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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RANDOLPH STEVEN ESQUIVEL, Defendant and Appellant.	B294024 (Los Angeles County Super. Ct. No. NA102362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Affirmed.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Randolph Steven Esquivel was convicted, by plea, of willfully attempting to burn a structure (Pen. Code, § 455).[1] A prison sentence of five years was imposed, but execution was suspended, and he was granted probation. Upon violation of probation, his probation was revoked and the previously imposed sentence executed. Defendant appeals, arguing: (1) the court was unaware of its discretion to reinstate probation; and (2) his previously-imposed sentence is now improper in several respects, due to changes in the law. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Offense*

Around 1:00 a.m., on August 7, 2015, defendant pounded on the window of the apartment occupied by Cecilia Hernandez and Iker Garcia. Garcia scared defendant off, but defendant returned 20 minutes later. At this point, he poured a bottle of lighter fluid on the apartment's front door and Garcia's truck. Defendant was arrested at the scene; he appeared intoxicated. Defendant had no previous relationship with Hernandez or Garcia, but had previously visited their upstairs neighbor.[2]

2. *Defendant's Plea*

Defendant was charged by information with willful attempt to burn (§ 455) and possession of flammable material with the intent to maliciously use (§ 453, subd. (a)). With respect to both counts, he was alleged to have suffered two prior prison terms

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

[2] The probation report in connection with this incident suggests the person who lived upstairs was defendant's girlfriend.

(§ 667.5, subd. (b)), a prior strike (§ 667, subds. (b)-(j)), and a prior serious felony conviction (§ 667, subd. (a)(1)).

On September 11, 2015, Defendant agreed to enter a negotiated plea of no contest to the count of willful attempt to burn, and admit the priors, in exchange for a five-year suspended sentence.

The sentence was calculated as follows: The three-year high term for intent to burn, plus two years for the two prior prison terms. The strike and prior serious felony conviction enhancements were stricken in the interests of justice. The five-year term was imposed and stayed, pending successful completion of five years formal probation. The court explained to defendant that if he violated probation, he would be sentenced to the full five years. The court explained, "Even if I'm not around, there is no other judge that has the option or discretion to strike it and simply give you a better sentence. The five years have been imposed and stayed."

Relevant conditions of probation required defendant to obey all laws, use only his true name, not give false information to any police officer, and not use force against anyone. Defendant accepted all the terms and conditions of probation.

Certain fines and fees were also imposed: (1) a restitution fine of $300 (Pen. Code, § 1202.4, subd. (b)); a criminal conviction facilities assessment fee of $30 (Gov. Code, § 70373, subd. (a)); and a court security fee of $40 (Pen. Code, § 1465.8, subd. (a)(1)).

3. *Defendant is Reminded to Report to Probation*

On June 14, 2016, the matter was called for a possible probation violation.[3] Defendant was present in court and was told to "report to probation without any excuses."

4. *Probation is Revoked for Failure to Report*

Two years later in August 2018, the probation officer submitted a report "Regarding Desertion of Probationer." It indicated that defendant last reported on March 9, 2018, failed to report on April 27, 2018, and had not reported since. Probation did not have a current telephone number or address for defendant, and recommended that probation be revoked and a bench warrant be issued.

On August 17, 2018, probation was revoked and a bench warrant issued. In September 2018, defendant was arrested, appeared in court, and was remanded pending the receipt of a supplemental probation report.

5. *The Probation Officer's Supplemental Report*

On October 10, 2018, the probation officer submitted a supplemental report. The report indicated two arrests since defendant last reported to probation: (1) an arrest in Brea for providing false identification to police (Pen. Code, § 148.9) and driving without a license (Veh. Code, § 12500, subd. (a)); and (2) an arrest in Fullerton for theft (Pen. Code, § 484). The report also disclosed that, while defendant was on probation in this case, he was also under post-release community supervision (Pen. Code, § 3455) in another case, and previously had multiple arrests for unidentified violations of his post-release community supervision.

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[3] The record on appeal is missing the probation report which led to this hearing.

The probation officer interviewed defendant, who claimed that the reason he had failed to report to probation was because he was in custody for violating his post-release community supervision. "According to the defendant, when asked if he suffered any new arrests since absconding from probation the defendant stated, yes, and explained they were mistakes and they were simple violations based on his appearance while out in the community. He stated he is frequently stopped by officers for this reason."

