

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MANUEL MARTINEZ,

Defendant and Appellant.

F039200

(Super. Ct. No. 25556)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Frank Dougherty, Judge.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Patrick Whalen and Lee E. Seale, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Part I of the Discussion.

Victor Manuel Martinez (defendant) was convicted of attempting to manufacture a controlled substance and ordered to pay a restitution fine in excess of \$5,000.00 to the Department of Toxic Substances Control. On appeal, defendant argues that the fine was unauthorized. We publish to settle the question of whether the Department of Toxic Substances Control is a victim within the meaning of Penal Code section 1202.4, subdivision (f).¹ We conclude it is.

PROCEDURAL HISTORY

By information, defendant was charged with a single count of manufacturing a controlled substance (Health & Saf. Code, § 11379.6, subd. (a)). A jury found defendant not guilty of manufacturing a controlled substance, but guilty of the lesser-included offense of attempting to manufacture a controlled substance. Defendant was sentenced to the middle term of two years and six months and ordered to pay, pursuant to section 1202.4, subdivision (f), a restitution fine in the amount of \$5,402.67 to the Department of Toxic Substances Control.

FACTUAL HISTORY

On January 7, 2001, at approximately 9:30 a.m., a narcotics officer with the sheriff's department conducted surveillance on a suspected methamphetamine lab at a residence in Merced County. The officer stopped a vehicle driven by defendant that was leaving the residence. Inside the vehicle, the officer found objects commonly used in the manufacture of methamphetamine. The officer also found several receipts in defendant's possession for items associated with the manufacture of methamphetamine. Officers searched the residence and found a "super lab"—a laboratory capable of producing multiple pounds of methamphetamine.

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

Defense

Defendant testified in his own behalf. He denied manufacturing methamphetamine, but admitted to being present at the residence on January 7, 2001. According to defendant, he had originally purchased the vehicle from another individual, but was never provided with the necessary paperwork. The prior owner therefore took the vehicle back, but did so before defendant retrieved his tools from the car. At the time defendant was stopped, he was driving the vehicle to his home, with the owner's permission, to return his tools. Defendant maintained that the other items in the vehicle did not belong to him.

DISCUSSION

I. Marsden² motion

Defendant made two *Marsden* motions prior to trial, both of which the court denied. Defendant argues the court erred in denying his second *Marsden* motion. We disagree.

Marsden motions are subject to the following well-settled rules. A defendant seeking to discharge his appointed counsel and substitute another attorney must establish either 1) that appointed counsel is not providing adequate representation, or 2) that he and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Mayfield* (1997) 14 Cal.4th 668, 795.) “Denials of *Marsden* motions are reviewed under an abuse of discretion standard. [Citation.] Denial ‘is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel. [Citations.]’ [Citation.]” (*People v. Barnett, supra*, 17 Cal.4th at p. 1085.)

²*People v. Marsden* (1970) 2 Cal.3d 118.

Here, defendant argues there was a near complete breakdown of communication between him and his attorney. Specifically, defense counsel told the court, “[W]e don’t really communicate anymore. We talk about the fact that he wants to get rid of me, but that’s about it. We don’t -- in fact, one time he even considered refusing to see me, and then after speaking with a cellmate came out and talked to me anyway. There has been a breakdown of communications.” After the court denied the motion, defendant stated that he refused to speak to or cooperate with his attorney. As a result, defendant contends “[t]here was no communication between [him] and counsel necessary to investigate or present an effective defense on [his] behalf.”

Our review of the record finds that the court allowed defendant to state his complaints, and defendant failed to relate any instances of inadequate performance on the part of his attorney or an irreconcilable conflict. Defendant’s alleged conflict with his attorney appears to be based on defendant’s belief that the attorney’s investigator lied to him, and his attorney originally informed him it would be better for him to withdraw as counsel. However, the breakdown of communication to which defendant refers is due entirely to defendant’s own refusal to speak to or cooperate with his attorney. “[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict.” (*People v. Smith* (1993) 6 Cal.4th 684, 696; see also *People v. Barnett*, *supra*, 17 Cal.4th at p. 1086 [trial court not required to conclude that irreconcilable conflict exists if defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness].) “If the court is satisfied that counsel is providing constitutionally adequate assistance there is no right to have counsel whom defendant might prefer, or in whom defendant has more confidence, substituted.” (*People v. Bean* (1988) 46 Cal.3d 919, 947.)

On this record, there is no basis for concluding that the court abused its discretion in denying defendant’s *Marsden* motion.

II. Restitution fine

Defendant argues that the \$5,402.67 restitution fine was unauthorized because the Department of Toxic Substances Control is not a victim within the meaning of section 1202.4, subdivision (f). “The trial ‘court’s allocation of restitutionary responsibility must be sustained unless it constitutes an abuse of discretion or rests upon a demonstrable error of law.’ [Citations.]” (*People v. Draut* (1999) 73 Cal.App.4th 577, 581-582.)

