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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.

JUAN SAENZ, JR.,

Defendant and Appellant.

E057764

(Super.Ct.No. CR66620)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Juan Saenz, Jr., appeals after the trial court denied his ex parte motion for reconsideration of his restitution fine (set at \$5,000), based on a claim that the trial court failed to determine his ability to pay the fine imposed, and a claim that

his trial attorney was incompetent in failing to object to the restitution order amount, or to advise defendant of his right to appeal the restitution order. We affirm.

FACTS AND PROCEDURAL HISTORY

Defendant is a state prison inmate who apparently was convicted of a crime¹ and sentenced in 1997. At sentencing, the trial court imposed a restitution fine of \$5,000. Since his incarceration in 1997, defendant has made payments on the restitution fine from his prison earnings. As of July 2012, 15 years after starting payments, \$3,859.67 still remained to be paid on the restitution fine.

On August 10, 2012, defendant filed an ex parte motion requesting reconsideration of the restitution fine. Defendant contended that the sentencing court failed to consider his ability to pay when it decided to impose a restitution fine of \$5,000. He argued that the fine was excessive under the Eighth Amendment, apparently based on his estimation that it would take him an additional 50 years, at his current earning rate, to pay the entire fine. Defendant also argued that his trial attorney was incompetent for failing to object to the restitution order, and failing to present evidence of defendant's indigent status to the sentencing court, to challenge the appropriateness of the fine imposed. Defendant complained that the attorney's failure to object forfeited defendant's right to appeal on that issue. The attorney also did not advise defendant to consult an independent attorney

¹ Defendant does not identify the offense or offenses of which he was convicted and for which he is incarcerated. The minute orders in the clerk's transcript list the charges in defendant's case as: "1) 187 PC, 1) 187 PC, 2) 664/187 PC, 2) 664/187 PC," or "1) 187 PC-F C, 2) 664/187 PC-F C," from which we infer that defendant may have been convicted of one count of murder and one count of attempted murder.

about a potential ineffective assistance of counsel (IAC) claim on appeal. Finally, defendant urged that the imposition of such a fine violated the equal protection of the laws, because convicted persons who are granted probation have the ability to earn income with which to pay fines, but state prisoners do not.

Minute orders included in the record show that the trial court read and considered defendant's ex parte motion on August 10, 2012, but made no disposition of the motion. On November 8, 2012, a different judge also entered a minute order stating that it had read and considered defendant's ex parte communication, but again no disposition appeared on the minutes. With his notice of appeal, filed December 21, 2012, defendant included another copy of the minute order of November 8, 2012, this time showing that, "The Court hereby denies said request," i.e., for reconsideration of the restitution order.

ANALYSIS

After defendant filed his notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case, and identifying two possible, related areas of inquiry: whether the trial court properly denied defendant's ex parte application for reconsideration of the restitution fine, and whether the issue of defendant's ability to pay has been forfeited.

Defendant has been offered an opportunity to file a personal supplemental brief; no such brief has been filed. Pursuant to the mandate of *People v. Kelly* (2006) 40

Cal.4th 106, we have conducted an independent examination of the entire record and have found no arguable issues.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.