The probation officer's report included a recommendation that probation be reinstated with an additional term and condition of suitable jail time. The officer explained, "Since this is the defendant[']s first potential probation violation on this case,[4] and given the defendant[']s prior reporting history it appears he has made an effort to comply with probation conditions. According to the defendant the only reason why he is even before the court for this violation is simply because he was in custody at the time and was unable to report to his probation officer."

6. *Motion Requesting Revocation of Probation*

A few weeks later, the prosecution filed a motion requesting revocation of probation, which painted a somewhat different picture of defendant's violations. The motion acknowledged that defendant's probation had already been preliminarily revoked, but alleged further facts constituting a violation of probation. Specifically, the motion attached police reports detailing the Brea and Fullerton arrests alluded to in the

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[4] The probation officer was apparently unaware of the potential violation in June 2016.

supplemental probation report. It also represented that on March 6, 2018, defendant was convicted of domestic violence (§ 243, subd. (e)).

The Brea police report indicated that in June 2018, defendant had been driving a car with an expired registration and with no driver's license. He identified himself to police using his brother's name, and subsequently admitted that he had lied about his identity because he was wanted for a probation violation. The Fullerton police report indicated that in August 2018, defendant and his girlfriend were arrested for shoplifting from a Target. Again, defendant gave police his brother's name; his true identity was revealed after he was fingerprinted.

7. *Probation Revocation Hearing*

At the hearing on the probation violation, the prosecution sought judicial notice of the file regarding defendant's domestic violence conviction. Defendant objected that there was no confirmation that he was the defendant in that case. The court overruled the objection and took judicial notice, stating that the identity of the defendant does not go to the issue of judicial notice. Then, turning to the issue of identity, the court concluded that defendant had, in fact, been the defendant who sustained the conviction, based on the identical name and date of birth, similar physical description, and the victim having been associated with defendant. The file indicated that the domestic violence incident occurred on February 23, 2017, and defendant entered his plea in that case on March 3, 2018.

The court also took judicial notice of all of the files before it, which included the Brea and Fullerton police reports.

Finally, the court heard testimony regarding defendant's failure to report. Deputy Probation Officer Ronald Story was defendant's supervisor for post-release community supervision,

and was also assigned to supervise him on probation in this case. He explained that defendant last reported to him in August 2017. Since that time, he has either been in custody or in absconsion.

In April 2018, when defendant was required to report to Officer Story, he telephoned and explained that his girlfriend had lost a baby when she was eight months pregnant, and he was distraught. He claimed to have forgotten when to report. Officer Story told him to report before April 27 or be in violation; defendant did not report. Officer Story testified that defendant is required to inform him of arrests or convictions, and confirmed that when defendant called in April 2018, he did not tell Officer Story about the domestic violence conviction he had sustained in early March 2018.

Defendant offered no witnesses in defense. Instead, counsel argued that this was not a "significant violation." Counsel argued that there was confusion regarding defendant's reporting requirements, and he was having difficulty due to his girlfriend's miscarriage. Counsel noted that the file for the domestic violence conviction indicated that, at the time of defendant's plea, he was in custody and was given time served. Counsel then speculated that if defendant "was in custody when this miscarriage was happening, of course, he would have pled to get out of custody in order to be present for his girlfriend when she's going through this difficult time."

The court found defendant in violation of probation for multiple reasons: he failed to report to probation; he failed to inform probation of his domestic violence conviction; and he did, in fact, sustain the domestic violence conviction.

8. *Sentencing*

The court turned to sentencing. Defendant argued for reinstatement of probation with jail time, arguing that defendant

was now getting mental health services for PTSD and bipolar disorder, and that he had a better support system in place.

The court stated, "if the court will give the defendant any time, even one day, the court must give the suspended time because he was already sentenced. The law is clear. I don't have any discretion, no authority. The case law is quite clear on that. [¶] Even if I had the authority not to – given the discretion, I will not exercise that discretion because the defendant was convicted and physically abused the mother of his future child."

Although defense counsel suggested the court had misidentified the domestic violence victim, the court found this to be a distinction without a difference, stating, "So if he beat the mother of his future child, that's horrible. If he beat another woman, that's horrible too. No matter what, he was convicted of beating a woman." Defense counsel then said the word "beating" was a misstatement of the evidence; the court responded, "Is it looking at them with a strong face? What is domestic violence?" Defense counsel replied that there are different types of domestic violence. The court ended argument; defense counsel stated that the court was "misstating what's in front of the court."

