

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

SHEILA THOMAS,

Defendant and Respondent.

A107411

(Solano County
Super. Ct. No. FCR182777)

This case is the last in a series of appeals the Solano County District Attorney (appellant) filed in 2004 challenging the amount of restitution ordered in certain welfare fraud cases. Each of the four previous appeals has been decided against appellant. (*People v. Akins* (2005) 128 Cal.App.4th 1376 [First District Court of Appeal, Division One]; *People v. Fortune* (2005) 129 Cal.App.4th 790 [First District Court of Appeal, Division Four]; *People v. Brown* (Oct. 28, 2005, A107410) [nonpub. opn.; First District Court of Appeal, Division Two]; *People v. Chester* (Oct. 28, 2005, A107400) [nonpub. opn.; First District Court of Appeal, Division Two].) We join our colleagues in rejecting appellant's arguments, and we affirm the restitution order here in its entirety.

BACKGROUND

On April 25, 2000, appellant filed a complaint charging Sheila Thomas (respondent) with one count of welfare fraud (Welf. & Inst. Code, § 10980, subd. (c)(2)) and 12 counts of perjury (Pen. Code, § 118). The complaint alleged respondent

had failed to report money she earned from working during the period from August 1996 through June 1997. On August 1, 2000, respondent pleaded no contest to the welfare fraud count, and all remaining charges—and charges in a separate case alleging fraud during the period from January 1998 to January 2000—were dismissed with a *Harvey* waiver¹ pursuant to a plea agreement. Respondent agreed to pay restitution in both cases, plus \$405, but the plea agreement did not state the amount of restitution owed.

According to the probation department’s presentence report, the Solano County Department of Health and Social Services (Department) claimed respondent received overpayments in 1996 through 1997 of \$3,420 in AFDC cash aid² and \$1,599 in food stamps, and overpayments in 1998 through 1999 of \$1,822 in AFDC aid and \$2,053 in food stamps. Some of these amounts were being adjusted, however, because the Department had reduced the level of respondent’s ongoing benefits to recoup its losses. On December 5, 2000, the court placed respondent on probation for a term of three years and ordered her to pay restitution of \$9,299 “less any grant adjustments” and as determined or directed by her probation officer. On September 9, 2003, respondent’s probation was extended for two years because she had not made complete restitution. The district attorney represented that she owed a balance of \$6,681.74.

On April 23, 2004, respondent’s counsel filed a motion to modify the amount of restitution. Relying on *People v. Crow* (1993) 6 Cal.4th 952 (*Crow*) and this court’s then-recent decision in *People v. Hudson* (2003) 113 Cal.App.4th 924 (*Hudson*), respondent argued the Department had been calculating restitution owed for cash aid

¹ *People v. Harvey* (1979) 25 Cal.3d 754.

² AFDC is an acronym for the Aid to Families with Dependent Children program, which is now known as the California Work Opportunity and Responsibility to Kids (CalWORKS) program. (*People v. Fortune, supra*, 129 Cal.App.4th at p. 792.)

and food stamps in a manner that reimbursed the Department for an amount greater than its actual loss.

The trial court held a combined hearing in May and June 2004 on respondent's motion and a similar motion filed by another defendant.³ After two hearings with argument and testimony from the Department, the court ordered the Department's appeals specialist to calculate the amount of cash aid and food stamp benefits respondent would have received had she been completely honest in reporting her income from work. The Department's calculations, which were independently confirmed by the public defender's office, indicated that the Department had suffered a total loss of \$4,247 as a result of respondent's fraud. The court therefore ordered the total amount of restitution corrected to this figure, less any payments made or appropriate credits received.

On June 11, 2004, respondent filed a request for dismissal of the charges against her pursuant to Penal Code section 1203.4 on the ground that she had fulfilled the terms of her probation and paid all of the restitution ordered (indeed, she had paid more than the \$4,247 ordered). The motion was set for July 19, 2004, but the court granted appellant's request for a one-week continuance. In the meantime, on July 23, 2004, appellant filed a notice of appeal from the order reducing restitution. Appellant then appeared at the July 26, 2004 hearing and argued respondent's petition for relief under Penal Code section 1203.4 was premature because respondent had not completed the extended term of probation and because the case was on appeal. The trial court declined to dismiss the case because of the pending appeal. However, it ordered that trial court proceedings after the notice of appeal be made part of the appellate record.⁴

³ The court's order amending restitution in this other defendant's case was recently affirmed in an unpublished opinion by Division Two of this District. (*People v. Brown* (Oct. 28, 2005, A107410) [nonpub. opn.])

