

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,) H030269
) (Santa Clara County
v.) Superior Court No.
) CC065011)
SONYA MARSHALL,)
)
Defendant and Appellant.)
_____)

APPELLANT’S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an appeal from the sentence imposed after an admission of a violation of a probation. It is an order after judgment affecting appellant's substantial rights and finally resolves the issues between the parties; thus an appeal is authorized by Penal Code section 1237, subdivision (b).

STATEMENT OF THE CASE

A criminal complaint was filed on March 14, 2000, alleging that appellant, Sonya Marshall, committed welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2)) and form perjury (Pen. Code, § 118).¹ (CT 1-3.) She pled no contest to the charges on January 9, 2003. (CT 4.) On February 6,

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

2003, the court placed her on probation for three years on condition, among other things, that she serve 51 days in jail and pay restitution. (CT 9.)

On January 19, 2006, the court summarily revoked probation for failing to pay restitution. (CT 10.) On February 23, 2006, appellant admitted she violated probation. (CT 17.) The court reinstated probation and extended it three more years to February 23, 2009; she was ordered to serve seven more months in jail. (CT 17.)

On April 5, 2006, appellant moved to modify probation (CT 21-25) which was denied on May 9, 2006. (CT 26.)

Appellant filed a notice of appeal on July 12, 2006 after this court granted her permission to file a late notice of appeal. (CT 26-27.)

STATEMENT OF EVIDENCE

According to a 2006 probation report, appellant received financial aid for herself and three children when she stated under penalty of perjury that she and the children's father did not work. However, she was working on and off at the time, leading to overpayments. (CT 11.)

ARGUMENT

THE COURT LACKED JURISDICTION TO EXTEND PROBATION TO BE LONGER THAN A TOTAL OF FIVE YEARS.

In the violation of probation proceedings, it was alleged that appellant violated the conditions of probation because “[t]he defendant failed to pay the Court ordered restitution. The defendant was ordered to pay \$3,397.00 to Social Services (AFDC \$2,316.00 and Food Stamps \$1,081.00). The defendant has never made a payment. Probation is scheduled to expire February 6, 2006.” (CT 12.)

After probation was summarily revoked, appellant appeared in court on February 23, 2006. Her counsel stated she was willing to “admit a violation of probation and accept the Court’s offer of seven months” in jail. (3RT 17.) There was no mention that an extension of probation was part of the agreement. The court asked, “Ms. Marshall, do you now admit the circumstances of violation set forth in this petition?” (*Ibid.*) She said she did. (*Ibid.*) The court declared the “[v]iolation of probation is admitted.” (*Ibid.*) It reinstated probation, and ordered she serve seven months in jail. (*Ibid.*) It then stated, “I’m going to impose a new three year grant of probation until February 23, 2009.” (*Ibid.*)

An unauthorized sentence can be challenged on appeal, even if there were no objection below. (*People v. Scott* (1994) 9 Cal.4th 331, 354; *People*

v. Welch (1993) 5 Cal.4th 228, 235.)

The “power of the court with regard to probation is strictly statutory, and the court cannot impose a condition of probation which extends beyond the maximum statutory period of probation.” (*In re Bolley* (1982) 129 Cal.App.3d 555, 557.) Because the maximum term of incarceration that appellant could have suffered was less than five years, probation could not extend past five years.² (§ 1203.1, subd. (a).)³ The attempt by a trial court to extend probation beyond its authorized maximum period is “void” and “invalid.” (*In re Daoud* (1976) 16 Cal.3d 879, 883-884.)

² If the defendant can be sentenced to serve more than five years in prison, the maximum period of probation is the maximum possible sentence. (§ 1203.1, subd. (a), par. 1.) For simplicity, this brief refers to the maximum period of probation to be five years because this is what applies in this case. Further, it is always assumed that the maximum period of probation does not include the period that probation was summarily revoked. (§ 1203.2, subd. (a); see *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1267.)

³ Section 1203.1, subdivision (a) states in pertinent part: “The court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case. [¶] However, where the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. . . .”

Under section 1203.3,⁴ the court can modify probation before it expires, based on a willful failure to comply with a condition of probation or because of a change in circumstances. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1097-1100.) When the court initially sets probation for a period of time that is less than five years, it can extend probation when the probationer has failed to pay a fine or restitution. However, the total period of probation cannot be longer than five years. (*Id.* at pp. 1098-1100.)

In *Cookson, supra*, 54 Cal.3d 1091, the defendant was granted probation for three years but failed to pay the entire amount of restitution. The trial court extended probation to last a total of five years, though there was no finding the defendant willfully failed to pay. (*Id.* at p. 1095.) The Supreme Court held the procedure was authorized. (*Id.* at pp. 1095-1100.) The Court noted, however, that an extension resulting in probation lasting longer than five years would have been unauthorized. (*Id.* at p. 1094, fn. 2.)

This court followed *Cookson* in *Medeiros, supra*, 25 Cal.App.4th 1260. There, the defendant was placed on probation for three years and ordered to

⁴ Section 1203.3, subdivision (a) states: “The 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. The court may at any time when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held.” However, “[t]his section does not apply to cases covered by Section 1203.2.” (§ 1203.3, subd. (e).)

pay restitution. She failed to pay the restitution, and the court extended probation for two more years. She again failed to pay the restitution, stating she was the sole support for her child and her felony conviction made it difficult for her to obtain employment. The trial court found that she did not willfully violate probation but extended probation another five years. (*Id.* at pp. 1262-1263.) This court held the extension of probation beyond five years for a non-willful failure to pay restitution was unauthorized. (*Id.* at p. 1297.)

