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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY B. CALDWELL,

Defendant and Appellant.

A106985

**(Solano County
Super. Ct. No. FCR 199347)**

Jeffrey B. Caldwell (Caldwell) appeals from an order requiring him to pay restitution in connection with his conviction for grand theft of an automobile. He contends the court erred in calculating the restitution amount. We agree the court erred in part. We will therefore vacate the order and remand to the trial court for issuance of a new restitution order consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A criminal complaint charged Caldwell with 34 felonies and five misdemeanors, allegedly perpetrated between September 2000 and October 2001, as follows: 15 counts of obtaining money, labor, or property by false or fraudulent representation or pretense (Pen. Code, § 532, subd. (a));¹ 12 counts of grand theft of personal property exceeding \$400 in value (§ 487, subd. (a)); five counts of grand theft of an automobile (§ 487, subd. (d)); one count of petty theft with a prior petty theft conviction (§ 666); one count of forgery (§ 470, subd. (a)); and five counts of failing to deliver a certificate and card in violation of Vehicle Code section 5753.

In February 2003, Caldwell pleaded no contest to count VII (grand theft of a 1997 Honda Civic EX), pursuant to a plea agreement that: (a) the court would impose a sentence no greater than three years in prison; (b) there would be no immediate imposition of a prison term and Caldwell would be allowed to participate in an alternative sentencing program; (c) the remaining 38 charges would be dismissed, with a *Harvey* waiver by which the court could consider facts relating to unfiled or dismissed charges for sentencing purposes (*People v. Harvey* (1979) 25 Cal.3d 754); (d) a restitution hearing would be held; (e) the felony conviction would be reduced to a misdemeanor if Caldwell paid off a certain amount of the restitution ordered; and (f) the conviction would be dismissed upon full payment of restitution and completion of probation.

A. UNDERLYING FACTS

According to the probation officer's report, Caldwell operated a business known as Duke City Auto. Fairfield Police received numerous fraud complaints about Caldwell and his business between May and November 2001. Primarily, customers reported that they bought extended warranty plans, purportedly through Heritage Warranty Insurance Co. (Heritage), when they purchased their vehicles from Duke City Auto, but later learned that the money for the extended warranty contracts was never forwarded to Heritage. In addition, Caldwell reportedly charged excessive Department of Motor Vehicle (DMV) fees, failed to pay DMV registration fees as promised, did not pay customers the proceeds from the sales of their vehicles given to him to sell on consignment, and failed to pay off liens on vehicles customers had traded in. A search warrant served on Caldwell at his business resulted in the seizure of three computers, sales and purchase contracts, files, and DMV documents.

B. RESTITUTION HEARING

Evidence was presented as to seven victims who sought restitution. The court fixed restitution in the aggregate amount of \$41,913.28. The following summarizes the

¹ Except where otherwise indicated, all statutory references are to the Penal Code.

evidence with respect to the four restitution claims as to which Caldwell contends the court erred.

1. Hayden Scott (Theft of Hyundai from Duke City)

Around February 2001, Hayden Scott consigned his 2001 Hyundai Accent to Duke City Auto for sale. Scott had purchased the Hyundai from a source other than Duke City Auto for approximately \$13,500 and had financed a portion of the purchase price with a loan.

Scott drove by Duke City Auto every day. Some days his Hyundai was not in the lot, and he assumed it was being used.

In June, Caldwell told Scott that the Hyundai had been stolen by Caldwell's secretary. According to Caldwell's testimony, he tried to locate the suspected thief and gave her name to the police. From June until August, Scott continued to make his monthly payments on the car loan and insurance, in case the stolen car was involved in an accident.

In August, Scott's insurance company paid off the loan balance of \$10,914. The court ordered Caldwell to pay the \$10,914 to Scott. (Presumably, Scott would have to reimburse his insurance company in turn.) Caldwell's attorney objected, claiming his client was not the one who stole Scott's car.

2. Joyce Oren (Unpaid License Fee)

Joyce Oren purchased a 1997 Corvette from Duke City Auto in February 2001. She also paid Duke City Auto a \$1,050 license fee, \$45 for a smog test, \$8 for a miscellaneous DMV charge, and \$2,423 for an extended warranty from Heritage.

When Oren attempted to obtain personalized license plates for the car in May 2001, the DMV informed her that the vehicle was not registered to her or to Duke City Auto, and there was still an outstanding loan on the car in some other person's name. Oren then checked the status of the extended warranty, and learned that Heritage had received neither her signed warranty contract nor her payment.