⁴ Although the trial court twice noted that respondent was free to pursue sanctions for appellant's conduct in this court, it appears she has chosen not to do so since the

DISCUSSION

Appellant’s multiple arguments on appeal essentially fall into two categories: (1) challenges to the methods used to recalculate restitution, and (2) challenges to the trial court’s authority to recalculate restitution at all. Because arguments in this second category are less weighty—indeed, bordering on frivolous—we address them at the end of the opinion.

I. Amount of Restitution Ordered Is Consistent with Case Law

A trial court’s order setting the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) “No abuse of discretion will be found when there is a factual or rational basis for the amount of restitution ordered. (*People v. Dalvito* (1997) 56 Cal.App.4th 557, 562.)” (*Hudson, supra*, 113 Cal.App.4th at p. 927.) The order need not reflect the exact amount of the loss, nor must the order reflect the amount of damages recoverable in a civil action. (*People v. Akins, supra*, 128 Cal.App.4th at p. 1382; *People v. Bernal* (2002) 101 Cal.App.4th 155, 162.) “In determining the amount of restitution, all that is required is that the trial court ‘use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ [Citations.]” (*People v. Akins, supra*, 128 Cal.App.4th at p. 1382.)

Both parties agree that the Supreme Court’s decision in *Crow, supra*, 6 Cal.4th 952, governs the computation of restitution in welfare fraud cases. In the context of determining applicability of a sentencing enhancement, the Supreme Court in *Crow* held that “the defrauded agency’s ‘loss’ should be calculated by subtracting the amount the government would have paid had no acts of fraud occurred from the amount the government actually paid. Any money that the government would have

respondent’s brief contains no request or argument for sanctions against the Solano County District Attorney. (It should be noted that the Solano County District Attorney’s office is prosecuting this appeal, and not the Attorney General.)

been obligated to pay had the fraud not occurred is not attributable to the fraud, and thus is not a ‘loss’ arising out of the criminal offense.” (*Crow, supra*, 6 Cal.4th at p. 962.)

Ten years later, in another appeal from Solano County brought by the same district attorney who is prosecuting the present appeal, this court applied the rule stated in *Crow* to the calculation of restitution for the overissuance of food stamps. (*Hudson, supra*, 113 Cal.App.4th at pp. 928-929.) In *Hudson*, an employee of the Department (who also testified in this case) explained that state regulations normally entitle welfare recipients to have 20 percent of their earned income disregarded in determining their food stamp entitlement; however, recipients found to have underreported their income are not entitled to this 20 percent disregard. (*Id.* at pp. 926-927.) Following these regulations, the Department did not give the defendant the benefit of the 20 percent disregard when it calculated the restitution she owed for overissued food stamps. (*Id.* at p. 927.) In an opinion authored by Justice Corrigan, we concluded the Department’s method of calculating food stamp restitution “violated *Crow*’s clear directive” that the agency’s loss be computed based on the amount it would have paid *had no acts of fraud occurred*. (*Id.* at pp. 928-929.)

Consistent with *Crow* and *Hudson*, the trial court in this case ordered the Department to recalculate restitution for food stamp overissuances and for cash aid by determining what respondent would have been entitled to receive had no fraud occurred. In calculating the total amount of these benefits absent fraud, the court’s order required the Department to give respondent the benefit of the 20 percent disregard to which she would have been entitled. Thus, restitution for cash aid would equal the amount of aid respondent actually received minus the amount she would have received if she had reported all income. Because the court ruled this second figure—the amount respondent would have received absent fraud—must take account of the 20 percent income disregard the Department gives welfare recipients as an incentive to work, the amount to be subtracted was larger than before, thus making the restitution figure smaller. Similarly, restitution for food stamp overissuances would

equal the value of food stamps actually issued to respondent minus the value of food stamps to which she would have been entitled if she had reported all income. Again, because 20 percent of respondent's monthly income would have been disregarded in the absence of fraud, this second figure was larger under the court's order than it was under the Department's prior calculations, thus making the restitution figure smaller.

The court's order was consistent with the plain language *Crow* and, at least with respect to food stamp restitution, virtually mandated by our decision in *Hudson*.

