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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.

BRADFORD PATE,

Defendant and Appellant.

B276901

(Los Angeles County
Super. Ct. No. PA077323)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Lloyd M. Nash, Judge. Judgment affirmed; order vacated and remanded.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

In this tragic case, appellant Bradford Pate collided with two vehicles as he drove intoxicated on the wrong way of a highway in the early morning hours. He killed two passengers and seriously injured another. He pled no contest to six counts, including two counts of murder, and was sentenced to a term of 23 years to life.¹ The only issue in this appeal is whether the trial court properly ordered appellant to pay \$37,905 for the costs of towing and impounding his vehicle pursuant to Vehicle Code section 22655.5, subdivision (d). We conclude the award was an abuse of discretion. We will vacate it and remand for a new hearing.

DISCUSSION

As noted, appellant was sentenced to 23 years to life following his no contest plea. As part of that sentence, the parties stipulated to and the court awarded restitution for the three victims in the amounts of \$4,950.50, \$56,742.42, and \$18,921.86. The court also awarded \$10,000 to the former Victim Compensation Appeals Board. Finally, the court awarded \$37,905 to the California Highway Patrol (CHP).

At a hearing on the payment to the CHP, the prosecution requested the \$37,905 reimbursement for the CHP pursuant to Vehicle Code section 22655.5, subdivision (d) for the towing and storage of appellant's vehicle. The prosecutor offered to provide the breakdown of the cost of reimbursement, but it is not clear whether the court received it.² Defense counsel objected to the payment. He acknowledged the payment was discretionary with

¹ He had two prior arrests for driving under the influence.

² No documentation of the costs appears in the record on appeal.

the court, but he noted the defense never asked for the vehicle to be preserved, and he believed the fee was like a “third party contract” between the prosecution and the CHP for appellant to pay the fee.

The court imposed the fee, explaining, “Well, here’s the thing: I could order him to pay \$30 or \$30 million. The chances of anybody receiving anything are probably very minimal anyway, so it’s—I mean, we could fight over this. [¶] There is a code section, and the code section says if convicted to pay the cost of towing and storage of the vehicle. Pretty clear to me. I don’t know why I wouldn’t order that when it’s there, and besides, it’s not going to happen, in all likelihood, anyway. [¶] So in the old days when someone made license plates, which, by the way, they do not make anymore, they used to pay them 15 cents an hour, and they would take 8 cents an hour of it towards restitution. [¶] There’s not going to be any payments made to anybody. It’s just a judgment. That’s all.” The court finished: “Okay. \$37,905 ordered to the CHP to be paid by Mr. Pate.”

Both the minute order for the hearing and the abstract of judgment listed the fee awarded to the CHP along with the other “restitution” awarded pursuant to Penal Code section 1202.4, subdivision (f).

On appeal, appellant argues the \$37,905 award was actually “restitution” awarded pursuant to Penal Code section 1202.4. We disagree.³ Crime victims are entitled to restitution from a defendant pursuant to Penal Code section 1202.4 when

³ Because we conclude the fee was not a restitution award pursuant to Penal Code section 1202.4, we need not decide whether appellant forfeited his challenge to the fee for failing to object on that basis in the trial court, as respondent contends.

they have “suffered economic loss as a result of the defendant’s conduct.” (Pen. Code, § 1202.4, subd. (f).) “[V]ictim restitution is mandated by both the Constitution and [Penal Code] section 1202.4. [Citations.] The only discretion retained by the trial court in this regard is in fixing the amount of the award.” (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751.) In contrast, Vehicle Code section 22655.5, subdivision (d) grants discretion to the court to order reimbursement for the towing and storage costs for a vehicle involved in a crime. Nothing in the court’s remarks during the hearing suggested it was treating the award as victim restitution under Penal Code section 1202.4. To the contrary, the prosecutor sought the fee pursuant to Vehicle Code section 22655.5, subdivision (d) and everyone present at the hearing seemed to understand that was the applicable statute. While the minute order of the hearing and the abstract of judgment listed the fee under “restitution,” the court’s oral pronouncement at the hearing controls. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.)

Properly labeled reimbursement under Vehicle Code section 22655.5, subdivision (d), there is no dispute reimbursement was *available* under the statute. This provision applies when officers “remove a motor vehicle from the highway or from public or private property within the territorial limits in which the officer may act” if the officer has probable cause to believe the vehicle was either “used as the means of committing a public offense” or “the vehicle is itself evidence which tends to show that a crime has been committed or that the vehicle contains evidence, which cannot readily be removed, which tends to show that a crime has been committed.” (Veh. Code, § 22655.5, subsd. (a), (b).) In a prosecution for the crime involving a vehicle

impounded pursuant to those subdivisions, “the prosecutor may request, and the court may order, the perpetrator of the crime, if convicted, to pay the costs of towing and storage of the vehicle, and any administrative charges imposed pursuant to Section 22850.5.” (Veh. Code, § 22655.5, subd. (d).)

There is also no dispute the trial court retained discretion to order an award and determine the amount. We have found no cases setting guidelines for exercise of discretion in this context, but it suffices to say here that, as in other contexts, we review the court’s decision for abuse and will affirm unless it was arbitrary or capricious. (Cf. *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172-1173 [applying principles in victim restitution context].)

The court’s decision here was arbitrary for several reasons. First, it defies logic that appellant’s inability to pay would *justify* reimbursement. If the court truly believed he would never pay, it should have declined to award reimbursement at all. Second, the court’s assumption that appellant would never be able to pay was simply incorrect. There could be plenty of scenarios in the future when appellant might be able to pay. It was incumbent on the court to determine the proper amount for an award now in anticipation of those future scenarios, however unlikely. And third, the court was so focused on appellant’s presumed inability to pay it did nothing to verify the amount requested by the prosecutor. It appears the court rebuffed the prosecutor’s evidence of the expenses at issue, believing instead it “could order [appellant] to pay \$30 or \$30 million” because “[t]he chances of anybody receiving anything are probably very minimal anyway.” Had the court looked more critically at the request, it might have noted \$37,905 seems extremely high for towing and storage of a

vehicle. The accident occurred in June 2013 and the hearing on reimbursement occurred in November 2015, approximately 29 months later. That means the cost for towing, storage, and administrative fees amounted to \$1,300 *per month*. Perhaps the prosecution could have justified this amount to the trial court if put to its proof. But it was not. On this record, the court abused its discretion and remand is necessary for the court to conduct a new hearing pursuant to Vehicle Code section 22655.5, subdivision (d).

DISPOSITION

The order awarding \$37,905 pursuant to Vehicle Code section 22655.5, subdivision (d) is vacated and the matter is remanded for a new hearing consistent with this opinion.⁴

In all other respects, the judgment is affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

⁴ In any future minute orders and abstract of judgment, the trial court is to avoid labeling this reimbursement as “restitution.”

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