Concluding that there were at least four to six probation violations, the court imposed the five-year sentence on which execution was previously suspended. The court also stated, "The fines are mandatory minimum [fines]." It imposed the $300 restitution fine, $30 court security fee and $40 criminal conviction facilities assessment fee.[5]

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[5] The court also purported to impose "a $300 parole revocation restitution fine per [Penal Code] section 1202.44. That fine is stayed pending successful completion of parole." Defendant does not address this fine, nor do we.

Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant initially argued: (1) the court misunderstood its discretion to reinstate probation, and therefore did not make an impartial appraisal of whether probation should be reinstated; and (2) the restitution fine and court fees could not have been imposed without a determination of his ability to pay them, under the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). In supplemental briefing, defendant argued a third ground: an intervening change in the law that requires the two prior prison term enhancements to be stricken. As we shall discuss, the parties' briefing on the prior prison term enhancements also applies to, and defeats, defendant's *Dueñas* argument.

1. *There Was No Error in Failing to Reinstate Probation*

"A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant's probation upon finding the defendant has violated probation. [Citation.] The power to modify probation necessarily includes the power to reinstate probation. [Citations.] Thus, upon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. [Citations.] [¶] If the court decides to reinstate probation, it may order additional jail time as a sanction." (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 (*Bolian*).) If the court terminates probation, the sentence options depend on whether imposition of sentence had previously been suspended, or if sentence had been imposed but execution suspended. In the former situation, the

court has full sentencing discretion; in the latter situation, "upon revocation and termination of probation, the court must order that imposed sentence into effect." (*Id*. at pp. 1420-1421.)

"The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court. [Citations.]" (*Bolian, supra,* 231 Cal.App.4th at p. 1421.) " 'The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

However, if the court is unaware of its discretionary authority, it cannot exercise informed discretion. Remand is appropriate if the record indicates the court misunderstood or was unaware of the scope of its discretionary powers. (*Bolian, supra,* 231 Cal.App.4th at p. 1421.)

Defendant argues the court did not understand its discretionary power to reinstate probation, based on the court's statement: "[I]f the court will give the defendant any time, even one day, the court must give the suspended time because he was already sentenced. The law is clear. I don't have any discretion, no authority."

This is a correct statement of the court's discretion *if the court does not reinstate probation*, because sentence was previously imposed with only its execution suspended. The court may not "re-sentence." However, the statement is incorrect if the trial court meant that it lacked discretion to reinstate probation with suitable jail time.

Taken alone, the trial court's statement is ambiguous. In context, however, the court immediately addressed the circumstance of what it would do if it did, in fact, have discretion:

"[G]iven the discretion, I will not exercise that discretion because the defendant was convicted and physically abused the mother of his future child." Thus, even if the court was unclear as to its discretion to reinstate probation, the court unambiguously indicated that it would not exercise its discretion to do so.

Focusing on several of the court's statements during sentencing, defendant argues that the court did not truly exercise its discretion. We disagree; the essence of the court's conclusion was that defendant's domestic violence conviction takes the case out of the realm of those in which the court might reinstate probation. Even if we were to accept defendant's argument that the trial court was curt with defense counsel and may not have articulated its discretion clearly, it would not be grounds for reversal. Those claims do not undermine the trial court's finding that defendant had violated his probation terms by his conviction for domestic violence and his repeated failures to report to his probation officer, both of which were proper grounds to revoke probation.

Similarly, defendant draws support from the fact that the court "did not discuss any of the factors which defense counsel offered in opposition or in mitigation." But there is no authority which requires a court to address and reject every factor raised by a defendant at a probation violation hearing, particularly when the court expresses the reasons for its refusal to reinstate probation. That the trial court did not affirmatively acknowledge facts that might have supported reinstatement of probation does not detract from the trial court's proper exercise of its decision or suggest, as appellant does, that the trial court "failed to make an

impartial appraisal" of whether defendant should have been given a second chance on probation.[6]

We find no abuse of discretion. While defendant would characterize his probation violation as a simple failure to report while suffering the trauma of his girlfriend's miscarriage, the facts paint a very different picture. When defendant called Officer Story in April 2018, explaining that his failure to report was caused by the girlfriend's miscarriage (and neglecting to mention the intervening domestic violence conviction), Officer Story gave defendant a second chance and told him to report by April 27. Defendant did not report in April. Defendant did not report in May, June, July or August, either, and a bench warrant was issued. During this time, defendant twice intentionally gave a false name to police – because he knew he was wanted for a probation violation, and was also repeatedly shoplifting with his girlfriend. This was not a distraught man accidentally violating probation in a confused haze; this was a defendant who knew he was in violation of probation and intentionally lied to police to avoid the consequences. The trial court's decision to not reinstate probation was well-supported.