A. Calculation of Food Stamp Restitution Proper

Despite our clear rejection of the same position in *Hudson, supra*, 113 Cal.App.4th at pp. 928-929, the Department stubbornly insisted on applying its internal regulations to calculate respondent's food stamp allotments using "all of the money that she actually got in her hand." Amazingly, appellant—the same district attorney's office that appeared before us two years ago in the *Hudson* case, represented by the same deputy—repeats these arguments here. Once again, appellant contends that state and federal regulations and appellant's own overwrought interpretation of *Crow* support the Department's original food stamp restitution calculation, which was based on the actual aid respondent received. We rejected these arguments in *Hudson* and disapproved of the same method of calculating food stamp restitution appellant seeks to validate in this case. (113 Cal.App.4th at pp. 928-929.) Because this method produces a restitution figure larger than the difference between benefits actually received and benefits that would have been received absent the fraud, we observed in *Hudson* that appellant's position "cannot be squared with *Crow*." (*Id.* at p. 929.) We also explained why federal and state regulations are irrelevant in the context of court-ordered restitution, noting "[t]his appeal does not implicate the Department's right to calculate and collect whatever administrative penalties it may be entitled to impose under appropriate statutes and regulations. The issue here is whether the agency is entitled to have the court impose such penalties as restitution after a criminal

conviction. *Crow* holds it is improper to do so.” (*Ibid.*)⁵ We are not inclined to change our minds on these matters, and appellant’s implied suggestion that *Hudson* was wrongly decided is best addressed (again) to a higher court.⁶

Appellant asserts that respondent might not have been entitled to the 20 percent disregard even in the absence of fraud. For example, she may have failed to report income from other jobs inadvertently, or because she did not realize she was supposed to report them. But respondent’s failure to report income from work during the relevant time periods has been conclusively established as a result of the criminal proceedings instituted against her. Moreover, appellant’s speculation about possible reasons respondent could have lost the work incentive benefit ignores our standard of review, and it in no way demonstrates that the trial court’s order applying the 20 percent disregard was arbitrary or capricious.

Appellant also complains the trial court should not have applied *Hudson* “retroactively,” observing that restitution was originally ordered in this case three years before *Hudson* was decided. But the *Hudson* decision did not announce a new principle of law; rather, it analyzed one application of the rule set forth 10 years earlier by the Supreme Court in *Crow*. (See *Hudson, supra*, 113 Cal.App.4th at pp. 928-929.) Moreover, the trial court had the power to modify the amount of restitution ordered at any time during the term of probation. (Pen. Code, § 1202.4, subd. (f)(1); see also Pen. Code, § 1203.3, subd. (b)(5) [stating, with respect to conditions on court’s power to revoke, terminate or modify probation, “[n]othing in this section shall be construed to prohibit the court from modifying the dollar amount of a restitution order pursuant

⁵ Division One of this court has also rejected appellant’s claim that state and federal regulations govern restitution. In *People v. Akins, supra*, 128 Cal.App.4th at p. 1387, the court explained that “no deference is owed to . . . administrative regulations” in this context because courts, not agencies, have the relevant expertise in determining proper restitution under section 1202.4 of the Penal Code.

⁶ The Supreme Court denied appellant’s petition for review of *Hudson*. (*Hudson, supra*, 113 Cal.App.4th at p. 930.)

to subdivision (f) of Section 1202.4 at any time during the term of the probation”].) Although appellant insists the trial court was powerless to reexamine its original restitution order in light of *Hudson*, it cites no authority for this proposition, and we conclude the argument is meritless.

Besides challenging use of the Department’s 20 percent disregard, appellant also contends all of the cash aid respondent received (i.e., including the overpayment) should be considered “income” for purposes of determining what her food stamp allotment would have been (See *People v. Akins, supra*, 128 Cal.App.4th at pp. 1388-1389 [discussing same argument]; see also *Hudson, supra*, 113 Cal.App.4th at p. 928, fn. 2. [not reaching this issue].) In contrast, the trial court’s method starts with a clean slate and determines what cash aid and food stamps respondent would have received absent fraud. Because it assumes a higher income, appellant’s method produces a lower figure for the amount of aid that would have been paid absent fraud, and consequently results in a higher restitution obligation. But appellant ignores the fact that respondent has been ordered to pay restitution for the excess amount of cash aid she received. Thus, by requiring respondent to pay restitution for food stamps based on an income she must also pay back in restitution, appellant’s method would reward the Department with double restitution. (See *People v. Akins, supra*, 128 Cal.App.4th at p. 1389 [noting a court could reasonably conclude this method results in restitution exceeding the amount necessary to make the victim whole].)

