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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAILE M. CARMICHAEL, Defendant and Appellant.	A106894 (Contra Costa County Super. Ct. No. 5-032055-6)

Maile Carmichael appeals from convictions of possession for sale of methamphetamine, sale of methamphetamine and conspiracy. She contends the trial court erred in ordering her to pay restitution to the Bureau of Narcotic Enforcement for "buy funds" and to pay a court security fee. We shall strike the restitution order and imposition of the security fee and affirm the judgment in all other respects.

STATEMENT OF THE CASE

Appellant was charged by information filed on October 15, 2003, with sale and possession for sale of methamphetamine (Health & Saf. Code, §§ 11379, subd. (a), 11378) on January 22, January 27, February 6 and April 16, 2003. The information further charged appellant with conspiracy (Pen. Code[1], § 182, subd. (a)(1)), alleging six overt acts that occurred on the dates listed above. It was also alleged that appellant was

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

ineligible for probation under section 1203.073, subd. (b)(2), due to the quantity of methamphetamine she sold and possessed.[2]

Trial began on March 23, 2004. On March 30, 2004, after the defense rested, the court granted appellant's section 1118 motion to dismiss as to the four counts relating to January 22 and January 27, 2003. On April 2, 2004, the jury found appellant guilty of the sale and possession for sale charges related to the February 6 and April 16 counts, found the section 1203.073, subdivision (b)(2) allegations true and found appellant guilty of conspiracy, with three overt acts.

On June 11, 2004, appellant was sentenced to the middle term of three years in prison on the count of sale of methamphetamine on February 6, 2003, a concurrent middle term of three years for the April 16 sale, and a concurrent midterm of three years for the conspiracy count. Two-year middle terms for the two counts of possession for sale were stayed pursuant to section 654. The court ordered appellant to pay a $600 restitution fine (§ 1202.4, subd. (b)); a $600 parole violation restitution fine, suspended unless parole revoked (§ 1202.45); restitution of $2,900 to the California Department of Justice, Bureau of Narcotics Enforcement for buy funds (§ 1202.4, subd. (f)); a $135 laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)); a $150 drug program fee (Health & Saf. Code, § 11372.7, subd. (a)); and a $20 security fee.

Appellant filed a timely notice of appeal on June 15, 2004.

STATEMENT OF FACTS

A detailed recitation of the facts is unnecessary to resolution of the issues before us. The charges arose from a series of sales of methamphetamine arranged by California Department of Justice, Bureau of Narcotics Enforcement, Special Agent Andre LeMay. On February 6, LeMay purchased methamphetamine from appellant with $2,900 in prerecorded funds. On April 16, LeMay was unavailable to complete an arranged

[2] A codefendant, Adrian Miguel Arroyo, was charged with the same offenses as appellant, except that he was not charged with the April 16, 2003 sale of methamphetamine. The jury ultimately deadlocked on the charges against Arroyo and a mistrial was declared.

transaction, but Antioch police officers assigned to assist with the case stopped the car appellant was driving as it left the prearranged location. The officers found a Tupperware-type container holding a "white powder crystal substance" in the front seat.

DISCUSSION

I.

Appellant contends the court erred in ordering her to pay restitution to the Bureau of Narcotics Enforcement because it was not a "direct victim" of her crime. Section 1202.4, subdivision (f), provides in pertinent part: "In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . ." Subdivision (k) of section 1202.4 defines "victim," for purposes of the section, as "[a]ny corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity *when that entity is a direct victim of a crime*." (Emphasis added.)

People v. Torres (1997) 59 Cal.App.4th 1, 2, held that "a law enforcement entity that spends money to purchase illegal drugs does not thereby become a 'direct victim of a crime' entitling it to receive direct restitution reimbursing it for the cash it spent on the drugs." *Torres* noted cases involving restitution under other statutes which found that a government agency could be a "direct victim" of crime when it is defrauded (*People v. Crow* (1993) 6 Cal.4th 952, 960 [county agency victim of welfare fraud entitled to restitution under former Gov. Code, § 13967, subd. (c)]; *People v. Baker* (1974) 39 Cal.App.3d 550, 559 [dicta indicating government entitled to "reparation" as crime victim under former § 1203.1 for offense of tax evasion or theft of government property]). (*People v. Torres, supra*, 59 Cal.App.4th at p. 3.)