2. *The Sentencing Issues Are Not Cognizable on This Appeal*

A. *Introduction to the Sentencing Issues*

Effective January 1, 2020, section 667.5, subdivision (b) was amended to apply only if the defendant's prior prison terms were for sexually violent offenses. (Stats. 2019, ch. 590, § 1.)

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[6] Defendant attempts to parlay his argument that the court misunderstood its discretion into a federal due process violation because the court was not an impartial arbiter. We see no evidence of impartiality.

Defendant's prior prison terms were not. Defendant contends, and the prosecution agrees, that this amendment is retroactive, and applies to all cases not yet final at the time of its effective date. But, respondent argues defendant's sentence became final for the purposes of retroactive application of ameliorative amendments when it was imposed in 2015, and defendant failed to challenge it on appeal at the time.

Defendant also challenges the imposition of a restitution fine and two court fees without a hearing on his ability to pay, under the relatively recent authority of *Dueñas*. But if the fine and fees were imposed, and became final, back in 2015, it also is too late to challenge them on this appeal.

Thus, the issue raised by both contentions – which we find to be dispositive – is when defendant's sentence became final for the purpose of challenging the sentence on appeal.

B. *Appealability of a Probationary Judgment*

Section 1237, subdivision (a) provides that an appeal may be taken from a judgment of conviction, and that, for purposes of appealability, an order granting probation "shall be deemed to be a final judgment."

For this reason, if a defendant receives a probationary sentence following a finding of guilt at trial, the defendant must immediately appeal to challenge any errors at trial; he cannot wait until probation is revoked and he is sentenced to prison to then raise those issues. (*People v. Howard* (1965) 239 Cal.App.2d 75, 77.) "Under section 1237 of the Penal Code, appellant could have challenged the merits of his conviction on an appeal from the order granting probation which is deemed to be a final judgment. [Citation.] Appellant's 'acceptance of probation would not . . . prevent him from taking advantage of any error inhering in the judgment . . . but merely forecloses action based on errors

committed at the trial which his acceptance of the benefits . . . estops him from reviewing.' [Citation.] Since no appeal was taken within the allowable time from this order, appellant is now precluded from going behind the order granting probation. [Citation.]" (*Ibid.*)

C. *Appealability of a Probationary Judgment Extends to the Imposed Sentence on Which Execution is Suspended*

The issue of whether a sentence that has been imposed, but with execution suspended pending probation, is final for purposes of appeal at the time of the order granting probation was addressed in *People v. Scott* (2014) 58 Cal.4th 1415. That case concerned the Criminal Justice Realignment Act, which changed punishment for certain offenders from state prison to county jail. The Realignment Act specifically provided that it applied to any person sentenced on or after October 1, 2011. In *Scott*, the defendant's prison sentence was imposed prior to the October 1, 2011 date, but it was suspended until defendant's probation was revoked sometime later. The Supreme Court concluded the defendant was not eligible for jail under the Realignment Act; its rationale was that defendant had been "sentenced" when the sentence was initially imposed. (*Id.* at p. 1421.) The court held a defendant is sentenced when a judgment "imposing punishment is pronounced even if execution of the sentence is then suspended. A defendant is not sentenced again when the trial court lifts the suspension of the sentence and orders the previously imposed sentence to be executed." (*Id.* at p. 1423.) The defendant's failure to appeal from the originally imposed sentence barred a future appeal of the sentence upon probation violation.

The same analysis governed *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1423. In that case, a four-year sentence was imposed but execution was suspended. When defendant violated probation for a second time the parties entered into a negotiated disposition: Defendant was reinstated on probation with some additional terms and conditions. As part of the agreement, the court also increased the four-year suspended sentence to five years. When defendant subsequently violated probation and the five-year sentence was executed, defendant sought to challenge the improper increase. He could not do so, as he had failed to timely appeal the increase when it was imposed as part of the negotiated disposition. "[W]hen a court imposes sentence but suspends its execution at the time probation is granted, a defendant has the opportunity to challenge the sentence in an appeal from the order granting probation. [Citation.] If the defendant allows the time for appeal to lapse during the probationary period, the sentence becomes final and unappealable. [Citation.] This is so regardless of the fact the defendant will not serve the sentence unless the court revokes and terminates probation before the probationary period expires." (*Id.* at p. 1421.) The appellate court also rejected the defendant's argument that the court lacked jurisdiction to increase the sentence, and jurisdictional errors may be raised at any time. The court found that the trial court had exceeded its jurisdiction but had not lacked jurisdiction. The failure to appeal the increased sentence at the time it was imposed was fatal. (*Id.* at pp. 1421-1427.)

