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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KELLY ELTON BUZBY, Defendant and Appellant.	D049153 (Super. Ct. No. SCD192261)

APPEAL from a judgment of the Superior Court of San Diego County, George W. Clarke, Judge. Affirmed as modified.

Kelly Elton Buzby entered negotiated guilty pleas to four counts of lewd and lascivious conduct with a minor under the age of 14 years. (Pen. Code, § 288, subd. (a).)[1] He admitted substantial sexual conduct in three of the crimes. (§ 1203.066, subd. (a).) The court sentenced him to a stipulated 14 years in prison: the eight-year upper term on one count with a consecutive full six-year middle term on a second count. It imposed concurrent terms on the two remaining counts and ordered Buzby to pay victim

restitution of $1,366 to the San Diego Police Department under section 1202.4, subdivision (f) and a parole revocation restitution fine of $2,800. Buzby contends the trial court erred by ordering him to pay $1,366 victim restitution to the San Diego Police Department.

FACTS

When Buzby's daughter was six years old, Buzby sexually molested her. His acts included touching her vagina, touching her breasts, forcing her to masturbate him, orally copulating her, forcing her to orally copulate him and attempting to penetrate her vagina with his penis.

Under the heading "Victim Information" in the probation report, the San Diego Police Department reported it spent $1,366 during the investigation of Buzby's alleged crimes: $275 for examination of Buzby and $1,091 for interviewing, examining and photographing the victim. At the sentencing hearing the court asked if Buzby agreed to restitution of $1,366, and Buzby responded, "Yes."

DISCUSSION

The parties agree that generally a defendant who does not object in the trial court to a discretionary sentencing decision of the court waives challenge to the decision on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.) The parties agree that an exception to this rule exists when the challenged term of the sentence is unauthorized or

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1 All statutory references are to the Penal Code.

beyond the court's jurisdiction. (*Id*. at p. 354.) The parties agree that a sentence is unauthorized when it "could not be imposed under any circumstances in the particular case." (*Ibid*.) Finally, the parties appear to agree that victim's restitution for costs police incur during investigation of a crime is unauthorized. Although the People recognize that the $1,366 victim restitution the court ordered Buzby to pay appears to be for investigation costs, they argue that they were precluded from showing otherwise because Buzby agreed to pay the $1,366.

If payment of the $1,366 victim restitution to the San Diego Police Department was a stipulated term of the plea agreement, the People would be correct. Normally, a specified term of a sentence agreed to as part of a plea agreement is not within the exception to the waiver principle. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Here, the parties stipulated to a specific sentence of 14 years in prison in exchange for entry of the guilty pleas but did not stipulate to payment of victim restitution for expenditures the police incurred. Payment by Buzby of $1,366 victim restitution was not a term of the plea agreement. If payment of victim restitution to the police is otherwise unauthorized, Buzby did not waive challenge to the order by not objecting to it in the trial court.

Section 1202.4, subdivision (f) provides in part, "[I]n every case in which a *victim* has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the *victim or victims* in an amount established by court order, based on the amount of loss claimed by the *victim or victims* or any other showing to the court." (Italics added.) The People agree that victim restitution can be

awarded to a governmental agency only when it is a direct victim of a crime. (§ 1202.4, subd. (k)(2); *People v. Torres* (1997) 59 Cal.App.4th 1, 4.) Apparently recognizing the court was unauthorized to order Buzby to make victim restitution to the police department for investigation costs (see *id*. at pp. 4-5), the People argue they were precluded from showing they were the direct victim of Buzby's crimes because he agreed to pay the restitution. However, they do not claim the $1,366 expressed as investigation costs in the probation report is not the same $1,366 the court ordered Buzby to pay as victim restitution. Rather, they argue that to allow Buzby to challenge on appeal the $1,366 victim restitution absent objection in the trial court puts "the cart before the horse and renders the waiver doctrine meaningless." However, the People's position would bar challenge to every unauthorized sentence not objected to in the trial court and eliminate the exception stated in *People v. Scott, supra*. To follow the principle expressed in *People v. Scott*, we determine whether the sentence was unauthorized under any circumstances in the particular case.

We are limited to the record before us. (*People v. Jackson* (1964) 230 Cal.App.2d 485, 490; *People v. Roberts* (1963) 213 Cal.App.2d 387, 394.) On the record before this court, it appears that the court ordered Buzby to pay victim restitution to the San Diego Police Department for investigation costs and not for direct victim restitution. This order resulted in an unauthorized sentence. (*People v. Torres, supra,* 59 Cal.App.4th 1, 4-5.)

DISPOSITION

The order that Buzby pay the San Diego Police Department $1,366 victim restitution is stricken and the trial court shall so advise the Department of Corrections. The judgment is otherwise affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.