ASSEMBLY BILL No. 461

Introduced by Assembly Member Gaines

February 24, 2009

An act to add and repeal Section 1203.044 of the Penal Code, relating to economic crimes, and declaring the urgency thereof, to take effect immediately.

legislative counsel's digest

AB 461, as introduced, Gaines. Economic Crime Act of 1992: reenactment.

Provisions of law known as the Economic Crime Act of 1992 provided for specified limitations with respect to probation for, the imposition of specified restitution orders on, and a surcharge on a defendant convicted of a felony for theft of an amount exceeding $50,000. The Economic Crime Act of 1992 was repealed by its own terms on January 1, 2008.

This bill would reenact those provisions and provide for their repeal on January 1, 2019, unless a later enacted statute, enacted before January 1, 2019, deletes or extends the date.

Because this bill would impose additional duties on local officials, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1203.044 is added to the Penal Code, to read:

1203.044. (a) This section shall apply only to a defendant convicted of a felony for theft of an amount exceeding fifty thousand dollars ($50,000) in a single transaction or occurrence. This section shall not apply unless the fact that the crime that involved the theft of an amount exceeding fifty thousand dollars ($50,000) in a single transaction or occurrence is charged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact. Aggregate losses from more than one criminal act shall not be considered in determining if this section applies.

(b) Notwithstanding any other law, probation shall not be granted to a defendant convicted of a crime to which subdivision (a) applies if the defendant was previously convicted of an offense for which an enhancement pursuant to Section 12022.6 was found true even if that enhancement was not imposed by the sentencing court. The prior conviction shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.

(c) In deciding whether to grant probation to a defendant convicted of a crime to which subdivision (a) applies, the court shall consider all relevant information, including the extent to which the defendant has attempted to pay restitution to the victim between the date upon which the defendant was convicted and the date of sentencing. A defendant claiming inability to pay restitution before the date of sentencing shall provide a statement of assets, income, and liabilities, as set forth in subdivision (j) to the court, the probation department, and the prosecution.

(d) In addition to the restrictions on probation imposed by subdivisions (b) and (c), probation shall not be granted to any person convicted of theft in an amount exceeding one hundred thousand dollars ($100,000) in a single transaction or occurrence, except in unusual cases if the interests of justice would best be served if the person is granted probation. The fact that the theft was of an amount exceeding one hundred thousand dollars ($100,000) in a single transaction or occurrence, shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact. This subdivision shall not authorize a grant of probation otherwise prohibited under subdivision (b) or (c). If probation is granted pursuant to this subdivision, the court shall specify on the record and shall enter in the minutes the circumstances indicating that the interests of justice would best be served by that disposition. Aggregate losses from more than one criminal act shall not be considered in determining whether this subdivision applies.

(e) Subject to subdivision (f), if a defendant is convicted of a crime to which subdivision (a) applies and the court grants probation, a court shall impose at least a 90-day sentence in a county jail as a condition of probation. If the defendant was convicted of a crime to which subdivision (d) applies, and the court grants probation, the court shall impose at least a 180-day sentence in a county jail as a condition of probation.

(f) The court shall designate a portion of any sentence imposed pursuant to subdivision (e) as a mandatory in-custody term. For the purpose of this section only, “mandatory in-custody term” means that the defendant shall serve that term, notwithstanding credits pursuant to Section 4019, in custody in a county jail. The defendant shall not be allowed release on any program during that term, including work furlough, work release, public service program, or electronic monitoring. The court shall designate the mandatory in-custody term as follows:

(1) If the defendant was convicted of a crime to which subdivision (a) applies, the mandatory in-custody term shall be no less than 30 days. If the person serves a mandatory in-custody term of at least 30 days, the court may, in the interests of justice, and for reasons stated in the record, reduce the mandatory minimum 90-day sentence required by subdivision (e).

(2) If the defendant was convicted of a crime to which subdivision (d) applies, the mandatory in-custody term shall be no less than 60 days. If the person serves a mandatory in-custody term

of at least 60 days, the court may, in the interests of justice, and for reasons stated in the record, reduce the mandatory minimum 180-day sentence required by subdivision (e).

(g) If a defendant is convicted of a crime to which subdivision (a) applies, and the court grants probation, the court shall require the defendant as a condition of probation to pay restitution to the victim and to pay a surcharge to the county in the amount of 20 percent of the restitution ordered by the court, as follows:

(1) The surcharge is not subject to any assessments otherwise imposed by Section 1464. The surcharge shall be paid into the county treasury and placed in the general fund to be used exclusively for the investigation and prosecution of white collar crime offenses and to pay the expenses incurred by the county in administering this section, including increased costs incurred as a result of offenders serving mandatory in-custody terms pursuant to this section.