Section 1202.4 states:

“(f) 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.... [¶] ... [¶]

“(k) For purposes of this section, ‘victim’ shall include all of the following:

“(1) The immediate surviving family of the actual victim.

“(2) Any 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.”

The term “victim” in the restitution statute is given a broad and flexible meaning. (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 796-797; see also *People v. Broussard* (1993) 5 Cal.4th 1067, 1075 [word “victim” includes anyone who has sustained economic loss resulting from defendant’s criminal acts].) The California Supreme Court has defined a victim, for restitution purposes, as a person who is the object of a crime. (See *People v. Crow* (1993) 6 Cal.4th 952, 957.) A government agency qualifies as a victim entitled to restitution. (See *Id.* at p. 960; *People v. Torres* (1997) 59 Cal.App.4th 1, 2-3.)

It is well settled that a government agency is not entitled to restitution for the costs incurred in investigating and prosecuting criminal activity. (See *People v. Torres, supra*, 59 Cal.App.4th at pp. 4-5 [law enforcement agency not entitled to restitution for reimbursement for cash spent purchasing illegal drugs as part of criminal investigation]; *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1797-1798 [reimbursement for prosecution costs improper]; *People v. Baker* (1974) 39 Cal.App.3d 550, 558-560.) However, apart from the general costs of prosecuting criminals, a government entity may be reimbursed for losses “resulting from unusual expenses directly incurred because of defendant’s conduct.” (*People v. Rugamas* (2001) 93 Cal.App.4th 518, 523 [upholding restitution award to police department for medical bills it paid for injuries sustained by defendant when he was shot by police].)

Defendant maintains that the Department of Toxic Substances Control is not a direct victim of a crime. In reading the language of section 1202.4 and in considering the public policy of this state, we find the Department of Toxic Substances Control falls within the definition of a direct victim in this case.

The Department of Toxic Substances Control has statutory responsibilities to protect the public’s health and safety from the release, or threatened release, of hazardous substances. (See Health & Saf. Code, § 25300, et seq. [Carpenter-Presley-Tanner Hazardous Substance Account Act].) Health and Safety Code section 25354.5 requires the Department of Toxic Substances Control to remove and dispose of hazardous substances discovered by law enforcement officials while investigating illegal drug laboratories. It provides:

“(a) Any state or local law enforcement officer or investigator or other law enforcement agency employee who, in the course of an official investigation or enforcement action regarding the manufacture of any illegal controlled substance, comes in contact with, or is aware of, the presence of a substance that the person suspects is a hazardous substance at a site where an illegal controlled substance is or was manufactured, shall notify the [Department of Toxic Substances Control] for the purpose of

taking removal action, as necessary, to prevent, minimize, or mitigate damage that might otherwise result from the release or threatened release of the hazardous substance

“(b)(1) Notwithstanding any other provision of law, upon receipt of a notification pursuant to subdivision (a), the [Department of Toxic Substances Control] shall take removal action, as necessary, with respect to any hazardous substance that is an illegal controlled substance, a precursor of a controlled substance, a material intended to be used in the unlawful manufacture of a controlled substance and any container for such a material, a waste material from the unlawful manufacture of a controlled substance, or any other item contaminated with a hazardous substance used or intended to be used in the manufacture of a controlled substance. The [Department of Toxic Substances Control] may expend funds appropriated from the Illegal Drug Lab Cleanup Account created pursuant to subdivision (e) to pay the costs of removal actions required by this section.... [¶] ... [¶]

“(e) The Illegal Drug Lab Cleanup Account is hereby created in the General Fund and the [Department of Toxic Substances Control] may expend any money in the account, upon appropriation by the Legislature, to carry out the removal actions required by this section. The account shall be funded by moneys appropriated directly from the General Fund.” (See also Health & Saf. Code, § 25312.)

Here, defendant’s criminal activity in the attempted manufacture of methamphetamine resulted in damage to the environment, requiring an expenditure of \$5,402.67 by the Department of Toxic Substances Control for cleanup of the lab site. The cost was not part of the investigation or prosecution of defendant’s criminal activity. It represents the expense necessarily incurred by the Department of Toxic Substances Control to clean up the site. The \$5,402.67 expenditure resulted directly from defendant’s actions and is an appropriate matter for restitution. In light of the language of section 1202.4 and the mandate in Health and Safety Code section 25354.5, we find the Department of Toxic Substances Control was a direct victim of defendant’s criminal activity. (Cf. *In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1131-1134 [upholding restitution award that included custodial cleanup costs and employee benefit payments in case where minor damaged school property].)

