Filed 1/28/22 P. v. Smith CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. KATIE RHIANNON SMITH, Defendant and Respondent.	A161676 (Mendocino County Super. Ct. No. SCTMCRCR2034853001)

This case involves a People's appeal from the trial court's order reducing defendant Katie Rhiannon Smith's offense from a felony to a misdemeanor, pursuant to Penal Code section 17, subdivision (b)[1] (section 17(b)), following her plea of no contest to a felony charge of animal cruelty. On appeal, the People contend the trial court erred when it (1) reduced the offense to a misdemeanor at sentencing, which violated the terms of the plea agreement, and (2) failed to address the People's request for animal care restitution, pursuant to sections 597, subdivision (g)(1) and 597.1, subdivision (*l*)(1), and for payment of legal assistance costs incurred by the county, pursuant to former section 987.81. In addition, defendant has filed a motion

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

to dismiss the appeal on the ground that none of the issues the People raise on appeal are in fact appealable.

For the reasons discussed in this opinion, we shall affirm the order granting defendant's section 17(b) motion. We shall, however, dismiss the purported appeal from the order placing defendant on summary probation with various terms and conditions that did not include the conditions of animal care restitution and payment of legal assistance costs incurred by the county.

FACTS

As this case was not tried and the record does not include a probation report, our description of the facts is largely taken from the testimony received by the court at the lengthy sentencing hearing and the unusually numerous letters to the court, many of which were orally recited by the court from the bench and made a part of the record.

At the commencement of the sentencing hearing, the court noted that it had received an extraordinary amount of mail from animal rights activists urging imposition of the maximum prison term, but that letters from defendant and others "provide countervailing evidence that would lead to a different set of inferences that can reasonably be drawn from the facts."[2]

The statements of defendant and witnesses who wrote letters to the court or testified in support of defendant were that the dog, named Thunder, "was unhinged from the beginning" and "vicious"; had "aggressively gone after children and neighbors' dogs"; and "wasn't abused or neglected and was well loved and well cared for." On one occasion he knocked down a girl and pinned her to the floor while barking at her and had to be pulled away." Defendant's ill father who was unable to care for himself lived with

[2] These letters were not made a part of the appellate record.

defendant's family, but was repeatedly bitten by the dog, as were her children and others. Defendant had the dog neutered in the hope it would diminish his hostility, but "it had no effect." In addition, defendant stated that Dr. Bartholomew, a veterinarian who testified at the preliminary hearing, felt that Thunder had symptoms consistent with a form of cancer common in German Shepherds (which defendant and her husband were unaware of) and a serious skin condition. Defendant's treatment of Thunder's progressively worse skin condition did not respond to various treatments, and the pain he experienced exacerbated Thunder's hostility.[3]

Defendant further stated that she and her husband "had both been raised in families that put our own dogs down when the time came. So it was the natural choice. Even if we hadn't been raised that way, we couldn't afford the several hundred dollars it would take at the vet if they even would have seen us," which the vets they contacted were not willing to do.

Defendant (and other witnesses) stated that at the time of the offense, defendant's family had just lost their business, and for that reason and the cost of her mother's cancer treatment, were "struggling financially" and unable to afford the cost of euthanasia by the humane society, which charged $400 for the service.[4] Defendant testified that when she realized she failed to kill Thunder and he ran, she and her husband searched for him until it got dark and spent the next three days searching for him. Defendant did "not

---

[3] The court subsequently observed that Dr. Bartholomew had stated that Thunder's condition at the time he was taken to the humane society, including the loss of weight and skin condition, could have arisen from his medical conditions, as well as from neglect.

[4] Defendant was also financially unable to obtain private defense counsel. For that reason, the private attorney she initially engaged promptly asked to be relieved. After inquiring into defendant's ability to pay, the court relieved counsel and appointed the public defender.

know that we will ever forgive ourselves for the decision we made. It haunts our dreams and our waking hours, but we have to find a way to move on and for our family to heal."

Additionally, defendant had just spent more than three years training to be a licensed real estate appraiser and a felony conviction would cause her to lose that license, in which case she and her husband "will lose our vehicle and our home" and she, her husband and their three children . . . will be homeless" because there will be "no way to get to and from a job because we have no transportation."

The prosecutor was unimpressed by defendant's description of her conduct because he believed "she's lied throughout the proceedings so it's difficult to treat anything that she has said about the history as gospel since she has repeatedly demonstrated that she is willing to lie to people in a position of authority in order to avoid the consequences of her behavior." The prosecutor also pointed out that defendant had also initially lied to the police, telling them her husband had shot Thunder. He also claimed that "when you take your dog to a remote part of the woods, shoot it and trust that it's going to die. I don't accept as fact that she looked for it. That was not something that she addressed to law enforcement prior to writing the letter to the court." The prosecutor also pointed out that although Dr. Bartholomew's initial statement had been that Thunder's condition could have been caused either by neglect or by an underlying medical condition, her opinion was that neglect was the likely cause.

The court credited most of defendant's testimony and said it was relying not just on her statements, "but the corroborating statements from other family, from other friends, there's corroboration of the dog's aggressive

tendency from lots of different people." The court also noted that Dr. Bartholomew testimony was not conclusive.

THE PROCEEDINGS BELOW

On June 19, 2020, defendant was charged by information with one count of felony cruelty to animals (§ 597, subd. (b)), and the allegation that defendant personally used a firearm in committing the offense, within the meaning of section 12022.5, subdivision (a).

On October 5, 2020, shortly before a jury trial was scheduled to begin, defendant pleaded no contest to count one and the People dismissed the enhancement allegation, pursuant to an open plea agreement.