On the other hand, other cases have held a defendant could not be required to make restitution for the costs of extradition (*People v. Burnett* (1978) 86 Cal. App. 3d 320, 323) or prosecution (*People v. Baker, supra*, 39 Cal. App. 3d at pp. 559-560)

because such expenses are "general cost[s] of prosecuting and rehabilitating criminals." (*People v. Torres, supra,* 59 Cal.App.4th at p. 3.) "Reading the statutory language in light of the cases described above in which restitutionary orders have been permitted only when the government agency is itself victimized we conclude the Legislature did not intend to include as a 'direct victim of a crime' a law enforcement agency that in the course of investigating criminal activity purchases illegal drugs." (*Id.*, at pp. 4-5.)

Respondent urges that *Torres* should be reconsidered in light of subsequent revision of the relevant statutes, a preexisting California Supreme Court case and two cases distinguishing *Torres*. Respondent's central argument is that restitution serves rehabilitative goals.

Respondent relies upon *People v. Rugamas* (2001) 93 Cal.App.4th 518, in which the defendant, as a condition of probation, was required to pay restitution to a police department for medical costs incurred after the defendant was shot with rubber bullets when he persisted in brandishing a machete at police investigating a domestic disturbance. Respondent describes the court as having distinguished *Torres* by relying upon a distinction between the rehabilitative goals of restitution as a condition of probation under section 1203.1 and the compensatory goals of direct restitution under section 1202.4 by defendants sentenced to prison. Respondent argues that our Supreme Court has long recognized that restitution serves rehabilitative goals for a defendant sentenced to prison as well as one granted probation (*People v. Crow, supra,* 6 Cal.4th at p. 958), and that the statutes governing restitution now reflect a "more unitary approach" in the prison and probation contexts.

The restitution order in *Rugamas* was made under section 1203.1, under which a trial court has broad discretion to impose conditions to "foster rehabilitation and protect public safety." (*Rugamas, supra,* 93 Cal.App.4th at p. 521.) The court distinguished *Torres* as having involved "section 1202.4's mandatory restitution for 'direct victims' " and restitution for "overhead expenses incurred in the course of the regular investigatory duties of the sheriff's department." (*Rugamas, supra,* at p. 523.) In *Rugamas*, by contrast, the police department "was not provided restitution for expenses associated with

the cost of performing its regular duties such as the weapons or rubber bullets used, the gasoline for the squad cars, or the salaries of the officers involved. Instead, it was reimbursed for its out-of-pocket loss resulting from unusual expenses directly incurred because of defendant's conduct." (*Ibid.*) *Rugamas* did not address whether the restitution under section 1202.4 is concerned with rehabilitation or compensation, only that restitution under that statute was limited to "direct" victims and would not include routine costs of a criminal investigation.

Respondent's statutory argument is based on the 1995 amendment of section 1202.4, subdivision (f). Prior to that amendment, section 1202.4, subdivision (f), provided for direct victim restitution only when the defendant was sentenced to prison. Section 1203.1 governed restitution in probation cases, stating that the court "shall provide for restitution in proper cases." The 1995 amendment of section 1202.4, subdivision (f), removed the limitation to prison cases. (Stats. 1995, ch. 313, § 5.) In 1998, an amendment to section 1203.1 added a provision that "[t]he restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code." (Stats. 1998, ch. 931, § 393.3.)

We fail to comprehend the significance respondent attaches to these statutory changes. Restitution was ordered in the present case under the sole authority of section 1202.4. *Torres* analyzed section 1202.4 as amended in 1995 (*Torres, supra,* 59 Cal.App.4th at p. 2, fn. 1), so the amendment that respondent discusses provides no reason to reconsider *Torres*. Nothing in respondent's argument suggests any basis for departing from the rule that restitution to a government agency under section 1202.4 is limited to situations in which the agency is a direct victim of the defendant's crime.

This rule was recently reaffirmed in *People v. Martinez* (2005) 36 Cal.4th 384 *(Martinez)*. At issue there was restitution to a state agency for the costs of removing hazardous waste from the defendant's illegal drug laboratory. *Martinez* held restitution for these costs could not be imposed under section 1202.4 because the agency was not a direct victim in that the "defendant's attempt to manufacture methamphetamine was not

an offense committed against the Department, nor was the Department the immediate object of his crime."[3]