Here, appellant was alleged only to have failed to pay restitution, and this is what she admitted. (CT 12, 17; 3RT 17.) While the court had broad discretion to revoke probation, the court may not act arbitrarily or capriciously; its findings must be based on the allegations and facts before it. (*People v. Smith* (1970) 12 Cal.App.3d 621, 626.) Due process under the Fourteenth Amendment mandates that a violation of probation can be based only on allegations made in a writing before the violation of probation hearing. (*People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489, *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782, and *Black v. Romano* (1985) 471 U.S. 606, 611-612.) Accordingly, in *People v. Andre* (1974) 37 Cal.App.3d 516, the allegation that the defendant “hasn't paid the restitution” and “hasn't paid the fine” was insufficient notice to find the failure to pay was willful. (*Id.* at pp.

523-524.) Here, there was no allegation, and thus no admission or finding that the failure to pay restitution was willful. Thus, the court did not have jurisdiction to extend probation to last more than five years.

Even if there were somehow a valid implied finding appellant willfully failed to pay restitution, the trial court lacked the jurisdiction to extend probation beyond the five year maximum period. In *Medeiros, supra*, 25 Cal.App.4th 1260, this court noted that the only grounds for extending probation beyond the maximum period is found in section 1203.2, subdivision (e). The statute states that if probation is revoked after the judgment has been pronounced, it can be reinstated as it could have been done immediately following conviction.⁵ This court examined the legislative history of the provision and concluded that it applies only if a revocation of probation is set aside after probation otherwise would have expired. (*Id.* at pp. 1265-1267.) “Probation cannot be imposed ‘again’ under that subdivision unless probation

⁵ Section 1203.2, subdivision (e) states: “If probation has been revoked before the judgment has been pronounced, the order revoking probation may be set aside for good cause upon motion made before pronouncement of judgment. If probation has been revoked after the judgment has been pronounced, the judgment and the order which revoked the probation may be set aside for good cause within 30 days after the court has notice that the execution of the sentence has commenced. If an order setting aside the judgment, the revocation of probation, or both is made after the expiration of the probationary period, the court may again place the person on probation for that period and with those terms and conditions as it could have done immediately following conviction.”

is revoked based on a violation of probation and the revocation has been set aside.” (*Id.* at p. 1267.)

But for the limited circumstance a revocation of probation is set aside, the court lacks the jurisdiction to extend probation longer than five years. (*Medeiros, supra*, 25 Cal.App.4th at p. 1267.) However, this court stated in dictum that its interpretation of section 1203.2 “does not affect the treatment of probationers who are able to pay and willfully do not. If these circumstances appear at the formal revocation hearing, the court is authorized to revoke probation and either order imprisonment or to set aside the revocation and reinstate probation for a new term not exceeding the original maximum.” (*Ibid.*)

The government relied on this passage to argue in *People v. Jackson* (2005) 134 Cal.App.4th 929 that probation can be extended for longer than the maximum period when there is a willful failure to pay. The Second District Court of Appeal found there was substantial evidence of a willful failure to pay (*Id.* at pp. 933-935) but decided the court lacked jurisdiction to extend probation beyond five years:

Because the third sentence of Penal Code section 1203.2, subdivision (e) applies only where the order revoking probation

“is made after the expiration of the probationary period,” it provided no authority for the extension or reimposition. [Citation.] Although the court was free to recalculate the date of expiration of appellant's probationary term as a result of the tolling, nothing authorized it to extend appellant's probation beyond the maximum five year period.

(*Id.* at p. 932.)

In *People v. Ottovich* (1974) 41 Cal.App.3d 532, probation was revoked before it expired and reinstated with its term extended to make the total period of probation longer than that authorized by law. (*Id.* at p. 535.) The First District Court of Appeal held “the lower court had no jurisdiction to extend appellant's probation beyond the three-year period, and the order purporting to do so is therefore void.” (*Ibid.*)

“A court cannot establish a period of probation longer than the maximum period of imprisonment for the offense involved. [Citation.] Any attempt to do so is null and void. [Citations.]” (*Bolley, supra*, 129 Cal.App.3d at p. 557; see also *In re Trevor W.* (2001) 88 Cal.App.4th 833, 839.)

Here, appellant's probation was revoked before it expired, so subdivision (e) of section 1203.2 does not apply. Thus, the trial court lacked jurisdiction to extend probation to last longer than five years.

Here, appellant's probation was revoked before it expired, so subdivision (e) of Penal Code section 1203.2 does not apply. Nor has a revocation of probation set aside. Thus, the trial court lacked jurisdiction to

extend probation to last longer than five years. The appropriate remedy was to modify the trial court's order so that probation would last no longer than the maximum period of probation. (*Daoud, supra*, 16 Cal.3d at p. 885.)

CONCLUSION

For the foregoing reasons appellant, Sonya Marshall, respectfully requests that this court modify the order of the trial court so that probation will terminate on February 23, 2008.

DATED: July 24, 2007.

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Appellant
Sonya Marshall

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S
OPENING BRIEF contains 2222 words.

Executed under penalty of perjury at Santa Clara, California, on July
24, 2007.

Jonathan Grossman