On December 16, 2020, at the conclusion of the sentencing hearing, the trial court reduced defendant's conviction to a misdemeanor, pursuant to section 17(b). The court then suspended imposition of judgment[5] placed defendant on summary probation for 36 months without active supervision, and imposed various terms and conditions. The court also ordered defendant to perform 500 hours of community service, perhaps through the local humane society, and to serve 360 days in county jail, though it suspended execution of that order.

The court stated that it reduced the offense to a misdemeanor due to the facts that it was not precluded by her earlier open plea to a felony; defendant "was acting not justifiably but under the stress of the unique situation that's unlikely to recur"; the collateral consequences of a felony conviction, particularly for her children, would be disproportionate to her culpability "given a full view of the circumstances in which this offense

[5] In this opinion, the phrases, "imposition of judgment" and "imposition of sentence" will be used interchangeably.

arose"; and "the policies of rehabilitation and restorative justice" set forth in section 1170 of the Penal Code.

On December 16, 2021, the People filed a notice of appeal and on December 24, 2021, the People filed an amended notice of appeal.[6]

On May 18, 2018, defendant filed a motion to dismiss the People's appeal due to the alleged lack of appealability of the issues raised on appeal, and on June 1, 2021, the People filed an opposition to the motion to dismiss. On June 3, 2021, this court filed an order stating that the motion to dismiss "is taken under submission and will be decided with the merits of the appeal."[7]

DISCUSSION

I. *General Legal Principles Concerning a People's Appeal*

"The People have no right of appeal except as provided by statute. [Citation.] Section 1238 . . . governs the People's appeals from orders or judgments of the superior courts." (*People v. Douglas* (1999) 20 Cal.4th 85, 89–90 (*Douglas*).)

Section 1238, subdivision (a) provides in relevant part: "An appeal may be taken by the people from any of the following: [¶] . . . [¶]

"(5) An order made after judgment, affecting the substantial rights of the people.

---

[6] On January 26, 2021, the same Mendocino County Deputy District Attorney who represented the People in the trial court substituted for the Attorney General as appellate counsel in this appeal.

[7] In parts II. and III., *post*, of this opinion, we will address the question of appealability as to each issue raised on appeal, after briefly setting forth general legal principles applicable to a People's appeal in part I., *post*.

"(6) An order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense. [¶] . . . [¶]

"(10) The imposition of an unlawful sentence, whether or not the court suspends the execution of the sentence . . . . As used in this paragraph, 'unlawful sentence' means the imposition of a sentence not authorized by law . . . ."

II. *The Trial Court's Reduction of Defendant's Offense to a Misdemeanor*

A. *Trial Court Background*

As noted, defendant was charged with one count of felony animal cruelty (§ 597, subd. (b)—count one),[8] with a firearm use allegation. (§ 12022.5, subd. (a)).

At the conclusion of the June 17, 2020 preliminary hearing, at which the trial judge who presided over the plea agreement and sentencing was also the judge, defendant's then-counsel raised the question of a reduction of the charged offense to a misdemeanor, pursuant to section 17(b). Before addressing that motion, the court described the evidence of defendant's

---

[8] Subdivision (b) of section 597 provides in relevant part: "Except as otherwise provided in subdivision (a) or (c), every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal . . . , and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for each offense, guilty of a crime punishable pursuant to subdivision (d)." Subdivision (d) provides that a violation of section 597 "is punishable as a felony . . . , or alternatively, as a misdemeanor . . . ." (§ 597, subd. (d).)

conduct as showing "a willingness to do what appears to be a legal act, but in a really poor way," and therefore declined to permit the case to go forward under subdivision (a) of section 597, since the evidence did not show that defendant had acted maliciously. (See § 597, subd. (a) [which applies to a defendant "who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal"].) The court found, however, that the evidence was sufficient under subdivision (b) of section 597 for the People to hold defendant to answer to that charge. The court then stated, "I'm going to deny the request for a 17(b) reduction at this time without prejudice to renew at a later point in the case."

On October 5, 2020, the parties entered into a plea agreement in which defendant pleaded no contest to count one and the People dismissed the enhancement allegation, with the court indicating probation as the likely disposition. The prosecutor stated that "it is an open plea, and not a condition of probation."

On December 6, 2020, near the start of the lengthy sentencing hearing, the prosecutor argued against a grant of probation, stating that "[t]he ultimate result as the court is well aware, if probation is granted in this case, is that the court will be allowing the defendant . . . to work toward a misdemeanor at the end of . . . probation." The prosecutor further stated, "I think the crime itself is a felony and should stay a felony" and that "this is a crime that should never be reducible to a misdemeanor." The prosecutor therefore requested that the court sentence defendant to three years in prison. However, following a lengthy discussion of the numerous factors it had considered, the court stated that it intended to grant probation.

Then, after additional argument by the prosecutor, the court asked defense counsel if he wished to address "[t]he question of a 17(b) reduction."

Defense counsel responded by asking the court to reduce the section 597 offense to a misdemeanor, pursuant to section 17(b). Counsel argued that this case was distinguishable from other cases involving shooting an animal, all of which involved a pet "shot in anger or terrorized for revenge, [and] none of that is present here." Unlike in those cases, where the perpetrator was "clearly a danger to society, counsel believed "[t]he facts here are very different and I think the case should be treated differently."

