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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

No. _____

Plaintiff and Respondent,

Court of Appeal Case No.
A135733

v.

Sonoma County
Superior Court
Case No. SCR-530837

WILLIAM J. FORD,

Defendant and Appellant.

Appeal from the Sonoma County Superior Court
Honorable BRADFORD DEMEO, Judge

**PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE
COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION
THREE, AFFIRMING THE ORDER OF THE SUPERIOR COURT**

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PETITION FOR REVIEW

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO
THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA:

Appellant WILLIAM J FORD petitions this court for review following
the decision of the Court of Appeal, First Appellate District, Division Three,
filed in that court on July 17, 2013. A copy of the decision of the Court of
Appeal is attached hereto as **Exhibit A**.

QUESTION PRESENTED

1. Does Penal Code section 1202.46 grant the trial court never-ending jurisdiction to modify restitution even after the expiration of probation, and despite the express language of Penal Code section 1203.3, which authorizes modification of the conditions of probation only during the probationary term?

NECESSITY FOR REVIEW

A grant of review and resolution of this issue by this court is necessary to settle an important question of law, involving the rights of probationers who successfully complete probation and the interpretation of Penal Code section 1202.46, which has not been held applicable where the defendant was granted probation rather than sent to state prison.

SUMMARY OF ARGUMENT

At the time of Mr. Ford's sentencing, the trial court ordered victim restitution in an amount in excess of \$12,000 and granted Mr. Ford probation. By operation of law, payment of all restitution fines and orders become conditions of probation pursuant to Penal Code section 1202.4(m). Thereafter, modification of the restitution order is authorized under Penal Code section 1203.3 (b)(5), which allows modification at any time during the

term of probation. Consequently, when a victim requests additional restitution, a modification of probation is sought through the trial court. Here, the Sonoma County Probation Department contacted Mr. Ford and attempted to modify his probation. After multiple delays, primarily due to the victim's failure to furnish appropriate accounting records, the court failed to modify the restitution amount prior to the expiration of Mr. Ford's probation.

The People argued that the original sentence, which contained both a restitution fine and a restitution amount payable directly to the victim, was invalid. Secondly, the People argued that Penal Code section 1202.46 provides authority for a trial court to impose an additional restitution order at any time, regardless of the expiration of probation. Mr. Ford disagreed, and argued that the plain language of Penal Code section 1203.3 brings the trial court's jurisdiction to modify probation to an end when the probationary term expires. The trial court determined that it still had jurisdiction to act and issued an additional restitution order after probation had terminated.

Mr. Ford contends that after termination of his probation, any act by the court not supported by either statute or decisional authority is an act in excess of jurisdiction, which is therefore invalid. Mr. Ford did not consent to the court's act of ordering an additional restitution amount. Rather, at the first opportunity, through defense counsel, Mr. Ford challenged the court's

jurisdiction and has refrained from engaging in any further litigation of this issue before the trial court.

After argument was heard in Division Three of the First District of the Court of Appeal concurred with the trial court and held that Penal Code section 1202.46 authorizes the order of additional restitution after the termination of probation. In light of the unanimous opinion, no Petition for Rehearing was filed.

STATEMENT OF THE CASE

Procedural History

Mr. Ford was involved in a motor vehicle accident resulting in injury on February 2, 2008. He failed to stop his vehicle at the scene of the accident or to provide the identification and vehicle registration information required by law. On August 21, 2008, defendant William J. Ford entered a plea of no contest to one felony violation of Vehicle Code Section 20001(a). On October 9, 2008, imposition of sentence was suspended and Mr. Ford was granted formal probation with standard terms for 36 months. Restitution was imposed in the amount of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (**\$12,465.88**) for victim's medical expenses. Further restitution was reserved.

On May 7, 2010, in a letter to the appellant, the Sonoma County Probation Department informed Mr. Ford that he was required to pay

restitution in the amount of Two Hundred Eleven Thousand Dollars (**\$211,000**), or Thirteen Thousand One Hundred Eighty-Seven Dollars and Fifty Cents (**\$13,187.50**) per month. In response, Mr. Ford exercised his statutory right to a hearing on this proposed modification of his probation terms.

The hearing date was initially set September 24, 2010. Thereafter, the hearing date was re-set six times between October 2010 and April 2011. After April 1, 2011, the court and counsel met a further five times before once again re-setting the date of the hearing for August 26, 2011. However, on August 19, 2011, this date was again vacated and the People stipulated that Mr. Ford had requested a timely Restitution Hearing. After further court appearances, the hearing date was re-set for October 5, 2011, four days before Mr. Ford's probation was due to expire. Prior to October 5, 2011, the Probation Department, in the form of an Order Modifying Probation, recommended the aforementioned modification of the conditions of Mr. Ford's probation to the trial court. The proposed Order also contained a specific request that formal probation be extended for 24 months "in order to allow him to pay the ordered restitution." A copy of the letter and proposed Order were attached as an Exhibit to the Appellant's Opening Brief (hereinafter "AOB Exhibit _") as Exhibit A.