The Supreme Court recently resolved a related, but distinguishable, issue, holding that when a convicted defendant is placed on probation with *imposition* of sentence suspended, the judgment of conviction is not final. (*People v. McKenzie* (2020)

___ Cal.5th ___ [2020 WL 939371].) In that case, the defendant pleaded guilty in 2014, and imposition of sentence was suspended pending probation. In 2016, defendant's probation was revoked, and a prison sentence imposed. While defendant's appeal was pending, an ameliorative statute was enacted and went into effect. Defendant sought the benefit of that statute. (*Id.,* at p. *1.) The prosecution argued that defendant was not entitled to the benefit of the statute as he did not appeal his conviction in 2014. (*Id.* at p. *2.) The Supreme Court disagreed. For these purposes, there is no judgment of conviction without a sentence. (*Id.* at p. 3.) Prior to the imposition of sentence, the case was not sufficiently final. The *McKenzie* court did not expressly discuss the finality of the situation raised by this case – the finality when sentence is imposed but execution suspended. However, its conclusion that imposition of sentence is necessary for a judgment of conviction is in line with *Scott* and *Ramirez*.

D. *Application to the Present Appeal*

1. The Prior Prison Term Issue is Not Cognizable.

In 2015, defendant admitted the two then-valid prior prison terms, and sentence was imposed on the prior prison terms, although execution of sentence was suspended. Defendant did not timely appeal and that sentence became final. The subsequent amendment to section 667.5, subdivision (b) has no effect on this case. As to this amendment, defendant is situated the same as if sentence had not only been imposed but executed in 2015 – that is, if he had been immediately committed to prison. The sentence would have been final in 60 days, and the 2020 amendment would have no retroactive application to defendant. That defendant here had the advantage of a grant of probation and an opportunity to avoid prison does not provide an

opportunity to take advantage of a subsequent statutory amendment enacted long after his sentence became final.[7]

2. The *Dueñas* Issue is Not Cognizable

Defendant challenges his $300 restitution fine, $30 court security fee and a $40 criminal conviction facilities assessment fee under *Dueñas*, because the court did not determine his ability to pay the fine and fees prior to their imposition.

The problem with defendant's argument is that once again the fine and fees were imposed in 2015 and appellate review is now time-barred. The court referred to the fine and fees again when probation was revoked, stating, "The fines are mandatory minimum [fines]." On appeal, the prosecution takes the position that the court did not impose a second set of fines and fees, but simply "again went over appellant's fines." While the court's statement may have been ambiguous, the prosecution's implied concession is correct. A restitution fine imposed at the time probation is granted survives the revocation of probation; a second restitution fine would be unauthorized. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 820-821.) The proper procedure is to simply direct that the abstract of judgment reflect only the fine previously imposed. (*People v. Cropsey* (2010) 184 Cal.App.4th 961, 965-966.)

Similarly, the $40 criminal conviction facilities assessment is imposed "on every conviction," (Pen. Code, § 1465.8) and the $30 court security fee is likewise imposed "on every conviction"

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[7] Because the issue is one of finality of judgments, the fact that defendant's sentence was the result of a negotiated plea is irrelevant. Section 1016.8's ban on plea bargains requiring defendants to waive future benefits of legislative enactments has no bearing on the case.

(Gov. Code, § 70373). As we have explained, defendant was convicted only once, in 2015, no appeal was taken, and his sentence has long since become final. The fees could only be imposed once. Defendant did not appeal the fine or fees at the time they were imposed; they have therefore become final, and cannot be challenged on appeal from the revocation of probation.[8]

DISPOSITION

The judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

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[8] Here, defendant's abstract of judgment correctly reflects a single restitution fine, but does not include the fees at all. It is unclear if the abstract intentionally omitted the fees as previously imposed as a condition of probation, or in error. Although the parties do not address this point, we direct the trial court to make clear that the abstract of judgment reflects that only one set of fees and fines has been imposed.