The prosecutor then stated, "I cannot help but feel that I have been ambushed by the court and counsel here. That was not a condition of the plea." The prosecutor also explained why he believed defendant was not entitled to such a reduction, noting that he was objecting on both procedural and substantive grounds. When the court asked if "the plea bargain was conditioned on a felony disposition, defense counsel responded, "That wasn't my understanding. My understanding was that it was an open plea to violating one count of . . . section 597[, subdivision] (b). That the court, in chambers had made a nonbinding indication of probation. So I think the court, under those circumstances . . . , could deviate either up or downward in its discretion." Counsel further noted that the offense "is a wobbler," which meant that with an open plea, reducing the offense to a misdemeanor was in the court's discretion.

The court recollected that the plea bargain did not preclude a 17(b) motion, stating "[i]t was simply an open plea, with the court indicating probation. I don't think the bargain precluded the court considering a 17(b) motion either now or at the conclusion of probation."

The prosecutor responded, "Well, it was definitely not the People's understanding that the defendant would make a 17(b) motion at sentencing. Nor would I have entered into any agreement had that been part of the

record." After defense counsel said he believed that "unless otherwise precluded we're always entitled to make that motion," the court said, "I agree with defense counsel, there's no preclusion to the court granting a 17(b) motion to reduce the offense to a misdemeanor at this time." The court then explained some of its reasons for doing so, concluding "that the policies of rehabilitation and restorative justice on the unique set of facts in this case warrant a 17(b) reduction." The prosecutor replied, "I want to make very clear, your honor, this is going [to] effect [*sic*] the People's position in future cases. This was not a bargained for term. The People dismissed a charge, the court was not free to do this. And the court will have my notice of appeal by the end of the day."

The court then suspended imposition of judgment and placed defendant on 36 months of summary probation,[9] with various terms and conditions.

B. *Legal Analysis*

The People contend the trial court erred when it reduced defendant's offense to a misdemeanor pursuant to section 17(b)(3), in violation of the terms of the plea agreement. The People argue that this claim is appealable under section 1238, subdivision (a)(6) and (a)(12).

Section 17(b) provides in relevant part: "When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or

---

[9] At sentencing, the court and the parties discussed whether the period of probation would be automatically reduced to one year on January 1, 2021, pursuant to recently enacted legislation. (See § 1203a, subd. (a) [courts in misdemeanor cases "may suspend the imposition or execution of the sentence and make and enforce the terms of probation for a period not to exceed one year"]; as amended by Stats. 2020, ch. 328, § 1, eff. Jan. 1, 2021.) Since defendant has not raised the issue of an unauthorized sentence, we presume her period of summary probation has now been reduced to one year under amended section 1203a.

imprisonment in a county jail under the provision of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . (3) When the court 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." (§ 17, subd. (b)(3).)

"The Legislature has classified most crimes as *either* a felony or a misdemeanor, by explicitly labeling the crime as such, or by the punishment prescribed. . . . There is, however, a special class of crimes involving conduct that varies widely in its level of seriousness. Such crimes, commonly referred to as 'wobbler[s]' [citation], are chargeable or, in the discretion of the court, punishable as either a felony *or* a misdemeanor; that is, they are punishable either by a term in state prison or by imprisonment in county jail and/or by a fine. (§ 17, subd. (b); [citation].)" (*People v. Park* (2013) 56 Cal.4th 782, 789.)

" ' "A wobbler offense charged as a felony is regarded as a felony for all purposes until imposition of sentence or judgment. [Citations.] If state prison is imposed, the offense remains a felony; if a misdemeanor sentence is imposed, the offense is thereafter deemed a misdemeanor. [Citations.]" ' [Citation.] The trial court has discretion to '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, when the defendant has successfully completed probation.' [Citations.] . . . [¶] The purpose of the trial judge's sentencing discretion to downgrade certain felonies is to 'impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon.' [Citation.]" (*People v. Tran* (2015) 242 Cal.App.4th 877, 885–886.)

In this case, defendant pleaded no contest to section 597, subdivision (b), which is a "wobbler," punishable either as a felony or a misdemeanor, in the court's discretion. (§ 597, subd. (d); see § 17(b)(3).)

1. *Appealability of the Order Reducing the Offense to a Misdemeanor*

Subdivision (a)(6) of section 1238 provides that the People may take an appeal from "[a]n order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed *or modifying the offense to a lesser offense*." (Italics added.)

In her motion to dismiss, defendant contends the trial court's order granting her section 17(b) motion to reduce the section 597 offense to a misdemeanor at sentencing is not appealable by the People because section 1286, subdivision (a)(6) "does not authorize an appeal where the error claimed is not in the reduction of the degree of the offense from a felony to misdemeanor, but is in the *legal authority* to reduce the offense from a felony to [a] misdemeanor." In support of this assertion, defendant cites *People v. Godfrey* (1978) 81 Cal.App.3d 896 (*Godfrey*), in which the appellate court addressed a *prior* version of section 1238, subdivision (a)(6), which gave the People a right to appeal only when the court modified a verdict "by reducing the degree of the offense or the punishment imposed." (Former § 1238, subd. (a)(6).)

The *Godfrey* court relied on the then recent Supreme Court decision in *People v. Drake* (1977) 19 Cal.3d 749 (*Drake*) to reject the People's argument that the trial court's reduction of a felony to a misdemeanor in contravention of the parties' plea agreement was appealable under subdivision (a)(6) of section 1238. The *Godfrey* court explained: "The fact that the act of the trial court was without authority . . . and thus was an act in excess of the trial court's jurisdiction in itself cannot enlarge the right of appeal by the People.

