

# People v. Flores

Court of Appeal of California, Second Appellate District, Division Six

February 21, 2023, Opinion Filed

No. B321802

## Reporter

2023 Cal. App. Unpub. LEXIS 1033 \*

THE PEOPLE, Plaintiff and Respondent, v. JORGE FLORES, Defendant and Appellant.

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**Prior History:** [\*1] Superior Court of Ventura County, No. 2021015988, Ryan J. Wright, Judge.

**Counsel:** Mi Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and Stefanie Yee, Deputy Attorneys General, for Plaintiff and Respondent.

**Judges:** BALODANO, J.; GILBERT, P. J., YEGAN, J. concurred.

**Opinion by:** BALODANO, J.

## Opinion

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Jorge Flores appeals from the judgment after he pleaded guilty to a misdemeanor of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and a jury convicted him of felony arson of forest land (Pen. Code, § 451, subd. (c)). The trial court sentenced him to state prison for four years for arson, and a concurrent sentence of 60 days in county jail for the misdemeanor.

Flores contends: (1) the trial court erred when it ordered

him to pay restitution to government entities for firefighting costs, and (2) the abstract of judgment erroneously imposed court operations and conviction assessments the trial court did not impose orally. We accept the Attorney General's concessions and strike the restitution orders to fire agencies and assessments. We also impose but stay the mandatory restitution [\*2] fine. In all other respects, the judgment is affirmed.

## FACTUAL AND PROCEDURAL HISTORY

Flores set fire to woodland vegetation by Highway 33. The fire spread onto Mike Cromer's ranch property, where it burned eucalyptus trees, singed lemon trees, and melted a portion of the ranch's irrigation and sprinkler system. Fire engines and a helicopter responded and put the fire out.

The probation report included a financial statement that showed Flores was unemployed with no income and no assets. The trial court ordered Flores to pay restitution for emergency response costs of \$13,548.06 to the Ventura County Fire Protection District and \$22,861.75 to the California Department of Forestry and Fire Protection (CAL FIRE). The court also ordered restitution to the Ventura City Fire Department for its emergency response costs, and to Mike Cromer, in amounts to be determined by further court order.

Although not mentioned by the trial court during its oral pronouncement of judgment or in the minute order, the abstract of judgment includes an \$80 court operations assessment (Pen. Code, § 1465.8) and a \$60 conviction assessment (Gov. Code, § 70373). The court waived the restitution fine of \$450 (Pen. Code, § 1202.4, subd. (b)) based on Flores's inability to pay.

## DISCUSSION [\*3]

### *Restitution*

Flores contends the restitution orders to the county, state, and city fire agencies for their costs in fighting the

fire are unauthorized by law.<sup>1</sup> Because the validity of those restitution orders is based on interpretation of a statute, we review them de novo. (*People v. Henderson* (2018) 20 Cal.App.5th 467, 470.) The Attorney General correctly concedes that these orders must be stricken.

The court must order restitution in a criminal case to "a victim of crime who incurs an economic loss as a result of the commission of a crime." (Pen. Code, § 1202.4, subd. (a)(1); Cal. Const., art. I, § 28, subd. (b)(13).) A "victim" includes a "government, governmental subdivision, agency, or instrumentality . . . when that entity is a direct victim of a crime." (Pen. Code, § 1202.4, subd. (k)(2).) But a government agency is not entitled to restitution for the costs of its response to a crime committed against another. (*People v. Martinez* (2005) 36 Cal.4th 384, 393-394 & fn. 1 [illegal drug laboratory cleanup costs].) *Martinez* disapproved *In re Brian N.* (2004) 120 Cal.App.4th 591, "to the extent it holds that a fire department that has incurred labor costs in fighting a fire on a vacant lot not owned by the department is a direct victim of the crime." (*Martinez*, at p. 394, fn. 2.)

At sentencing, the prosecutor relied upon Health and Safety Code section 13009, which allows public entities to recover the costs of fire suppression. This statute "provide[s] the basis for an action[\*4] to recover" firefighting costs. (*People ex rel. Grijalva v. Superior Court* (2008) 159 Cal.App.4th 1072, 1077.) "[S]ection 13009 provides the sole mechanism by which a public agency may recover costs associated with fire suppression" on property of another. (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493, 503, fn. 6.) The Attorney General does not contend that section 13009 makes the fire department a "direct victim" of arson of the property of another, or that it authorizes criminal restitution here.

We order the judgment modified to delete the restitution orders to the Ventura County Fire Protection District, CAL FIRE, and Ventura City Fire Department.

### Assessments

The abstract of judgment lists an \$80 court operations assessment (Pen. Code, § 1465.8) and a \$60 conviction assessment (Gov. Code, § 70373). Although both sections provide that the assessments "shall be

imposed," there is an exception where the defendant does not have the ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164; *People v. Son* (2020) 49 Cal.App.5th 565, 595-596.)

When imposing judgment, the court did not orally order these assessments. The oral pronouncement of judgment controls over conflicting entries in the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Appellate courts must order correction of errors in the abstract. (*Id.* at pp. 185-187.) We accordingly accept the Attorney General's concession and modify the judgment to strike the court operations and conviction assessments.

### Restitution fine

Separate from restitution to victims, [\*5] the court is required to impose a restitution fine to be paid into the state Restitution Fund. (Pen. Code, § 1202.4, subds. (b), (e).) The minimum restitution fine for a felony is \$300, and for a misdemeanor is \$150. (Pen. Code, § 1202.4, subd. (b)(1).) "The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so . . . . A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine." (Pen. Code, § 1202.4, subd. (c).)

The trial court set the restitution fine at \$450 but waived it because Flores had no ability to pay it. But unlike the court operations and conviction assessments, the restitution fine is punitive and may not be waived based on inability to pay. (*People v. Son, supra*, 49 Cal.App.5th at pp. 581, 596.) The parties agree that the judgment must be modified to impose the restitution fine.

The parties also agree that "[i]f the trial court determines a defendant is unable to pay . . . execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490; *People v. Dueñas, supra*, 30 Cal.App.5th at p. 1172.) Because the trial court found that Flores did not have the ability to pay it, we order the judgment modified to impose and stay the restitution fine.

### DISPOSITION

The judgment [\*6] is modified as follows: (1) restitution to the Ventura County Fire Protection District, CAL

<sup>1</sup> Flores does not challenge the restitution order to Mike Cromer.

FIRE, and Ventura City Fire Department are stricken; (2) the court operations assessment (Pen. Code, § 1465.8) and conviction assessment (Gov. Code, § 70373) are stricken; and (3) a restitution fine of \$450 is imposed but stayed pending future showing of ability to pay. The trial court shall prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BALTODANO, J.

We concur:

GILBERT, P. J.

YEGAN, J.

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