Caldwell contested restitution as to the \$1,050 license fee. He admitted not forwarding the \$1,050 to the DMV, but claimed he sent Oren a check for \$1,025 to

reimburse her. At the restitution hearing he produced a checkbook receipt, purportedly indicating the \$1,025 payment. However the checkbook receipt was not entered into evidence. Nor did Caldwell produce the cancelled check, claiming that his financial records had been seized by the district attorney's office when it executed the search warrant on Duke City Auto. The court imposed restitution for the full \$1,050, as well as the \$45 fee for a smog test (which was apparently not performed), the \$8 miscellaneous fee, and \$2,423 for the extended warranty contract.

3. Reginald Eaton (Payments on Corvette)

In March 2001, Reginald Eaton purchased a 1996 Corvette from Duke City Auto for \$33,000, which included \$2,423 for an extended warranty from Heritage. Eaton paid \$2,500 down and financed the balance with a loan requiring monthly payments of \$467.66.

Eaton subsequently discovered that Heritage had no record of his extended warranty contract. When he later took the Corvette's smog test results to the DMV, he was informed that the vehicle was not registered in his name and could not be registered while court proceedings were pending.

Eaton made payments on the car loan and insurance for 23 months, during which time he used the Corvette. He eventually stopped making payments, and the car was repossessed.

Eaton sought restitution for the 23 car and insurance payments, reasoning that the payments were intended for the purchase of a car he could own. He also claimed restitution for the extended warranty.

As to the 23 monthly payments, the parties agreed that restitution should be offset by the reasonable value of Eaton's use of the car during the 23 months. The prosecution offered no evidence of the Corvette's fair rental value, but suggested the offset should be no more than half of Eaton's \$467.66 payment. Caldwell offered no evidence either, but suggested the fair rental value should equal Eaton's monthly payment. The court determined the value of the use of the Corvette to be \$250 per month, and deducted that

amount from Eaton's monthly payments of \$467.66. For 23 months, the sum came to \$5,006.18.

4. Susan Johnson (DMV Fees)

In May 2001, Susan Johnson bought a 1997 Lexus from Duke City Auto for \$41,742. She traded in her Toyota T-100 truck and financed the balance through a credit union.

Although the purchase price included \$1,100 in DMV fees, Caldwell did not forward the fees to the DMV. Over the next 27 months, Johnson paid the DMV \$993 in an attempt to register the car, and the DMV indicated she needed to pay \$177 more.

Caldwell also failed to pay off Johnson's loan on the Toyota T-100 she had traded in. The T-100 was later stopped by the police and repossessed by the finance company, which sold it and sued Johnson for the \$5,197 balance still owing on the loan.

The defense agreed that Johnson was entitled to restitution for the \$5,197 from the civil suit and \$1,170 for the DMV fees Johnson incurred. Over defense objection, however, the court also awarded Johnson \$1,100 in restitution for the DMV fees she had paid to Duke City Auto, which Caldwell had never forwarded to the DMV.

C. SENTENCE

On June 23, 2004, the court suspended imposition of sentence and placed Caldwell on formal probation for five years. As conditions of probation, the court ordered him to pay restitution, serve 365 days in county jail, and pay additional fees.

This appeal followed.

II. DISCUSSION

As mentioned, Caldwell maintains the trial court erred with respect to its award of restitution to four individuals. We address each in turn.

A. THEFT OF SCOTT'S HYUNDAI FROM DUKE CITY AUTO

Caldwell argues the court abused its discretion in ordering him to pay restitution for the theft of Scott's Hyundai, because it was not Caldwell who stole the vehicle. We do not agree.

Restitution is mandatory “[i]n every case in which a victim has suffered economic loss *as a result of* the defendant’s conduct.” (§ 1202.4, subd. (f), italics added.) A “victim of [a] crime who incurs any economic loss *as a result of* the commission of a crime shall receive restitution directly from any defendant convicted of that crime,” and victims must be “fully reimburse[d] . . . for every determined economic loss incurred *as the result of* the defendant’s criminal conduct” (§ 1202.4, subs. (a), (f)(3), italics added.)