Drake directs a strict and limited reading of the statute allowing appeal." (*Godfrey*, *supra*, 81 Cal.App.3d at p. 901.) The *Godfrey* court further stated that although the trial court had found the defendant guilty of a "lesser offense prior to the imposition of any sentence or rendition of any judgment," this fact did not make the order appealable under former subdivision (a)(6) of section 1238 because, " 'when the court acted here sentence had not yet been pronounced and hence there was no existing "punishment imposed" subject to reduction.' " (*Godfrey*, at p. 901, quoting *Drake*, at p. 756.) The court in *Godfrey* did find, however, that the People's claim that the trial court acted in excess of its jurisdiction when it reduced the felony offense to which the defendant pleaded guilty to a misdemeanor would be reviewable through a timely petition for writ of mandate. (*Godfrey*, at p. 904.)

We do not agree with defendant that *Godfrey* stands for the proposition that a People's appeal of an order modifying an offense to a lesser offense that is based on a claim that the court acted in excess of its jurisdiction, rather than a claim that the modification was an abuse of discretion, is not appealable under section 1238, subdivision (a)(6). Rather, *Godfrey*, like *Drake*, found that *former* subdivision (a)(6) did not permit a People's appeal from *any* trial court order modifying an offense to a lesser offense, considering that the subdivision's language at that time limited such appeals to orders either "reducing the degree of the offense or the punishment imposed." (Former § 1238, subd. (a)(6); see *Godfrey*, *supra*, 81 Cal.App.3d at pp. 899–900.)

As our Supreme Court later explained in *People v. Statum* (2002) 28 Cal.4th 682, 691 (*Statum*), the *Drake* court's holding was undermined by the Legislature's subsequent amendment of subdivision (a)(6) of section 1238, "which added the words, 'or modifying the offense to a lesser offense.' (See

Stats. 1978, ch. 1359, § 2, p. 4511.) . . . Thus, by the 1978 amendment, the Legislature not only overruled *Drake* but went further and authorized the People to appeal modifications of verdicts or findings to *all* lesser offenses . . . ." Therefore, the *Statum* court held, "section 1238[, subdivision] (a)(6) authorizes the People to appeal a trial court's order reducing a wobbler to a misdemeanor," pursuant to section 17(b). (*Statum*, at pp. 687, 692.)

In the present case, defendant pleaded guilty to a felony violation of section 597, subdivision (b), which is a wobbler. (See § 597, subd. (d).) Before suspending imposition of sentence and placing defendant on probation, the trial court granted her section 17(b) motion to reduce the offense to a misdemeanor, which plainly was an order "modifying the offense to a lesser offense," for purposes of section 1238, subdivision (a)(6). (§ 1238, subd. (a)(6).) The court's order was thus appealable, regardless of the nature of the People's claim of error related to the grant of defendant's motion.

Consequently, we will address the People's contention regarding the court's grant of the section 17(b) motion on the merits. (See *Statum*, *supra*, 28 Cal.4th at pp. 687, 692.)[10]

2. *Propriety of the Order Reducing the Offense to a Misdemeanor*

" 'Because a "negotiated plea agreement is a form of contract," it is interpreted according to general contract principles.' [Citations.] ' "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] . . ." [Citation.] "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as

---

[10] In light of this finding that the section 17(b) order is appealable pursuant to section 1238, subdivision (a)(6), we need not address the People's alternative ground for appealability: that the order is appealable under subdivision (a)(10) of section 1238 because it imposed an unlawful sentence.

extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]" ' [Citation.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 437 (*Feyrer*).)

In *Feyrer*, the defendant entered a negotiated plea agreement in which he pleaded no contest to felony assault and admitted an enhancement allegation, in exchange for being placed on formal probation in lieu of a prison sentence. (*Feyrer*, *supra*, 48 Cal.4th at p. 432.) During the hearing on the plea, the prosecutor advised the defendant—and received his acknowledgement—that the conviction " 'will be a strike under California law' " and that the defendant " 'will have this one strike for any future sentencing purposes.' " (*Ibid.*) The trial court then suspended imposition of sentence and placed the defendant on five years' probation. Defendant performed well on probation, and the court ordered early termination of probation, at the request of the probation department. (*Id.* at pp. 432–433.) The trial court, however, denied the defendant's request to declare the charged offense to be a misdemeanor, pursuant to section 17(b)(3). (*Ibid.*)

On review, our Supreme Court held that "the plea agreement did not render inoperative the statute [(§ 17(b)(3))] conferring upon the court discretionary authority to declare a wobbler offense to be a misdemeanor where the court initially granted probation by suspending imposition of a sentence." (*Feyrer*, *supra*, 48 Cal.4th at p. 431.) There was no indication that the parties "intended to provide that the felony could not be reduced to a misdemeanor under any circumstances, regardless of defendant's conduct during the period of probation. The terms of the plea agreement do not state that this is the case. Nor do the terms of that agreement abrogate the

provisions of section 17, subdivision (b)(3), or other statutes applicable during (or upon the conclusion of) a successful term of probation. [¶] Although the Attorney General asks that we imply such a term based upon defendant's express plea of no contest to a felony and his admission of the alleged felony enhancement, we are mindful of the rule that every term of a plea agreement should be stated on the record. [Citations.] Application of this rule to the present case is essential to ensure not only that defendant was not made subject to a term of which he was not made fully aware prior to giving his consent to the proposed plea, a term foreclosing any possible reduction of his offense, but also that the trial court was made aware of a term purporting to limit its sentencing authority—a restriction that if known might have caused it to refuse to accept the proposed plea agreement. Accordingly, we should not, and do not, imply such a term purporting to restrict the sentencing authority of the court." (*Feyrer*, *supra*, 48 Cal.4th at pp. 437–438.)

