IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S 212940
Plaintiff and Respondent,	Court of Appeal Case No. A135733
v.	Sonoma County Superior Court
WILLIAM J. FORD,	Case No. SCR-530837
Defendant and Appellant.	

Appeal from the First District Court of Appeal
Division Three

APPELLANT'S REPLY TO RESPONDENT'S ~~ANSWER~~ REPLY BRIEF ON THE MERITS

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Introduction

The Respondent in its brief urges this Court to ignore the meaning and language of the state's probation statutes and allow trial courts to exercise jurisdiction over a criminal defendant, in defiance of both statute and precedent, after probation has terminated. Despite multiple assertions to the contrary, there can be no doubt from the record that when further restitution was reserved in this case, it was as a specific condition of probation. The controlling language of Penal Code section 1203.3[1] is not ambiguous; restitution may be modified during the period of probation. There is not a single authority for the proposal made by the Respondent; namely that a court can amend the terms of restitution regardless of the fact that probation has ended. Moreover, since the filing of the Brief on the Merits, the Second District Court of Appeal issued its ruling in *Hilton v. Superior Court* (2014) 224 Cal. App. 4th 47, holding:

> A trial court does not have jurisdiction to modify a defendant's probation to impose restitution after the defendant's probationary term has expired. Such a modification would be erroneous as an act in excess of the trial court's jurisdiction. Moreover, to hold otherwise would subject a defendant placed on probation to a lifetime restitution obligation and there would be no end to the restitution orders trial courts could impose on such a defendant.

(*Id.* at p. 50.)

The First Appellate District's converse opinion is contrary to the Legislature's intent, will result in acts in excess of the trial court's statutory jurisdiction, and potentially opens the floodgates to a whole new field of litigation.

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[1] All further references are to the Penal Code unless expressly stated otherwise.

Argument

A. The Court expressly made any further restitution a condition of Mr. Ford's probation.

In its Reply, the Respondent makes much of Judge Daum's statement that he would "reserve further order and power to make further orders in that connection". (Answer Brief on the Merits (hereinafter "AB") 20.) While it may be an inconvenient truth for the Respondent, the sentence in relevant part actually reads as follows: "The Court will reserve further order and power to make further orders in [connection with restitution] *working with probation* and your counsel." (1 RT 16, emphasis added.) Moreover, this entire colloquy takes place during a conversation between the court, defense counsel and the probation officer.

Sentencing in this case took place on October 9, 2008, when Mr. Ford was placed on a grant of formal probation for three years. (1 RT 12.) After considerable discussion amongst all parties about further restitution, the trial court ordered restitution in the amount of $12,465.88 as reimbursement of medical expenses. According to the probation officer, the victim, Ms. Jennings, also indicated at this time that she would be requesting "over $36,000" in lost earning wages. (1 RT 15.) In his opening statement to the court, defense counsel explained he had discussed restitution in general terms with Ms. Jennings and had informed her that she could submit the supporting documentation she claimed to have "through probation." (1 RT 5.) It is abundantly clear from the record that any further restitution orders were inextricably intertwined with the court's grant of probation.

This is further supported by the fact that no more action regarding restitution took place until May 7, 2010 when the Appellant was notified he was being ordered to pay

$211,000 "through Sonoma County Probation Department". (CT 43.) On October 5, 2011, just prior to the date when the original grant of probation was due to terminate, the trial court, in response to a request from probation, extended Mr. Ford's probation in order to deal with the restitution question. (CT 72.) As explained by the Respondent, the defense stipulation was for a brief period of 30 days, rather than the two years originally requested by probation. (4 RT 124.) The final extension of probation took place on November 2, 2011, when the Honorable Judge Marcoida opted to extend Mr. Ford's probation until March 30, 2012. (4 RT 135.)

It is clear from the record that throughout the pendency of these proceedings all concerned – the trial court, the probation department, the defense team, and the People – considered this request for additional restitution to be a request for a modification of the conditions of probation. To suggest otherwise is not only disingenuous given the state of the record, but also flies in the face of the well-established practices of courts throughout the state on a daily basis.

B. Once probation was granted, the jurisdiction retained and maintained by the trial court was exclusively based on the fact Mr. Ford was on probation.

