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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MALINKA MOYE,

Defendant and Appellant.

A146208

(San Francisco City and County
Super. Ct. Nos. 215406, 216067)

Following protracted competency proceedings under Penal Code section 1368,¹ Malinka Moye entered guilty pleas to felony stalking (§ 646.9, subd (b)) in one matter, and to procuring a false deed (§ 115, subd. (a)) and stalking (§ 646.9, subd. (a)) in a second matter. Imposition of sentence was suspended in both matters, and Moye was placed on concurrent terms of probation for five years.

Assigned counsel submitted a *Wende*² brief, certifying an inability to identify any issues for appellate review. Counsel also submitted a declaration confirming that Moye was advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court's attention. No supplemental brief has been submitted.³ As

¹ Undesignated statutory references are to the Penal Code.

² *People v. Wende* (1979) 25 Cal.3d 436.

³ Notes in our clerk's file indicate a "declaration" by Moye was returned on September 30, 2016, for proof of service. As of the date of this opinion, Moye has submitted nothing further to this court.

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

I. BACKGROUND

Moye did not obtain a certificate of probable cause (§ 1237.5; Cal. Rules of Court, rule 8.304(b)), and consequently no cognizable issues are before us relating to his guilt or his plea.⁴ (*People v. Mendez, supra*, 19 Cal.4th at pp. 1097, 1099; *People v. Panizzon* (1996) 13 Cal.4th 68, 74.) We therefore briefly summarize the underlying facts (as reflected in probation reports and preliminary hearing and grand jury testimony) only for context.

Moye apparently suffers from a delusional belief he is the true owner of two San Francisco properties: a duplex residential property on Parsons Street (Parsons Property) and a three-unit apartment building located on Hayes Street (Hayes Property). Moye is the great nephew of Timothy Hurdle, a prior owner of both properties. Hurdle died in 2005, and his estate was distributed under the provisions of a trust. Moye was not a beneficiary of the trust.

The Parsons Property was purchased by the current owner in 2006. Between that time and 2011, Moye has alleged the transfer was illegal, filed a quiet title action, served several “eviction notices” on the owner and her tenants, called police on more than one occasion claiming the owner was a “squatter” and seeking her immediate eviction, placed the property’s utilities in his name and turned them off on at least three occasions, and came to the property several times, shouting at the owner. In July 2006, and again in August 2009, the owner obtained restraining orders against Moye, but Moye was

⁴ Moye filed pro se notices of appeal in each matter requesting a certificate of probable cause. The trial court denied both requests. “Section 1237.5 is designed to preclude ‘frivolous appeals by requiring the defendant to set forth grounds for appeal and, if she does so, by requiring the trial court to rule on the issue of probable cause.’ ” (*In re Brown* (1973) 9 Cal.3d 679, 683, overruled on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1092–1093, 1097–1098.) The failure of the trial court to issue a certificate of probable cause precludes appellate review. Refusal to issue a certificate of probable cause is reviewable only by a petition for writ of mandate. (*Brown*, at p. 683.)

undeterred.⁵ Moye signed and recorded a fraudulent grant deed purportedly showing he owned the property. The Parsons Property owner testified that interactions with Moye caused her to live in fear.

On disbursement of the Hurdle estate, the Hayes Property passed to Hurdle's niece, who resides in one of the apartment units. Moye came to the property repeatedly, frightened the owner, and repeatedly sent unwanted mail to her apartment. In one instance, he ran inside the building and threatened her. In another, he came to her home and said "That's my house . . . I'll blow the m-effer up before I let you have it." Moye signed and recorded a fraudulent grant deed purportedly showing he owned the property. The Hayes Property owner testified Moye made her life a "nightmare" and "a living hell," and she was afraid to leave her house.

On May 11, 2011, Moye was charged by information in case No. 215406 with one count of felony stalking in violation of section 646.9, subdivision (b) and eight counts of misdemeanor contempt of court in violation of section 166, subdivision (a)(4).⁶ On July 12, 2011, a grand jury indicted Moye in case No. 216067 on two counts of procuring false grant deeds in violation of section 115, subdivision (a) and stalking in violation of section 646.9, subdivision (a).

On November 16, 2011, Moye was found not competent to assist in his defense, and criminal proceedings were suspended under section 1368. Moye was committed to Napa State Hospital. On February 6, 2013, the court found Moye's competency had been restored, but proceedings were again suspended under section 1368 on March 12, 2014, and Moye was returned to the state hospital. On June 8, 2015, the court found Moye's competence had been restored and criminal proceedings were again reinstated.

On July 1, 2015, Moye, with the assistance of counsel, entered a plea of no contest to stalking (§ 646.9, subd. (b)) in case No. 215406, with the remaining counts dismissed.

⁵ At the 2006 restraining order hearing, Moye admitted he did not own the Parsons Property.

⁶ The contempt charges were based on Moye's repeated violations of the restraining orders issued against him.