In confirming that restitution to a governmental entity is permissible under section 1202.4, subdivision (k), only when it is a direct victim of crime, *Martinez* noted that the term "direct victim" had a "precise meaning" before it was added to section 1202.4, subdivision (k) in 1994: Prior caselaw "had recognized that restitution to the government was proper when it was a victim of a crime, but also that restitution was not proper when a governmental loss resulted from prosecuting a crime. (See *People v. Burnett* [, *supra,*] 86 Cal. App. 3d 320, 322; *People v. Baker* [, *supra,*] 39 Cal. App. 3d 550, 559.)" Cases had viewed a government entity as a direct victim of a crime when it was a victim of tax evasion or theft of government property. (*Martinez, supra,* 36 Cal.4th at p. 393, discussing *People v. Narron* (1987) 192 Cal.App.3d 724, 732; People *v. Crow, supra,* 6 Cal.4th at p. 957-958.) *Martinez* further noted that cases decided after the 1994 amendment of section 1202.4 had "preserved the distinction." (*Martinez, supra,* at p. 393, fn. 1.) The Supreme Court used *Torres* as an example of such a case, and quoted from *People v. Ozkan* (2004) 124 Cal.App.4th 1072, 1077 *(Ozkan),* " 'Under the relevant case law and the statutory scheme, public agencies are not directly "victimized" for purposes of restitution under Penal Code section 1202.4 merely because they spend money to investigate crimes or apprehend criminals.' (*Martinez, supra,* 36 Cal.4th at p. 393, fn. 1.)"

Respondent suggests that *Ozkan* supports a restitution order in the present case, apparently because it views the case as having required "a rehabilitative award that impressed upon the unjustly enriched defendant the costs to society of uncovering and

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[3] The agency in *Martinez, supra,* 36 Cal.4th 384, was entitled to restitution for its clean up costs under statutes enacted specifically for this purpose, Health and Safety Code sections 11470.1 and 11470.2. *Martinez* held these statues were the " 'exclusive' means by which a government entity that is not a direct victim of a crime may recoup its costs of eradicating or cleaning up toxic or hazardous substances resulting from controlled substance crimes." (*Martinez, supra,* at p. 394.)

prosecuting his criminal behavior . . . ." As respondent recognizes, *Ozkan* followed *Torres* in concluding a restitution order for investigative costs was not permissible under section 1202.4. (*Ozkan, supra,* 124 Cal.App.4th at pp. 1076-1077.) It reversed the trial court's refusal to order restitution only because it found a different statutory basis to do so: The defendant's offenses involved violations of Business and Professions Code sections concerning weights and measures and Business and Professions Code section 12015.5 specifically authorizes recovery of investigative costs in such cases. (*Ozkan*, *supra*, at pp. 1078-1081.) No such statutory basis for a restitution order exists in the present case.

We conclude the restitution order under section 1202.4 must be stricken.

II.

Appellant also contends the trial court erred in imposing a $20 security fee under section 1465.8 because her offenses were committed before the effective date of the statute authorizing such fees.

Section 1465.8, subdivision (a)(1), provides in pertinent part: "To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense . . . ." This statute was enacted on August 2, 2003, and became effective on August 17, 2003. (Stats. 2003, ch. 159 § 25.) Appellant's offenses were committed between January 2003 and April 2003. She was sentenced on June 11, 2004.

"The Penal Code provides, in section 3, that none of its provisions are retroactive unless expressly so declared. (See also *People v. Hayes* (1989) 49 Cal. 3d 1260, 1274 [Stating that '[a] new statute is generally presumed to operate prospectively absent an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise.'].) [¶] . . . [¶] In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after

the statute's effective date. [Citations.] A law is not retroactive 'merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 156-157.)

Appellant argues section 1465.8 contains no language demonstrating a legislative intent for retroactive application and therefore cannot be applied to attach a new legal consequence to conduct that predated the effective date of the statute. Respondent counters that the statute is *not* being applied retroactively when used to impose a security fee at a sentencing taking place after the statute's effective date. Whereas appellant views the "last act or event necessary to trigger application of the statute" to be the last offense she committed, respondent views it to be the conviction and sentencing, which occurred after the effective date.

We agree with appellant. Section 1465.8 requires imposition of the security fee after conviction, but imposition of the fee is nevertheless a "new legal consequence[]" attached to the offense appellant committed and increases her liability for conduct that was completed before the statute's effective date. (*People v. Grant, supra,* 20 Cal.4th at p. 156-157.) Not every application of a statute to offenses completed before the effective date is improper. For example, laws governing the conduct of trials may be applied to trials of offenses committed before they became effective. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 297-300 [provisions of Proposition 115].) "Even though applied to the prosecution of a crime committed before the law's effective date, a law addressing the conduct of trials still addresses conduct in the future. . . . Such a statute ' "is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future." ' " (*Id.*, at p. 288.) Such is not the case here. Imposition of a security fee on a conviction for conduct completed prior to the effective date of section 1465.8 necessarily adds to the legal consequences of the conduct.