As referenced above, subsequent to the filing of Mr. Ford's Brief on the Merits on February 25, 2014, the Second Appellate District issued its opinion in *Hilton v. Superior Court, supra,* 224 Cal.App. 4th 47. Mr. Hilton, after pleading no contest and being placed on probation for three years, was initially ordered to pay $3,215 in restitution. (*Id.* at p. 50.) Despite a $3.5 million settlement in a civil suit, the *Hilton* victim filed a motion for further restitution of more than $886,000 after Mr. Hilton's probation had terminated.

The Second District explained, "when a defendant is convicted and a trial court can either grant probation or impose a prison sentence, former section 1202.4 contemplates a court will *impose* its mandatory restitution *either* as a condition of probation or upon the imposition of the prison sentence." (*Hilton, supra*, at p. 60.) As in the instant case, the Respondent Superior Court relied on Article I, Section 28, former subdivision (b) for the proposition that the California Constitution made additional restitution mandatory, regardless of the expiration of probation. Disagreeing, the court undertook an analysis of the following language of the Article:

> It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. Restitution 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, 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.

(*Id.* at p. 58-59.)

Pointing out that the Article was not self-executing, but rather called for the Legislature to implement legislation, the *Hilton* court concluded this language provides "no independent constitutional predicate" for awarding additional restitution. (*Id.* at p. 59.)

Next, Justice Kitching reviewed the history of section 1202.4, the legislative response to Article I, section 28, former subdivision (b), focusing on the pre-existence of section 1203.3(a), *In re Griffin* (1967) 67 Cal.2d 343, and a number of other cases, prior to the Legislature's consolidation of the restitution scheme in the mid-1990s. Using canons of construction developed over hundreds of years, the opinion notes the Legislature is presumed to have been "aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." (*Hilton, supra*, at p. 61, citing

People v. Harrison (1989) 48 Cal.3d 321, 329.) Hence, the *Hilton* court concluded, when it enacted former section 1202.4(f), the Legislature intended harmonizing the section "with the preexisting statutory and case law regarding probation." (*Hilton*, *supra*, at p. 61.)

Thus when the court grants probation, the court will impose the restitution mandated by former section 1202.4 as a condition of probation (§ 1202.4, subd. (m)). However, this mandate is necessarily subject to the preexisting probation law that once the probationary term *has expired*, a trial court lacks jurisdiction over a probationer, lacks jurisdiction to impose restitution or additional restitution, and lacks jurisdiction to modify probation to impose any such restitution." (*Id.* at p. 61, original italics.) The constitutional right is implemented by requiring the trial court to impose restitution as a condition of probation. (*Id.* at p. 61-62.) This in turn means a trial court must exercise its jurisdiction subject to existing probation law. (*Ibid.*) And section 1202.4 does not authorize restitution "untethered to probation". (*Ibid.*) For this reason, the jurisdiction over Mr. Ford was exclusively based on the grant of probation.

In Mr. Ford's case, like the court in *Hilton*, at the time of sentencing, the trial court was faced with two choices: impose a state prison sentence or grant probation. By way of its grant of probation, the trial court chose to *impose* restitution as a condition of probation. Not only is this in keeping with the statutory scheme, but also is reflected in all of the subsequent procedural steps taken in the case by the prosecutor and the probation department.

C. The language of subdivision (b)(5) of Penal Code section 1203.3 is unambiguous and must be given its plain meaning.

When asked to interpret the language of a statute, the role of the court is "to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) The starting point is the plain language of the statute, and the words should be given their ordinary and usual meaning. (*People v. Cornett* (2012) 53 Cal. 4th 1261, 1265.) "The plain meaning controls if there is no ambiguity in the statutory language." (*Ibid.*) There can be nothing plainer than the language of subdivision (b)(5) of Penal Code section 1203.3:

> 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 probation.**

(§1203.3, subd. (b)(5).) (Emphasis added.)

This section grants the court broad discretion to modify restitution during the probationary term. Moreover, "every word and phrase employed in a statute is presumed to be intended to have meaning and perform a useful function ... [and] a construction rendering some words in the statute useless or redundant is to be avoided. (*Hilton v. Superior Court, supra*, 224 Cal. App. 4th 47, 56.)

Contrary to the Respondent's claim, while the court here did reserve jurisdiction over the Appellant for the purposes of restitution, that jurisdiction was specifically stated by the court to be based on a grant of probation. And, as section 1203.3 states, modification of the restitution amount may occur at any time during the term of probation. Moreover, by operation of section 1202.4(m), all restitution orders become conditions of probation. Not only is the language of the statute readily understood and must be given its plain meaning, but also, the court's purpose was plain: restitution was ordered at the time of

sentencing and any further modification was to be carried out through the usual probationary procedures.

