

NOT TO BE PUBLISHED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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS JOHN LEWIS,

Defendant and Appellant.

C079464

(Super. Ct. No. CM037592)

Appointed counsel for defendant Nicholas John Lewis has asked this court to review the record to determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). With regard to one of the fines, we note a discrepancy between the trial court's oral pronouncement of judgment and the minute order and abstract of judgment. We shall order a correction of both to reflect the oral pronouncement of judgment. Finding no other arguable error that would result in a disposition more favorable to defendant, we affirm the judgment.

I

Factual and Procedural History

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

Defendant was charged by criminal complaint with two counts of attempted premeditated murder, a felony (Pen. Code, §§ 664/187, subd. (a)--counts 1 and 2),¹ and shooting at an occupied motor vehicle, a felony (§ 246--count 3).² The complaint specially alleged that, as to all three counts, defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally used a firearm within the meaning of section 12022.53, subdivision (b), and the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(c).

On February 25, 2013, the complaint was amended to include an additional charge of carrying a loaded firearm on a public street (§ 25850, subd. (a)--count 5), as well as additional allegations defendant was doing so as an active participant in a criminal street gang (§ 25850, subd. (c)(3)), and he committed the crime for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(c)).

That same day, defendant entered a negotiated plea of guilty to shooting at an occupied motor vehicle (count 3) and carrying a loaded firearm on a public street (count 5), and admitted the criminal street gang enhancement as to count 5 in exchange

¹ Undesignated statutory references are to the Penal Code.

² The complaint also charged defendant's four codefendants.

for dismissal of the remaining charges and allegations against him pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, and defendant's agreement to testify truthfully in all court proceedings related to matters pending against his four codefendants. The parties stipulated a factual basis could be taken from the probation report and the court deferred finding a factual basis until sentencing "at which time the sentencing judge may make a factual finding, a factual basis based upon a review of the probation report."

At the May 28, 2014 sentencing hearing, the trial court found there was a factual basis for defendant's plea based upon the following information contained in the probation report: On October 25, 2012, the victim, a documented Sureño gang member, and his wife were stopped at an intersection when their car was struck by three bullets fired from a car driven by David Allen Abed and in which defendant and three other individuals, several of whom were identified as Norteño gang members, were passengers. Defendant later admitted to police he was in the vehicle at the time of the shooting but was not the shooter.

The trial court suspended imposition of sentence and, finding the case to be unusual pursuant to section 1203, subdivision (e)(2), granted defendant three years of formal probation subject to specified terms and conditions. The court awarded defendant 1,160 days of presentence custody credit (580 actual days plus 580 conduct credits). Defendant entered a waiver pursuant to *People v. Johnson* (2002) 28 Cal.4th 1050 whereby he waived his custody credits with the understanding he would not then be sentenced to serve any additional jail time.

The court imposed a \$240 restitution fine (§ 1202.4, subd. (b)); a \$240 probation revocation restitution fine, stayed pending successful completion of probation

(§ 1202.44); an \$850 fine as to count 3 (§ 672³); as to count 5, a \$40 court operations assessment (§ 1465.8) and a \$30 conviction assessment (Gov. Code, § 70373); and probation supervision fees of \$164 per month for 36 months. The court found defendant had no ability to pay for the presentence investigative report and reserved jurisdiction on the issue of victim restitution. Defendant did not object.

The court's May 28, 2014 minute order imposes a \$240 restitution fine (§ 1202.4, subd. (b)), a \$240 probation revocation restitution fine, stayed pending successful completion of probation (§ 1202.44), and an \$850 fine, and states the \$40 court operations assessment (§ 1465.8) and a \$30 conviction assessment (Gov. Code, § 70373) are "[i]ncluded in total."

The "Financial Obligations" terms attached to the May 28, 2014 terms and conditions of probation impose the same fees and fines reflected in the minute order, but impose the \$40 court operations assessment (§ 1465.8) and a \$30 conviction assessment (Gov. Code, § 70373) in addition to, not included in, the \$850 total.

On November 6, 2014, the probation department filed a petition for violation of probation alleging defendant committed new crimes by leaving the scene of an accident (Veh. Code, § 20002, subd. (a)) and being a felon in possession of ammunition (§ 30305, subd. (a)(1)).

On November 20, 2014, defendant admitted the Vehicle Code violation. The trial court modified the terms and conditions of probation to require that defendant serve 120

³ Section 672 provides: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed."

days in county jail, report to the probation department within 72 hours of release, and “not drive without a valid California driver’s license [and] proof of insurance” in his possession.

