

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES GIORDANO,

Defendant and Appellant.

E036325

(Super.Ct.No. INF 046095)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White, Judge. Affirmed.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and James D. Dutton, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant Charles Giordano pleaded guilty to Penal Code section 192, subdivision (c)(3), driving under the influence resulting in the death of another

individual. He was sentenced to four years in prison, ordered to pay a restitution fine of \$400 and a parole restitution fine of \$400. The plea agreement expressly provided that no direct restitution would be made to the victim.

On May 5, 2004, after defendant's plea on December 18, 2003, the decedent's wife noticed a restitution hearing on June 18, 2004, pursuant to Penal Code section 1203.4¹, seeking restitution for the death of her husband. As a result of the hearing, the trial court ordered defendant to pay restitution in the amount of \$167,711.65.

Defendant appeals, contending that the order violated his original plea agreement and that the Penal Code authorizes no direct restitution to the surviving spouse of a deceased victim based upon his future earnings.

We find that the trial court properly ordered victim restitution and affirm defendant's sentence as modified by the restitution order.

2. Facts

Kenneth Armstrong was killed when defendant, driving under the influence, struck Armstrong's motorcycle. Defendant pleaded guilty to the charge, was sentenced to four years in prison and ordered to pay a restitution fine of \$400. The sentence included no direct restitution to victims. Six months later Armstrong's wife noticed a hearing requesting restitution for the loss of earnings Armstrong would have earned.

Defendant contends that section 1202.4 does not authorize such restitution and the award of any amount violated his plea agreement.

¹ All further statutory references are to the Penal Code.

3. Right to Seek Restitution

The court raised the question as to whether it had jurisdiction to hear the decedent's request for restitution six months after defendant was sentenced. The court ultimately concluded the delay did not prevent the proceeding, relying upon section 1202.46, which provides that "when the economic losses of a victim cannot be ascertained at the time of sentencing pursuant to subdivision (f) of Section 1202.4, the court shall retain jurisdiction over a person subject to a restitution order for purposes of imposing or modifying restitution until such time as the losses may be determined." In this case the defendant pleaded guilty on the date scheduled for his preliminary hearing. Apparently no notice of the plea was given to the victim's wife and she was not present in court when the plea was taken.

People v. Moreno (2003) 108 Cal.App.4th 1, confirms the trial court's decision to order restitution. In that case the Fifth Appellate District concluded that ". . . notwithstanding a trial court's failure to retain jurisdiction to impose or modify a restitution order, the second part of section 1202.46 permits the prosecutor, *at any time*, to request correction of a sentence that is *invalid* because, as in the present case, the court at the initial sentencing had neither ordered restitution nor found 'compelling and extraordinary reasons' for ordering less than full restitution. The victim too may make such a request, or the trial court may act on its own motion. It follows that the court is not barred from correcting the invalid sentence simply because the prosecutor failed to object when it was imposed. An invalid or unauthorized sentence is subject to correction whenever it comes to the court's attention. [Citations.]

“Given this conclusion, it is not necessary for us to decide whether the restitution order violated the prohibition against double jeopardy by increasing the punishment for [defendant’s] offense. An invalid or unauthorized sentence ‘is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.’ [Citations.]” (*People v. Moreno, supra*, 108 Cal.App.4th at pp. 10, 11.)

The trial court also raised the question as to whether a decedent’s wife is entitled to seek restitution. Section 1202.4, subdivision (k) answers that question and confirms a spouse’s right to seek restitution. It provides that “For purposes of this section ‘victim’ shall include all of the following:

”(1) The immediate surviving family of the actual victim. [¶] . . . [¶]

“(3) Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions:

“(A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.”

4. Recovery of Decedent’s Future Earnings.

Defendant contends that the trial court cannot order restitution to a spouse for the earnings her deceased husband may have earned had he lived. Section 1202.4, subdivision (f)(3) provides that the restitution order “. . . shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as a result of the defendant’s criminal conduct, including, but not limited to, all

of the following: . . .” Subsection (D) of section 1202.4, subdivision (f)(3) includes loss of wages or profits due to the victim’s injury.

Defendant contends that even if wife was a victim as defined by section 1202.4, subdivision (k), she was not entitled to recover the future wages of her husband; she personally suffered no losses. We reject that contention. The People of California adopted Proposition 8 in 1982 adding Section 28 to Article I of the State Constitution. Subdivision (b) of that section provides that “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.”

