

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY CLINTON EADS,

Defendant and Appellant.

C068703

(Super. Ct. No.
CRF10460)

After defendant Gary Clinton Eads pleaded no contest to forcible rape and assault with intent to commit rape (Pen. Code, §§ 220, 261, subd. (a)(2); section references that follow are to the Penal Code), the trial court sentenced him to 12 years in state prison. The court also imposed a restitution fine of \$2,400 (§ 1202.4, subd. (b)) and a suspended restitution fine in the same amount, to be imposed if parole were revoked (§ 1202.45). The court found defendant had the ability to pay the fine "based upon Social Security Disability benefits that he

will receive." Defendant did not object to the amount of the fine or to the court's reasoning.

Defendant appeals, contending: (1) the restitution fine was unlawfully imposed as to any amount over the \$200 statutory minimum because the court's reason for finding defendant could pay was legally incorrect; (2) since the amount of the fine was unauthorized, his failure to object did not forfeit the issue; and (3) if his failure to object forfeited the issue, he received ineffective assistance of counsel.

We affirm the judgment. However, we must remand the matter to the trial court for a correction of the abstract of judgment.

FACTS AND PROCEEDINGS

Defendant's contentions do not require us to discuss his offenses in detail. The factual basis for his plea, derived from the evidence offered at the preliminary hearing, was as follows: On September 18, 2010, defendant had non-consensual sexual intercourse by means of force and violence with a person not his spouse. The victim had attempted to escape by jumping out of a window, but he caught her, carried her into the house, and forced her onto his bed, then committed the rape.

According to the probation report, defendant, who was 56 years old, had been unemployed and receiving Social Security Disability benefits since 2002, currently \$908 per month; he was legally blind due to retinal deterioration. He also claimed to suffer from thyroid cancer, high blood pressure, and alcoholism.

The probation report recommended a restitution fine and a suspended restitution fine in the amounts the trial court imposed.

DISCUSSION

Defendant contends the restitution fine and the suspended restitution fine must be reduced to the statutory minimum of \$200 because the trial court could not lawfully consider defendant's disability benefits in assessing his ability to pay and the record does not show that he had any other assets with which to do so. We conclude the claim is forfeited because defendant did not object to the fine. In any event, the claim lacks merit.

When defendant was sentenced, former section 1202.4 provided in part:

"(b) 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.

"(c) The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. 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.

. . .

"(d) In setting the amount of the fine pursuant to subdivision (b) in excess of the two[-]hundred-dollar (\$200) . . . minimum, the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, [and] the seriousness and gravity of the offense and the circumstances of its commission Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. . . ." (Stats. 2010, ch. 351, § 9.)

"Unless there are 'compelling and extraordinary reasons,'" the defendant's 'lack of assets' and 'limited employment potential' are 'not germane' to his or her ability to pay the fine. [Citations.] In the absence of a contrary showing, the court is entitled to presume the defendant will pay the

restitution fine out of future earnings. [Citations.]” (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405.)

Defendant asserts the trial court could not properly consider his disability benefits in determining whether he could pay the fine, because felons may not receive such benefits while incarcerated. (42 U.S.C. § 402(x)(1)(A)(i); *Davel v. Sullivan* (7th Cir. 1990) 902 F.2d 559, 562-563.) Therefore, according to defendant, the court imposed an unauthorized sentence so far as the restitution fine exceeded the statutory minimum of \$200, and his failure to object did not forfeit the issue on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) Defendant’s second point does not follow from his first point.

An unauthorized sentence is a sentence that “could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott, supra*, 9 Cal.4th at p. 354.) The restitution fine imposed by the trial court did not exceed the statutory maximum. (Former § 1202.4, subd. (b)(1).) Furthermore, the court did not have to make any express finding that defendant could pay the assessed amount; rather, defendant had the burden of showing he could not do so. (Former § 1202.4, subd. (d).) Because defendant did not make that showing, he cannot show that the restitution fine here was an unauthorized sentence within the meaning of *Scott*. Therefore, his failure to object to the fine forfeited the issue on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gamache* (2010) 48 Cal.4th 347, 409.)

Defendant's backup argument of ineffective assistance of counsel is unavailing. Where, as here, the record does not show why counsel acted as he did, an ineffective assistance argument must fail on direct appeal unless there could be no reasonable explanation for counsel's actions. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Here, it is easy to find reasonable explanations for counsel's failure to object.

First, under the plain terms of former section 1202.4, the trial court could find that defendant had the ability to pay based on future earning capacity, regardless of any present lack of assets. (Former § 1202.4, subd. (d); *People v. Urbano*, *supra*, 128 Cal.App.4th at p. 405.) Second, under the federal law defendant cites, his benefits will not be terminated by his imprisonment but only suspended, and will resume on his release. (*Davel v. Sullivan*, *supra*, 902 F.2d at p. 562.) Defendant cites no authority, and we know of none, holding that a defendant's ability to pay a restitution fine depends on income received during incarceration, or that he must be found unable to pay within the meaning of former section 1202.4 unless he can do so before his release. For these reasons, counsel could have properly deemed it futile to object to the amount of the restitution fine imposed.

Because the trial court was not required to make any express finding that defendant could pay the restitution fine (former § 1202.4, subd. (d)), and defendant has shown no error in the amount of the fine imposed, we need not decide whether the court should have made the finding it did. We review the

trial court's results, not its rationale. (*Cal. Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 731.)

For all of the above reasons, we affirm the trial court's orders as to the restitution fines. We note, however, that the abstract of judgment incorrectly states the amount of the suspended restitution fine as \$600. The matter is therefore remanded to the trial court with directions to prepare a corrected abstract of judgment stating the amount of the suspended restitution fine as \$2,400.

DISPOSITION

The orders are affirmed. The matter is remanded to the trial court with directions to correct the abstract of judgment as described above and to furnish a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.