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Court of Appeal, Fourth District, Division 1,  
California.

The PEOPLE, Plaintiff and Respondent,  
v.  
Penni TURNER, Defendant and Appellant.

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Filed 02/20/2020

APPEAL from an order of the Superior Court of San Diego County, [Jay M. Bloom](#), Judge. Affirmed. (Super. Ct. No. SCD104568)

#### Attorneys and Law Firms

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[McCONNELL](#), P.J.

#### INTRODUCTION

\***1** In 1994, Penni Turner pleaded guilty to one charge of felony welfare fraud and, as a condition of probation, was ordered to pay nearly \$5,000 of victim restitution to the State of California. In 2018, she filed a motion to have her felony conviction reduced to a misdemeanor ([Pen. Code, § 17, subd. \(b\)\(3\)](#))<sup>1</sup> and a discretionary petition to have the charge dismissed/expunged ([§ 1203.4, subd. \(a\)\(3\)](#)). The trial court denied Turner's requests because she had not satisfied any of her victim restitution obligations.

Turner appeals the order denying reduction and dismissal/expungement (hereinafter expungement) of the felony conviction. She contends she lacked the financial means to make the court-mandated victim restitution payments and the order denying her requests for failure to pay victim restitution deprived her of certain statutory rights and benefits available to more affluent criminal defendants. She asserts the order therefore violates her due process and equal protection rights under the Fourteenth Amendment to the federal Constitution. In [People v. Allen \(2019\) 41 Cal.App.5th 312 \(Allen\)](#), we rejected arguments virtually identical to the ones Turner asserts in this appeal. We do so again here, and affirm.

II

#### BACKGROUND

A

I

In 1994, Turner pleaded guilty to one felony charge of welfare fraud in violation of [Welfare and Institutions Code section 10980, subdivision \(c\)\(2\)](#). The trial court placed her on probation for a period of five years and, as a

condition of probation, required her to pay victim restitution to the State of California in the amount of \$4,954. The probation report indicated Turner was 27 years old, completed 14 1/2 years of education, and was unemployed, but had employable skills and was in search of employment. Further, it indicated she was adamant about “[her] intent to repay [the] fraud ....” Turner made no victim restitution payments prior to the expiration of her probation term in March 2000.

## B

In 2018, Turner filed a motion to have her felony conviction reduced to a misdemeanor under [section 17, subdivision \(b\)\(3\)](#) and a petition to have the charge expunged, in the discretion of the court and in the interests of justice, under section 1203.4, subdivision (a)(3). She asserted the relief was warranted because she had “made major strides in her life and worked hard to pursue employment, education and a future.”

In a supporting declaration filed with the motion and the petition, Turner averred she attended barber school after her conviction and had been “continuously employed as a barber ever since.” She averred she was a military veteran and the United States Department of Veteran’s Affairs (VA) designated her as mentally and physically disabled. She alleged she earned \$400 per month as a barber, received \$2,300 per month from the VA, and received unquantified “welfare benefits for food and household items.” Further, she stated she had three associate’s degrees, was “paying [her] own way through law school,” and hoped to focus her future legal practice on assisting military veterans. According to Turner, she had concerns the conviction “could prevent [her] from passing the Moral Character Determination Application of the California State Bar.”

\*<sup>2</sup> Turner acknowledged she still owed \$4,954 in victim restitution, as well as probation supervision costs totaling \$278 ( $\$1203.1$ , subd. (b)) and court-appointed attorney costs totaling \$474 ( $\$987.8$ , subd. (b)). Nevertheless, she argued the court should grant her requests because she was in a “very difficult financial predicament,” had “limited financial means,” and was unable to pay the unpaid amounts. She averred her expenses “usually exceed[ed] her monthly income” and she was unable to

“make payments on [her] court ordered debt[s].” Further, she asserted an order denying her requests based on the unpaid victim restitution and other fees would violate her equal protection rights because she lacked the means to pay the remaining amounts.

The People opposed Turner’s requests to reduce and expunge the felony conviction. In support of their opposition, they relied on an audit of the Office of Revenue and Recovery indicating Turner’s victim restitution payments reflected “zero credit.” The People explained the audit findings in the following terms: “[It] means since defendant pled guilty almost 24 years ago, she has not paid one dollar toward the restitution, not when she was working, not when she was in the military or thereafter.”