At the time set for hearing on October 5, 2011, Mr. Ford stipulated to

an extension of his probation. However, the court only extended probation until November 2, 2011. On October 26, 2011, Mr. Ford once again agreed to a further extension of his probation by another 30 days. On November 2, 2011, all parties settled on extending Mr. Ford's probation until March 30, 2012.

The restitution hearing began on January 27, 2012, and in response to rebuttal, Ms. Jennings was ordered to provide further documents to defense counsel. The hearing was continued until March 1, 2012, at which time the People undertook further direct examination of Ms. Jennings. However, when a subpoenaed defense witness, Officer E. Rhodes of the Santa Rosa Police Department, failed to appear on this second date, the hearing was continued until March 8, 2012. Once again, despite defense counsel's efforts, on March 8, 2012, the witness failed to appear. As a result, Judge DeMeo issued an Order to Show Cause to Officer Rhodes. This Order was vacated the following day after Officer Rhodes appeared before the court in chambers. The hearing was re-set for March 27, 2012.

On March 27, 2012, the hearing was once again continued, this time due to the unavailability of the Deputy District Attorney assigned to the case. A Stipulation and Order to this effect were attached as AOB Exhibit B. The hearing date was re-set for April 6, 2012. No further request or orders regarding probation were forthcoming from either the trial court of the

Deputy District Attorney. As previously ordered by the trial court in early November, Mr. Ford's probation terminated on March 30, 2012.

On April 6, 2012, defense counsel made a special appearance on behalf of the Appellant solely to contest the trial court's continuing jurisdiction to enter any order relating to Mr. Ford and his now-terminated probation. During the April 6, 2012 court appearance, the Deputy District Attorney agreed that Mr. Ford's probation had not been extended and consequently had terminated, as indicated on the court docket, a copy of which is attached as AOB Exhibit C. The court asked both parties to brief the issue and set a further hearing date of May 17, 2012.

Both parties filed timely briefs and the hearing took place, as scheduled, on May 17, 2012. The Appellant, who had been present for the multitudinous previous hearings, was not present. The Court concluded it had jurisdiction over the matter and ordered restitution in the amount of Two Hundred Seventy-Five Thousand Seventeen Dollars (**\$275,017**).

Defense counsel requested an opportunity to research the available options for the Appellant. Although a briefing schedule and further hearing date were initially set, no further proceedings took place in the trial court. On June 15, 2012, the Appellant filed a timely Notice of Appeal.

Statement of Facts

The underlying criminal charges in this case stem from an accident that occurred on February 2, 2008. In light of the guilty plea entered by Mr. Ford, a brief summary of the facts, as stated in the original traffic collision report authored by Officer Eric Rhodes of the California Highway Patrol, is provided for background information only.

At approximately 8:00 p.m., Ms. Elaine Jennings, accompanied by her dog, began crossing B Street in Santa Rosa, California. As it was raining heavily, Ms. Jennings decided to cross the street without using a crosswalk. Although she saw Mr. Ford's vehicle approaching, she continued crossing the street, mistakenly believing he had seen her. The car struck both Ms. Jennings and her dog. Ms. Jennings' left leg was broken in multiple places. She also sprained her left shoulder, chipped a tooth, and suffered several bruises and abrasions.

Mr. Ford, whose license was suspended, was stopped by a patrol car on 7th Street, just east of Orchard Street. In his statement to the officer on scene, Mr. Ford explained he had seen a dog fly up onto his hood but after he stopped at a subsequent traffic light started to realize the damage appeared to be too substantial to have been caused by a dog. He added he was looking for an opportunity to turn around when he was stopped. Although the investigating officer concluded Ms. Jennings caused the collision by crossing

between two controlled intersections outside of a crosswalk in violation of Vehicle Code section 21955, he also recommended that Mr. Ford be charged with felony "hit and run", a violation of Vehicle Code section 20001(a) and a misdemeanor violation of driving on a suspended license pursuant to Vehicle Code section 14601.1 (a).

Mr. Ford entered a plea of no contest on August 21, 2008 and was subsequently sentenced to formal probation for 36 months. Multiple conditions of probation were imposed, including a six-month county jail sentence. The Court also ordered Victim restitution of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (**\$12,465.88**) for medical expenses.

