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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT KYLE AARON,

Defendant and Appellant.

E054694

(Super.Ct.Nos. RIF1104939,  
RIF1005340 & RIF1100204)

OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Johnson,  
Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting, Andrew  
Mestman and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and  
Respondent.

Robert Kyle Aaron, defendant and appellant (defendant), challenges the \$400 restitution fine the trial court imposed under Penal Code section 1202.4 after he pleaded guilty to one count of possessing a controlled substance for sale, admitted four of six alleged prior prison term allegations, and admitted that he violated the terms of his probation in two other cases.<sup>1</sup>

We conclude defendant's claim is meritless. Therefore, we will affirm.

### FACTS

At the hearing on defendant's change of plea, his attorney told the trial court, "With regard to the fines, Mr. Aaron has no ability to pay, and he's requesting they not be imposed. They are mandatory fines, but I don't believe the Court has any jurisdiction to change them; however, they have been imposed as terms of his supervised release, and we would be objecting to that, because I don't think that the Court or District Attorney or Probation should be allowed to violate his supervised release down the road for his inability to pay those. I would object to them being added as a term of supervised release." The trial court responded, "Well, he has to pay the restitution fines, and I will order those. Is that the only fine you're talking about?" When defense counsel cited the court security fee, and another \$40 fee, the trial court noted "those aren't subject to ability to pay" and ordered those fines. Accordingly, in sentencing defendant, the trial court imposed a restitution fine of \$400, a conviction fee of \$30, and a security fee

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<sup>1</sup> Pursuant to the plea agreement, the trial court sentenced defendant to a hybrid sentence of five years four months comprised of two years in county jail followed by supervised release for 40 months.

of \$40. When defendant asked the trial court to confirm a total of \$470 in fines, his attorney interjected, “There’s one issue with regard to the fines. And the request is that they not be imposed as a term of supervised release because he shouldn’t be subject—he should not be violated down the road for not being able to pay those. Because if he was sent to state prison, they would garnish his wages in order to pay the restitution fine. He’s not going to be able to work that time off in county jail. So the request is that the fines—the restitution fine, court security fee, and the court conviction assessment not be imposed as terms of supervised release. Although they will exist, they cannot be a basis for revoking his release.”

The trial court apparently was unmoved by defense counsel’s concern because the court did not reduce the fines imposed.

### **DISCUSSION**

Defendant contends the trial court abused its discretion by imposing a restitution fine of \$400 because the record does not reflect that the trial court exercised independent judgment in setting the amount and also did not consider defendant’s ability to pay. We disagree.

Penal Code section 1202.4 in effect at the time defendant committed his crime in 2011 required the trial court to impose a restitution fine of not less than \$200 and not more than \$10,000. (Sen. Bill 208, Stats. 2011, Ch. 45, § 1.) Under subdivision (c) of that statute, the court must 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) or one hundred-dollar minimum.” Subdivision (d) identifies various factors the court shall consider in setting a fine in an amount greater than the statutory minimum \$200 and includes the defendant’s inability to pay as a relevant factor. In addition, the court may consider the defendant’s future earning capacity, but the 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.” (Former § 1202.4, subd. (d).)

We note at the outset that defendant did not object in the trial court to the amount of the restitution fine; he objected to the fact of the fine, but conceded through his attorney, that imposition of a restitution fine is mandatory. Arguably, defendant has forfeited his objection to the amount of the restitution fine because he did not raise the objection in the trial court. But even if we construe his attorney’s statement regarding defendant’s inability to pay as an objection to the amount of the restitution fine, defendant has failed to demonstrate that the trial court abused its discretion in setting the fine at \$400.

Contrary to defendant’s argument, the trial court was not required to determine whether this was an exceptional case in which it could impose a restitution fine lower than the statutory minimum of \$200. As the Attorney General points out, the trial court could have calculated the restitution fine by multiplying the minimum fine (\$200) by the

number of years defendant would serve in county jail (two years) for a total fine of \$400, in accordance with Penal Code section 1202.4, subdivision (b)(2).<sup>2</sup>

As recounted previously, the only reason defendant offered in the trial court as the basis for objecting to imposition of a restitution fine was that under the recently adopted felony sentence realignment, he would be serving his two-year term in county jail rather than in prison and, as a result, would not have an opportunity to work and earn money while incarcerated. That argument is unpersuasive. In addition to the two year county jail term, the trial court also suspended defendant's sentence for 40 months and placed him on supervised release. Defendant will have an opportunity to work during those 40 months. Defendant did not present any evidence or other argument to support his claim that he lacked the ability to pay a restitution fine of \$400. Therefore, defendant failed to meet his burden of demonstrating that he lacked the ability to pay a restitution fine in that amount.

In short, we conclude the trial court did not abuse its discretion by imposing a restitution fine of \$400. That conclusion compels us to reject defendant's claim that the trial court violated his federal constitutional right to due process of law.

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<sup>2</sup> Former Penal Code section 1202.4, subdivision (b)(2) states, "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."

**DISPOSITION**

The judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.