At the hearing on Turner’s motion and petition, the trial court commended Turner on the “remarkable turnaround” in her life. Further, it told the parties to assume the unpaid probation supervision costs and court-appointed attorney costs did not preclude the relief Turner requested. Nevertheless, the court found Turner had “made no good-faith effort to pay even one dollar” of victim restitution. Therefore, it stated it was “not inclined to grant” the requests, and denied them without prejudice.

## III

### DISCUSSION

#### A

1

“[T]here is a special category of crimes that is punishable as either a felony or a misdemeanor, depending on the

severity of the facts surrounding its commission. [Citation.] These crimes, referred to as ‘wobbler[s],’ are ‘punishable either by a term in state prison or by imprisonment in county jail and/or by a fine.’” (*People v. Tran* (2015) 242 Cal.App.4th 877, 885 (*Tran*).) The offense of which Turner was convicted is a wobbler, as it is punishable “by imprisonment ... for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine; or by imprisonment in a county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both imprisonment and fine.” (Welf. & Inst. Code, § 10980, subd. (c)(2); see  *People v. Camillo* (1988) 198 Cal.App.3d 981, 990 [describing welfare fraud under prior version of statute as wobbler].)

As relevant here, section 17, subdivision (b) affords the trial court discretion to reduce a wobbler to a misdemeanor “for all purposes” if, among other circumstances, it “grants probation to a defendant and at the time of granting probation, *or on application of the defendant or probation officer thereafter*, the court declares the offense to be a misdemeanor.” (*Id.*, subd. (b)(3), italics added.) Thus, the trial court may reduce a wobbler to a misdemeanor either by declaring the crime a misdemeanor at the time probation is granted or at a later time—for example, after probation has been successfully completed or after the term of probation has expired. ( *People v. Park* (2013) 56 Cal.4th 782, 792;  *Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 140.)

By its terms, section 17, subdivision (b) vests discretion in the trial court under “a broad generic standard.” ( *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) However, the Supreme Court has articulated factors relevant to the exercise of discretion under section 17, subdivision (b), which include “‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’” (*Alvarez*, at p. 978.)

\*3 Independent of the procedure governing the reduction

of a felony conviction, a defendant may petition the court to set aside her guilty plea and dismiss the complaint or information under section 1203.4—a process commonly known as expungement. In pertinent part, section 1203.4 states: “In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall ... be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty ... and ... the court shall thereupon dismiss the accusations or information against the defendant and ... he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted[.]”

“As the statutory language makes clear, there are three situations in which a defendant may be entitled to have his or her conviction dismissed. The first two—when the defendant fulfilled the conditions of probation for the entire probationary period or when the defendant was discharged before the termination of the period of probation—require the court to grant the requested relief if the conditions are met. The last requires the court to determine whether, in its discretion and the interests of justice, the relief should be granted.” ( *People v. McLernon* (2009) 174 Cal.App.4th 569, 574.) Turner sought expungement of the welfare fraud conviction solely under the last scenario.

“If granted, section 1203.4 relief provides substantial benefits; the successful [petitioner] is generally released from all the ‘penalties and disabilities’ which otherwise would have resulted from the convictions.” (*People v. Mazunder* (2019) 34 Cal.App.5th 732, 745.) It “‘does not, properly speaking, ‘expunge’ the prior conviction’” or render it “‘a legal nullity.’” ( *People v. Vasquez* (2001) 25 Cal.4th 1225, 1230.) Thus, “charges dismissed under ... section 1203.4 may be treated as convictions for some purposes (e.g., impeachment with prior conviction in a future prosecution).” ( *People v. Guillen* (2013) 218 Cal.App.4th 975, 996.) Even so, release from the penalties and disabilities of a conviction provides a petitioner a “palpable benefit” and ensures “the conviction [will] be treated as if it were not a conviction for most purposes.” (*Ibid.*)

B

1

Turner challenges the trial court order denying her requests to reduce and expunge the welfare fraud conviction. She contends the court denied reduction and expungement of the felony charge based solely on her outstanding victim restitution obligations and asserts her alleged inability to pay precluded her from fulfilling those obligations. Relying principally on  *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), she claims the order violated her rights to due process and equal protection.

