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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(El Dorado)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

LOGAN SHELDON SHARP,

Defendant and Appellant.

C070033

(Super. Ct. No. S05CRF0355)

In February 2006, defendant Logan Sheldon Sharp pleaded no contest to first degree burglary. (Case No. SC05CRF0355 [the 2005 burglary case]; Pen. Code, §§ 459, 460, subd. (a).)<sup>1</sup> In December 2009, following several violations of probation, he was sentenced to state prison, ordered to make restitution to the victim (the Restitution Fund) in the amount of \$360.92 (\$ 1202.4, subd. (f)), and ordered to pay a \$200 restitution

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

fine (§ 1202.4, subd. (b)) and a \$200 restitution fine suspended unless parole is revoked (§ 1202.45).

At the same sentencing hearing, in a 2009 unrelated case, defendant was sentenced to state prison for second degree robbery (§§ 211, 212.5, subd. (c)), ordered to make restitution to the victim in the amount of \$1,659, and ordered to pay stayed and unstayed restitution fines in the amount of \$2,000. (Case No. S09CRF0042 [the 2009 robbery case].)

In a prior appeal, this court affirmed the judgment in both cases. (*People v. Sharp* (May 19, 2011, C063752) [nonpub. opn.] .) We issued our remittitur to the trial court in August 2011.

In December 2011, defendant filed a superior court motion, in propria persona, in both cases entitled, "Motion for Restitution Hearing for Reconsideration of Ability to Pay and Constitutionality of Excessive Fines." The motion contains two handwritten references to a "fine" of "\$4,219.92," which is the sum of the victim restitution and unstayed restitution fines imposed in both cases.

The trial court denied the motion, ruling: "The Court has read and considered defendant's motion for restitution hearing for reconsideration of ability to pay and constitutionality of excessive fines. [¶] COURT'S RULING: [¶] Court loses jurisdiction to modify the sentence 60 [sic] days after imposition of sentence. [¶] Time has expired. [¶] Motion is DENIED." (But see § 1170, subd. (d) [court lacks jurisdiction

to reconsider where motion filed more than 120 days after sentencing].)

Defendant now appeals from this ruling in the 2005 burglary case but not in the 2009 robbery case.<sup>2</sup> He contends, and the Attorney General concedes, the trial court had continuing jurisdiction to modify the *victim restitution order* even though it had no jurisdiction to modify the restitution fine.

(§ 1202.42, subds. (a), (d); *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207.) We agree with the parties.

The Attorney General claims the trial court's belief that it had lost jurisdiction to modify the victim restitution was harmless because the court was prohibited by statute from reducing victim restitution on the ground of inability to pay. Because we agree with the Attorney General on this point, we shall affirm the judgment.

### **DISCUSSION**

The facts of defendant's offenses are not at issue in this appeal and need not be recounted.

Defendant contends the trial court erred when it ruled that it had lost jurisdiction to consider his motion as it related to

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<sup>2</sup> Defendant acknowledges in a different context that a "notice of appeal 'is sufficient if it identifies the particular judgment or order being appealed.'" (Cal. Rules of Court, rule 8.100(a)(2).) Here, the notice of appeal plainly identifies "Case Number[] S05CRF0355," and defendant does not request that the notice be construed to include an appeal in case No. S09CRF0042. We note that case No. S09CRF0042 has been stricken from the caption of defendant's opening brief.

victim restitution. In his opening brief, he curiously targets "the award of \$1,659," which was entered in the 2009 robbery case, rather than the award of \$360.92 entered in the 2005 burglary case at issue here. The Attorney General's briefing notes the anomaly, but defendant's reply brief again repeats the greater amount and otherwise fails to address the issue.

The Attorney General concedes that the trial court erred in believing it had lost jurisdiction over the issue of victim restitution. She claims this error was harmless because the argument set forth in defendant's motion was limited to the restitution fines. Whether defendant's argument was so limited is not entirely clear.

But even if the motion made a sufficient *request* to reduce the victim restitution, it offered no adequate *ground* upon which to do so. The *only* ground proffered in the motion was defendant's inability to pay. This ground was inadequate as a matter of law.

Section 1202.4, subdivision (g) provides: "The court shall order full restitution 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 order, nor shall inability to pay be a consideration in determining the amount of a restitution order.*" (Italics added.)

Defendant's reliance on authority involving the construction and interpretation of notices of appeal is misplaced. There is no dispute whether defendant's notice of appeal is adequate to allow review of the victim restitution issue in *this* court. The question is whether *defendant's motion* gave *the trial court* any basis to modify the victim restitution order. It did not; thus, the court's failure to modify the order was not error, regardless of whether the court incorrectly believed the time in which the order could be modified had expired. (*People v. Fields* (1996) 13 Cal.4th 289, 296; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

For the first time on appeal, defendant claims the restitution order violated his due process rights because it was based "on an unsubstantiated claim included in the probation report." However, defendant's motion did not challenge the probation report or contend the recommended amount of victim restitution was factually unsubstantiated. Any such fact-based claim has been forfeited on appeal. (E.g., *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.)

In any event, defendant's sole support for his claim is a citation to the probation report's reference to victim restitution in the 2009 robbery case. That claim is not properly before us in this appeal from the judgment in the 2005 burglary case.

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.