There is no *direct* evidence that Scott’s vehicle was stolen as a result of criminal conduct perpetrated by Caldwell himself. According to Caldwell, Scott’s Hyundai was stolen by another Duke City employee, and he reported the theft to Scott and to the police. Caldwell therefore argues that restitution is not available under section 1202.4, subdivision (f).

Restitution may certainly be imposed, however, on another broader ground. Where probation is granted, restitution may be ordered to the end “that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer” (§ 1203.1, subd. (j).) Under this provision, restitution is permitted in the court’s discretion if “‘*reasonably related* to the crime of which the defendant was convicted or to future criminality.’” (*People v. Birkett* (1999) 21 Cal.4th 226, 235, italics added (*Birkett*)). In fact, restitution may be imposed where “the loss was caused by related conduct not resulting in a conviction, by conduct underlying dismissed and uncharged counts, and by conduct resulting in an acquittal.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121, citations omitted (*Carbajal*); see *People v. Goulart* (1990) 224 Cal.App.3d 71, 79 [restitution available for uncharged offenses if related to the offense for which defendant was convicted because of the same type].)

In the matter before us, there was a rational basis for concluding that Scott’s loss was caused by Caldwell’s related conduct, and that Caldwell was criminally connected to the theft of Scott’s vehicle. Caldwell pled guilty to grand theft of another automobile, so

he engaged in similar conduct at least one other time. Further, there was ample evidence that on numerous occasions he took money from customers for the purported purpose of paying for their extended warranty contracts or DMV fees, yet failed to make those payments. He also failed to pay off loans on their trade-in vehicles, despite his promise to do so. From this evidence it could be inferred that Caldwell's operation of Duke City Auto was rife with dishonesty and a breeding ground for the type of theft Scott suffered. Caldwell testified, in fact, that he knew an employee had access to the keys to Scott's car and was using the vehicle. And while Caldwell argues that his identification of the person he thought stole the car suggests his innocence, it would be within the court's discretion to conclude that Caldwell was actually disingenuous on this point, that *he* was the one involved in the theft, and that he was merely trying to pin the theft on a former employee.

We also point out that Scott's Hyundai was undisputedly stolen while it was *on consignment* at Duke City Auto. By definition, Duke City Auto and Caldwell held the Hyundai as Scott's agent. (See Oxford English Dictionary (2d ed. CD-ROM) [consignment is "[a] quantity of goods consigned to *an agent* or factor." (Italics added.)]; Civ. Code, § 2026 [factor is an agent].) As such, they owed Scott duties as their principal. (See generally Civ. Code, §§ 2295, 2306; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 ["An agent is a fiduciary." (Italics omitted.)].) While the breach of such duties may not constitute a crime, it certainly supports the conclusion that restitution to Scott furthers the interests of justice.

Caldwell has failed to establish that the trial court abused its discretion in ordering restitution for the theft of Scott's Hyundai.

B. OREN'S UNPAID LICENSE FEES

Caldwell objected to restitution for the \$1,050 Oren gave him for DMV license fees. Although he never sent the money to the DMV, he claims he refunded Oren \$1,025 and produced a checkbook receipt purportedly reflecting the payment at the hearing. He also suggests he was unable to produce the canceled check because it was in the possession of the prosecution.

Caldwell's arguments are unpersuasive. At the hearing, the defense never asked Oren if she received a reimbursement check from Caldwell, but she explicitly denied that Duke City Auto paid for her DMV registration fee. From this we can infer she never received the purported \$1,025 check. Although Caldwell produced a checkbook receipt indicating the check was written, the receipt was not entered into evidence. Nor did the court have to believe it was authentic. Given the indications of Caldwell's dishonesty, the court may well have rejected Caldwell's testimony that he sent the check at all. In short, substantial evidence supported the conclusion that Caldwell did not reimburse Oren for the DMV fees.

Caldwell contends the proceedings were unfair because the *canceled* check may have been in the district attorney's possession. This assertion, however, is not supported by the record. At the hearing, Caldwell admitted he did not have the canceled check. But he did *not* testify that he ever received the canceled check, or it was seized in the search of Duke City Auto, or it was in the prosecutor's possession. Rather, he merely went along with his attorney's leading question that canceled checks generally were among the many items seized from his business. "Q. And were there DMV fees ever paid by you [on behalf of Oren]? [¶] A. The DMV fees, no. The answer is no, the DMV fees were not paid, and we refunded those fees to her. [¶] Q. And your business records were largely taken by the District Attorney's Office when -- or by the District Attorney's Office through a search warrant; is that correct? [¶] A. Yes, sir. [¶] Q. Cancelled checks, items of that type? [¶] A. Cancelled checks, all of the current DMV transfers out of the DMV office, anything that was visible and that was able to be carried off. Computer systems, as well. [¶] Q. You just mentioned you had given them a refund of some sort? [¶] A. Yes, sir, I did. [¶] Q. You sent them a check? [¶] A. Yes, sir, I did. [¶] Q. How much was that check for that you refunded to them? [¶] A. I believe it was 1,050 or 1,065, somewhere in that neighborhood."