In May 2010, approximately nineteen months after the sentencing, Mr. Ford's probation officer began the process of modifying the probation conditions by asking Mr. Ford to pay an additional Two Hundred Eleven Thousand Dollars (**\$211,000**) as restitution for losses Ms. Jennings claims were suffered by her small business enterprise during 2008 and 2009 as a result of her injuries. During the partially completed hearing process, Ms. Jennings testified about various profit and loss calculations and taxation issues. Hence, the final amount of the May 17, 2013 court order was significantly higher (at **\$275, 017**) than the initial figure requested.

ARGUMENT

I.

MR. FORD WAS GRANTED PROBATION BY THE COURT AND THEREFORE ALL RESTITUTION FINES AND ORDERS MUST BE CONDITIONS OF PROBATION

Following the passage of Proposition 8 in 1982, the Legislature was required to adopt implementing legislation to enact what was known at the Victim's Bill of Rights. (*People v. Giordano* (2007) 42 Cal. 4th 644, 652-653.) Although it provided initially for mandatory restitution fines and restitution as a condition of probation, the early statutes did not "either require[e] or authoriz[e] trial courts to order defendants who were convicted of crimes but were not given probation to make restitution to any of the victims of their crimes." (*Ibid.*) This was remedied in 1986 by the addition of Government Code Section 13967, which provided for victim restitution in probation-denied cases. (*Ibid.*) By the mid-1990s, the state's restitution scheme was consolidated into Penal Code Section 1202.4 and the restitution sections of Government Code Section 13697 were deleted. (*Id.* at p. 653.) (All further references are to the Penal Code unless stated otherwise.) Of particular import to the case before the court is section 1202.4 (m), which provides:

In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation. Any portion of a restitution order that remains unsatisfied after a defendant is no longer on probation shall continue to be enforceable by a victim pursuant to Section 1214 until the obligation is satisfied.

(§ 1202.4 (m).)

At the sentencing on October 9, 2008, Mr. Ford was ordered to pay a restitution fine of Four Hundred Forty dollars (**\$440**) and restitution of Twelve Thousand Four Hundred Sixty-Five Dollars and Eighty-Eight Cents (**\$12,465.88**) directly to the victim. (See AOB Exhibit C.) Therefore, by operation of Section 1202.4 (m), payment of both of these imposed amounts became conditions of Mr. Ford's probation. Further confirmation of this is derived from the fact that it was the Probation Department who instigated this proceeding by attempting to both modify and extend Mr. Ford's probation, as shown on the Order Modifying Probation. (AOB Exhibit A.)

Thus, in a case where probation has been granted, restitution is no longer a sentencing issue, but rather becomes a condition of probation.

II.

SECTION 1203.3 IS THE SOURCE OF THE COURT'S AUTHORITY TO MODIFY PROBATION: WHEN PROBATION TERMINATES, THE COURT NO LONGER HAS ANY JURISDICTION TO MODIFY THE PREVIOUSLY-IMPOSED CONDITIONS OF PROBATION

It is axiomatic that an order revoking or modifying probation must be made during probation. (*People v. White* (1982) 133 Cal. App. 3d 677, 682-683; *In re Daoud* (1976) 16 Cal. 3d 879, 882; *People v. DePaul* (1982) 137 Cal App 3d 409, 412; see also, *In re Griffin* (1967) 67

Cal.2d 343, 347; *People v. Smith* (1970) 12 Cal.App.3d 621, 625; *People v. Blakeman* (1959) 170 Cal App 2d 596; *People v. Blume* (1960) 183 Cal App 2d 474.) Where no such order is made, “the probationary period terminates automatically on the last day. [Citations.] If no order of modification or revocation is made before the end of the period of probation delineated in the original or any subsequent probation grant, the court has no authority or jurisdiction over the defendant. [Citation.]” (*People v. White, supra*, at p. 682-683.)

The statutory authority for making changes to a previously-imposed grant of probation is found in section 1203.3, which states “[t]he court shall have authority at any time *during the term of probation* to revoke, modify, or change its order of suspension of imposition or execution of sentence. (§ 1203.3 (a).) (Emphasis added.) Further, modification of restitution is specifically addressed in section 1203.3 (b)(4) & (5), which provides:

(4) The court may modify the time and manner of the term of probation for purposes of measuring the timely payment of restitution obligations or the good conduct and reform of the defendant while on probation. The court shall not modify the dollar amount of the restitution obligations due to the good conduct and reform of the defendant, absent compelling and extraordinary reasons, nor shall the court limit the ability of payees to enforce the obligations in the manner of judgments in civil actions.