We are aware of *People v. Bailey* (2002) 101 Cal.App.4th 238, 241-242 (*Bailey*), which held a gang registration requirement could be imposed as a condition of probation under section 186.30 even though the offenses were committed before the enactment of

the statute. In response to the defendant's retroactivity challenge, the court stated: "Section 3 provides that no part of the Penal Code is retroactive unless 'expressly so declared.' The Supreme Court has construed this language to include either 'an express declaration of retroactivity or a clear and compelling implication that the Legislature intended otherwise.' (*People v. Hayes* [, *supra,*] 49 Cal.3d 1260, 1274; *People v. Grant* [, *supra,*] 20 Cal.4th 150, 157.) We believe that the Legislature expressed its intent that the registration requirement 'apply to any person convicted in a criminal court' of certain offenses. (§ 186.30.) Because defendant was convicted after the effective date of section 186.30, the law applies to him." (*Bailey, supra,* 101 Cal.App.4th at p. 243.)

Bailey did not explain how the language of section 186.30 demonstrated a legislative intent to include convictions for offenses predating its enactment. In our view, the statute is entirely silent on the issue. Accordingly, we decline to follow *Bailey*'s conclusory analysis.

We are also aware, as appellant recognizes, that section 1465.8 has been upheld against a challenge that it violated the prohibition against ex post facto legislation when applied to conduct preceding its effective date. (*People v. Wallace* (2004) 120 Cal.App.4th 867, 870 (*Wallace*).) Appellant correctly points out, however, that *Wallace* does not resolve the retroactivity issue. The questions to be resolved under an ex post facto challenge are "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795 [application of sex offender registration requirement to defendant whose offenses were committed before effective date of relevant statute did not violate ex post facto prohibition].) *Wallace* held section 1465.8 was enacted for a *nonpunitive* purpose, as the stated purpose of the legislation was to " 'ensure and maintain adequate funding for court security,' "[4] and was not so punitive as

[4] *Wallace* also noted in this regard that the statute was enacted as part of larger budgetary legislation, the same fee was also imposed on civil litigants, certain offenders

to override the legislative intent because it imposed a minimal burden, did not meet traditional aims of punishment and was rationally related to a nonpunitive purpose. (*Wallace, supra,* 120 Cal.App.4th at pp. 875-876.) The issue in the present case is that section 1465.8 attached a new legal consequence to, and increased appellant's liability for, conduct that occurred before it became effective, regardless of whether the fee constituted "punishment" within the meaning of the ex post facto clause.

The language of section 1465.8, imposing a fee "on every conviction for a criminal offense," falls far short of "a clear and compelling" indication the Legislature intended the statute to be applied retroactively, as required. (*People v. Hayes, supra,* 49 Cal.3d at p. 1274.) Absent a clear indication of such intent, imposition of the fee in this case would render Penal Code section 3 meaningless.

The judgment shall be modified to strike the restitution order under section 1202.4 and security fee under section 1465.8 and as so modified, is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

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Lambden, J.

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whose charges would be dismissed and certain arrestees who would not be charged with a crime, the statute would go into effect only if specified trial court funding levels were enacted, and the security fee was denominated a "fee" rather than a "fine." (*Wallace, supra,* 120 Cal.App.4th at pp. 875-876.)

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MAILE M. CARMICHAEL, Defendant and Appellant.	A106894 (Contra Costa County Super. Ct. No. 5-032055-6) **ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION**

THE COURT:

The opinion in the above-entitled matter filed on January 9, 2006 was not certified for publication in the Official Reports. For good cause, appellant's request for publication is granted in part, as follows:

Pursuant to California Rules of Court, rules 976 and 976.1, the opinion in the above-entitled matter is ordered certified for publication in the Official Reports, **with the exception of** the entire text of part I of Discussion (pp. 3-7).

Kline, P.J.

Trial Judge:	Honorable Harlan G. Grossman
Trial Court:	Contra Costa County Superior Court
Attorney for Appellant:	Kathleen Woods Novoa First District Appellate Project
Attorneys for Respondent:	Bill Lockyer, Attorney General Robert Anderson, Chief Asst. Atty. General Gerald A. Engler, Sr. Asst. Atty. General Christina vomSaal, Deputy Attorney General Catherine A. Rivlin, Supervising Deputy Attorney General