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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL CARNERO,

Defendant and Appellant.

B270935

(Los Angeles County
Super. Ct. No. BA420412)

APPEAL from an order of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Reversed and remanded.

Victor H. Toscano for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Miguel Carnero appeals from the trial court's post-conviction order requiring him to pay victim restitution. The court imposed victim restitution as a probation condition, but it failed to obtain appellant's consent to victim restitution as a condition of his probation, and thus the victim restitution order cannot stand. Accordingly we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Robert Berg were neighbors, who, over the years had a series of disputes. In 2011, Berg obtained a criminal protective order prohibiting appellant from making contact with or photographing Berg.

On December 15, 2013, Berg and one of his workers were outside working on Berg's property when they saw appellant get into his truck. It appeared that appellant began taking photographs of them with his cellular phone. Berg walked across the street to another one of his properties, and in so doing walked in front of appellant's truck. Appellant picked up his phone and pointed it at Berg, and Berg told appellant to stop taking his picture. According to Berg, appellant put his truck into gear, pulled out from the curb, and drove at him. Berg claimed that the truck struck him and that the truck dragged him for about 24 feet. Appellant denied taking photographs of Berg and denied that Berg was injured in the incident.

Appellant was arrested and charged with assault with a deadly weapon in violation of Penal Code¹ section 245, subdivision (a)(1) (count 1) and disobeying a court order in violation of section 166, subdivision (a)(4) (count 2). The jury found appellant guilty of count 2, disobeying a court order and acquitted him of count 1.

¹ All statutory references are to the Penal Code.

At the initial sentencing hearing on April 27, 2015, the prosecutor requested that the court place appellant on probation, with the condition that he serve 30 days in jail. He also requested that the court issue a protective order and added, “[I]t sounds like we’re going to need a restitution hearing with regards to Mr. Berg’s medical bills.”² The court responded: “I think maybe [we need] some case law on whether—given the nature of the verdicts, whether that’s appropriate” and the prosecutor agreed to submit a brief on the issue. Thereafter, the court granted appellant summary probation for three years on the conditions that appellant serve 90 days in jail (minus 33 days for good time/work time credit) and obey all laws. The court also reissued the protective order and ordered appellant to pay various statutory fees, assessments and fines. During the hearing, the court did not inquire of appellant whether he agreed to the terms and conditions of the probation. As to victim restitution, the court did not order victim restitution as a condition of the probation at that time, and instead directed that, “we’ll have to set a restitution hearing date, and I want legal memorandum as it relates to the medical [bills].”

At a subsequent hearing on October 28, 2015, the prosecution submitted a binder containing medical records and a statement from Berg indicating he suffered \$41,684.98 in economic damages as a result of appellant’s conduct. The prosecutor argued that victim restitution was appropriate even though appellant had been acquitted on the assault charge because appellant’s conduct of violating the court’s order was sufficiently connected to Berg’s medical expenses. Appellant disagreed. He responded that he was not sentenced to probation, and that instead he did “time.” The court corrected appellant, reminding him that the court had placed

² In Berg’s victim impact statement he claimed that he incurred approximately \$50,000 in medical costs as a result of the assault.

him on three years of summary probation, including 90 days in jail. Appellant also argued that the damages Berg claimed were not sufficiently connected to the crime for which appellant was convicted and thus he urged the court to deny restitution. The court disagreed with appellant and ordered him to pay victim restitution to Berg of \$41,684.98 as a condition of the probation. The court further observed, “[i]f [appellant] does not wish to pay victim restitution in that amount I certainly could give him the rest of the time in county jail and I think if he did a complete and full sentence he—and he wasn’t on probation, he wouldn’t be required to pay [Berg].” Appellant pointed out that the court had not previously offered him a chance to reject probation on the grounds that he did not want (or could not afford) to pay the victim restitution. The court responded: “Does he want jail time? I’ll give him the jail time. If he wants to do the balance of the year in the county jail, fine.” Appellant told the court, “Yeah, I’d rather do jail.”

The prosecutor objected, complaining that appellant would receive a “windfall” because he had already accepted probation and had been free of custody serving probation during the intervening months. He argued that appellant had agreed to probation knowing that the amount of victim restitution would be determined at a subsequent hearing. The court asked each side to “brief [the issue]” of whether it could resentence appellant—whether appellant could be held to have knowingly accepted probation or whether he was entitled to reject probation and be resentenced. Counsel agreed to submit briefing on the matter.

