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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ANDRADE ALATORRE,

Defendant and Appellant.

A146055

(Contra Costa County
Super. Ct. No. 11738954)

Daniel Andrade Alatorre pled no contest to aggravated assault and making criminal threats after entering a plea of no contest to these charges in Contra Costa County Superior Court. He was placed on probation for three years, ordered to serve 90 days in county jail, and assessed certain fines and fees. He appeals based on his sentence or other matters that occurred after he entered a plea of no contest that do not affect the validity of his plea, for which he was not required to obtain a certificate of probable cause from the superior court. (*People v. Maultsby* (2012) 53 Cal.4th 296, 299, fn. 2, citing Cal. Rules of Court, rule 8.304(b)(4).) However, he did not identify any specific issues in his notice of appeal.

Defendant's court-appointed counsel has filed a brief that does not raise any legal issues. He requests that this court independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Defendant was informed of his right to file a supplemental brief and did not do so. Upon our independent review of the record pursuant to *Wende*, we conclude there are no arguable appellate issues for our consideration and affirm the trial court's judgment.

BACKGROUND

In May 2015, the Contra Costa County District Attorney alleged in a complaint that on or about December 23, 2014, defendant and two co-defendants committed a robbery (Pen. Code, §§ 211/212.5, subd. (c)),¹ made criminal threats, (§ 422) and participated in a criminal conspiracy (§ 182, subd. (a)(1)), and that defendant had a previous juvenile adjudication for a serious felony offense within the meaning of the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). One of the co-defendants was also charged with misdemeanor battery (§§ 242/243, subd. (a)).

According to a probation officer’s report, on December 23, 2014, one of the loss prevention officers at a Macy’s department store saw defendant, the two co-defendants and a juvenile male select numerous items of clothing while walking through the store, then leave the store without paying for them. When one of the loss prevention officers followed them, they dropped their items and fled on foot. The officer caught up to defendant and, while attempting to detain him, the two “became engaged in a physical struggle.” The other three males came back and all four attacked the loss prevention officer, who said they struck him in the head, face and body, and knocked him to the ground.

A bystander intervened and one of the co-defendants bit the bystander’s arm. Mall security and other loss prevention officers were able to detain all four males. One of the males told an officer, “ ‘We’re gonna come back and shoot you.’ ” All of the stolen items were recovered. Their value, including clothing worn by defendant, amounted to \$2,085.89.

On July 9, 2015, pursuant to a negotiated disposition, the court granted the prosecution leave to amend the complaint to charge defendant with felony assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)) and misdemeanor criminal threats (§ 422), to which defendant pled no contest with the understanding that, among other things, he would remain responsible for restitution on one of the

¹ All statutory references are to the Penal Code unless otherwise noted.

dismissed counts, be subject to three years of felony court probation, a stay-away order, payment of \$50 in restitution to the victim, 90 days in county jail, and standard terms and conditions of probation. Defendant signed a written “Felony Advisement of Rights, Waiver and Plea Form” that he submitted to the court as part of this negotiated disposition.

The court found defendant guilty of the charges to which he pled no contest and dismissed the remaining counts and allegations, subject to restitution on one of the dismissed counts. It placed defendant on probation for three years with standard terms and conditions, and with the special conditions that he stay 100 yards away from the mall in which the incident occurred and serve 90 days in county jail. The court applied a total of 90 days of custody and conduct credits to defendant’s 90-day sentence in county jail.

As part of the terms and conditions of probation, the court also ordered defendant to pay a variety of fees and fines. These were: \$50 to the victim in restitution pursuant to section 1202.4, subdivision (f); a \$450 restitution fund fine pursuant to section 1202.4, subdivision (b)(2), comprised of \$300 for the felony conviction and \$150 for the misdemeanor conviction; a \$450 probation violation fine pursuant to section 1202.44; a \$60 criminal conviction assessment; an \$80 court operations assessment; and a \$176 probation report fee. The court concluded that defendant had accrued seven days of excess custody and awarded him credit of \$30 for each day, for a total credit of \$210 towards applicable fines. The court indicated that it was applying this \$210 credit by deeming the \$176 probation report fee to be paid in full and reducing the \$450 restitution fund fine by \$34 to \$416.²

When the court then asked counsel, “Are you ready?,” defense counsel stated, “And Your Honor, I wanted to point out that my client has no ability to pay.”

² Later in the hearing, the court also stated that the credit would not apply to a reduction of sentence if the district attorney filed, for example, a “petition in lieu,” apparently meaning in lieu of probation. We see no indication in the record that the district attorney did so.

The court responded that it would give defense counsel “the blue sheet of paper, and apparently you—we send you for a hearing, but you have to contact them in between. There’s a new procedure.”

Later in the hearing, after referring to a discussion earlier in the hearing, defense counsel stated, “We are entering an objection as to our discussion on the fines and fees.” The court responded, “I’m not understanding what your objection was. I gave you what you asked for. You asked for me to credit it.” Counsel answered, “I understand that.”

