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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL PETTAWAY,

Defendant and Appellant.

B227725

(Los Angeles County  
Super. Ct. No. NA065581)

APPEAL from an order of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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Earl Pettaway appeals from the order revoking his probation because he pleaded no contest to possessing a small amount of marijuana. We reject his contentions that the trial court abused its discretion when revoking his probation and that a second restitution fine was improperly imposed, and affirm the order.

### **FACTS AND PROCEDURAL HISTORY**

In March of 2006 Earl Pettaway pleaded guilty to a felony count of inflicting bodily injury on his former live-in girlfriend. (Pen. Code, § 273.5, subd. (a).) Pettaway confronted his former girlfriend in an alley and, after hitting her several times and throwing her against a brick wall, left her with a broken jaw and numerous cuts and bruises.<sup>1</sup> Pettaway also pleaded guilty to allegations that he personally inflicted great bodily injury as part of a domestic dispute (Pen. Code, § 12022.7, subd. (e)), and that he had a previous misdemeanor conviction for battery against a former spouse (Pen. Code, § 243, subd. (e)(1)).<sup>2</sup>

A 10-year sentence was imposed, but as part of a plea bargain accepted by Judge Tomson T. Ong, Pettaway was placed on probation for 5 years and ordered to make restitution to his victim in the amount of \$17,596.13. A restitution fine of \$200 was also imposed. (§ 1202.4, subd. (a).) Pettaway's terms of probation also required him to obey all laws and court orders and to seek a job or go to school.

In December 2009, Pettaway was arrested for misdemeanor possession of marijuana. In April 2010, he pleaded no contest to that charge and was ordered to perform three days of community service. When Pettaway's probation officer learned of this, it triggered a probation revocation hearing before Judge Ong.

In reports prepared for the revocation hearing, Pettaway's probation officer said that she learned of the drug charge during a records check, and that not only had

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<sup>1</sup> The facts surrounding the crime are contained in the probation officer's report from that proceeding.

<sup>2</sup> All further undesignated section references are to the Penal Code.

Pettaway not told her of the arrest, he denied having any new arrests during his probation office visits from December 2009 through March 2010. She noted that between the time of the March 2006 restitution order and April 2010 – a period of 48 months – Pettaway had made only 35 minimum payments of \$100 toward satisfying his victim restitution order of \$17,596.13. In addition, she reported, Pettaway had made no payments toward his \$200 restitution fine or other court fees, leaving an unpaid balance of \$20,198.74 on his combined total obligation of \$24,148.74. The reports also stated that Pettaway had “failed to seek and maintain employment,” but sometimes worked for cash, which was not traceable. According to the report, Pettaway often wore “large diamond stud earrings” to his office visits and, if he was able to afford those, should be held accountable to paying off his restitution fines.

The probation officer reported that Pettaway sometimes failed to show up for his visits with her. Pettaway explained that he missed his April 2010 meeting because of confusion about his graduation date from a trade school he attended to learn medical billing skills. He was expected to graduate from that school in April 2010.

The probation officer did not recommend revoking Pettaway’s probation. Instead, she believed Pettaway could still benefit from probation, and recommended that Pettaway serve 30 days in county jail. She also recommended imposing drug counseling and drug testing requirements, along with reminders about meeting his probation obligations.

The probation officer testified somewhat differently at the September 9, 2010, revocation hearing. When asked by Pettaway’s lawyer whether, apart from the marijuana charge, Pettaway was in compliance with the terms of his probation, she said, “as far as reporting, he is.” Consistent with her earlier reports, she maintained that Pettaway was not in compliance when it came to paying back his victim or seeking employment. When defense counsel asked whether she knew Pettaway had been attending the medical billing program, she answered, “[t]owards the end he was.”

When defense counsel asked the probation officer what her recommendation was, the court interjected: “Not relevant. I could read the report, counsel. [¶] Next question. [¶] I have not seen a probation officer since the time that we have had this budget crisis

that did not recommend reinstatement of probation, that includes robbery on probation or the person commits another robbery and that incenses me, so I make my own determination in probation violations.” Defense counsel asked the court whether it was referring to Pettaway’s probation officer. The court replied, “I have no idea. Next question.”

Defense counsel then asked the probation officer whether she considered the minor nature of Pettaway’s recent offense and whether her recommendation might have differed had Pettaway been charged with robbery. The probation officer said she had considered the nature of the crime, and that if Pettaway had committed robbery instead, she would have recommended a prison term. When defense counsel asked why, the court again interjected, asking the probation officer if she would “recommend a prison term if he committed robbery and he’s on probation in this case?” When the probation officer answered yes, the court responded, “Really? [¶] Okay. Good. Next.”

Pettaway testified that he had paid \$4,150 in victim restitution. While on probation, he tried to find work but failed because he was a convict with no education. He instead went to medical billing school to better prepare himself to find work. He got A’s and B’s in his coursework there. While attending school, he was trying to take care of his grandmother and two kids, and was able to support them with county general relief funds. The court interjected again: “So let me get this straight: You didn’t make any money, so the county is supporting your kids and your grandmother is supporting your kids; right?” “You didn’t earn any money?” Pettaway answered that it had been difficult to find work. The court said, “So the answer to that is ‘yes,’ your grandmother and the taxpayers are taking care of your kids?” When Pettaway replied that he “still [had] to work with it,” the court said, “I see the difficulty we have.”

The prosecutor asked Pettaway whether he bought a pair of diamond earrings while on probation. Pettaway said he had the earrings long before then. The court asked why he had not sold the earrings to help pay for restitution. Pettaway answered, “No. Why would I sell it?” The court replied, “That’s what I figured.”