The People attempt to distinguish *Feyrer* from the present case in light of the facts that the *Feyrer* court was addressing the reduction of an offense after the grant of probation, based on trial courts' "general authority to supervise the terms and conditions of probation under . . . section 1203.3." (Citing *People v. Segura* (2008) 44 Cal.4th 921, 936 (*Segura*).)

The *Feyrer* court was of course addressing the factual context before it, including the parties' expression of their understanding at the plea hearing that a term of their agreement was that the enhanced felony offense to which defendant pleaded no contest would be treated as a strike for purposes of any future criminal convictions. (See *Feyrer*, *supra*, 48 Cal.4th at p. 437.) Considering this term of the plea agreement, the issue was whether the agreement prohibited reduction of the offense to a misdemeanor *after* the defendant was placed on probation, which would not contradict any express

term of the plea agreement. (See *id.* at pp. 437–438.) Thus, based on the particular terms of the plea agreement and the procedural posture of that case, our Supreme Court was necessarily addressing the trial court's ability to grant a section 17(b)(3) motion at a later point in the case, at the conclusion of probation. (See *Feyrer*, at p. 440.)[11]

In the present case, there was nothing in the plea agreement that precluded the trial court from exercising its discretion at sentencing to grant the section 17(b) motion—first made months earlier and denied without prejudice to its later renewal—and reduce the offense to a misdemeanor before suspending imposition of sentence and placing defendant on probation. The case involved an open plea agreement, which did not purport to limit the court's discretion at sentencing to reduce the charged offense to a misdemeanor. (Cf. *People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247, fn. 9 [rejecting People's argument that "the trial court improperly entered into plea bargaining" when it reduced a wobbler offense to a misdemeanor at sentencing—thereby rendering the Three Strikes law inapplicable—since, when defendant pleaded guilty to the charged offenses, "he gave an 'open plea' " and the trial court properly "gave an 'indicated sentence' and then

---

[11] The *Feyrer* court distinguished its recent decision in *Segura*, *supra*, 44 Cal.4th 921, "in which the trial court *imposed* a sentence and suspended its execution" and in which the high court had "considered whether the requirement that the defendant serve a specified period in the county jail—an express condition of granting probation–constituted a material term of the plea agreement, and therefore was not subject to later modification by the trial court as a matter of its general statutory authority to modify probation in light of subsequent events." (*Feyrer*, *supra*, 48 Cal.4th at p. 436.) Because, in *Segura*—unlike in *Feyrer*—our high court found that "the term of incarceration [was] in the nature of a condition precedent to, and constitute[d] a material term of, the parties' agreement," the trial court "was not at liberty to modify a condition integral to the granting of probation in the first place . . . ." (*Segura*, at pp. 935, 936.)

exercised its discretion"].) Nor was any such term stated on the record at the hearing at which defendant pleaded no contest.

Finally, none of the extrinsic evidence cited by the People demonstrates an intent to eliminate the trial court's ability to exercise its sentencing discretion pursuant to section 17(b)(3). Rather, the circumstances surrounding the plea agreement reveal only that the parties never addressed whether such an exercise of discretion would be permitted, which is quite different from inclusion of express terms precluding a reduction of the offense to a misdemeanor at sentencing. (See *Feyrer*, *supra*, 48 Cal.4th at p. 438 ["we should not, and do not, imply such a term purporting to restrict the sentencing authority of the court"]; accord, *People v. Tran*, *supra*, 242 Cal.App.4th at p. 891.)

In sum, much of the court's discussion in *Feyrer* is equally applicable to the present case, including "the rule that every term of a plea agreement should be stated on the record" and the importance of ensuring both that a defendant is "not made subject to a term of which he was not made fully aware prior to giving his consent to the proposed plea, a term foreclosing any possible reduction of his offense," and that the trial court be "made aware of a term purporting to limit its sentencing authority—a restriction that if known might [cause] it to refuse to accept the proposed plea agreement." (*Feyrer*, *supra*, 48 Cal.4th at p. 438.)

Accordingly, as *Feyrer* instructs, we reject the People's request in this case that we "imply . . . a term purporting to restrict the sentencing authority of the court" to declare defendant's wobbler offense a misdemeanor at the sentencing hearing, before granting probation. (*Feyrer*, *supra*, 48 Cal.4th at p. 438; see § 17(b)(3); cf. *People v. Park*, *supra*, 56 Cal.4th at p. 790 ["When a fact finder has found the defendant guilty of, or the defendant has pleaded no

contest or guilty to, a wobbler that was not charged as a misdemeanor, the procedures set forth in [section 17(b)] govern the court's exercise of discretion to classify the crime as a misdemeanor"].)[12]

III. *The Trial Court's Failure to Order Defendant to Pay Animal Care Restitution and Legal Assistance Costs Incurred by the County*

A. *Trial Court Background*

Early in the lengthy sentencing hearing, at the conclusion of the People's argument for imposing a maximum prison sentence, the prosecutor stated he was also "asking that the court find that the defendant is completely liable for restitution to both [the person who found defendant's injured dog], for any cost that she has incurred as a result of this; to Mendocino Coast Humane Society for the cost they incurred for the significant treatment. Treatment they were forced to do for the wounds the defendant inflicted on [her dog]. And I'm also asking the court to reserve