At the conclusion of the hearing the court stated, “And we will give you a blue sheet of paper with your order that tells you what to do if you’d like a hearing on ability to pay the remaining fees and fines. There’s a new procedure for setting a hearing, but that’s only on the discretionary, which is—the only discretionary fee and fine here was the \$176, which . . . I got rid of with the money from your time in custody. So that’s what you do; follow those terms.” There is no indication in the record that defendant requested such a hearing.

The court memorialized all of the terms and conditions of its probation order, including all fees and fines, in a July 9, 2015 “Felony Order of Probation/Supervision.” In this order, defendant by his signature agreed to the following statement: “I have read and received a copy of these conditions of probation/supervision and I understand and agree to perform them and understand that if I fail to do so, my probation may be revoked and I may be sentenced to jail or sentenced as otherwise provided by law.”

In another July 9, 2015 written order, the court further ordered defendant to report to the county’s “Probation Collection Unit” within 20 working days from the date of the order or, if in custody, from release from jail, at which time a county probation officer would interview him to determine his ability to pay all or part of the attorney fees ordered in his case. The order stated this amount to be \$200. The order further advised defendant that if he did not report to the probation officer, he would waive his right to a hearing on his ability to pay the attorney fees and the court would enter

judgment against him ordering him to pay the fees. On the same date as the order, defendant signed and dated an acknowledgment of his receipt of it.

In an August 7, 2015 report, the Probation Collection Unit informed the court that defendant had not reported to the Unit as ordered, and recommended that the court order him to pay the full cost of his legal assistance. On August 19, 2015, the court filed an order directing defendant either to contest paying the attorney fees as recommended within 60 days or pay the fees.

On August 20, 2015, defendant timely filed his notice of appeal. After the appellate record was filed with this court, the superior court clerk submitted a record supplement consisting of the trial court's January 8, 2016 "unreported minute order." In it, the court corrected its July 9, 2015 probation order to reflect the sentence imposed. The court made no finding about defendant's "ability to pay," reduced the restitution fund fine from \$450 to \$300, reduced the probation violation fund fine from \$450 to \$300, and stated that "[d]efendant cannot use custody credits to decrease the Mandatory Restitution fine" pursuant to *People v. Morris* (2015) 242 Cal.App.4th 94. The court also stated that it did not order that defendant pay attorney fees, that defendant was given information for requesting a waiver, and that defendant had not made such a request.

DISCUSSION

We have independently reviewed the record, focusing on the court's sentencing orders and the matters that occurred after defendant entered a plea of no contest that do not affect the validity of his plea. We see no arguable appellate issues for our consideration and affirm the trial court's judgment.

First, as the trial court indicated, defendant's counsel at one point in the hearing stated a vague objection that he did not clarify after the court expressed its inability to understand the basis for the objection; in other words, defendant did not raise an understandable objection to the court's rulings. Further, defendant expressly agreed to perform all the terms and conditions of his probation as indicated by his execution of the court's written "Felony Order of Probation/Supervision."

Second, we see no arguable appellate issues regarding the court's probation and stay-away orders, and its application of custody and conduct credits to defendant's 90 day sentence in county jail, given the parties' negotiated disposition. Also, defendant was found guilty of felony assault by means of force likely to produce great bodily injury, which "shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment" (§ 245, subd. (a)(4)), and of committing misdemeanor criminal threats, which "shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison." (§ 422, subd. (a).)

Furthermore, the court's order of fines and fees were consistent with the amounts allowed by statute. Specifically, the court ordered defendant to pay restitution to the victim of \$50 pursuant to section 1202.4, subdivision (f), which provides in relevant part that "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 or victims or any other showing to the court."

The court, after correcting its sentencing order, ordered defendant to pay a restitution fund fine of \$300 (rather than its previous order that he pay \$450). Section 1202.4, subdivision (b) provides in relevant part that the court shall impose a separate and additional restitution fine that, starting on January 1, 2014, shall not be less than \$300 and not more than \$10,000 for a felony and not less than \$150 and not more than \$1,000 for a misdemeanor. (§ 1202.4, subd. (b)(1).) A fine shall be imposed unless the court finds and states on the record compelling and extraordinary reasons for not doing so, which shall not include the inability to pay. (§ 1202.4, subd. (c).) The defendant's inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine pursuant to paragraph (1) of subdivision (b). (*Ibid.*) It is unclear from the record why the court corrected its initial restitution fund fine order. We note, however, that in defendant's executed "Felony Advisement of Rights, Waiver and Plea Form," a form last revised in 2011, defendant initialed a

provision in the form which states that he understood his conviction could require him “to pay a restitution fine of not less than \$200 and not more than \$10,000 [for a felony conviction] or not less than \$100 and not more than \$1,000 [for a misdemeanor conviction].”

Related to this restitution fine order, the court, in its correction to its sentencing order, ruled that “[d]efendant cannot use custody credits to decrease the Mandatory Restitution fine” pursuant to *People v. Morris, supra*, 242 Cal.App.4th 94. *Morris* concluded that in July 2013, the Legislature “eliminat[ed] restitution fines from the fines to which excess custody credits may be applied.” (*Id.* at p. 100.) We have no reason to disagree with this conclusion.

