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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.

THOMAS JOSEPH MURPHY,

Defendant and Appellant.

E062331

(Super.Ct.No. FWV1101490)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Michael A. Sachs and Colin J. Bilash, Judges.\* Affirmed with directions.

Ronald R. Boyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland, Marvin

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\* Judge Sachs ruled on the *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) motion and Judge Bilash was the sentencing judge.

Mizell, Allison V. Hawley, and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury found defendant and appellant, Thomas Joseph Murphy, guilty as charged of the custodial possession of a weapon, namely, a shank. (Pen. Code, § 4502, subd. (a).)<sup>1</sup> Defendant admitted one prior strike and one prison prior (§§ 667, subds. (b)-(i), 667.5, subd. (b)), and was sentenced to seven years in prison.<sup>2</sup>

Defendant appeals, claiming the trial court erroneously denied his *Faretta* motion to represent himself on the custodial weapon possession charge. We conclude the *Faretta* motion was properly denied. Previously, the trial judge that heard defendant's *Faretta* motion in this case terminated defendant's in propria persona status in case No. FSB-902633 on the ground he used his in propria persona status and privileges, namely, the mail, to intimidate two witnesses against him in that case. Defendant's attempt to intimidate witnesses in case No. FSB-902633 justified denying his *Faretta* motion in this case. The trial court also considered, but reasonably rejected, imposing alternative

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The seven-year term consisted of six years on the substantive count (the middle term of three years, doubled to six years based on the prior strike), plus one year for the prison prior. The seven-year term was ordered to be served concurrently with defendant's sentence in San Bernardino County Superior Court case No. FSB-902633. In that case, defendant was convicted on 17 counts and sentenced to 73 years plus 175 years to life.

sanctions to denying his *Faretta* motion, including limiting or monitoring his use of the telephones and mail.

Defendant also claims the trial court violated ex post facto principles and his due process rights in imposing a \$300 rather than a \$200 restitution fine. (§ 1202.4.) He points out that, at sentencing, the court stated that it intended to impose the “minimum fines” and, under the version of section 1202.4 in effect in March 2011, when defendant was in possession of the shank, \$200 was the minimum restitution fine the court could have imposed. (Stats. 2008, ch. 468, § 1, pp. 3340-3349.)

We agree that the \$300 restitution fine, along with the \$300 parole revocation fine that the court imposed but stayed pending defendant’s successful completion of parole, must each be reduced to \$200. (§ 1202.45, subd. (a) [parole revocation fine must equal restitution fine].) We modify the judgment to reduce these fines, but we affirm the judgment in all other respects.

## II. BACKGROUND

### A. *The Underlying Offense*

On March 20, 2011, defendant was in custody in a single-person cell at the West Valley Detention Center when deputies arrived to search his cell. Defendant said something like, “Here, I’ll help you guys out,” and retrieved a “shank” from the space between his bunk bed and the wall. The shank was an eight inch long, one inch wide knife-like object, made of plastic and wrapped in “fabric and cellophane wrap” or tape. It

appeared that defendant had fashioned the shank out of a clear plastic lid from a hot food tray.

*B. The Faretta Motion*

On June 3, 2011, a felony complaint was filed charging defendant with custodial possession of a weapon, a shank, and alleging prior strike and prison prior enhancements. At his first appearance in the case on June 27, 2011, defendant asked the court to allow him to represent himself “under *Faretta*.” The court appointed counsel for defendant and set a hearing on his *Faretta* motion. The motion was heard on August 26, 2011, after defendant fully initialed and signed a *Faretta* waiver form. At the hearing, the court noted that it had been assigned for all purposes to another case against defendant, case No. FSB-902633. In the other case, the court had granted defendant’s *Faretta* motion, and defendant acted in propria persona “for quite some time,” but the court later revoked his in propria persona status because he “violated various rules and regulations” regarding his in propria persona status and tried to intimidate more than one witness against him in the case.

The court explained: “Specifically, [defendant], while he was within the custody of the Sheriff’s Department, essentially disguised private mail to an associate as legal mail to an attorney. The envelope was addressed to an attorney in the Crestline area. The envelope was handwritten with the . . . alleged attorney’s name, address, firm name, the enclosed material was not legal mail at all. It was a request by [defendant] for various items, some of which could have been determined to be contraband. Additionally,

contained in that letter or series of letters was a request by [defendant] for that individual to run an ad in the mountain paper, which this Court determined was an attempt to intimidate and threaten the witnesses who would be testifying in the San Bernardino case.

“Based on those materials and, in fact, [defendant’s] admission that he was angry at the person for allegedly lying and testifying against him, I revoked his pro per status. There’s not a question in my mind that if I were to allow [defendant] to become a pro per again, that he would conduct himself in the same manner, not follow the rules and regulations of West Valley Detention Center and the Sheriff’s Department and not follow the directives of this Court. I’m denying that request for him to represent himself.” In response, counsel for defendant pointed out that the present case involved defendant’s custodial possession of a shank and “no civilian witnesses,” and that the case was not “particularly complicated.” Still, the court expressed concern that if it granted defendant’s *Faretta* motion, defendant would use his in propria persona status and privileges to intimidate the witnesses against him in the present case, just as he had done in case No. FSB-902633.