Our court recently addressed and rejected substantially identical arguments in *Allen, supra*, 41 Cal.App.5th 312.<sup>2</sup> In *Allen*, the defendant pleaded guilty to felony welfare fraud and, decades later, petitioned for discretionary expungement of her convictions under section 1203.4, subdivision (a)(3), and section 1203.42. (*Allen*, at pp. 318–320.) The trial court denied her requests on grounds that she had outstanding victim restitution obligations, which she claimed she was unable to pay. (*Id.* at p. 320.) We affirmed the order, in large part, and rejected the defendant’s claim that denial of the expungement requests violated her equal protection and due process rights. (*Id.* at pp. 323–325, 329–330.)

We reasoned as follows:

“In [ *People v. Covington*] [2000] 82 Cal.App.4th 1263, the court held that denying mandatory expungement on the basis of an indigent defendant’s outstanding victim restitution obligation does not violate due process or equal protection.... [¶] [The *Covington* court] ... concluded that ‘the rehabilitative purposes of probation, much less the constitutional right of a victim to restitution, would be ill served if the defendant could have his or her conviction expunged without having made up for the victim’s losses.’ [Citation.]

\*4 “In reaching this conclusion, the *Covington* court

declined to find an equal protection violation ‘simply because [the defendant] was not wealthy enough to have paid her court-ordered restitution in full while she was on probation.’ [Citation.] The court explained that ... ‘[i]t would be anomalous indeed if a provision designed to equalize the treatment of rich and poor defendants were applied in a way that only shifted the inequality to the other extreme. Equal protection means only that [the defendant] can have her conviction expunged, the same as the wealthier defendant in her hypothetical, if and when she pays restitution to [the victim, in full].’ [Citations.]

“We find *Covington*’s reasoning persuasive, and see no principled reason why outstanding restitution obligations can properly disqualify an indigent defendant from *mandatory* expungement but not *discretionary* expungement.” (*Allen, supra*, 41 Cal.App.5th at pp. 324, 325.)

The *Allen* decision is squarely on point. Like the defendant in *Allen*, Turner sought discretionary expungement of a felony conviction under section 1203.4, subdivision (a)(3). As in *Allen*, the defendant contends the trial court denied the requested relief based solely on her failure to satisfy her victim restitution obligations. And, like the defendant in *Allen*, Turner asserts the denial of the expungement request violated her equal protection and due process rights because she was unable to pay her victim restitution obligations. Under these circumstances, we follow the *Allen* court’s analysis and conclude the denial of discretionary expungement based on an alleged indigent defendant’s failure to pay victim restitution obligations does not violate equal protection or due process.<sup>3</sup> (*Allen, supra*, 41 Cal.App.5th at pp. 323–325, 329–330.)

Our conclusion applies with equal measure to the denial of Turner’s discretionary motion to have the felony conviction reduced to a misdemeanor, which, according to Turner, was likewise based solely on her failure to fulfill her outstanding victim restitution obligations. Like expungement, “[t]he trial court’s ability to reduce a felony to a misdemeanor after probation has been granted serves as both a motivation and reward to a defendant to comply with probation conditions.” (*Tran, supra*, 242 Cal.App.4th at p. 891.) This purpose, combined with the victim’s constitutional right to restitution, would be just as ill-served if the defendant could have her conviction reduced without having made up for the victim’s losses. (*Allen, supra*, 41 Cal.App.5th at pp. 323–325, 329–330.)

As noted, Turner bases her constitutional challenge to the denial order primarily on *Dueñas, supra*, 30 Cal.App.5th 1157. In *Dueñas*, the trial court imposed a court facilities assessment, a court operations assessment, and a restitution fine on an indigent and developmentally-disabled defendant who pleaded no contest to misdemeanor driving with a suspended license.