D. The delays and dispute regarding the alleged decline in business earnings stemmed from Ms. Jennings' inability to provide any corroboration for the extortionate losses she claimed to have suffered.

In its brief, the Respondent also makes two inaccurate claims: that the delay in awarding full restitution was occasioned by "appellant's continuing efforts to seek more and more documentation" (AB 27); and that the Appellant was responsible for the delay in proceedings. This is nothing more than a fanciful, and convenient, re-writing of the record.

The delays were occasioned primarily by a failure on the part of the People and Ms. Jennings to provide any documents that actually supported the claim, which at one point had grown to over $300,000. As the Deputy District Attorney (DDA) on behalf of the People explained on August 19, 2011, "the documents we're waiting for are the subject of an I.R.S. F.T.B. issue that so far isn't completed." (3 RT 103.) When questioned further on October 26, 2011 by Judge Marcoida about why more time was needed, the DDA explained "there's been a lot of work between Mr. Andrian's office and myself and three other attorneys in our office that have been trying to figure out the most logical way to address this issue". Ms. Jennings had originally suggested her losses may be around $36,000; she then claimed $211,000 in a one-page brief letter with no supporting documentation sent to the probation department 18 months after sentencing. By August 2011 she was claiming these losses were over $300,000. As argued in Mr. Ford's original Points and Authorities regarding restitution (CT 76), "no court had discretion to

find facts for which there is not substantial evidence". (*In re K.F.* (2009) 173 Cal.App. 4th 655, 661.) And as Ms. Jennings herself agreed, she had in fact submitted documents that showed an increase in gross profits from 2007 to 2008, the period of time when she was claiming business losses. (5 RT 209.) Hence, the lengthy delays were occasioned by Ms. Jennings' inability to provide corroboration of the amount claimed; the fact that her purported documents actually undermined the amount of the claimed losses; and the existence of an IRS audit, apparently prompted by the underreporting of over $100,000 of income in 2007. (5 RT 211.)

As explained in previous briefing, the fact that the scheduled hearing did not take place on March 27, 2012 was neither the fault of, or at the request of, Mr. Ford. The Deputy District Attorney was unable to attend the hearing because of her involvement in an ongoing preliminary hearing. A stipulation to this effect was filed with the Court of Appeal. The Respondent correctly points out that the Court of Appeal reserved a determination of whether the stipulation would be considered by judicial notice but did not rule on the matter. Therefore, by way of a separately filed motion, Mr. Ford respectfully requests this Court to judicially notice the stipulation signed by all parties so that it may be considered a part of this record.

To suggest that the business losses were undisputed is equally fictitious. These proceedings were in fact only partially complete when they came to a halt because of the question of jurisdiction. While the court agreed that Ms. Jennings had testified to a prima facie amount, the defense's rebuttal of the amounts claimed by Ms. Jennings was not complete. As is amply documented in the record, it was the intention of the Appellant to raise the issue of comparative negligence through the evidence of the police

officer who investigated the original accident. The claim regarding comparative negligence was dropped only because this appeal was pending.

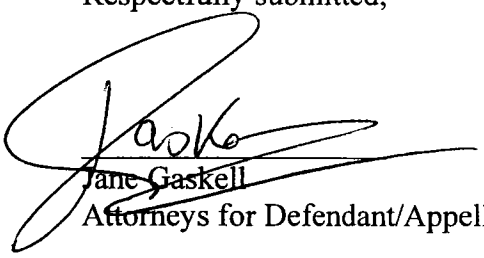
Conclusion

Neither precedent nor statute grants the trial court eternal jurisdiction to enforce sanctions, conditions, or make other alterations to a previously-imposed grant of probation after it has terminated. The issuance of a restitution order in this case was a an attempt to modify the terms of Mr. Ford's expired probation, and therefore was an erroneous act in excess of statutory jurisdiction.

For this reason, the Appellant respectfully requests that this court finds void the order of restitution imposed by the trial court.

Dated: April 2, 2014

Respectfully submitted,



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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 APPELLANT'S REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS, the word count of the brief is 2485.

Executed at Santa Rosa, California this 2nd day of April, 2014.

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 REPLY TO RESPONDENT'S ANSWER BRIEF ON THE MERITS** and **CERTIFICATE OF WORD COUNT** in the case entitled People v. Ford, Supreme Court No. S212940, to be served on the parties in this action, addressed as follows:

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Shelley Bjork

Shelley Bjork