(5) Nothing in this section shall be construed to prohibit the court from modifying the dollar amount of a restitution order

pursuant to subdivision (f) of Section 1202.4 at any time *during the term of the probation.*
(*Ibid.*) (Emphasis added.)

Furthermore, *In re Daoud, supra*, 16 Cal. 3d 879 also explains once lost, “a court cannot revive lapsed jurisdiction by the simple expedient of issuing an order nunc pro tunc. [Citation.]” (*Id.* at p. 882.) And, failure to act within the term of probation is judicial, not clerical error, hence “it is well settled that judicial error cannot be corrected once jurisdiction has expired. [Citations omitted.]” (*Ibid.*)

Hence, while he was on probation, the court had jurisdiction over Mr. Ford, and was statutorily empowered to modify the conditions of his probation. However, the authority provided by section 1203.3 came to an end on March 30, 2012, when Mr. Ford’s probation terminated automatically, at which point the court lost the jurisdiction to make further orders relating to this case. As stated in *In re Daoud*, this was judicial not clerical error, and therefore the court cannot issue an order nunc pro tunc to overcome the lapse in jurisdiction. Moreover, as stated in the attached Declaration of Chris P. Andrian (AOB Exhibit D) the continuing and lengthy delays in this case were primarily the result of the People’s inability to provide promised documents relating to Ms. Jennings’ business finances. Indeed, the court refused to set a hearing between April 2011 and August 2011

due to the lack of documentation. Meanwhile, Mr. Ford made himself available at numerous court dates, abided by the court's orders, and continued through his probationary period without incident. As stipulated to by the People, when the end of his probation was looming, Mr. Ford made a timely request for the hearing to be set prior to the original probation termination date.

Thus, Mr. Ford is no longer subject to probation and therefore there is no mechanism through which the court can make valid orders modifying any previously imposed terms and conditions of probation.

III.

THERE IS NO PRECEDENT TO SUPPORT THE PEOPLE'S ARGUMENT THAT PENAL CODE SECTION 1202.46 AUTHORIZES THE TRIAL COURT TO MODIFY THE TERMS OF PROBATION AFTER PROBATION HAS TERMINATED

During oral argument before the court on April 6, 2012, Deputy District Attorney Hammond claimed that Penal Code section 1202.46 granted the court never-ending jurisdiction to modify a restitution order at any time, even many years, after probation ended. A review of the history and case law shows that this interpretation is contrary to the legislative purpose and use of section 1202.46.

A. The History of 1202.46

In 1999, the Legislature enacted Senate Bill 1126 (SB 1126), the purpose of which was to convert the provisions of a Department of

Corrections (DoC) pilot project into permanent legislation. (Legis. Counsel's Dig., Sen. Bill No. 1126 (1999 Reg. Sess.). The DoC had developed a system of allowing inmates to appear in court via audio-video communications rather than personally. (*Ibid.*) Enactment of SB 1126 permanently authorized this program under section 1202.41. Similarly, the preceding legislation had also established a pilot program that enabled the State Board of Control to collaborate with the courts regarding the amendment of restitution orders. (*Ibid.*) This pilot included allowing the State Board of Control to determine if the cost of holding a hearing was justified, even where the hearing had not been waived. (*Ibid.*) The bill therefore also sought to specifically provide that restitution hearings could now be conducted using audio-video communications. In addition, section 1202.41(c) contains the mandate that the other provisions within the bill would not be construed as prohibiting "an individual or district attorney's office from independently pursuing the imposition or amendment of a restitution order that may result in a hearing, regardless of whether the victim has received assistance." (*Ibid.*) In other words, the bill was focused on dealing with a variety of problems relating to the ability to ensure defendants were able to appear in court when they were already in the custody of Department of Corrections.

This interpretation of the legislative history is further supported by the California Judges Benchguide 83, which provides guidance on how section

1202.46 allows a restitution order after sentencing when the initial amount of restitution is uncertain. (Cal. Judges Benchguide 83: Restitution (CJER 2012), §83.73, p. 83-54.) In particular, the attached 'judicial tip' explains this section's relationship to the problems of transporting inmates from the prison system.

The next provision of SB 1126 ultimately provided the language for section 1202.46, which reads as follows:

Notwithstanding Section 1170, when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined. Nothing in this section shall be construed as prohibiting a victim, the district attorney, or a court on its own motion from requesting correction, at any time, of a sentence when the sentence is invalid due to the omission of a restitution order or fine without a finding of compelling and extraordinary reasons pursuant to Section 1202.4.

(Ibid.)