---

[12] This case is distinguishable from *Godfrey*, mentioned earlier in this opinion on the question of appealability and relied on by the People, in which the appellate court ultimately refused to treat the People's appeal as a petition for writ of mandate because no such petition had been filed within the 60-day deadline. (*Godfrey*, *supra*, 81 Cal.App.3d at p. 905.) The court, however, found that a timely writ petition would have been reviewable due to the trial court's interference with a plea bargain by disregarding the offense to which the defendant pleaded guilty "and contrary to the plea bargain replaced the guilty plea and resulting conviction with a completely different finding to which the People did not agree and which the defendant did not request." (*Id.* at p. 902.) Thus, the court's replacement of the offense contained in the plea agreement with a different, lesser offense at the time of sentencing was without any statutory or other authority. (*Id.* at pp. 902–903.) The situation here was to the contrary: the court had clear statutory authority to reduce the wobbler offense to which defendant had pleaded no contest to a misdemeanor before placing her on probation, given that nothing in the plea agreement prohibited it. (See § 17(b)(3); *Feyrer*, *supra*, 48 Cal.4th at pp. 437–438.)

restitution for other parties as may come to light for the cost that they incurred as a result of this incident. [¶] . . . [¶] And finally, given the defendant's very significant income, I'm asking the court to impose full attorney fees for the cost that the county has incurred in defending this case. Given her reported income, that should not be a challenge."

Thereafter, at the conclusion of the sentencing hearing, after the court suspended imposition of judgment and placed defendant on summary probation, it discussed the terms and conditions of probation, including, inter alia, that defendant pay several fines and fees. The court made no mention of the legal assistance costs or animal care restitution that the prosecutor had briefly mentioned hours earlier when the sentencing hearing commenced. During the hearing, which appears to have lasted almost three hours, those matters were virtually ignored.

Just after the court finished stating the terms and conditions of probation, the prosecutor interjected that he wanted "to make it clear for the record for anyone who is in the audience that the court is imposing absolutely no custodial time for this case," and that he believed it "is an abysmal message to send to this community and to the defendant, Your Honor." The prosecutor interjected again a short time later that he objected "wholeheartedly" to the trial court's suggestion that defendant attempt to perform her community service through the local humane society. The prosecutor did not, however, raise any objection to or question about the court's failure to order animal care restitution or payment of legal assistance costs as additional terms of probation.

In its summary probation order, the court did not include any order for animal care restitution or payment of legal assistance costs; nor did it check the box reserving restitution. Nor did the People request a hearing on animal

care restitution or reimbursement or offer evidence regarding the costs that may have been incurred by the individual who found Thunder and brought him to the humane society, the humane society itself, or any other party that would be statutorily entitled to reimbursement.

B. *Legal Analysis*

The People contend the court erred when it failed to order that defendant pay animal care restitution and legal assistance costs as terms of probation. The People further argue that these alleged errors are appealable under subdivisions (a)(5) and (a)(10) of section 1238.

The statutes relevant to the People's contention include the following.

First, section 597, subdivision (g)(1) provides in relevant part: "Upon the conviction of a person charged with a violation of this section by causing or permitting an act of cruelty . . . , all animals lawfully seized and impounded with respect to the violation by a peace officer, officer of a humane society, or officer of an animal shelter or animal regulation department of a public agency shall be adjudged by the court to be forfeited and shall thereupon be awarded to the impounding officer for proper disposition. A person convicted of a violation of this section by causing or permitting an act of cruelty . . . , shall be liable to the impounding officer for all costs of impoundment from the time of seizure to the time of proper disposition."

Section 597.1, subdivision (*l*)(1) provides in relevant part: "Upon the conviction of a person charged with a violation of this section, or section 597 or 597a, all animals lawfully seized and impounded with respect to the violation shall be adjudged by the court to be forfeited and shall thereupon be transferred to the impounding officer or appropriate public entity for proper adoption or other disposition. A person convicted of a violation of this section shall be personally liable to the seizing agency for all costs of impoundment

from the time of seizure to the time of proper disposition. Upon conviction, the court shall order the convicted person to make payment to the appropriate public entity for the costs incurred in the housing, care, feeding, and treatment of the seized or impounded animals. Each person convicted in connection with a particular animal may be held jointly and severally liable for restitution for that particular animal. The payment shall be in addition to any other fine or sentence ordered by the court."[13]

Second, at the time of the sentencing hearing, former section 987.81 provided that "the court shall consider the available information concerning the defendant's ability to pay the costs of legal assistance and may, after notice . . . , hold a hearing to make a determination of the present ability of the defendant to pay all or a portion of the cost thereof." (Former § 987.81.)[14]

---

[13] We note that it is not entirely clear whether the animal care restitution portion of section 597.1, subdivision (*l*)(1) is applicable to defendant, who was convicted only of a violation of section 597. (See § 597.1, subd. (*l*)(1) ["Upon the conviction of a person charged with a violation of this section, or Section 597 or 597a," seized animals will be forfeited, while a person "convicted of a violation of *this section* shall be personally liable to the seizing agency for all costs of impoundment," and *"[u]pon conviction*, the court shall order the convicted person to make payment to the appropriate public entity for the costs incurred"], italics added.) However, because we conclude the contention related to animal care restitution is not appealable, as shall be discussed in part III.B.1., *post*, it is not necessary to decide whether section 597.1's animal care restitution provision also applies to defendants convicted solely of a section 597 offense.