(2) The court shall also enter an income deduction order as provided in Section 13967.2 of the Government Code to secure payment of the surcharge. That order may be enforced to secure payment of the surcharge as provided by those provisions.

(3) The county board of supervisors shall not charge the fee provided for by Section 1203.1, subdivision (*l*) of Section 1202.4, or subdivision (d) of Section 13967, as operative on or before September 28, 1994, of the Government Code for the collection of restitution or any restitution fine.

(4) The defendant shall not be required to pay the costs of probation as otherwise required by subdivision (b) of Section 1203.1.

(h) Notwithstanding any other law, if a defendant is convicted of a crime to which subdivision (a) applies and the court grants probation, as a condition of probation, within 30 court days after being granted probation, and annually thereafter, the defendant shall provide the county financial officer with all of the following documents and records:

(1) True and correct copies of all income tax and personal property tax returns for the previous tax year, including W-2 forms filed on the defendant’s behalf with any state tax agency. If the defendant is unable to supply a copy of a state tax return, the defendant shall provide a true and correct copy of all income tax returns for the previous tax year filed on his or her behalf with the

federal government. The defendant is not required to provide any particular document if to do so would violate federal law or the law of the state in which the document was filed. However, this section shall supersede all other laws in this state concerning the right to privacy with respect to tax returns filed with this state. If, during the term of probation, the defendant intentionally fails to provide the county financial officer with any document that he or she knows is required to be provided under this subdivision, that failure shall constitute a violation of probation.

(2) A statement of income, assets, and liabilities as defined in subdivision (j).

(i) The submission by the defendant of any tax document pursuant to paragraph (1) of subdivision (h) that the defendant knows does not accurately state the defendant's income, or if required, the defendant's personal property, if the inaccuracy is material, constitutes a violation of probation.

(j) A statement of income, assets, and liabilities form, that is consistent with the disclosure requirements of this section, may be established by the financial officer of each county. That statement shall require the defendant to furnish relevant financial information identifying the defendant's income, assets, possessions, or liabilities, actual or contingent. The statement may include the following:

(1) All real property in which the defendant has any interest.

(2) Any item of personal property worth more than three thousand dollars ($3,000) in which the defendant has any interest, including, but not limited to, vehicles, airplanes, boats, computers, and consumer electronics. Any collection of jewelry, coins, silver, china, artwork, antiques, or other collectibles in which the defendant has any interest, if that collection is worth more than three thousand dollars ($3,000).

(3) All domestic and foreign assets in the defendant's name, or in the name of the defendant's spouse or minor children, of a value over three thousand dollars ($3,000) and in whatever form, including, but not limited to, bank accounts, securities, stock options, bonds, mutual funds, money market funds, certificates of deposits, annuities, commodities, precious metals, deferred compensation accounts, individual retirement accounts, and related or analogous accounts.

(4) All insurance policies in which the defendant or the defendant's spouse or minor children retain a cash value.

(5) All pension funds in which the defendant has a vested right.

(6) All insurance policies of which the defendant is a beneficiary.

(7) All contracts, agreements, judgments, awards, or prizes granting the defendant the right to receive money or real or personal property in the future, including alimony and child support.

(8) All trusts of which the defendant is a beneficiary.

(9) All unrevoked wills of a decedent if the defendant or defendant's spouse or minor child is a beneficiary.

(10) All lawsuits currently maintained by the defendant or by or against a corporation in which the defendant owns more than a 25-percent interest if the suit includes a prayer for damages.

(11) All corporations of which the defendant is an officer. If the defendant is an officer in a corporation sole, subchapter S corporation, or closely held corporation, and controls more equity of that corporation than any other individual, the county financial officer shall have authority to request other records of the corporation.

(12) All debts in excess of three thousand dollars ($3,000) owed by the defendant to any person or entity.

(13) Copies of all applications for loans made by the defendant during the last year.

(14) All encumbrances on any real and personal property in which the defendant has any interest.

(15) All sales, transfers, assignments, quitclaims, conveyances, or encumbrances of any interest in real or personal property of a value exceeding three thousand dollars ($3,000) made by the defendant during the period beginning one year before charges were filed to the present, including the identity of the recipient of same, and relationship, if any, to the defendant.

(k) The information contained in the statement of income, assets, and liabilities shall not be available to the public. Information received pursuant to this subdivision shall not be disclosed to any member of the public. Any disclosure in violation of this section shall be a contempt of court punishable by a fine not exceeding one thousand dollars ($1,000), and shall also create a civil cause of action for damages.

(*l*) After providing the statement of income, assets, and liabilities, the defendant shall provide the county financial officer with copies of any documents representing or reflecting the financial information set forth in subdivision (j) as requested by that officer.