The trial court then revoked Pettaway's probation, and allowed Pettaway to speak. Pettaway said he had trouble sleeping after his grandmother and two uncles died and that he smoked marijuana to help him sleep. When he was arrested on the drug charge, he had less than \$5 worth of marijuana. The trial court said it believed Pettaway, but that he was going to prison because of the underlying conviction for inflicting serious injuries to his former girlfriend, not for the marijuana use. The marijuana conviction simply triggered the sentence Pettaway agreed to in case he violated the terms of his probation: "Let me just indicate he's not a candidate for law abiding. When they have death in the family, they mourn. If they can't sleep, they take sleeping pills. They don't go out there, smoke marijuana for a whole month and have marijuana in your possession. [¶] I don't believe that Mr. Pettaway is rehabilitated. He chooses a life of crime, unlawful conduct instead of leading a law-abiding life. That being the case, probation is revoked and terminated." Pettaway was then sent to prison to complete his 10-year sentence.

On appeal, Pettaway contends that Judge Ong abused his discretion because he rejected the probation officer's recommendation out of dislike for the probation department. He also contends that the trial court improperly imposed a second restitution fine under section 1202.4, subdivision (b).

## **DISCUSSION**

### **1. *The Probation Revocation Order Was Not An Abuse of Discretion***

A trial court may revoke probation if the interests of justice so require and if the court has reason to believe that the probationer has violated any of the conditions of his probation. (§ 1203.2, subd. (a); *People v. Urke* (2011) 197 Cal.App.4th 766, 772.) The substantial evidence burden of proof applies at probation revocation hearings, and we review the trial court's ruling under the substantial evidence standard of review. (*Urke*, at pp. 772-773.) The trial court has broad discretion and we give great deference to its ruling because probation is an act of clemency, not a right. The trial court's power to revoke probation is akin to its power to grant it, and we will not reverse an order revoking

probation unless the defendant shows abusive or arbitrary action. (*Id.* at p. 773.) We will reverse such an order in only an extreme case, and the defendant bears the burden of demonstrating an abuse of discretion. (*Ibid.*)

Pettaway contends that the trial court did not reject the probation officer's recommendation to keep him on probation with new conditions because of any evidence-based disagreement with that recommendation. Instead, Pettaway contends, the comments showed a generalized rejection of any recommendations from probation officers because the court believed the probation department routinely recommended probation out of budgetary concerns, regardless of how serious an offense had been committed while on probation. As a result, Pettaway argues, the trial court did not properly exercise its discretion.<sup>3</sup>

We share Pettaway's concerns about the trial court's comments because they reflect poorly on the integrity of the criminal justice system in two ways. First, someone learning of the comment might believe it was true and conclude that without regard to public safety, the probation department was recommending that probationers who commit even violent or serious crimes remain on probation solely out of budgetary concerns.<sup>4</sup> Second, that someone hearing a trial judge express such an opinion might conclude that a member of the bench had let his previous disagreements with probation officers' recommendations spill over into a personal opinion that caused him to predetermine his evaluation of future recommendations. We also observe that, to the extent the trial court was basing its sentencing decision on his dissatisfaction with probation reports in other cases, the trial court was improperly considering matters outside the record in this case.

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<sup>3</sup> Pettaway also suggests that the trial court's statement that it "could" read the probation report meant it had not read the report at all. We disagree. The report was signed by Judge Ong next to a statement that he had read and considered the report, and we interpret his comment to mean that he had done so.

<sup>4</sup> We express no opinion as to the validity of Judge Ong's assertion that probation officers had routinely recommended a reinstatement of probation for probationers who committed robbery while on probation.

Whatever our misgivings about the trial court's comments, they must give way to our role as circumscribed by the standard of review. Although the probation officer's report is designed to assist the court (Cal. Rules of Court, rule 4.411(d)), the court is free to disregard the probation officer's recommendation. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) If a probationer violated the terms and conditions of his probation, the trial court does not abuse its discretion by revoking probation. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.)

There is no dispute that Pettaway violated the terms and conditions of his probation because he was convicted of possessing marijuana. Although the small amount he possessed for solely personal use might well cause reasonable minds to differ as to whether revocation was proper, we cannot declare the trial court's ruling an abuse of discretion. This is especially so given Pettaway's spotty performance while on probation, including his failure to make all office visits, his concealment of and lies about his new drug arrest, and his apparent lack of diligence in pursuing either work or an education. Accordingly, we affirm the trial court's order revoking Pettaway's probation.<sup>5</sup>

## 2. *A New Restitution Fine Was Not Imposed*

When Pettaway was first sentenced and placed on probation in the underlying cohabitant battery case, the court imposed a \$200 restitution fine under section 1202.4, subdivision (b). At the probation revocation hearing, the trial court said Pettaway was to "pay restitution fine to the state" pursuant to the same section. The minute order from the revocation hearing includes that fine, along with the notation "previously imposed." The abstract of judgment includes one such fine. Pettaway contends that the trial court erroneously imposed a second fine under section 1202.4, which should be stricken. We disagree. Instead, the trial court was simply making sure that the fine originally ordered

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<sup>5</sup> Respondent contends we should deem the issue waived because Pettaway did not object to the trial court's comments or otherwise raise the issue below. (*People v. Downey, supra*, 82 Cal.App.4th at p. 910.) Given the nature of the trial court's comments, we choose to determine the issue on its merits.

continued to remain in effect. (*People v. Cropsey* (2010) 184 Cal.App.4th 961, 965; *People v. Chambers* (1998) 65 Cal.App.4th 819, 821-823.) There is no duplicate fine.

### **DISPOSITION**

The order revoking Pettaway's probation is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.