Furthermore, even if Caldwell had indeed written a check to Oren, she cashed it, he received a canceled check, it was seized from his business, and it was in the prosecutor's possession at the time of trial, there is no indication that Caldwell initiated

any procedure to obtain the canceled check, or a copy, from the prosecutor. Nor did Caldwell make any attempt to prove the payment to Oren by any other means, as by records from his own bank. Not only does this further diminish the credibility of Caldwell's assertion that he sent Oren a reimbursement check, it also indicates he could have avoided any prejudice from it being in the prosecutor's possession, but chose not to.

Caldwell has failed to establish reversible error in this regard.

C. EATON'S MONTHLY PAYMENTS

The court awarded Eaton restitution with respect to a portion of his monthly payments of \$467.66, which he had made for 23 months. Caldwell contends restitution is not warranted because Eaton did not incur economic loss and because the court erred in calculating the amount.²

On the first point, Caldwell argues there was no economic loss because "the 23 payments were exactly what he expected to make when he bought the car, and he had full use of the car during the time he made the payments." Therefore, he contends, Eaton was not entitled to restitution for the payments he made during the months he used the car. (See, e.g., § 1202.4, subs. (a)(1), (f), (f)(3).)

We do not agree. When Caldwell contracted to make monthly payments of \$467.66, he did so with the understanding that he was *buying* the car. Moreover, the monthly amount was established not in correlation to the value of using the car on a monthly basis, but as a monthly installment toward the purchase price and finance charges over a given number of months. Accordingly, the \$467.66 amortized payment is not necessarily equal to the reasonable value of the use of the car.

² Respondent suggests Caldwell waived this issue by failing to object at trial. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.) Respondent is incorrect. In the first place, the prosecutor agreed with the defense that there should be a set-off for the reasonable value of Eaton's use of the Corvette. Furthermore, Caldwell sufficiently preserved the issue for appeal. Defense counsel argued at the hearing that: the set-off should equal the "monthly payment" of "\$435" (meaning, perhaps, \$468), there was no restitution due for Eaton's payments on the loan and to the insurance company, and the prosecutor failed to present proof of the rental value of the Corvette.

As to his second point, Caldwell contends the court erred in setting the reasonable value of using the car at \$250 per month, based on the fair rental value of the Corvette. In part he argues there was no evidence to support this conclusion. He further claims that this figure, amounting to about \$8 per day for the five-year-old Corvette, was unreasonable.

The trial court did not abuse its discretion. At the outset, we must be mindful that a restitution hearing does not require the formalities of a criminal trial. (*People v. Foster* (1993) 14 Cal.App.4th 939, 947.) A victim is not required to provide documentation of value or even establish the value of stolen property or amount of damages to a certainty. (*Carbajal, supra*, 10 Cal.4th at p. 1121; *People v. Thygesen* (1999) 69 Cal.App.4th 988, 992 (*Thygesen*)). Nor does a trial court abuse its discretion merely because its order does not reflect the exact amount of loss. (*People v. Balestra* (1999) 76 Cal.App.4th 57, 64; *Thygesen, supra*, at p. 992.) Indeed, the court “may use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole.” (*In re Brian S.* (1982) 130 Cal.App.3d 523, 527.)

Based on the record in this matter, we cannot say that the court was irrational in setting the reasonable value of the Corvette’s use at \$250 per month. It may be, as Caldwell argues, that a reasonable rental rate for a five-year-old Corvette would ordinarily not be \$8 a day. But it is not absurd to conclude that \$8 per day *was* a reasonable rental rate for a Corvette that was supposedly covered by an extended warranty but was not, was supposed to be registered to Eaton but was not, and could not be registered until the criminal proceedings against Caldwell had concluded. After all, without registration and registration tags, Eaton was subject to being stopped and cited by law enforcement at any time. We also note that Caldwell points to no *evidence* indicating the amount set by the court was unreasonable. Caldwell has failed to establish that the award was an abuse of the broad discretion afforded by section 1203.1.

