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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTIN NUNEZ MARTINEZ, Defendant and Appellant.	H029044 (Santa Clara County Super. Ct. No. CC461907)

Defendant Martin Nunez Martinez was placed on probation after pleading guilty to auto theft. Among the orders accompanying his placement on probation were directives to pay a restitution fine and various other assessments. Defendant was subsequently charged with violating probation in that, among other things, he had failed to pay the restitution fine. He admitted the violation, and the court reinstated probation while ordering that defendant make payments of $100 per month against the outstanding assessments. On appeal, defendant contends that the order for monthly payments was erroneous because it violated a plea agreement, included amounts that could not be made conditions of probation, and included amounts that were not yet due. We detect no error, and affirm the order reinstating probation.

BACKGROUND

On August 1, 2004, defendant attempted to steal a van, but only managed to drive 60 feet before it stalled. Its understandably irate owner, assisted by a friend, pulled defendant from the van and detained him until police arrived. Defendant, whom police believed to be a transient, told them he needed a car to drive around town. He later told a probation officer that at the time of the theft he was living under a bridge. He said he took the van in hopes of selling a vacuum cleaner and tools inside it, then using the proceeds to buy food and clothes.

On August 4, 2004, an information was filed charging defendant with auto theft in violation of Vehicle Code section 10851, subdivision (a). On August 9, 2004, defendant pleaded guilty to the charge on the condition that he would receive no state prison time. On September 3, 2004, the court suspended imposition of sentence and placed defendant on probation, ordering him to serve 150 days in the county jail, of which 50 were already deemed served. It declared him ineligible for any form of early release, imposed a search condition, directed him to seek gainful employment, education, or vocational training, directed him to avoid contact with the victim, and told him not to associate with any members of a criminal street gang. It ordered him to report to the probation department within three days of his release from custody, and referred him to the revenue department "for determination as to [his] ability to pay fines and fees." The court also imposed several charges: "a restitution fine of $330.00, court security fee of $20.00, a justice booking fee payable to the [C]ity of San Jose [of] $140.50, investigation fee of $450.00, [and] supervision fee of $42.00 a month commencing upon [his] release from custody."

On April 7, 2005,[1] a probation officer filed a petition to modify the terms of probation, asserting as "circumstances of violation" that defendant (1) "failed to report to

[1] The petition is file-stamped "April 7, 2004," but shows an "approved" date of "3/25/05" and seeks a hearing date of April 7, 2005. Moreover it references the docket number for the information in this case, which was not filed until August 4, 2004.

the Probation Department [within] three days upon release from custody"; (2) "failed to make a payment towards the outstanding Restitution Fine to the Department of Revenue, leaving a balance of $330.00"; and (2) "failed to provide proof of education, vocational training or employment."

A bench warrant issued on April 7, 2005, and defendant was brought before the court on May 5, 2005. At that time defendant told the court that he had reported to probation about two days after his release from custody, and had thereafter attempted to communicate with his probation officer as instructed, but was unable to reach her.[2] Pronouncing this a "pretty credible" account, the court suggested that defendant be released for time served if he would admit a probation violation consisting of the failure to make payments.[3] Speaking to defendant, the court said, "[I]f you want to admit the circumstances of your violation that you failed to make your payments on the timely basis, I'll release you for the time you've already served and order you to report to probation and work out a reporting relationship with them *and a payment plan*." (Italics added.) Defendant thereupon admitted that he had "failed to make payments as required by [his] conditions of probation." The court ordered defendant released and directed him to report to probation within three days. The court then stated, "I'm going to set

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[2] Defendant said, "I went up to the main desk there in the lobby, they checked my name on a list and gave me a phone number to call which was suppose[d] to be my P[robation] O[fficer]. I called later, I called several times and left messages but never heard anything back." He said he did not remember the name of the officer, and that all his paperwork was at home, but that "I know it was a woman."

[3] The court appeared to address this suggestion to the prosecutor in the first instance, saying "I think you [*sic*] ought to let him off for time served, tell him to report to probation." Unless this is a mistranscription, it suggests that before offering the proposed disposition to defendant, the court sought assent from the prosecutor. We further infer in support of the judgment that such assent was given, albeit nonverbally. This answers respondent's contention that the seeming lack of prosecutorial involvement precludes finding a plea bargain.

payments. He has, what, $330 to pay?" The prosecutor asserted that defendant's "entire balance" was "$2362."[4] Defense counsel objected that this sum included "civil obligations that the Court need not and ought not to concern itself with." The court declared that "[p]ayments are set" at $100 a month beginning two months hence, on July 15, 2005. Counsel again objected that this amount included "sums that are not conditions of probation," and that there had been no assessments "that would indicate a need for a hundred dollars a month over a period of several years." The court reaffirmed that "[p]ayments are $100 a month starting on July 15th."

Defendant filed this timely appeal.

DISCUSSION

Defendant asserts that the court's "imposition of a payment schedule of $100 per month" constituted error in several respects. First he contends that it violated a plea bargain under which he admitted a violation in exchange for, among other things, a referral to probation authorities to "work out . . . a payment plan" based upon his ability to pay. The court breached this agreement, he contends, by "set[ting] an arbitrary payment plan of $100 per month without any consideration of [defendant's] ability to pay this amount . . . ." Second he contends that many of the fees and assessments were not, and could not properly be, conditions of probation, and therefore could not properly be included in the court's calculation of a payment schedule. Finally he contends that the schedule included sums that were payable on a monthly basis, and therefore had not yet accrued when the court made its order.