At the hearing on January 6, 2016, the prosecutor argued that because appellant had “agreed to pay restitution at the time he was granted probation” he could not later change his mind and request to be sentenced so that he could avoid paying victim restitution. Appellant, however, reminded the court that it had

not previously asked him “whether he wanted probation. The court just ordered [it].” To which the court responded: “I always ask at the end if [the defendant] understands and accepts the terms and conditions of probation.” The court recollected that at the initial sentencing hearing it had ordered jail time and victim restitution as a condition of the probation and that appellant understood and accepted those terms.

Appellant timely appeals.

DISCUSSION

Appellant challenges the victim restitution order arguing that because he was sentenced to jail as opposed to being placed on probation the court erred in ordering restitution for losses that directly resulted from the crime of which he was acquitted. In any event, he asserts that—assuming that the victim restitution was ordered as a condition of probation—the order violated appellant’s right to due process because the court imposed victim restitution without obtaining appellant’s consent to victim restitution as a condition of probation. Only appellant’s latter contention has merit.

The court’s authority to order victim restitution under California law depends on whether the court imposes a judgment and sentence or grants the defendant probation. (*People v. Walker* (2014) 231 Cal.App.4th 1270, 1274.) When judgment is imposed and the defendant is sentenced to a period of incarceration (in prison or jail), victim restitution is governed by section 1202.4, subdivision (a)(1), which provides, “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.” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049 [“[c]ourts 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”], citing *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247.)

In contrast, where probation is granted, section 1203.1, governs an award of victim restitution. A section 1203.1 restitution order is not limited to losses arising out of the conduct for which the defendant was convicted. (*People v. Woods, supra*, 161 Cal.App.4th. at p. 1050.) “ ‘California courts have long interpreted the trial courts’ discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction,’ [including] conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation].’ ” (*People v. Anderson* (2010) 50 Cal.4th 19, 27, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) In addition, because probation is a privilege, probationers may be required to undertake obligations, including payment of victim restitution as a condition of probation. (See *People v. Olguin* (2008) 45 Cal.4th 375, 384.) If, however, “a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence.” (*Id.* at p. 379.)

The trial court’s determination of whether to impose probation conditions is reviewed for abuse of discretion and error will not be found unless the decision is arbitrary or capricious, exceeds the bounds of reason, or rests upon a demonstrable error of law. (*People v. Carbajal, supra*, 10 Cal.4th at pp. 1120-1121.)

Appellant asserts that any victim restitution order here was governed by section 1202.4 because the court ordered him to serve 90 days in jail. The record does not support his characterization of his punishment. The court did not enter a judgment and sentence in this case. Instead, the court suspended the imposition of the judgment and the sentence and placed appellant on summary

probation based on various conditions including that appellant serve 90 days in jail. The fact that the court conditioned appellant's probation on his serving jail time did not alter the character of the punishment from probation to judgment and sentence. (*In re Hays* (1953) 120 Cal.App.2d 308, 310 [“ ‘An order placing a defendant on probation, even though it includes as a condition a period of detention in the county jail, is not a *judgment and sentence*.’ ”].) In view of the record, section 1203.1, not section 1202.4 governed the victim restitution order.

This notwithstanding, we conclude that the court's victim restitution order is reversible error because it was based on the court's erroneous recollection that appellant had accepted victim restitution as a condition of his probation. At the first sentencing hearing, the court specifically reserved the issue of victim restitution for another hearing, directing the parties to submit legal briefing on whether, given the nature of the verdicts, victim restitution would be a valid probation condition. Consequently, at the time the court granted probation, the victim restitution was not a condition of the probation; the court had not yet determined whether the restitution order was appropriate nor had it determined the amount of the restitution. As a result, the court was mistaken when, at the subsequent hearing on January 6, 2016, it recalled that it had previously asked appellant whether he understood and accepted the terms of probation, including victim restitution, and that appellant had accepted that condition. The record does not support the court's recollection of the proceedings. It would be inherently unfair to find that the appellant had agreed to pay victim restitution as a probation condition when he did not know that condition would be imposed or know the amount of the restitution. Under the circumstances, we conclude that the trial court abused its discretion in ordering appellant to pay victim

restitution as a condition of his probation.³ (*People v. Olguin*,
supra, 45 Cal.4th at p. 379.)

DISPOSITION

The order granting appellant probation is reversed and the matter is remanded to the trial court with directions to vacate the victim restitution order and to conduct a new sentencing proceeding.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.

³ In reaching this conclusion we do not assess the merits of the court's finding that a sufficient causal connection existed between Berg's injuries and appellant's conviction to support a victim restitution order or whether victim restitution is an otherwise legally valid condition of appellant's probation.