Two published cases from this District have recently reaffirmed *Hudson* and approved of the precise method of calculating food stamp restitution that the trial court ordered in this case. (*People v. Fortune, supra*, 129 Cal.App.4th at pp. 794-797; *People v. Akins, supra*, 128 Cal.App.4th at pp. 1386-1389.) Both of these cases concluded that the Department’s method of basing food stamp restitution on actual cash aid received would result in restitution awards larger than the Department’s actual losses. (*People v. Fortune, supra*, 129 Cal.App.4th at p. 796; *People v. Akins, supra*, 128 Cal.App.4th at p. 1386.) Both cases also observed that the Department’s method of basing food stamp restitution on its prior overpayments of cash aid “ignores the fact

that the restitution order will also require defendant to repay the cash overpayment and results in a figure representing less net welfare aid, i.e., cash and food stamps, than the amount she would have been entitled to had she never committed the crime.” (*People v. Akins, supra*, 128 Cal.App.4th at p. 1389; see also *People v. Fortune, supra*, 129 Cal.App.4th at pp. 796, fn. 6 [“We note that by following the prosecution’s method of calculation, a defendant would be required to pay restitution of over-issuance of food stamps based upon an income figure which would include overpayment of cash benefits, which the defendant would also be required to pay back in restitution”].)

Moreover, in the *People v. Akins* case, Division One echoed the view we expressed in *Hudson* that the Department’s regulatory guidelines for determining and collecting overpayments do not constrain a criminal court’s discretion in determining the amount of restitution, nor do they require or permit a court to impose restitution in a manner that violates *Crow*. (See *Hudson, supra*, 113 Cal.App.4th at p. 929.) As the *Akins* court explained, “state and federal regulations that require the Department to calculate the amount of overpayment according to a different method in [no] way circumscribe the discretion of the court to calculate the amount of restitution under section 1202.4. [Citations.]” (*People v. Akins, supra*, 128 Cal.App.4th at p. 1387.)⁷ Restitution ordered as part of a criminal conviction is not part of this regulatory scheme, and the trial court remains free to use any rational method to set a restitution amount that can reasonably be said to make the victim whole. (*Ibid.*; see *People v. Thygesen, supra*, 69 Cal.App.4th at p. 992.)

For these reasons, we conclude the trial court did not abuse its discretion by declining to calculate the amount of restitution respondent owed in the manner urged by appellant.

⁷ For these reasons, a different result is not compelled by *Knebel v. Hein* (1977) 429 U.S. 288, a case discussed at length by appellant in the reply brief and at oral argument. The *Knebel* case has nothing to do with criminal restitution; rather, it addresses how state welfare agencies may implement federal food stamp regulations.

B. Calculation of Cash Aid Restitution Proper

Next, assuming the validity and applicability of *Hudson*, appellant argues the trial court abused its discretion by “expand[ing]” *Hudson*’s holding to cash aid calculations. This same argument was rejected in *People v. Akins*, which concluded that application of the 20 percent disregard in the context of cash benefits was a reasonable exercise of discretion. (*People v. Akins, supra*, 128 Cal.App.4th at pp. 1387-1388.) More to the point, the trial court’s order was not an expansion of *Hudson* at all, but a simple application of the rule announced in *Crow*. Just as *Crow* requires, the court ordered that cash aid restitution be calculated based on the amount respondent would have been entitled to receive had she committed no fraud. (*Crow, supra*, 6 Cal.4th at p. 962.) In the absence of fraud, the Department’s regulations would have required it to disregard 20 percent of respondent’s income in calculating her cash aid. Therefore, consistent with *Crow*, restitution should have been calculated as the amount of cash aid actually paid minus the amount of aid the Department would have paid if respondent had reported all income and received the benefit of the 20 percent disregard. Even appellant concedes the restitution order “is consistent with the language of *Crow*,” though it claims the order cannot be reconciled with *Crow*’s “spirit.”

Furthermore, as the *Akins* court observed in rejecting the same arguments, appellant “fail[s] to explain why the extension of the deduction to the calculation of cash benefits is irrational, arbitrary, or capricious. The trial court could reasonably conclude that, for the same reasons that failure to apply the 20 percent earned income deduction when calculating the amount of food stamps the defendant would have been entitled to results in an overstatement of the restitution amount, the failure to apply the deduction would also result in an overstatement with respect to restitution for cash benefits.” (*People v. Akins, supra*, 128 Cal.App.4th at p. 1388.) We likewise conclude the trial court did not abuse its discretion in applying the 20 percent disregard to calculate the cash aid restitution respondent owed the Department.

