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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH RAYMOND CALIHAN,

Defendant and Appellant.

A146641

(Contra Costa County
Super. Ct. No. 5-0411231)

Defendant Kenneth Raymond Calihan appeals an order denying his motion to reduce or vacate a \$3,600 restitution fine ordered by the court under Penal Code section 1202.4.¹ His court-appointed counsel has filed a brief seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Counsel attests that defendant was advised of his right to file a supplemental brief in a timely manner, but he has not exercised such right. We conclude there are no issues requiring further review and affirm.

Defendant is presently serving an 18-year prison term following his no contest plea in February 2006 to one count of first degree residential burglary (§§ 459, 460, subd. (a)) and one count of possession of drug paraphernalia (Health & Saf. Code, § 11364). As part of his negotiated plea, defendant also admitted that he had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12) and had served three prior prison terms (§ 667.5, subd. (b)).

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

On October 1, 2015, defendant, appearing in propria persona, filed a motion to reduce or vacate a \$3,600 restitution fine imposed at the time of sentencing. He argued that the court violated his right to due process under the Fifth and Fourteenth Amendments by failing to consider his ability to pay the restitution fine when imposing sentence.

On October 5, 2015, the trial court denied defendant's motion, finding that it had no jurisdiction to grant the requested relief. Defendant filed a timely notice of appeal.

Section 1202.4, subdivision (b), provided at the time of defendant's sentencing as follows: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (Stats. 2005, ch. 240, § 10.5 [Assem. Bill No. 22].) Subdivision (c) expressly provided that "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two-hundred-dollar (\$200) . . . minimum." (*Ibid.*)

At the February 2006 sentencing hearing, defendant objected to the amount of the restitution fine stating, "What? [¶] . . . [¶] I thought [the restitution fine] was only \$200 dollars [¶] . . . [¶] When did they up that?" The court explained that the "standard restitution fine" had been \$200 per year for "a long time." Although defendant filed a notice of appeal from his conviction, he later filed a request to abandon the appeal, which was granted. Accordingly, any challenge to the amount of the fine has been waived and the trial court properly denied defendant's request to reduce the fine.

We note, however, that this court recently filed an opinion remanding this case to the trial court for further consideration of defendant's petition for habeas corpus which seeks resentencing based on the reduction of one of his prior strike convictions to a misdemeanor under Proposition 47. (*People v. Calihan* (Dec. 9, 2015, A145746) [nonpub. opn.].) If defendant's petition is granted, his sentence would be reduced from 18 years to 13 years. Reconsideration of the restitution fine, including defendant's inability to pay should he make such a showing, would be within the court's discretion at the time of his resentencing. (*People v. Rosas* (2010) 191 Cal.App.4th 107, 109.)

Disposition

The order denying defendant's request to reduce or vacate the restitution fine is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.