

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA ANN SMITH,

Defendant and Appellant.

A153490

(San Mateo County  
Super. Ct. No. SC084100)

Pursuant to a negotiated plea agreement, Cynthia Ann Smith pled no contest to workers' compensation fraud (Ins. Code, § 11760, subd. (a)) and to failure to collect, account, or pay unemployment insurance tax amounts (Unemp. Ins. Code, § 2118.5). The agreed sentence included a requirement that she pay restitution in an amount to be determined by the court. Other felony charges and enhancement allegations were dismissed with a *Harvey*<sup>1</sup> waiver, permitting the court to consider the dismissed charges in setting restitution. Smith stipulated to restitution amounts awarded to three of four victims. She contested restitution claimed by the fourth victim. Following an evidentiary hearing, the court ordered Smith to pay \$14,200 plus interest to that individual.

Assigned counsel submitted a *Wende*<sup>2</sup> brief, certifying an inability to identify any issues for appellate review. Counsel also submitted a declaration confirming Smith was advised of her right to personally file a supplemental brief raising any points which she wishes to call to the court's attention. No supplemental brief has been submitted. As

<sup>1</sup> *People v. Harvey* (1979) 25 Cal.3d 754.

<sup>2</sup> *People v. Wende* (1979) 25 Cal.3d 436.

required, we have independently reviewed the record. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110.) We agree no arguable issues are presented and affirm.

### **BACKGROUND AND PROCEDURAL HISTORY**

Smith owned and operated a flower shop in Menlo Park. In 2015, a multi-agency task force investigated Smith's business, which revealed she failed to pay correct workers' compensation insurance premiums and related payroll taxes over the course of several years. Smith was charged by information with workers' compensation fraud (Ins. Code, § 11760, subd. (a); count 1); insurance fraud (Pen. Code, § 550, subd. (b)(3); count 2); failure to make unemployment insurance contributions (Unemp. Ins. Code, § 2108; counts 3–6); failure to file a tax return, report, or statement with intent to evade tax (*id.*, § 2117.5; counts 7–10); failure to collect, account, or pay over required tax amounts (*id.*, § 2118.5; counts 11–14); grand theft of labor (Pen. Code, § 487, subd. (a); count 15); and grand theft of personal property (*id.*, § 487, subd. (a); count 16).

Pursuant to a negotiated disposition, Smith pled no contest to counts 1 and 14. Under the terms of the plea agreement it was agreed she would not be sentenced to state prison; she would be granted probation with a maximum of 90 days to be served in county jail; all other counts and allegations would be dismissed; the amount of restitution would be reserved and determined by the court subject to a *Harvey* waiver; and the court would consider reducing felony counts 1 and 14 to misdemeanors (Pen. Code, § 17) and terminating probation upon full payment of restitution.

At sentencing, the trial court suspended imposition of sentence, placed Smith on formal probation for five years, with terms and conditions including 90 days in county jail and imposition of statutory fines and fees. Smith objected to the restitution report and requested a restitution hearing.

At the hearing, Smith stipulated to restitution amounts awarded to the California Employment Development Department (\$41,187 plus interest); to FTD Company (\$61,783 plus interest); and to State Farm Insurance Company (\$12,998 plus interest)

Smith contested amounts claimed by James Waldschmidt. Waldschmidt asserted a restitution claim for over \$100,000.<sup>3</sup>

Waldschmidt testified at the restitution hearing that he met Smith in a bar in San Carlos in 2014. She offered him a place to live at her home in Menlo Park, a full-time job as a driver, and a rate of pay starting at \$10 per hour. Waldschmidt totaled his work hours weekly and gave Smith a copy of the wage statement. He was never paid and claimed \$45,000 for unpaid work and overtime.<sup>4</sup> His calendars and wage statements were admitted into evidence. Waldschmidt acknowledged he never paid Smith any rent, although he had a written lease agreement calling for rent of \$800 per month. Waldschmidt also had previously reported to police he was missing \$400 in cash he kept in Smith's home.

The People sought a restitution order of \$36,716 for Waldschmidt in back wages and overtime as documented by his testimony and exhibits plus the missing \$400. Smith argued she was responsible for no more than \$14,560 in restitution based on the records and testimony presented. The court ordered Smith to pay Waldschmidt \$15,000 in restitution for unpaid wages including overtime hours, less an offset of \$800 in unpaid rent, for a total of \$14,200 plus interest.

### DISCUSSION

Smith's notice of appeal challenges only the "sentence or other matters occurring after the plea." No cognizable issues relate to Smith's guilt or to her plea. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097, 1099; Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b); see *People v. Panizzon* (1996) 13 Cal.4th 68, 74.) Her sentence was consistent with the agreed terms of her plea bargain. The only contested element of Smith's sentence was the restitution order to Waldschmidt.

---

<sup>3</sup> Waldschmidt's claim apparently included \$25,000 for "mental stress" and sales taxes of \$30,000 allegedly incurred under a sales license in his name issued by the State Board of Equalization. Nothing in the record before us provides any documentation for these claims.

<sup>4</sup> Waldschmidt originally told police Smith owed him \$2,300 in back wages.

Victim restitution is mandated by the California Constitution. (*People v. Broussard* (1993) 5 Cal.4th 1067, 1070–1074; Cal. Const., art. I, § 28, subd. (b)(13)(A) [all persons who suffer losses as a result of criminal activity shall have the right to . . . restitution from the persons convicted of the crimes for losses they suffer].) Penal Code “[s]ection 1202.4, which implements the constitutional mandate, provides in pertinent part: ‘(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime. [¶] . . . [¶] (f) . . . [I]n 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 . . . .’ ” (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) “At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim’s testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] ‘Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.’ ” (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.)

We normally review a trial court’s restitution order for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) Its determination on an issue of fact is reviewed under the substantial evidence standard. (*In re K.F.* (2009) 173 Cal.App.4th 655, 661.) However, none of the supporting documents relevant to restitution claim are included in the record before us.<sup>5</sup> The prosecution and defense appeared to agree Waldschmidt’s records showed a total of 1,119 unpaid hours. Smith’s counsel contended Waldschmidt’s records showed, applying a compensation rate of \$10 per hour with \$15.00 per hour for overtime, a maximum of \$14,560 in unpaid compensation. The court found \$10 per hour in base compensation to be the appropriate rate. The People’s

---

<sup>5</sup> The reporter’s transcript reflects the exhibits were “returned to the parties.”

calculation of the amount due was \$16,365 and conceded a rental offset of at least \$800.<sup>6</sup> Despite finding the records “a mess,” the court ultimately set restitution at \$15,000, with an \$800 rental offset.

A court may use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole and which is consistent with the purpose of rehabilitation. (*In re Brian S.* (1982) 130 Cal.App.3d 523, 527.) Even though the amount was contested, the record does not indicate the court awarded anything in excess of the victim’s actual economic losses. (*People v. Smith* (2011) 198 Cal.App.4th 415, 431 [except under Pen. Code, § 1202.4, subd. (f)(3)(F), “restitution orders are limited to the victim’s economic damages”].) Smith fails to raise an arguable issue.

#### **DISPOSITION**

The judgment is affirmed.

---

<sup>6</sup> Smith claimed a \$2,400 rental offset.

---

BRUINIERS, J.

WE CONCUR:

---

JONES, P. J.

---

SIMONS, J.