D. JOHNSON’S DMV REGISTRATION FEE

Johnson paid Duke City Auto \$1,100 for DMV registration fees, but Caldwell did not forward the money to the DMV. Johnson also paid, or will have to pay, \$1,170 to the

DMV directly for registration of the car. In receiving restitution for both the \$1,100 she paid to Duke City Auto and the \$1,170 required by the DMV, Caldwell argues, Johnson improperly received a double-recovery, since she would have had to have paid to register her car with DMV anyway. Caldwell is correct.

Respondent contends that Caldwell forfeited this issue by failing to raise it at the restitution hearing. Although defense counsel argued it was the prosecution's fault that the fees were not paid to the DMV because the documents were seized from Duke City Auto's office, he did not argue that double recovery was improper. Indeed, when the court invited defense counsel to remark on this aspect of the restitution order, defense counsel responded that he had "no" comment. Contrary to Caldwell's assertion in his reply brief in this appeal, the error of which he complains did not render Caldwell's sentence an *unauthorized* sentence, but was merely a purported abuse of discretion in imposing double recovery.

If defense counsel's failure to object gave rise to a waiver, however, Caldwell asserts that it constitutes ineffective assistance of counsel as well. To be sure, we can think of no legitimate reason why defense counsel would not have objected to this aspect of restitution as providing a windfall double-recovery. As our next step in analyzing the ineffective assistance claim, we would have to consider the validity of the omitted objection to determine if counsel's failure to object was prejudicial. Thus, whether there was a waiver or not, we must proceed to the merits of Caldwell's contentions.

On the merits, Johnson should not be reimbursed both for the amount she paid to Duke City Auto for the registration fees and the amount she paid to DMV for the fees. Respondent argues that the restitution amount was reasonable because it was directly related to Caldwell's crimes, met the purposes of section 1203.1, and Johnson had trouble with the DMV and was sued by her finance company due to Caldwell's failure to pay off the loan on her trade-in vehicle. But without trivializing the "trouble" Johnson had with the DMV, there is no indication it translated into *economic* loss beyond the amounts she paid. Although she was sued by her finance company, she received separate restitution

for the \$5,197 sought in the lawsuit.³ On the record we review, therefore, the court was without basis for imposing restitution for both the amount Johnson paid to Duke City Auto and the amount she paid to the DMV directly.

Respondent contends that double recovery by a victim is permitted, relying on *Birkett, supra*, 21 Cal.4th 226. The court in *Birkett*, however, ruled that the defendant could be required to pay restitution even though the victim had been fully compensated by *insurance*. (*Id.* at p. 246.) In other words, *Birkett* indicated that a defendant's restitution obligation cannot be reduced by the fact that the victim has been reimbursed by sources independent from the defendant. It did not hold that the victim may *retain* a double recovery, noting instead that the victim might have to reimburse the third-party source. (*Ibid.*) The purpose of the restitution statutes is to make the victim whole, not to provide the victim a windfall. (*Thygesen, supra*, 69 Cal.App.4th at p. 995; see also *People v. Bernal* (2002) 101 Cal.App.4th 155, 166-167 [payments from *defendant's* insurance company may offset defendant's restitution obligation to victim].)

Because Caldwell conceded at the hearing that he should pay restitution for Johnson's direct payments to the DMV (\$1,170), the order of restitution with respect to the \$1,100 amount paid to Duke City Auto must be set aside.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Caldwell urges that, if we conclude his assertions on appeal are barred by his attorney's failure to object at the hearing, the attorney failed to provide effective assistance of counsel. As to the restitution for Eaton's monthly payments, however, we rejected respondent's waiver argument. As to the restitution for Johnson's DMV registration, we agreed with Caldwell that he should not have to pay restitution for both the amount Johnson paid Duke City Auto and the amounts she is paying the DMV. We therefore need not address Caldwell's ineffective assistance of counsel argument further.

³ Johnson testified that the \$5,197 did not include attorney fees and court costs in the lawsuit brought by the finance company, but she did not request recovery for those items.

III. DISPOSITION

The order of restitution is vacated. The matter is remanded to the trial court for issuance of a new order of restitution consistent with this opinion.

STEVENS, J.

We concur.

JONES, P.J.

GEMELLO, J.