(m) The defendant shall sign the statement of income, assets, and liabilities under penalty of perjury. The provision of information known to be false, or the intentional failure to provide material information knowing that it was required to have been provided, shall constitute a violation of probation.

(n) The Franchise Tax Board and the Employment Development Department shall release copies of income tax returns filed by the defendant and other information concerning the defendant's current income and place of employment to the county financial officer upon request. That information shall be kept confidential and shall not be made available to any member of the public. Any unauthorized release shall be subject to subdivision (k). The county shall reimburse the reasonable administrative expenses incurred by those agencies in providing this information.

(o) During the term of probation, the defendant shall notify the county financial officer in writing within 30 days, after receipt from any source of any money or real or personal property that has a value of over five thousand dollars ($5,000), apart from the salary from the defendant's and the defendant's spouse's regular employment. The defendant shall report the source and value of the money or real or personal property received. This information shall not be made available to the public or the victim. Any unauthorized release shall be subject to subdivision (k).

(p) The term of probation in all cases shall be 10 years. However, after the defendant has served five years of probation, the defendant shall be released from all terms and conditions of probation except those terms and conditions included within this section. A court may not revoke or otherwise terminate probation within 10 years unless and until the defendant has satisfied both the restitution judgment and the surcharge, or the defendant is imprisoned for a violation of probation. Upon satisfying the restitution judgment, the defendant is entitled to a court order vacating that judgment and removing it from the public record. Amounts owing on the surcharge are forgiven upon completion of the term of probation.

(q) The county financial officer shall establish a suggested payment schedule each year to ensure that the defendant remits amounts to make restitution to the victim and pay the surcharge. The county financial officer shall evaluate the defendant's current earnings, future earning capacity, assets (including assets that are in trust or in accounts where penalties may be incurred upon premature withdrawal of funds), and liabilities, and set payments to the county based upon the defendant's ability to pay. The defendant shall bear the burden of demonstrating the lack of his or her ability to pay. If the defendant objects to the suggested payment schedule, the court shall set the schedule. Express findings by the court as to the factors bearing on the payment schedule shall not be required. After the payment schedule is set, a defendant may request a change in the schedule upon a change of circumstances. The restitution schedule shall set a reasonable payment amount and shall not set payments in an amount that is likely to cause severe financial hardship to the defendant or his or her family.

(r) The willful failure to pay the amounts required by the payment schedule or to comply with the requirements of the county financial officer or the probation department pursuant to this section, if the defendant is able to pay or comply, is a violation of probation.

(s) In determining the defendant's ability to pay, the court shall consider whether the annual payment required, including any money or property seized to satisfy the restitution judgment, exceeds 15 percent of the defendant's taxable income for the previous year as identified on the defendant's tax return for the defendant's state of residence or on the defendant's federal tax return. If the defendant has filed a joint return, the defendant's income for purposes of this section shall be presumed to be the total of all wages earned by the defendant, plus one-half of all other nonsalary income listed on the tax return and accompanying schedules, unless the defendant demonstrates otherwise. The court shall also consider the defendant's current income and future earning capacity. A defendant shall bear the burden of demonstrating lack of his or her ability to pay. Express findings by the court as to the factors bearing on the payment schedule shall not be required.

(t) The defendant shall personally appear at any hearing held pursuant to any provision of this section unless the defendant is incarcerated or otherwise excused by the court, in which case the defendant may appear through counsel.

(u) Notwithstanding subdivision (d) of Section 1203.1, the county financial officer shall distribute proceeds collected by the county pursuant to this section as follows:

(1) If the restitution judgment has been satisfied, but the surcharge remains outstanding, all amounts paid by the defendant shall be kept by the county and applied to the surcharge.

(2) If the surcharge has been satisfied, but the restitution judgment has not been satisfied, all amounts submitted to the county shall be remitted to the victim.

(3) If neither judgment has been satisfied, the county shall remit 70 percent of the amounts collected to the victim. Those amounts shall be credited to the restitution judgment. The remaining 30 percent shall be retained by the county and credited toward the surcharge.

(v) Neither this section, nor the amendments to Section 12022.6 of the Penal Code enacted pursuant to Chapter 104 of the Statutes of 1992, are intended to lessen or otherwise mitigate sentences that could otherwise be imposed under any law in effect when the offense was committed.

(w) For the purpose of this section, a county may designate an appropriate employee of the county probation department, the department of revenue, or any other analogous county department to act as the county financial officer pursuant to this section.

(x) This section shall remain in effect only until January 1, 2019, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2019, deletes or extends that date.

SEC. 2. It is the intent of the Legislature in enacting this act to reenact the provisions of the Economic Crime Act of 1992.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to protect Californians from ongoing devastating economic theft, it is necessary this act go into effect immediately.

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