Wife clearly suffered a loss as a result of defendant’s criminal activity, including the loss of income her husband would have earned, and she was therefore entitled to any wages decedent may have otherwise earned. We reject defendant’s claim that because the term “injury” used throughout the Penal Code and in insurance law cases refers only to nonfatal injuries, section 1202.4, subdivision (f)(3) does not provide restitution for losses caused by death of the victim. The right to restitution provided by Article I, section 28 imposes no such limitation.

Defendant suggests that there should be no restitution for future earnings. Otherwise, argues defendant, the criminal restitution hearing would turn into a civil trial, requiring expert testimony on life expectancy, proof of earning capacity, pecuniary loss,

and actual or expected contributions to the survivor. It is clear, however, that had a wrongful death action been initiated by wife, she would have been entitled to claim the present value of the decedent's future contributions to the community. (*Carr v. Pacific Tel. Co.* (1972) 26 Cal.App.3d 537, 545.) Defendant cites no authority holding that wife's restitution motion should be treated any differently than an action for wrongful death, nor did defendant challenge the restitution ordered by evidence in opposition. (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.)

We do not read the statute to preclude restitution for lost income. Section 1202.4, subdivision (f)(3) expressly provides that the trial court order of restitution “. . . shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, . . .” In this case the criminal conduct resulted in wife's loss of the income that her husband would otherwise have contributed to the family.

The evidence of wife's loss was based upon the testimony of decedent's employer. He testified that decedent had worked for him for nine years as a superintendent of his roofing business. For the last three years before his death, decedent earned \$38,940, \$29,131, and \$32,546. Defendant's council stipulated to the accuracy of the records confirming that testimony. On the basis of the average of those earnings, \$33,542.33, the trial court ordered defendant to pay decedent's wife for five years of lost income, \$167,711.

“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 The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” (§ 1202.4, subd. (f).) The trial court made a finding not to award restitution.

5. Restitution Does not Violate Defendant’s Plea Agreement

Defendant’s plea agreement expressly stated that direct victim restitution would not be ordered. Since that provision was a condition of the plea agreement, defendant contends that section 1192.5 precludes punishment more severe than that specified in the plea and the imposition of the \$167,711.65 restitution order is more severe. Therefore, suggests defendant, his plea agreement without the restitution should be specifically enforced.

We disagree. In *People v. Bernal* (2002) 101 Cal.App.4th 155, 164-165 the court observed: “We note that victim restitution is mandated by both the Constitution and section 1202.4, and a sentence imposed without such an award is invalid. (*People v. Rowland* (1997) 51 Cal.App.4th 1745, 1751.) Section 1202.4 requires ‘full restitution.’ An order providing less is similarly invalid. (*Ibid.*)” The prosecution cannot waive the victim’s right to be reimbursed for economic losses resulting from the defendant’s criminal conduct, particularly in a case like this one where the defendant pleaded guilty at arraignment and wife received no notice of the plea or its conditions. “[V]ictim

restitution is mandatory and a sentence without such an award is invalid. The trial court does not have discretion over issuance of the award itself. The only element over which the court retains discretion—and to which the ‘clear and compelling reasons’ language applies—is the amount of the award. (*People v. Rowland, supra*, 51 Cal.App.4th at pp. 1751-1752.) Article 1, section 28 of the Constitution confirms that restitution must be ordered in every case regardless of the sentence imposed.

The trial court was obligated to and properly ordered defendant to pay restitution to the victim’s wife.

6. Defendant Is Not Entitled to Reduce The Restitution Fine From
\$400 to \$200

Defendant complains that the plea agreement provided for a restitution fine of no more than \$200, while at sentencing the court imposed a restitution fine of \$400. Defendant requests the fine be reduced to \$200. The People counter that defendant’s counsel failed to object and therefore forfeited the issue for purposes of appeal. The People cite numerous cases in support of their position, not the least of which is *People v. Tillman* (2000) 22 Cal.4th 300, 302 in which our Supreme Court, quoting from *People v. Scott*, observed: “‘Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. *Routine defects in the court’s statements of reasons are easily prevented and corrected if called to the court’s attention.* As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the

judicial resources otherwise used to correct them.’ (*People v. Scott, supra*, 9 Cal.4th at p. 353, italics added.)”

7. Disposition

The judgment is affirmed.

s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/King
J.

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ORDER

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THE COURT

A request having been made to this court, pursuant to rule 978 of the California Rules of court, for publication of a nonpublished opinion heretofore filed in the above-entitled matter on August 24, 2005, and it appearing that the opinion meets the standard for publication as specified in rule 976 of the California Rules of Court:

IT IS ORDERED that said opinion be certified for publication pursuant to California Rules of Court, rule 976.

s/Gaut

J.

We concur:

s/Hollenhorst

Acting P. J.

s/King

J.