

THE PEOPLE, Plaintiff and Respondent,
v.
JAMES SUMINTO, Defendant and Appellant.
H030996
Court of Appeal of California, Sixth Appellate District
June 26, 2008
Not to be Published

Appeal from the Santa Clara County, Super. Ct. No. EE504030.

PREMO, J.

Defendant James Suminto entered a negotiated plea of no contest to six counts of commercial burglary. The trial court placed defendant on three years probation and ordered him to pay victim restitution. After a contested hearing, the trial court ordered defendant to pay the victim approximately \$289,000. On appeal, defendant challenges approximately \$11,000 of that amount. He contends that the trial court abused its discretion because the challenged amount was not attributable to his burglaries given that it was incurred after his arrest and for the cost of upgrading the victim's security system. We disagree and affirm the judgment.

BACKGROUND

Defendant worked for Endevco Corporation until February 2004. Between October 2004 and January 2005, he burglarized Endevco's premises six times. Police arrested him on January 8, 2005. For the restitution hearing, Endevco submitted evidence supporting various losses such as investigative costs, missing equipment, security equipment, employee time, and the like. The evidence supporting the challenged loss was an invoice dated March 8, 2005, for investigative and security services performed in February 2005. Defendant objected to this evidence as follows: "On the March 8th document I just want to note for the record an objection to this request in its entirety, in that it appears to me that this is security assessment related, that it occurred after [defendant] was arrested in January of 2005 and that therefore it really relates more to future security issues within Endevco than it relates to the past crimes that occurred and that I would just argue that there's not a sufficient relationship and that [defendant] should not foot the bill for the company choosing to upgrade and decide to do a thorough look into their security, that that's not, wouldn't fall within the realm of the criminal restitution." The trial court overruled the objection and explained as follows: "Well, actually, reviewing [Penal Code] Section 1202.4, which guides me—incidentally, this statute is to be very liberally construed in order to provide victims their constitutional right of restitution—specifically, the Court is to allow expenses for installing or increasing security incurred related to a crime. And that could be any deficiencies that—in a security system to prevent a defect in the future [phonetic]. So specifically the legislature wants me to order this kind of restitution and citizens are encouraged to take security precautions."

DISCUSSION

Defendant urges that the trial court misapplied the law. He points out that Penal Code section 1202.4, subdivision (f)(3)(J)¹ authorizes restitution for "Expenses to install or increase residential security incurred related to a crime . . . , including, but not limited to, a home security device or system, or replacing or increasing the number of locks." From this, he reasons that this category of restitution is limited to residential security. And from this, he concludes as follows: "In imposing restitution for the March 8, 2005 invoice for security assessments, the trial court's application of the statute is impermissibly broad, and allowed Endevco to get an award for a security upgrade to its business premises even after [defendant] was arrested. That security upgrade is not attributable to [defendant's] actions and is unauthorized by the restitution law." Defendant's analysis is erroneous.

The restitution order was a probation condition under section 1203.1. Under this statute, "courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*.) A probation condition "will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." " (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702.) Under these principles, a restitution condition is proper if it is "reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality." (*Carbajal, supra*, 10 Cal.4th at p. 1123; accord *In re I. M.* (2005) 125 Cal.App.4th 1195, 1209-1210.) A trial court's determination that a restitution order satisfies these factors is entitled to substantial deference and must be upheld unless the court's determination was "arbitrary or capricious," and exceeds the "bounds of reason." " " (*Carbajal, supra*, 10 Cal.4th at p. 1121.) Restitution as a probation condition is not dependent on a finding that the defendant was the cause of the loss. (*In re I. M., supra*, 125 Cal.App.4th at pp. 1209-1210.) "That a defendant was not personally or immediately responsible for the victim's loss does not render an order of restitution improper. . . . [T]he question simply is whether the order is reasonably related to the crime of which the defendant was convicted or to future criminality." (*Id.* at p. 1209; see *Carbajal, supra*, 10 Cal.4th at pp. 1123-1124.)

Here, defendant makes no argument that the trial court had no basis for concluding that the restitution was reasonably related to his criminal conduct or future criminality. Nor can he. The security upgrades were presumably necessary because Endevco's existing security was insufficient to protect it from defendant's criminal conduct. The trial court could therefore have concluded that the upgrades were reasonably related to defendant's criminal conduct. Moreover, defendant was presumably able to continue burglarizing Endevco's premises while on probation. The trial court could therefore have concluded that the upgrades were reasonably related to deterring future criminality.

