendant identifies the clerical error.

3. DISPOSITION

The judgment is affirmed. The trial court is ordered to prepare a corrected abstract of judgment showing defendant’s year of birth as 1971, deleting reference to an order for “atty fines/fees,” deleting reference to a “stay away” order, and reflecting the court’s prohibition of “visitation,” not “contact,” between defendant and the child victims. The corrected abstract shall be forwarded to the Department of Corrections and Rehabilitation.

GROVER, J.*

WE CONCUR:

RUSHING, P.J.

ELIA, J.

*Judge of the Monterey County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.