Next, in its corrected order, the court ordered defendant to pay a \$300 probation violation fine (rather than the initial order that he pay \$450). Section 1202.44 states in relevant part, “In every case in which a person is convicted of a crime and a conditional sentence or a sentence that includes a period of probation is imposed, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional probation revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional probation revocation restitution fine shall become effective upon the revocation of probation or of a conditional sentence, and shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on record.”

The court also ordered defendant to pay a \$60 criminal conviction assessment. Government Code section 70373 provides in relevant part, “To ensure and maintain adequate funding for court facilities, an assessment shall be imposed . . . in the amount of thirty dollars (\$30) for each misdemeanor or felony[,]” subject to exceptions not relevant here. (*Id.*, subd. (a)(1).)

Next, the court ordered defendant to pay an \$80 court operations assessment. Section 1465.8 states in relevant part, “To assist in funding court operations, an assessment of forty dollars (\$40) shall be imposed on every conviction for a criminal offense,” subject to exceptions not relevant here. (*Id.*, subd. (a)(1).)

The court also ordered defendant to pay a \$176 probation report fee, as is authorized by section 1203.1b. A “Probation Officer’s Report” is contained in the record which states the results of an investigation into the alleged charges and defendant’s prior juvenile and criminal record. It states it was dictated on June 1, 2015, and typed on June 4, 2015, which dates were prior to the court’s July 9, 2015 hearing; it is not signed by any judge as having been read and considered, nor is there an indication that it was formally filed with the superior court. The report does not make any recommendation about a probation report fee. At the relevant hearing, the court referred to “the probation report” when it ordered defendant pay the \$176 probation report fee.

Section 1203.1b provides for various steps to be taken in the determination of such a probation report fee. This includes that when a convicted defendant is subject to any preplea or presentence investigation and report, and in any case where a defendant is granted probation, “the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision, conditional sentence, or term of mandatory supervision, of conducting any preplea investigation and preparing any preplea report pursuant to Section 1203.7, of conducting any presentence investigation and preparing any presentence report made pursuant to Section 1203 A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant’s ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court

shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).)

Further, "[w]hen the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." (§ 1203.1b, subd. (b).)

It is not clear from the record what steps called for by Section 1203.1b were followed by the court in setting this fee. Nonetheless, the record indicates that after the court ordered defendant to pay all of the fees and fines ordered, including the \$176 probation report fee, his counsel stated, "I wanted to point out that my client has no ability to pay." Both at that time and at the end of the hearing, the court indicated it would provide a blue sheet of paper to the defense that explained the procedure to follow to set a hearing regarding the \$176 probation report fee.

Defendant did not object to the court's procedure in responding to his counsel's statement and availing him with an opportunity to challenge his ability to pay this fee; nor is there any indication in the record that defendant requested a hearing or otherwise objected to the court's ordering this fee. Moreover, he proceeded to indicate his agreement to all of the conditions of his probation by his execution of the court's "Felony Order of Probation/Supervision." Under these circumstances, defendant forfeited any appellate issue regarding this probation report fee, as indicated by our Supreme Court recently in *People v. Aguilar* (2015) 60 Cal.4th 862. There, the court held that a defendant forfeited any appellate claims about the \$176 presentence investigation report fee he was ordered to pay by the Contra Costa County Superior Court (the same court as in this case) pursuant to section 1203.1b because he "neither sought to present, nor was

precluded from presenting, evidence on his own behalf and the record contains no suggestion he ever accepted the trial court's invitation to address to the probation office any concerns about his ability to pay" the fee, and had two opportunities to object and did not do so. (*Aguilar*, at pp. 866, 867–868.)

Next, the court concluded that defendant had accrued seven days of excess custody and awarded him credit of \$30 for each day, for a total credit of \$210 towards applicable fines. This was consistent with former section 2900.5, in effect at the time the court issued its July 9, 2015 probation order, which stated in relevant part that a person in defendant's circumstances should be credited at a rate not less than \$30 a day in the court's discretion. (2014 Stats, ch. 612, §5.)

The court indicated that it was applying this \$210 credit by deeming the \$176 probation report fee to be paid in full. Although it also initially reduced a \$450 restitution fund fine by the remaining \$34 of credit to \$416, as we have discussed, it later both reduced this restitution fund fine and determined that defendant could not apply this credit to reduce the amount of the corrected fine. The record does not indicate to what, if anything, the \$34 was applied upon the court's issuance of its January 8, 2016 minute order correcting its prior probation order. However, given that there are no indications in the record that defendant objected to this minute order or requested that this \$34 be otherwise applied, or that the court prohibited that it be otherwise applied, we see no arguable appellate issues regarding this aspect of the court's order.

Finally, regarding the court's ruling on defendant's attorney fees, the court in its correction to its probation order stated that it had not ordered that defendant pay these fees.

DISPOSITION

We conclude based on our independent review pursuant to *Wende* that there are no arguable appellate issues for our consideration. The matters appealed from are affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

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