[14] We also note that in September 2020, a short time before the sentencing hearing in this case, the Legislature enacted Assembly Bill No. 1869 (2019-2020 Reg. Sess.), which repealed former section 987.81, along with many other statutes requiring defendants to pay certain assessments; the effective date of the repeal was July 1, 2021. (See former § 987.81, repealed by Stats. 2020, ch. 92, § 38.) Thus, assuming the trial court was otherwise required to consider defendant's ability to pay any of the legal assistance costs in question at the time of the sentencing hearing, "by its plain terms the ameliorative changes of Assembly Bill 1869 apply

In their opening brief and in opposition to defendant's motion to dismiss, the People argue that the trial court's failure to require defendant to pay animal care restitution pursuant to sections 597, subdivision (g)(1) and 597.1, subdivision (*l*)(1), and legal assistance costs pursuant to former section 987.81 as terms of probation was appealable under subdivision (a)(5) and (a)(10) of section 1238.

For the two independent reasons discussed below, we conclude we lack jurisdiction to consider the issues raised in this portion of the People's appeal.

First, the People's amended notice of appeal states: "The People of the State of California hereby give notice that they appeal *from the grant of the judicially-invited and uncontemplated motion for reduction pursuant to Penal Code section 17(b)*, granted by the Honorable Clayton Brennan on December 16, 2020, in the Superior Court of the State of California, in and for the County of Mendocino. [¶] This appeal is made pursuant to Penal Code sections 1238(a)(5) and 1238(a)(6)." (Italics added.) That notice of appeal, amended by the district attorney, said nothing about animal care restitution or reimbursement of the costs to the county of providing legal assistance.

California Rules of Court, rule 8.304(a)(4) provides in relevant part that, in criminal cases, "[t]he notice of appeal must be liberally construed. Except [in cases where a defendant appeals following a guilty plea], the notice is sufficient if it identifies the particular judgment or order being

---

retroactively to make any unpaid portion of the identified assessments [including section 987.81], as they existed on June 30, 2021, 'unenforceable and uncollectible' as of July 1, 2021. (Stats. 2020, ch. 92, §§ 11, 62.)" (*People v. Greeley* (2021) 70 Cal.App.5th 609.) However, considering our conclusion that this claim is not appealable (see pt. III.B.1., *post*), there is no need to decide whether the People's claim that the court's failure to consider defendant's ability to pay and/or order her to pay legal assistance costs pursuant to former section 987.81 is now moot.

appealed. . . ." Here, the amended notice of appeal states only that it is from the grant of the motion to reduce the offense to a misdemeanor; there is nothing even suggesting that the People are also appealing from the subsequent and separate order placing defendant on probation with certain terms and conditions, or even from the omission of a separate order concerning animal care restitution and legal assistance costs.

As the appellate court stated in *In re J.F.* (2019) 39 Cal.App.5th 70, 76, in the context of a civil appeal: "[T]here are limits to our ability to liberally construe a notice of appeal. 'The policy of liberally construing a notice of appeal in favor of its sufficiency [citation] does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all.' [Citations.] Therefore, when a notice of appeal manifests a ' "clear and unmistakable" ' intent to appeal only from one order, we cannot liberally construe the notice to apply to a different, omitted order. [Citations.]"

Here, this court does not have jurisdiction to consider the People's purported appeal from omissions from the court's subsequent probation order, where the notice of appeal was expressly from only the earlier, separate order granting the section 17(b) motion. (See Cal. Rules of Court, rule 8.304(a)(4).)

There is a second reason this portion of the People's appeal must be dismissed: it is not appealable under either of the two subdivisions of section 1238 asserted by the People. (See § 1238, subd. (a)(5), (10).)

First, as to the claim of appealability under section 1238, subdivision (a)(5), unlike a defendant, the People have no right to appeal from a judgment. (See § 1238; compare § 1237.) However, as noted, the People do have the right to appeal from "[a]n order made after judgment, affecting the substantial rights of the people." (§ 1238, subd. (a)(5).)

In this case, according to the People, their challenge to the trial court's failure to include either animal care restitution or legal assistance costs constituted an order after judgment, which affected their substantial rights. (See § 1238, subd. (a)(5).) However, because the court suspended imposition of judgment and placed defendant on probation, the probation order itself—which included the terms and conditions of probation, but omitted those of concern to the People—constituted the "judgment." (See § 1237, subd. (a) ["an order granting probation [is] deemed to be a final judgment" from which a defendant may appeal]; see also *Douglas*, *supra*, 20 Cal.4th at p. 91 [for purposes of a defendant's appeal, "an order suspending imposition of sentence and granting probation is considered a final judgment"].)

In *Douglas*, the California Supreme Court found that an order reducing the defendant's offense to a misdemeanor at the sentencing hearing was appealable by the People under section 1238, subdivision (a)(5), where the trial court "first suspended imposition of judgment and granted probation. Only after the court had orally pronounced the judgment granting probation and signed the probation order did it formally proceed to the section 17(b)(3) declaration. . . . The section 17(b)(3) order was thus made 'after' the judgment granting probation; it was, therefore, appealable under section 1238, subdivision (a)(5)." (*Douglas*, *supra*, 20 Cal.4th at p. 91; accord *People v. Cavallaro* (2010) 178 Cal.App.4th 103, 108 [where trial court suspended imposition of sentence and granted probation before, "in a subsequent hearing nearly a month later," denying prosecution's request that defendant be subject to mandatory sex offender registration, latter order was appealable as an order after judgment under section 1238, subdivision (a)(5)].) Similarly, in *People v. Hamilton* (2003) 114 Cal.App.4th 932, 938, the appellate court held that the trial court's order concerning the defendant's

victim restitution obligation at a 2003 hearing, which was made *after* the imposition of sentence in 1996, it was appealable as an order after judgment under section 1238, subdivision (a)(5).