In case No. 216067, Moye entered no contest pleas to one count of procuring a false instrument (§ 115, subd. (a)) and stalking (§ 646.9, subd. (a)), and the remaining count was dismissed.

On July 23, 2015, the court suspended imposition of sentence in both matters and placed Moye on concurrent periods of probation for five years in each case. Moye was ordered to serve 653 days in custody with credit for 653 days. As conditions of probation, Moye agreed to waive 365 actual days of custody credits, waive Fourth Amendment rights to be free from warrantless search and seizure, “comply with all the terms and conditions with the Adult Probation Department’s individualized treatment and rehabilitation plan,” abstain from drugs and alcohol, possess no weapons, pay \$45,750 in restitution with a 15 percent administrative fee, pay other fines and fees on each count (\$300 restitution fine, \$40 court operations assessment, \$30 criminal conviction assessment), and stay away from the owners of the Parsons Property and the Hayes Property and their residences.

II. DISCUSSION

We find no arguable issues. As previously noted, we consider no issues related to Moye’s guilt or plea. Moye was represented by counsel at sentencing, and he made no objection to the probationary sentence, custody credit calculation, or imposed fines, fees and penalties. We find no error in the application or calculation of the assessments or credits. He waived 365 days of custody credits in the event of a future probation violation. This was permissible. (*People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1153 [“ ‘a defendant who has served one year in jail as a condition of probation and who thereafter violates probation may be sentenced to an additional period of up to one year in jail if he knowingly and intelligently waives the provisions of . . . section 2900.5’ ”].)

As an issue which “might arguably support the appeal” (*Anders v. California* (1967) 386 U.S 738, 744), Moye’s appointed appellate counsel suggests we consider whether the trial court’s order requiring Moye to pay victim restitution is disproportionate to his offense because it serves no penological purpose, and whether the restitution amount is excessive because Moye has diminished culpability for the crime due to mental

illness. Moyer's counsel directs our attention to *Paroline v. United States* (2014) 572 U.S. ___ [134 S.Ct. 1710, 1726] and *United States v. Bajakajian* (1998) 524 U.S. 321, 334. Neither case has application here.

United States v. Bajakajian involved the question of whether a currency forfeiture constituted an "excessive fine" under the Eighth Amendment. Finding the forfeiture amount excessive under the circumstances of the underlying offense, the *Bajakajian* court noted that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. . . . We . . . hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." (524 U.S. at p. 334; *id.* at p. 344.) *Bajakajian* does not deal with compensation for actual economic loss suffered by a victim of crime. *Paroline v. United States* addressed the appropriate calculation of noneconomic damages payable to a victim pursuant to federal statute (18 U.S.C. § 2259)⁷ by an individual possessor of child pornography, and "whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances." (*Paroline, supra*, 134 S.Ct. at p. 1726.) *Paroline* is likewise irrelevant to the determination of quantifiable victim economic loss.

In this case, the trial court awarded victim restitution to the Parsons Property owner. 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".])

⁷ California law similarly permits recovery of noneconomic damages as restitution to victims of certain sex offenses. (See § 1202.4, subd. (f)(3)(F) [authorizing restitution in "a dollar amount that is sufficient to *fully* reimburse the victim" for "[n]oneconomic losses, including, but not limited to, psychological harm, for felony violations of [s]ection 288" (italics added)].)

“Section 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.)

The Parsons Property owner appeared at the sentencing hearing and testified as to the damage done by Moye’s stalking, threats to her and to her tenants, and of the physical damage done by Moye, or others at his behest. The damage included loss of rental income, and “several thousands of dollars in attorneys’ fees and court costs because of his incessant attempts to gain control of [the Parsons Property].” The victim earlier had obtained a civil judgment against Moye, with damages determined in the amount of \$42,462.20. A claim for additional restitution for repairs to damage caused by Moye to the property brought the total claim to \$45,750.⁸ Defense counsel *stipulated* to restitution in the amount reflected in the civil judgment. When the court offered a restitution hearing on the additional amount claimed, counsel responded “We’ll just stipulate to the entire amount, Judge.”

⁸ 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.) The record provided here does not permit us to directly review the evidence. While Moye requested augmentation of the record in other respects, none of the supporting documents relevant to restitution claim, including the civil judgment, are included in the record before us. Moye does not, however, challenge the accuracy of information presented at the hearing or its sufficiency to support the claim, and he does not contend 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 § 1202.4, subd. (f)(3)(F), “restitution orders are limited to the victim’s economic damages”].) He would have great difficulty doing so in light of his stipulations below to the amounts awarded. Moye fails to demonstrate error.

The amount of restitution ordered was a sum judicially determined to be directly attributable to Moye's conduct and the amount agreed to be appropriate by Moye. We find no arguable issue that the restitution amount is therefore either excessive or disproportionate to the harm Moye caused.

III. DISPOSITION

The judgment is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

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