On March 9, 2015, the probation department filed a second petition for violation of probation alleging defendant was found to be under the influence of alcohol.

On March 12, 2015, defendant admitted the alleged probation violation, and the trial court referred the matter to the probation department for preparation of a supplemental probation report.

On April 23, 2015, the court terminated probation as unsuccessful, sentenced defendant to serve an aggregate term of five years eight months in state prison, and awarded him 184 days of presentence custody credit (92 actual days plus 92 conduct credits). The court reimposed the fees and fines previously ordered by referring the parties to “page 7 of the March 24, 2015, supplemental [probation] report [filed April 23, 2015],” and imposed the previously suspended \$240 probation revocation fine (§ 1202.44) and a \$240 parole revocation restitution fine, stayed pending successful completion of parole (§ 1202.45).

On page seven of the supplemental report, the probation department recommends reimposition of the previously imposed restitution fine (§ 1202.4) and the previously imposed but suspended probation revocation restitution fine (§ 1202.44), as well as the previously imposed \$850 fine as to count 3, comprised as follows: A \$200 fine (§ 672); a \$40 court surcharge (§ 1465.7); a \$100 state court facilities construction fund fee (Gov. Code, § 70372, subd. (a)); \$200 state penalty assessment (§ 1464); an \$80 DNA identification fund fee (Gov. Code, § 76104.6); a \$20 DNA identification fund fee (Gov. Code, § 76104.7); a \$140 county penalty assessment (Gov. Code, § 76000); a \$40 court operations assessment (§ 1465.8); and a \$30 conviction assessment (Gov. Code,

§ 70373). The report also recommends imposition of a parole revocation restitution fine, stayed pending successful completion of parole (§ 1202.45), and a \$40 court operations assessment (§ 1465.8) and a \$30 conviction assessment (Gov. Code, § 70373) as to count 5. The court's minute order dated April 23, 2015, attributes the previously imposed \$850 fine to section 672.

The abstract of judgment imposes a \$240 restitution fine (§ 1202.4, subd. (b)); a \$240 probation revocation restitution fine (§ 1202.44); a \$240 parole revocation restitution fine, stayed pending successful completion of parole (§ 1202.45); a \$40 court operations assessment as to count 5 (§ 1465.8); a \$30 conviction assessment as to count 5 (Gov. Code, § 70373); and an \$850 fine as to count 1 (§ 672).

Defendant filed a timely notice of appeal. He neither requested nor obtained a certificate of probable cause.

II

Wende Review

Counsel filed an opening brief that sets forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) 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.

We note a discrepancy between the trial court's oral pronouncement of judgment and the minute order and abstract of judgment. The trial court referred the parties to page seven of the supplemental probation report, which breaks down the \$850 aggregate fine as follows: A \$200 fine (§ 672), plus a \$40 court surcharge (§ 1465.7); a \$100 state court facilities construction fund fee (Gov. Code, § 70372, subd. (a)); \$200 state penalty assessment (§ 1464); an \$80 DNA identification fund fee (Gov. Code, § 76104.6); a \$20

DNA identification fund fee (Gov. Code, § 76104.7); a \$140 county penalty assessment (Gov. Code, § 76000); a \$40 court operations assessment (§ 1465.8); and a \$30 conviction assessment (Gov. Code, § 70373). The minute order and the abstract of judgment both impose an \$850 fine pursuant to section 672, but do not set forth the specific amounts and statutory bases purportedly included within this \$850 amount, as listed in the supplemental probation report and set forth above.

When there is a discrepancy between the oral pronouncement of judgment and the minute order/abstract of judgment, the oral pronouncement controls. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Under our inherent authority to correct such clerical errors (*People v. Rowland* (1988) 206 Cal.App.3d 119, 123; *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1125-1126), we order correction of the abstract of judgment to conform to the trial court's oral pronouncement of judgment regarding the \$850 fine as set forth on page seven of the supplemental probation report. We also direct the trial court to correct the corresponding minute order (dated April 23, 2015) to avoid confusion. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 388.)

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

DISPOSITION

The judgment is affirmed. The trial court is ordered to prepare a corrected abstract of judgment to reflect the specific amounts and statutory bases comprising the \$850 aggregate fine as set forth on page seven of the supplemental probation report dated March 24, 2015, and to correct its minute order dated April 23, 2015, to reflect the

same corrections. The court is further directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

_____/s/
HOCH, J.

We concur:

_____/s/
BLEASE, Acting P. J.

_____/s/
DUARTE, J.