Pervading defendant's arguments is the supposition that the "payment schedule" set by the court was a condition of probation, such that failure to comply with it could

[4] This figure comes within $6.50 of our own estimate of the total amount defendant would eventually be obligated to pay, i.e., one-time charges of $940.50, plus monthly charges of $1,428.00 (34 charges of $42 each), for a total of $2,368.50.

itself constitute a violation of probation. If this were true, we would agree with defendant that the order under review was to that extent invalid, because payment of the costs of probation cannot be made a condition of probation. (*People v. Hart* (1998) 65 Cal.App.4th 902, 906-907.) If the order before us violated that rule, the remedy would be to modify it to provide that payment of these charges is not a condition of probation. (*Id.* at p. 907.)

Here, however, it is difficult to see the application of this rule because the court never purported to include defendant's payment obligations in the conditions of his probation.[5] Indeed, the court did not even express the payment schedule as an order. It first stated an intention to "set" payments; it then said that statements were "set" in the specified amount; and finally it said, "Payments are $100 a month starting on July 15th." Assuming this was an order, and not merely a hortatory device to motivate defendant, it still cannot be supposed that the court intended compliance with the order to be a condition of probation. On the contrary, given the impropriety of including some of these amounts in the conditions of probation, the presumption of correctness requires us to presume that the payment schedule was *not* a condition of probation.[6]

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[5] Of the various charges assessed against defendant, two were required by statute to be conditions of probation: the $330 restitution fine (Pen. Code, § 1202.4, subd. (m)), and the $140.50 booking and processing fee (Gov. Code, § 29550.1; see §§ 29550.2, 29550, subd. (d)(2)). Assuming this mandate alone gave those charges the status of probation conditions, it might still be questioned whether a defendant can be said to violate such a condition if he has never been *told* that it is a condition. Here the issue does not arise because the petition for modification alleged, and defendant admitted, that failure to pay the $330 was a probation violation.

[6] It follows that the court's payment schedule intermingled amounts whose payment was a condition of probation and those whose payment was not (and could not be). This could muddy the waters with respect to the future allocation, and hence the effect on defendant's probation status, of payments, failures to pay, or partial payments. If defendant makes the first four $100 payments, has he satisfied the condition that he pay a $330 restitution fine? It appears that the trial court can avoid most such problems by explicitly ordering, as part of any payment schedule, that sums first due thereunder are

This conclusion is fatal to defendant's contention that the court violated a plea bargain by failing to refer him to the probation department for determination of his ability to pay. Assuming there was a bargain containing such a term, a variance from it would have to be " 'significant' in the context of the plea bargain as a whole" before it could be held to "violate the defendant's rights." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) Failure to refer defendant to the probation department for a determination of his ability to pay might indeed be significant if the payment schedule "set" by the court in violation of that undertaking actually exposed defendant to a charge of violating probation. But as we have observed, the schedule here cannot be supposed to have had that effect. At most it constituted an order; it may have been something even less. Nor is there any reason to suppose that its effect on defendant was irrevocable or otherwise prejudicial. If the schedule proves unduly burdensome, defendant can seek to modify it. (See Pen. Code, § 1203.3.)

The gist of the plea bargain as a whole was that defendant would be released from confinement forthwith on the conditions that (1) he report to probation authorities to arrange his ongoing submission to their supervision, and (2) a payment schedule be developed. Surely the chief appeal of this proposal to defendant was that it produced his immediate release from confinement. Given that the court-set payment schedule was presumptively modifiable and would not support a revocation order in any event, it simply cannot be said that it marked a significant departure from the plea bargain as a whole.

We also accept for purposes of analysis defendant's contention that the court could not require him to pay assessments that had not yet accrued. However we do not believe

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attributable, and those first paid are allocated, to charges whose payment is a condition of probation. Only after those sums have been fully paid (and the corresponding conditions performed) will further payments be allocated to the remaining charges.

the court's order had that effect. The only unaccrued assessments were future monthly charges of $42 for probation supervision. At the time of the order "setting" defendant's payments, he already owed $940.50 in one-time assessments and several months' worth (we estimate six) of supervision charges, for a total balance, by our estimate, of $1,192.50.[7] By the time of his first scheduled $100 payment (July 15, 2005), the accrued balance would have grown to $1,318.50. At $100 per month, with ongoing accruals of $42 per month, defendant would not pay down his balance to zero until about April 2007, five months before the scheduled end of his probation. At that point, continued payments of $100 (rather than the $42) would indeed be subject to the objection defendant raises here. But it is impossible to conclude on this record that the order will in fact produce that effect. If it does, defendant will have an appropriate remedy in the trial court; he may seek a modification of the payment schedule. On the present record the objection is hypothetical, and cannot sustain a claim of error.

[7] The present record does not permit precise calculation of these dates and figures, primarily because it fails to disclose the date of defendant's release from his initial confinement, which is when the $42 monthly payments began to accrue. We have estimated that date as November 9, 2004, based on the fact that defendant had 100 remaining days to serve as of September 3, 2004, and on the assumption that he would earn all available credits against that time, thus being required to serve only 67 more days. To the extent this or any other of our calculations do not precisely reflect the accounting details of defendant's case, we remain confident that the essential point is correct—he will have to make $100 payments for a long time before he is in danger of paying charges in advance of their accrual.

DISPOSITION

The order appealed from is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.