

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNIE RAY BROADWAY,

Defendant and Appellant.

C079203

(Super. Ct. Nos. CM039451,
CM039809)

Appointed counsel for defendant Donnie Ray Broadway has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) We modify the judgment to include mandatory fees and affirm.

BACKGROUND

In January 2014, pursuant to a plea agreement, defendant pleaded no contest to two counts of possession of methamphetamine for sale (Health & Saf. Code, § 11378)¹ in two separate cases (Nos. CM039451 and CM039809). He also admitted the three allegations with respect to prior convictions. The remaining counts were dismissed. In accordance with the plea agreement, the trial court sentenced defendant to the upper term of six years eight months and suspended execution of sentence, placing defendant on formal probation. Defendant was ordered to serve 270 days in jail and, upon release, to attend a year-long recovery program. Together with other fines and fees, in case No. CM039451 the trial court imposed a \$50 drug lab fee (along with \$145 in concomitant penalty assessments) pursuant to section 11372.5.

On March 18, 2015, defendant admitted to violating his probation by testing positive for methamphetamine. The trial court revoked defendant's probation and, on April 22, 2015, ordered the previously suspended sentence executed, with post-release community supervision of three years. (Pen. Code, § 1170, subd. (h).) Defendant was also ordered to pay all fines and fees previously imposed, as well as restitution fines. Defendant appealed this sentence.

On April 27, 2015, the trial court denied defendant's petition for resentencing brought pursuant to Penal Code section 1170.18 (Proposition 47). We granted defendant's request to construe his notice of appeal to include the denial of his petition for resentencing.

¹ Further undesignated statutory references are to the Health and Safety Code.

DISCUSSION

Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days elapsed, and we received no communication from defendant.

I

Petition for Resentencing

Whether the protections afforded by *Wende* and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 [18 L.Ed.2d 493], apply to an appeal from an order denying a petition brought by Proposition 47 remains an open question. Our Supreme Court has not spoken. The *Anders/Wende* procedures address appointed counsel's representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been loath to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551 [95 L.Ed.2d 539]; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Sade C.* (1996) 13 Cal.4th 952; *People v. Dobson* (2008) 161 Cal.App.4th 1422; *People v. Taylor* (2008) 160 Cal.App.4th 304; *People v. Thurman* (2007) 157 Cal.App.4th 36; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570.) Nonetheless, in the absence of Supreme Court authority to the contrary, we believe it prudent to adhere to *Wende* in the present case, where counsel has already undertaken to comply with *Wende* requirements.

Because the trial court properly found defendant's crimes of conviction were not eligible for reduction under Proposition 47, we see no error.

II

Pleas and Sentences

Our review of the record discloses omission of a mandatory fee in both cases.

As we have described, the trial court originally imposed the mandatory \$50 drug lab fee with penalty assessments in case No. CM039451. However, the court failed to impose this fee in the second case and later deleted the order to pay and amended the abstract in case No. CM039451 to omit the fee.

The drug lab fee (or criminal laboratory analysis fee) under section 11372.5 is mandatory for defendant's counts of conviction, one fee for each separate offense, and is not subject to ability to pay analysis. (See *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519.) The trial court's failure to impose these fees renders the sentence unauthorized; we may correct it on our own motion. (*Ibid.*) We shall therefore order the judgment modified to impose the two \$50 drug lab fees under section 11372.5, along with the appropriate penalty assessments, and the abstract of judgment amended to reflect these fees.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to include the mandatory fees and any corresponding penalty assessments pursuant to section 11372.5 as to both counts of conviction. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

/s/
Duarte, J.

We concur:

/s/
Murray, Acting P. J.

/s/
Renner, J.