(*Id.* at pp. 1160–1163.) The Court of Appeal reversed the assessments and concluded “due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant’s present ability to pay before it imposes court facilities and court operations assessments ....” ( *Id.* at p. 1164.) Further, it interpreted the restitution fine statute to avoid purported constitutional infirmities and, therefore, read it to require a stay of execution of any restitution fine “until and unless the People demonstrate that the defendant has the ability to pay the fine.” ( *Id.* at p. 1172.)

\*5 In *Allen*, we declined to follow *Dueñas* for two reasons. (*Allen, supra*, 41 Cal.App.5th at p. 326.) First, it was “readily distinguishable. It involved revenue-generating assessments and punitive fines, whereas [the *Allen*] case involve[d] a constitutionally mandated victim restitution order intended to make the victim whole for its losses. These purposes are ‘fundamentally different.’” (*Ibid.*)

Second, we “adopt[ed] the reasoning of the numerous courts that have rejected *Dueñas*’s due process analysis,” many of which have “‘have suggested that the proper analytic framework ... is the excessive fines clause of the Eighth Amendment to the United States Constitution, rather than the due process clause.’” (*Allen, supra*, 41 Cal.App.5th at p. 326; see *People v. Hicks* (2019) 40 Cal.App.5th 320, 326–329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1068–1069; *People v. Evans* (2019) 39 Cal.App.5th 771, 776.)

Additionally, the *Allen* court concluded “the more general due process underpinnings discussed in *Dueñas* ... support[ed] the conclusion there was no due process

violation.” (*Allen, supra*, 41 Cal.App.5th at p. 327.) As we explained, “the nature and extent ‘‘of the individual interest affected’’ ” in an expungement case—the “desire for a clean criminal record”—did not resemble other instances in which a due process violation has been recognized (e.g., where there has been “a complete loss of personal liberty”). (*Allen*, at p. 328.) Further, the defendant in *Allen* did not persuasively argue expungement would extensively affect her individual rights. (*Ibid.*) Finally, we determined that “allowing courts to withhold expungement as inducement to ensuring payment of restitution bears a ‘‘rational[ ] ... connection’’ ” [citation] to the primary purpose of victim restitution—fulfilling the voter-enacted constitutional provision requiring that defendants make victims whole.” (*Id.* at p. 329.)

These same considerations control here. As in the *Allen* case, the unsatisfied victim restitution underpinning the trial court’s denial order is fundamentally different than the revenue generating assessments and punitive fines at issue in *Dueñas*. (*Allen, supra*, 41 Cal.App.5th at p. 326.) Further, we agree with those courts that have rejected the *Dueñas* court’s due process analysis for the reasons discussed in the *Allen* opinion. (*Id.* at pp. 326–327.) Finally, the due process “underpinnings” discussed in *Dueñas* do not suggest there has been a due process violation here. (*Id.* at p. 327.) In particular, Turner’s desire to reduce or expunge her felony conviction is not akin to “a complete loss of personal liberty,” her speculation that the felony conviction “could” complicate her efforts to become a lawyer is not a persuasive argument that her rights will be severely impaired by the denial order, and the denial order bears a rational connection to the primary purpose of victim restitution—ensuring that defendants make victims whole. (*Allen*, at pp. 328, 329.)

#### IV

#### DISPOSITION

The order is affirmed.

WE CONCUR:

HALLER, J.

GUERRERO, J.

**All Citations**

Not Reported in Cal.Rptr., 2020 WL 828701

**Footnotes**

- <sup>1</sup> All further statutory references are to the Penal Code, unless otherwise noted.
- <sup>2</sup> We issued the *Allen* opinion after this appeal was fully briefed, but the parties both submitted supplemental briefs analyzing the case and its application to this appeal.
- <sup>3</sup> As the People note, the trial court stated it denied Turner's requests on grounds that she "made no good-faith effort" to pay victim restitution, not because she failed to fulfill all her victim restitution obligations. We accept for purposes of the appeal Turner's characterization of the trial court's order, but note for the record that insofar as the court found her failure to make any victim restitution payments was the product of a lack of bona fide effort to repay the victim, this would seem to constitute an independent reason to affirm. (See  *Bearden v. Georgia* (1983) 461 U.S. 660, 668 ("[A] probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay [a] fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is ... justified in revoking probation and using imprisonment as an appropriate penalty for the offense."].)