Section 1202.46 must first be read then in conjunction with section 1170, which is the statute from which the court derives its authority for determinate sentencing. Its provisions provide the court with authority to recall the original sentence and re-sentence the defendant. (§ 1170(d).) However, this authority is limited to a 120-day period after the original sentence. *(Ibid.)* Thereafter, under section 1170, the court has no authority to amend the sentence once 120 days have

transpired. Where a defendant has been sentenced to state prison, a restitution order must be made at sentencing. (§ 1170(d).) And because there is no condition of probation, which can be used as a vehicle for modifying restitution, any amendment of restitution where the defendant was committed to state prison can only be achieved by a change to the sentence. Hence, without section 1202.46, the court would lose jurisdiction to re-sentence the defendant after the first 120 days of incarceration.

When the whole bill is considered, the resultant statutes were clearly intended to provide the court with authority to act with regard to restitution when the defendant was imprisoned. As discussed at length above, Mr. Ford was granted probation. Hence, section 1202.46 is not applicable to his situation.

B. The Case Law

After an extensive review of available case law, there are only six published cases that discuss section 1202.46. The first five cases are summarized as follows:

1. *People v. Giordano* (2007) 42 Cal. 4th 644, 650-651: The defendant was serving a sentence in state prison. The Court of Appeal affirmed defendant's sentence as modified by the restitution order. It agreed with the trial court's determination that Penal Code section 1202.46 granted the trial court jurisdiction to consider the request for restitution seven months after defendant was sentenced. (*Giordano* at p. 650-651.)

2. *People v. Turrin* (2009) 176 Cal. App. 4th 1200: The defendant was serving a sentence in state prison. The trial court had lost jurisdiction to modify defendant's restitution fines; thus, an order denying defendant's motion to modify restitution fines was not appealable post-judgment order.

3. *People v. Brown* (2007) 147 Cal. App. 4th 1213: The defendant was serving a sentence in state prison. The only reference to 1202.46 relates to the court's authority to imposing a restitution order after the initial sentencing. This case involved withdrawal of plea after the restitution amount was altered from the original agreement.

4. *People v. Zackery* (2007) 147 Cal. App. 4th 380: The defendant was serving a sentence in state prison. The issue is the procedure to be adopted when the court, under the authority of 1202.46, corrects a what is deemed a clerical error at the original sentencing.

5. *People v. Moreno* (2003) 108 Cal. App. 4th 1: The defendant was serving a sentence in state prison. This case stands for the proposition that under 1202.46, a sentence is considered invalid if the court at the initial sentencing had neither ordered restitution nor found "compelling and extraordinary reasons" for ordering less than full restitution.

The sixth and final case is *People v. Bufford* (2007) 146 Cal. App. 4th 966, wherein the Court of Appeal affirmed a trial court's ability to impose restitution after the defendant had completed her state prison sentence. (*Id.* at p. 971-972.) Of particular note is the court's reliance on the procedural history, i.e. that it was the defendant who caused the delay in setting the restitution amount because an appeal was pending and she refused to testify until the outcome of the appeal was affirmed. (*Ibid.*) *Bufford* is the only case

that makes any reference to section 1203.3, the statute allowing modification of restitution during the period of probation. At footnote 4, the court notes:

Section 1203.3 does not apply in this case, because defendant was not placed on probation. [. . .]
(*Bufford* at p. 970, footnote 4.)

Though not stated explicitly, it is clearly implied that if a defendant was on probation, section 1203.3 would apply.

Every published case in which section 1202.46 is discussed involves a defendant who was sentenced to state prison. The only case that references probation does so simply to point out that the court does have jurisdiction because this is not a case governed by the probation statutes.

Deputy District Attorney Hammond also argued the sentence was illegal or invalid because of this failure to modify probation. Again, this assertion is not supported by either the language of the statute or the case law. Rather, “[w]here the court fails to issue an award altogether . . . the sentence is invalid. [Citation.]” (*People v. Rowland* (1997) 51 Cal. App. 4th 1745, 1751.) And section 1202.46 itself describes a sentence as being invalid ‘due to the omission of a restitution order or fine.’

Here, Mr. Ford did not go to state prison. Nor did the sentencing court neglect to impose victim restitution: rather, at the time of sentencing, restitution of over Twelve Thousand Dollars (**\$12,000**) was ordered to reflect Ms. Jennings’ medical expenses. Although under Penal Code section 1170(d) a

prison sentence can be recalled by the court during the first 120 days, here there was no imposition of prison, and therefore section 1170 does not apply. As discussed above, once formal probation is granted, the Court has authority to act under section 1203.3; probation can be revoked, modified, or terminated.

