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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD HOLT AYERS III,

Defendant and Appellant.

C067095

(Super. Ct. Nos.
CRF074342, CRF051990)

In August 2005, in case No. 051990 (the 2005 case),¹ defendant Gerald Holt Ayers III pled no contest to cashing a check with intent to defraud. Imposition of sentence was suspended and defendant was placed on probation for five years on the conditions, among others, that he pay a \$200 restitution fine and a \$200 restitution fine suspended unless probation is revoked.

¹ For ease of reading, the prefix CRF has been omitted from each superior case number.

In October 2007, in case No. 074342 (the 2007 case), defendant pled no contest to threatening to commit a crime resulting in death or great bodily injury, reckless driving while eluding a pursuing peace officer, resisting an executive officer, and driving under the influence of alcohol or drugs. Defendant admitted that, as a result of these convictions, he violated his probation in the 2005 case.

Defendant was sentenced to state prison for four years four months in the 2007 case plus eight months consecutive in the 2005 case. Execution of sentence was suspended and defendant was again placed on probation for five years on the conditions, among others, that he pay a \$200 restitution fine and a \$200 restitution fine suspended unless probation is revoked.

In November 2010, defendant admitted that he violated his probation in both cases. In December 2010, the trial court ordered execution of the prison sentence. The court orally imposed a \$200 restitution fine in each case. Then, turning to matters that had not been part of the suspended sentence, the court orally imposed a \$200 parole revocation fine and a \$30 "court construction fee assessment" in each case. Defendant was awarded 229 days' custody credit and 114 days' conduct credit.²

² The relevant 2010 amendment to Penal Code section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (Pen. Code, §§ 422, 1192.7, subd. (c)(38); former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

In addition to these orally pronounced fines and fees, the abstract of judgment reflects a \$200 probation revocation fine in each case.

On appeal, defendant contends the trial court erred by imposing restitution fines following revocation of probation that were in addition to, or greater than, the fines imposed at the original sentencing hearing. Defendant also contends, and the People concede, the \$30 criminal conviction assessments must be stricken because the statutes do not apply to convictions that occurred prior to the January 1, 2009, effective date. We shall modify the judgment.

FACTS³

The 2005 Case

Defendant wrote insufficient funds checks totaling \$3,284.64.

The 2007 Case

Defendant repeatedly telephoned the Davis Police Department demanding that police warn a former Yolo County District Attorney to retract information that had led to a criminal prosecution against him. Defendant also told police that the former deputy district attorney needed to leave town. After making the same comments to a Davis police sergeant, defendant became angry and told the sergeant that he was "dead."

³ Because defendant's matters were resolved by plea, our statement of facts is taken from the probation officer's report. The facts are not at issue in this appeal involving sentencing issues.

Defendant told a witness that, if the deputy district attorney did not leave town within 72 hours, defendant would kill the deputy. When Davis Police officers located defendant, he led them on a high-speed chase on Interstate 80. Eventually, he was taken into custody with the use of a Taser. Subsequent tests showed that defendant's blood-alcohol level was ".07/.08."

DISCUSSION

I

Restitution Fines

Defendant acknowledges that the trial court imposed a \$200 restitution fine as a condition of his probation in the 2005 case, and that it later imposed a \$200 restitution fine as a condition of his probation in the 2007 case. He contends that, when it ordered execution of the prison sentence in 2010, the court erred under our opinion in *People v. Chambers* (1998) 65 Cal.App.4th 819 by imposing a second, duplicative restitution fine in each case. The record does not support this contention.

We held in *Chambers* that "a restitution fine imposed at the time probation is granted survives the revocation of probation." (*People v. Chambers, supra*, 65 Cal.App.4th at p. 820.) Because such a fine survives the revocation of probation, there is no authority to impose a second fine. (Accord, *People v. Urke* (2011) 197 Cal.App.4th 766, 779.)

The error in *Chambers* was patent because the fine imposed as a condition of probation was \$200, and the fine imposed upon revocation of probation was \$500. (*People v. Chambers, supra*, 65 Cal.App.4th at p. 823.) The larger \$500 fine could not be

construed merely as confirmation or reiteration of the smaller \$200 fine.

Here, in contrast, we find no indication that the restitution fines imposed upon execution of the prison sentence were anything other than reiterations of the restitution fines imposed as conditions of probation.

As the appellant, defendant has the duty to show error by an adequate record. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) With respect to the restitution fines, he has not done so. In any event, this opinion authoritatively construes the fines as reiterations of the earlier fines, and we shall direct the trial court to correct the abstract of judgment to so reflect. Thus, there is no danger that defendant will be compelled to make duplicative payments for a single fine.

Defendant claims the trial court imposed a "\$600 restitution fine pursuant to Penal Code section 1202.4, subdivision (b)," at least as to the 2007 case. Unfortunately, he does not explain how he arrived at the \$600 figure. We thus deduce that, per the abstract of judgment, the \$600 figure represents a \$200 restitution fine under Penal Code section 1202.4, an unstayed \$200 probation revocation fine under Penal Code section 1202.44, and a stayed \$200 parole revocation fine under Penal Code section 1202.45. Because each of these \$200 fines was authorized by the relevant statute, we find no error.

II

Criminal Conviction Assessment

Defendant contends, and the People concede, the \$30 criminal conviction assessments must be stricken because the governing statute, Government Code section 70373, does not apply to convictions, whether by plea or jury verdict, that occurred prior to its January 1, 2009, effective date. We accept the People's concession and order the assessments stricken. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.)

DISPOSITION

The judgment is modified by striking the \$30 criminal conviction assessments in each case. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment, omitting the criminal conviction assessments and confirming the previously imposed restitution fines, and to forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.