Here, unlike *Douglas* and *Hamilton*, there was no hearing or order with respect to either animal care restitution or legal assistance costs, either concurrent with or following the sentencing hearing. Rather, the People are essentially attempting to appeal from the order suspending imposition of judgment and granting probation with certain terms and conditions, i.e., the judgment itself. Hence, the challenged terms and conditions of probation included in the probation order—or rather the *lack* of certain allegedly required terms—are not appealable as an order after judgment under section 1238, subdivision (a)(5). As Division One of this court has stated, "where *imposition of sentence is suspended* and a valid order of probation granted," the probation order "cannot be considered an appealable order after judgment under the provisions of subdivision (a)(5)" of section 1238. (*People v. LaFave* (1979) 92 Cal.App.3d 826, 829, italics added; cf. *Fadelli Concrete Pumping, Inc. v. Appellate Department* (1995) 34 Cal.App.4th 1194, 1200 [finding that the "fine challenged by the People here cannot be considered an appealable 'order . . . after judgment' " because "[i]n a criminal case, judgment is synonymous with the imposition of sentence"], relying on California Supreme Court decisions in *Stephens v. Toomey* (1959) 51 Cal.2d 864, 870 and *People v. Warner* (1978) 20 Cal.3d 678, 682, fn. 1; compare *Douglas*, *supra*, 20 Cal.4th at p. 96 ["The People did not explicitly appeal from 'an order granting probation,' the only type of appeal barred by [section 1238, subdivision (d)'s] plain language, but from a formally and legally separate order"].)[15]

---

[15] Section 1238, subdivision (d) requires the People to seek appellate review of an order granting probation "by means of a petition for a writ of mandate or prohibition which is filed within 60 days after probation is

Second, the People argue in their opposition to the motion to dismiss the appeal that the court's omissions are appealable as unlawful sentences under subdivision (a)(10) of section 1238. (See § 1238, subd. (a)(10) ["imposition of an unlawful sentence . . . means the imposition of a sentence not authorized by law"].) Because the claim of an unauthorized sentence can be raised at any time, regardless of whether it is otherwise appealable, we will address this contention now, notwithstanding the People's failure to preserve the issue on appeal. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*).)

In *Smith*, our Supreme Court reiterated the "narrow exception to the waiver rule for ' "unauthorized sentences" or sentences entered in "excess of jurisdiction." ' [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." (*Smith*, *supra*, 24 Cal.4th at p. 852, quoting *People v. Scott* (1994) 9 Cal.4th 331, 354 and *People v. Welch* (1993) 5 Cal.4th 228, 235.)

Here, the trial court's failure to order animal care restitution and payment of legal assistance costs do not fit within the narrow category of unauthorized sentences that can be reviewed at any time, regardless of the

---

granted." (See 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2021 supp.) Appeal, § 87, p. 362 [citing cases].)

failure to object below. That is because neither alleged error presents a " 'pure question[] of law' " that is " ' "clear and correctable" ' independent of any factual issues presented by the record at sentencing." (*Smith*, *supra*, 24 Cal.4th at p. 852.) Rather, resolution of the proper amount of animal care restitution, if any, would require a determination of the amount owed, based on the costs incurred by the Mendocino Coast Humane Society and others, which would entail a determination of factual issues either by reference to facts in the record or, more likely, a remand for further fact finding. (See §§ 597, subd. (g)(1), 597.1, subd. (*l*)(1); see also *Smith*, at p. 852.) Likewise, resolution of defendant's ability to pay legal assistance costs and the amount owed, if any, would require remand for a determination of defendant's income and expenses, and her ability to pay any such costs. (See former § 987.81; see also *Smith*, at p. 852.)[16]

Consequently, because the unauthorized sentence exception to the waiver rule is inapplicable to these alleged errors, we will not address them now. (Compare *Smith*, *supra*, 24 Cal.4th at p. 853 [invalid parole revocation fine in that case fell "within the narrow class of sentencing errors exempt from the waiver rule" "[b]ecause the erroneous imposition of a parole revocation fine presents a pure question of law with only *one* answer [and] any such error is obvious and correctable without reference to any factual

[16] In their briefing, the People cite the record and, in particular, the probation report for evidentiary support regarding defendant's ability to pay the legal assistance costs. As noted, it appears that the probation report was not included in the record on appeal; the People did not request its inclusion when they designated the record on appeal. This does not, however, affect our resolution of the People's claim, in light of our finding that this issue is forfeited and not reviewable as an unauthorized sentence.

issues in the record or remanding for further findings"]; see § 1238, subd. (a)(10).)[17]

In sum, because (1) the amended notice of appeal did not state that the People were appealing from any order other than the one reducing defendant's offense to a misdemeanor under section 17(b)(3), and (2) the People's appeal on this issue is not from an order after judgment (§ 1238, subd. (a)(5)) or an unlawful sentence (§ 1238, subd. (a)(10)), the portion of the People's appeal that purports to be from the court's failure to include certain terms in the probation order must be dismissed.

DISPOSITION

The trial court's order reducing defendant's offense to a misdemeanor pursuant to section 17(b)(3) is affirmed. The appeal from the order placing defendant on summary probation with various terms and conditions is dismissed.

---

[17] Although not discussed in the parties' briefing, our Supreme Court has also found that an appeal under section 1238, subdivision (a)(10) is unavailable in circumstances where, as here, the trial court suspended imposition of sentence and ordered probation. (See *Douglas*, *supra*, 20 Cal.4th at p. 92, fn. 7 ["Because no sentence was imposed in the present case, subdivision (a)(10) of section 1238 is inapplicable here"].)

Kline, J.*

We concur:

Stewart, Acting P.J.

Miller, J.

People v. Smith (A161676)

*Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.