There simply is no alternative vehicle through which the court can alter a sentence more than 18 months after its imposition. Section 1202.46 does not apply and Mr. Ford's sentence was neither illegal nor invalid.

IV.

THE TRIAL COURT'S IMPOSITION OF A MODIFIED RESTITUTION ORDER AFTER THE TERMINATION OF PROBATION WAS AN ACT IN EXCESS OF JURISDICTION TO WHICH MR. FORD DID NOT CONSENT.

A. While the court did not lack fundamental jurisdiction, the court acted in excess of its power.

"A lack of jurisdiction in its fundamental or strict sense results in 'an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.] (*People v. Lara* (2010) 48 Cal.4th 216, 224–225.) As case law explains, "[n]either the probation statutes nor the cases applying them support a holding that expiration of the probationary period terminates the court's jurisdiction of the subject matter." (*In re Bakke* (1986) 42 Cal. 3d 84, 89.) Indeed, probation statutes themselves contemplate that such fundamental jurisdiction

continues, for they provide for the court's determination of certain matters after the end of the probationary term. (*Ibid.*)

However, while a court “may have jurisdiction in the strict sense”, it may “nevertheless lack ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.]” (*People v. Lara, supra*, 48 Cal.4th at p. 225.) When a court acts outside the bounds of its power, it is said to have acted in excess of jurisdiction. (*Ibid.*)

Mr. Ford does not argue that the trial court lacked fundamental jurisdiction over the subject matter. Rather, while the court does have certain enumerated powers, which enable it to act after probation expires, perhaps the most commonly used being the power to expunge convictions, there is simply no statutory authority which allows a trial court to modify a condition of probation after termination. The durability of section 1203.3 is discussed above: It is the source of the court’s authority for modifying probation and ends when probation is complete. Of course there can be no doubt the Legislature intended to ensure victims of criminal behavior receive appropriate restitution. However, the current penalogical scheme embodied within section 1202.4 et seq. more than adequately allows for this both at the imposition of sentence and through the subsequent probationary procedures.

The court here seeks to expand its reach without support from either statutory or decisional authority.

B. Mr. Ford did not consent to the court's act in excess of jurisdiction and should not be estopped from raising the issue on appeal.

It is well settled that when a court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. (*City of Los Angeles v. Cole* (1946) 28 Cal.2d 509, 515; *Guardianship of Di Carlo* (1935) 3 Cal.2d 225, 228-229; *People v. Patrich* (1897) 118 Cal. 332, 333; *Hoshour v. County of Contra Costa* (1962) 203 Cal.App.2d 602, 605; *Phillips v. Beilsten* (1958) 164 Cal.App.2d 450, 457.) Hence, in contrast to fundamental jurisdiction, where a court's order is in excess of jurisdiction "is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time.' " (*People v. Lara, supra*, at p. 225.) However, a defendant will be excused from the necessity of a timely objection if such an objection would be futile. (*People v. Hill* (1998) 17 Cal. 4th 800, 820; *People v. Arias* (1996) 13 Cal. 4th 92, 159; *People v. Noguera* (1992) 4 Cal. 4th 599, 638; *People v. DeFrance* (2008) 167 Cal. App. 4th 486, 501.) In addition, a defendant will not be estopped from raising an issue on appeal if the issue calls into question "the functioning of the courts and in some instances on other considerations of public policy." (*City of Los Angeles v. Cole, supra*, at p. 515.)

Here, Mr. Ford was present and ready to continue the hearing scheduled on March 27, 2012. However, prior to entering the courtroom, the Deputy District Attorney informed defense counsel that she was required to return to another courtroom to resume a partially-complete preliminary hearing and would not be able to move forward that afternoon with Mr. Ford's hearing. This issue was not clear from the very brief transcript of the proceedings before Judge DeMeo. Therefore, a Stipulation and Order to Modify the Record has been attached to this brief. Any objection to the District Attorney's unavailability would have therefore been futile and Mr. Ford should not be estopped from asserting on appeal that the trial court acted in excess of its jurisdiction.


CONCLUSION

The concept of never-ending authority to impose victim restitution espoused by the trial court and the People flies in the face of logic. The purpose of punishment is fulfilled when a sentence is imposed and served, whether it be in the state prison system or through a completed grant of probation. To allow the re-opening of the question of restitution after the completion of every other aspect of a sentence would subject an otherwise rehabilitated criminal defendant to a lifetime penalty.

Mr. Ford respectfully requests that this Court overturn the decision of the First District Court of Appeal and invalidate the restitution order issued by the trial court in this matter.

Dated: August 22, 2013

Respectfully submitted,



Jane Gaskell

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM J. FORD,

Defendant and Appellant.