Our conclusion is inescapable. Cleanup of land that has been poisoned with the toxic byproducts of methamphetamine labs requires special expertise and equipment not possessed by ordinary citizens. This is undoubtedly why the California legislature created a special department to deal with this sensitive (and expensive) task. No one can seriously dispute that land exposed to toxic substances has been damaged—its property value has been significantly impacted. The landowner, an obvious direct victim, does not possess the expertise, equipment or authority to remove toxic waste generated by methamphetamine labs. The only agency that has the *power* to do so is the Department of Toxic Substances Control. Put in context, had this landowner performed the clean-up, there would be no question that restitution could be ordered. There is no reason to reach a different result simply because a state agency performs the same task.

Our finding is further supported by the express public policy of this state. In *People v. Crow, supra*, 6 Cal.4th at page 958, the California Supreme Court articulated the public policy behind restitution: “[R]estitution ensures “that amends ... be made to society for the breach of the law,” enables ‘people who suffer loss as a result of criminal activity [to] be compensated for those losses,’ and acts ‘as a “deterrent to future criminality” ... and “to rehabilitate the criminal.”’ [Citation.]” It is also clear that “[r]equiring the defendant to make complete reparation to [his] victims for the harm done to them is more likely to make an impression on the defendant than simply imposing a statutory fine.” (*People v. Ortiz, supra*, 53 Cal.App.4th at p. 796.)

We need not detail the numerous destructive effects on the environment from the illegal operation of methamphetamine labs. In its official Web site, the Department of Toxic Substances Control notes: “The illegal manufacture of psychoactive drugs, primarily methamphetamine, has escalated dramatically since 1980. California leads the nation in the number of illicit drug laboratory seizures. Contaminants at clandestine labs range from highly volatile organic solvents and semi-volatile organic compounds, to highly corrosive inorganic acids and bases, the illicit drug itself, and other by-products.”

(Department of Toxic Substance Control, *Clandestine Drug Lab Removals* <http://www.dtsc.ca.gov/SiteCleanup/ERP/Drug_Lab_Removal.html> [as of Mar. 25, 2003].³) The costs of cleaning up the damage to our natural resources caused by the operation of these labs are ultimately borne by the taxpayers. Restitution, in the form of cleanup costs, places the burden back on those who participate in this criminal activity—those who cause harm to the environment. In short, reparation is made to society for breach of the law. We also find this form of restitution to be a significant deterrent, since the cleanup costs can be substantial. (See *People v. Bernal* (2002) 101 Cal.App.4th 155, 162 [direct relation between harm and punishment gives restitution a more precise deterrent effect than a traditional fine].)

Defendant cites *People v. Miller* (1989) 216 Cal.App.3d 758 and *People v. Birkett* (1999) 21 Cal.4th 226 in support of his argument that the restitution award is unauthorized. We find nothing in *Miller* that precludes the restitution award in this case. The defendant in *Miller* pleaded guilty to the sale of heroin and was ordered to pay a restitution fine, a portion of which was to be paid to a county special investigations bureau. In modifying the judgment to provide that the full amount of the restitution fine be paid to the restitution fund in the State Treasury, the *Miller* court found that the county special investigations bureau was not a crime victim. In fact, there was no crime victim in the case. (*People v. Miller, supra*, 216 Cal.App.3d at pp. 760-763.) In contrast here, we have the destruction of natural resources and a corresponding cost, charged to the

³We take judicial notice on our own motion of the Department of Toxic Substances Control's official Web site. (See Evid. Code, §§ 452, subd. (c), 459; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 37, fn. 2 [sua sponte judicial notice]; *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 753 fn. 1 [official publications of government agencies proper subjects for judicial notice].)

Department of Toxic Substances Control, to restore those resources. Unlike *Miller*, we have a crime victim in this case.

People v. Birkett, supra, 21 Cal.4th 226, is similarly unpersuasive. In *Birkett*, the California Supreme Court held that the trial court erred in splitting a mandatory restitution award for the full amount of two of the victims' losses between the victims themselves and the insurers who had partially reimbursed them. (*Id.* at pp. 245-247.) The Court found it clear from the 1994 statutory scheme governing mandatory restitution as a condition of adult probation that "the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his crime had caused*, and that such reparation should go entirely to *the individual or entity the offender had directly wronged*, regardless of that victim's reimbursement from other sources." (*Id.* at p. 246.) In this case, we have no insurers seeking restitution. We have only the party directly wronged by defendant's activity—the Department of Toxic Substances Control.

In sum, we find no error in the trial court's restitution award, pursuant to section 1202.4, subdivision (f), to the Department of Toxic Substances Control.

DISPOSITION

The judgment is affirmed.

Wiseman, J.

WE CONCUR:

Dibiaso, Acting P.J.

Levy, J.