II. Trial Court Had Power to Amend Restitution Order

We next consider appellant's arguments that the trial court lacked authority to amend the restitution order.

A. Plea Agreement Not Conditioned on Specific Amount of Restitution

The criminal case against respondent was resolved by a plea bargain. Appellant now argues the trial court could not modify its original restitution order because in doing so it effectively allowed respondent to "retract" her part of the agreement. However, this argument is premised on an incorrect factual assumption that respondent agreed to pay a specific amount of restitution in entering the plea bargain. In fact, she did not. Respondent initialed a statement in the waiver of rights form confirming that she agreed to pay restitution in the two criminal cases "plus \$405," but the amount of restitution was not indicated. The minute order from the change of plea hearing does not indicate that the plea was based on respondent's agreement to pay a specific sum in restitution. Indeed, no specific amount of restitution was even mentioned until the sentencing hearing held four months *after* respondent entered her no contest plea. At that time, the court ordered restitution in the amount represented by the prosecutor but expressly indicated this amount was to be reduced by "any grant adjustments" that had been made to respondent's benefits.

Penal Code section 1202.4, subdivision (f)(1) authorizes the court to modify the amount of restitution "on its own motion or on the motion of the district attorney, the victim or victims, or the defendant." The court has the power to correct the amount of restitution ordered at any time during the term of probation. (See Pen. Code, § 1203.3, subd. (b)(5).) Nothing in the record suggests respondent waived her right to seek a modification of restitution under these statutes. Nor does appellant cite any authority for its position that a trial court lacks authority to amend a restitution order under these

circumstances. Accordingly, the trial court properly concluded it had jurisdiction to modify its prior restitution order.⁸

B. Lack of Notice Claim Waived

Appellant also argues the order should be reversed because respondent did not serve a copy of her motion to amend the amount of restitution on the “victim,” i.e., the Department, as required by Penal Code section 1202.4, subdivision (f)(1). Because appellant did not raise this issue below—indeed, it did not even serve the Department with a copy of its own brief opposing respondent’s motion—the claim is waived on appeal. (*People v. Fortune, supra*, 219 Cal.App.4th at pp. 793-794.)

Furthermore, even assuming the claim was not waived, there was no due process violation in this case because the Department had actual notice of the proceedings and a meaningful opportunity to be heard. (See *In re Brian K.* (2002) 103 Cal.App.4th 39, 42 [“the essence of due process is actual notice and a ‘meaningful opportunity’ to be heard”].) Tina Williams, an appeals specialist from the Department, appeared and testified during two days of hearings regarding the modification of restitution amounts in respondent’s case and another case.⁹ In addition, appeals specialist Lisa McKinnon appeared at the second day of hearings and agreed to recalculate respondent’s restitution obligation according to the court’s order. Because the record demonstrates the Department had actual notice and ample opportunity to be heard in the proceedings, appellant’s due process claim fails on the merits.

C. Rehabilitative Purpose of Restitution Does Not Warrant Reversal

Finally, appellant argues the original restitution order should not have been disturbed, even if it overcompensated the Department’s losses, because it served the valid goal of rehabilitating the defendant. But the defensibility of the original

⁸ Although the trial court assumed there had been a stipulation as to the amount of restitution, it reasoned that the stipulation should be set aside because the parties were operating under a mutual mistake of fact.

⁹ Ms. Williams also testified for the Department in *Hudson*. (See *Hudson, supra*, 113 Cal.App.4th at pp. 926-927.)

restitution order is not at issue in this appeal; rather, we are concerned only with whether the trial court abused its discretion in modifying the order. For the reasons discussed, we conclude it did not. The trial court ordered the amount of restitution recalculated in accordance with the method stated in governing Supreme Court precedent. We have concluded the court had the power to modify the amount of restitution, and it employed a rational method of calculation reasonably designed to make the victim whole. (See *People v. Akins, supra*, 128 Cal.App.4th at p. 1382.) Appellant's arguments about the rehabilitative purpose of restitution are thus beside the point.

DISPOSITION

The restitution order is affirmed in its entirety.

McGuiness, P.J.

We concur:

Parrilli, J.

Pollak, J.