No. _____

A 135733

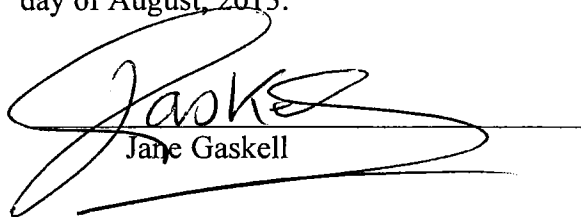
Superior Ct. No. SCR-530837

(Superior Court of Sonoma County)

CERTIFICATE OF WORD COUNT

I, Jane Gaskell, appellate counsel of record for WILLIAM J. FORD in this matter, do hereby certify that according to Microsoft Word, the word processing program used to generate the PETITION FOR REVIEW, the word count of the brief is 5248 .

Executed at Santa Rosa, California this 27th day of August, 2013.


Jane Gaskell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Law Offices of Andrian & Gallenson, attorneys for Defendant and Appellant William J. Ford, and is a person of such age and discretion to be competent to serve papers. The undersigned certifies that she caused copies of Appellant's **PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, AFFIRMING THE ORDER OF THE SUPERIOR COURT** in the case entitled People v. Ford, Court of Appeal Case No. 135733, to be served on the parties in this action, addressed as follows:

Office of The Attorney General
455 Golden Gate, Suite 11000
San Francisco, California 94102-7004

Clerk of The Court
First District Court of Appeals
Division 3
350 McAllister Street
San Francisco, CA 94102

_____ (By Federal Express Delivery), I caused such envelope to be shipped by Federal Express, Priority Overnight Delivery, from Santa Rosa, California, to the person or office of each addressee above.

Honorable Bradford Demeo
Sonoma County Superior Court
600 Administration Drive
Santa Rosa, California 95403

Sonoma County District Attorney
Attention: Robin Hammond
Hall of Justice, Room 212-J
600 Administration Drive
Santa Rosa, California 95403

_____ (By Personal Service/Messenger), I caused such envelope to be delivered by hand to the person or offices of each addressee above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 28, 2013** at Santa Rosa, California.



Cynthia Waugh
Law Offices of Andrian & Gallenson

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,

v.

WILLIAM J. FORD,
Defendant and Appellant.

A135733

(Sonoma County
Super. Ct. No. SCR-530837)

William Ford appeals from an order awarding victim restitution. He contends the court lost jurisdiction to award restitution when his probation term expired nine days earlier. We disagree. The court's retention of jurisdiction to determine and award victim restitution was permissible under Penal Code sections 1202.4 and 1202.46¹ irrespective of the expiration of Mr. Ford's probation.

We therefore affirm.

BACKGROUND

Ford severely injured Elaine Jennings in a hit and run accident in 2008. Following his no contest plea to leaving the scene of an accident, he was placed on three years' probation and ordered to pay \$12,465.88 in restitution for Jennings's medical expenses. Ford's probation officer advised the court that Jennings also sought over \$36,000 restitution for lost wages. Ford's counsel expressed his intent to request a hearing on the amount of restitution. The court expressly reserved jurisdiction to determine the amount of additional restitution.

¹ All further statutory references are to the Penal Code.

On May 7, 2010, the probation department notified Ford that he owed Jennings \$211,000 in victim restitution.² Ford requested a hearing. The hearing was initially set for August 3, but there followed a series of delays and continuances during which Ford's probation was extended several times. The restitution hearing was finally held on January 27, March 1, and April 6, 2012. On April 6, defense counsel made a limited appearance to contest jurisdiction because Ford's probation term had expired on March 30. The People asserted the court retained jurisdiction over restitution under section 1202.46 "unless and until the amount of restitution owing the victim can be determined." Following additional briefing on the jurisdictional issue, the court ruled it had jurisdiction to award restitution under section 1202.4. "This was not just a condition of probation, it was a restitution order, the Court reserving jurisdiction to determine the amount." Ford was ordered to pay Jennings restitution in the amount of \$275,017.

This timely appeal followed.

DISCUSSION

Ford contends the restitution award was a condition of his probation, and therefore that the court had no jurisdiction to alter it once his probation term expired. His contention is without merit.