Defendant's reliance on *People v. Scroggins* (1987) 191 Cal.App.3d 502 (*Scroggins*), to support a causation requirement is erroneous. In *Scroggins*, the defendant

pleaded guilty to receiving stolen property. The stolen property items found in his possession were later returned to the owners. The trial court nonetheless ordered the defendant to pay restitution for the value of the victim's missing property not found in his possession. In holding that this restitution order was improper, the court relied on *People v. Richards* (1976) 17 Cal.3d 614, 619-620 (*Richards*), a case that narrowly construed a trial court's authority to impose restitution for damages that were not specifically caused by the defendant's criminal conduct. (*Scroggins, supra*, 191 Cal.App.3d at pp. 506-507.) In particular, the court noted that *Richards* had concluded that, if a restitution order requires payment for a loss that was not caused by the conduct for which the defendant was convicted, the order does not serve a rehabilitative purpose " `unless the act for which the defendant is ordered to make restitution was committed with the same state of mind as the offense of which he was convicted" (*Id.* at p. 506, quoting *Richards, supra*, 17 Cal.3d at p. 622.) In *Carbajal*, however, the Supreme Court expressly disapproved this language in *Richards*, and, in so doing, made clear the broad scope of a court's discretion to order restitution to meet statutory goals of requiring a defendant to "make amends `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.'" (*Carbajal, supra*, 10 Cal.4th at p. 1126.) Although the specific issue in *Carbajal* concerned a court's discretion to order restitution when the defendant's noncriminal conduct caused the victim's damages, the essence of the *Carbajal* court's reasoning, and its discussion of *Richards*, was to disapprove a restrictive view of the required nexus between the criminal conduct and the victim's losses to justify a restitution order. (*Id.* at pp. 1126-1127; [In re I. M., supra, 125 Cal.App.4th at pp. 1209-1210.](#))

Based on *Carbajal*, we conclude that *Scroggins* is no longer controlling to the extent that it held a court has no discretion to order restitution if the defendant's conduct was not the actual cause of the victim's losses. (*Scroggins, supra*, 191 Cal.App.3d at pp. 505-506.)

Moreover, *Scroggins* is unhelpful here because it is factually distinguishable. As mentioned, in *Scroggins*, the defendant was charged with receiving stolen property that was later returned but the trial court ordered restitution for stolen property that defendant had not been charged with or responsible for stealing. Here, however, the trial court ordered defendant to pay restitution for security costs to the premises that he admittedly burglarized. In other words, defendant was involved in the chain of criminal activity that resulted in the costs to Endeveco. ([In re I. M., supra, 125 Cal.App.4th at pp. 1208-1210](#) [upholding probation condition requiring juvenile to pay funeral expense of murder victim, even though juvenile's sole participation in the crime was after the murder took place].)

We are constrained to add that defendant's argument, framed as it is under the restitution law rather than the probation law, is plainly without merit.

Section 1202.4, subdivision (f)(3), provides in part that a 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 the result of the defendant's criminal conduct, including, but not limited to, all of the following." The statute then proceeds to list 11 items.

By providing that the subdivision was "including, but not limited to, all of the following" the Legislature has signaled a clear intent that a trial court could award restitution for other items not specifically listed. "Use of those words manifests a legislative intent that the statute not be given an `expressio unius' construction." (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 528.) The nonexclusive list in the statute is not intended to tie the hands of the trial courts. (See *People v. Thygesen* (1999) 69 Cal.App.4th 988, 994.)

Two cases illustrate this interpretation of the statute. In *People v. Lyon* (1996) 49 Cal.App.4th 1521, the court upheld an award of attorney fees incurred by the victim of an embezzler. The attorney fees were expended in a civil action against the defendant designed to recover the amount of embezzled funds. (*Id.* at pp. 1524-1525.) The restitution statute was amended after this decision (Stats. 1996, ch. 629, § 3, p. 2867) to list as it does now in section 1202.4, subdivision (f)(3)(H): "(H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim." In *People v. Nguyen* (1994) 23 Cal.App.4th 32, we upheld a restitution award to a victim for the cost of closing her business while she testified in court. (*Id.* at pp. 42-45.) The restitution statute was amended after this decision (Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 46, § 4, p. 8757) to list as it does now in section 1202.4, subdivision (f)(3)(E): "(E) Wages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution."

Thus, if a trial court properly determines that installation of a business security upgrade was an "economic loss incurred as the result of the defendant's criminal conduct," then a restitution award for that loss cannot be challenged on the basis that the restitution statute does not specifically list this type of loss.

DISPOSITION

The judgment is affirmed.

WE CONCUR:

Rushing, P.J.

Mihara, J.

Notes:

1. Further unspecified statutory references are to the Penal Code.