We had occasion to address a closely related issue in *People v. Bufford* (2007) 146 Cal.App.4th 966, in which we held the trial court retained jurisdiction to adjudicate restitution following a defendant's completion of her prison sentence. We explained why California's restitution scheme, embodied in our Constitution and statutes, mandates this result:

"Article I, section 28 was added to the California Constitution by initiative measure adopted by the voters June 8, 1982. Subdivision (b) provides, in part, 'that all persons who suffer losses as a result of criminal activity shall have the right to restitution' and that '[r]estitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss,

² This amount included substantial lost earnings and additional medical expenses.

unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.’ [¶] Implementing legislation was added to Penal Code section 1202.4 that now provides, in relevant part that ‘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. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. . . .’ (§ 1202.4, subd. (f).)” (*People v. Bufford, supra*, 146 Cal.App.4th at pp. 969-970; see also *People v. Giordano* (2007) 42 Cal.4th 644, 651-653 [outlining legislative history].)

The Legislature also made it clear that the trial court retains jurisdiction to impose or modify a restitution award until the appropriate amount can be ascertained. “Section 1202.46 specifically provides that ‘when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution *until such time as the losses may be determined.*’ ” (*People v. Bufford, supra*, 146 Cal.App.4th at p. 970, italics added.)

In *Bufford* we held that these provisions mean exactly what they say and that the completion of a prison term was irrelevant to the court’s ability to exercise jurisdiction. “Under a reading of the plain language of section 1202.4, if the court cannot determine the amount of restitution at the time of sentencing, there is no limitation upon when the court must next set a restitution hearing. . . .” (*People v. Bufford, supra*, 146 Cal.App.4th at p. 971, italics added.) We also observed that an interpretation that would terminate the court’s ability to adjudicate restitution upon completion of the defendant’s prison term conflicts with the constitutional directive that, absent “compelling and extraordinary circumstances,” restitution must be ordered whenever a crime victim suffers a loss, regardless of the sentence or disposition. We said: “We are not willing to read section 1202.4 so narrowly that restitution may not be awarded in this case. To do so would frustrate the clear language of article I, section 28.” (*Ibid.*) The same reasoning applies

here, and the court retained jurisdiction to award additional restitution without regard to the expiration of Ford's probation.

Ford attempts to distinguish *Bufford* on the ground that the defendant there was sentenced to prison, not probation, but nothing in sections 1202.4 or 1202.46 supports that distinction. To the contrary, section 1202.4, subdivision (f) expressly provides that the trial court retains jurisdiction to award or modify restitution "until such time as the losses may be determined." The Legislature made no distinction between defendants sentenced to prison terms and those granted probation.

Ford maintains the difference is nonetheless meaningful because "where probation has been granted, restitution is no longer a sentencing issue, but rather becomes a condition of probation." Therefore, he argues, the court's power to modify restitution awards in probation cases is controlled exclusively by section 1203.3, which concerns the court's power to revoke, modify, or terminate probation orders during a probationary term. We disagree. Initially enacted in 1937, section 1203.3 was amended in 2000 to specify that "Nothing in this section shall be construed to prohibit the court from modifying the dollar amount of a restitution order pursuant to subdivision (f) of section 1202.4 *at any time during the term of the probation.*" (§ 1203.3, subd. (b)(5), italics added; see Historical and Statutory Notes, 50D West's Ann. Pen. Code (2004 ed.) foll. § 1203.3, p. 534.) Ford says this concluding phrase of subdivision (f) means the court is prohibited from modifying the amount of restitution *after* probation ends, but subdivision (b)(5) neither says so nor, in view of section 1204.46's contrary directive, can it be applied to encompass that meaning. Subdivision (b)(5) is permissive, not restrictive. It takes nothing away from the court's authority to award restitution under section 1204.4.

Ford makes much of our footnote in *Bufford* that states: "[s]ection 1203.3 does not apply in this case, because defendant was not placed on probation" (*People v. Bufford, supra*, 146 Cal.App.4th at p. 970, fn. 4), and suggests we thereby meant to imply that section 1203.3 would have applied had the defendant been given probation instead of a sentence to state prison. Not so, and so what? We identified section 1203.3 merely to clarify that it did not apply, and it is fundamental that an opinion is only authority for

“ “the points actually involved and actually decided.” ’ ” (*People v. Knoller* (2007) 41 Cal.4th 139, 155.) As explained above, section 1203.3 does not limit the jurisdiction delineated by sections 1204.4 and 1204.46.

We therefore hold the trial court had jurisdiction to award restitution under section 1204.4 when it awarded Jennings the full amount of economic losses she suffered as a result of Ford’s actions.

DISPOSITION

The restitution order is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

Trial Court: Superior Court of the County of Sonoma

Trial Judge: Honorable Bradford DeMeo

Counsel for Appellant: Jane Gaskell
William J. Ford ADRIAN & GALLENSON

Counsel for Respondent: Kamala D. Harris, Attorney General
Dane R. Gillette, Chief Assistant
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General