Next, defendant directly addressed the court, asking it to appoint standby counsel for him and arguing that his two cases were “completely independent of one another” and he had engaged in “no overt activity one way or another” in the present case. Counsel for defendant added that there were “other safeguards” or alternative sanctions the court could impose in lieu of refusing to allow defendant to represent himself, but counsel did not elaborate on what those other safeguards might be. Counsel also pointed out that the

court could revoke defendant's in propria persona status if he engaged in "further misconduct." Still, the court denied the *Faretta* motion.<sup>3</sup>

### III. DISCUSSION

#### A. *We Take Judicial Notice of the Record in Case No. E062132*

While this appeal was pending, defendant requested that this court take judicial notice of the record in another pending appeal, case No. E062132. We grant the request (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1523, fn. 2 [appellate court may take judicial notice of files in another action]), though we observe that the People oppose the request on the ground the record in case No. E062132 is irrelevant to the present appeal (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6 [appellate court may decline to take judicial notice of any irrelevant matter]).

We observe that, in case No. E062132, defendant appeals from the judgment of conviction in case No. FSB-902633, the case in which the court revoked his in propria persona status on the ground he abused it by attempting to intimidate witnesses against him. In case No. FSB-902633, defendant was convicted on 17 counts, namely, three counts of false imprisonment by violence, four counts of assault by means of force likely to produce great bodily injury, one count of assault with a deadly weapon, one count of

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<sup>3</sup> On January 12, 2012, several months before trial, defendant renewed his *Faretta* motion, and again the court denied it.

battery, four counts of criminal threats, three counts of dissuading a witness, and one count of cruelty to an animal. The crimes occurred in the Crestline area. As will appear, the record in case No. E062132 is relevant to the present appeal because it includes details and evidence concerning the trial court's reasons for denying defendant's *Faretta* motion in this case.

*B. Defendant's Faretta Motion Was Properly Denied in This Case*

Criminal defendants have a right under the federal Constitution, particularly the Sixth and Fourteenth Amendments, to represent themselves. (*Faretta, supra*, 422 U.S. at pp. 807, 821; *People v. Doss* (2014) 230 Cal.App.4th 46, 54 (*Doss*)). “There are limits on the right to act as one’s own attorney,” however. (*People v. Butler* (2009) 47 Cal.4th 814, 825.) For example, “[r]evoking a defendant’s in propria persona status is justified when the defendant has “deliberately engage[d] in serious and obstructionist misconduct,” occurring either inside or outside the courtroom [citation], that ‘seriously threatens the core integrity of the trial.’” (*Doss, supra*, at p. 55.)

As our state Supreme Court has explained: “One form of serious and obstructionist misconduct is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential ‘subversion of the core concept of a trial.’ [Citation.] ‘A defendant acting as his own attorney has no greater privileges than any member of the bar. He may not disrupt proceedings or intimidate witnesses.

[Citations.] . . . The trial court can stop harassment and abuse of a witness by a threatening defendant and can terminate self-representation by a defendant who engages in serious misconduct. [Citations.]’ [Citation.] Threatening or intimidating acts are not limited to the courtroom. [Citation.] When a defendant exploits or manipulates his in propria persona status to engage in such acts, wherever they may occur, the trial court does not abuse its discretion in determining he has forfeited the right of continued self-representation.” (*People v. Carson* (2005) 35 Cal.4th 1, 9.)

Indeed, the denial of a *Faretta* motion for self-representation is reviewed for an abuse of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 735.) “The trial court possesses much discretion when it comes to terminating a defendant’s right to self-representation,” and possesses the same degree of discretion in determining whether to deny a motion for self-representation in the first instance. (*Ibid.*) “[O]ne reason for according deference to the trial court is that it is in the best position to judge defendant’s demeanor.” (*Ibid.*) The erroneous denial of a *Faretta* motion is reversible per se. (*People v. Butler, supra*, 47 Cal.4th at p. 824.)

Here, the court plainly did not abuse its discretion in denying defendant’s *Faretta* motion, given his previous attempt to intimidate witnesses against him in case No. FSB-902633. The record on appeal in case No. E062132 shows that, while defendant was acting as his own attorney in case No. FSB-902633, he wrote a letter from the West

Valley Detention Center to the law offices of “Kata Jedenne,” though the court noted that no attorney by that name was listed by the California State Bar.

The letter, dated December 20, 2010, asked its recipient to place two classified advertisements in the Alpenhorn, a newspaper in the Crestline area, where the crimes charged in case No. FSB-902633 occurred and witnesses to the crimes were located. The first ad was to read: “Terresa P. I’m proud of you. Keep the wind at your back. Send me a message if I can help. Corporal.” The second ad was to be placed in the “Help Wanted” section and was to read: “Confidential Informants wanted. No experience needed. Will train you to testify. For info. and details contact Kristin Flowers, or Ricky Neria at: 333-RATS or 333-0600 or Kristin F., your cover is blown. Come in. The D.A.”

When questioned by the court in case No. FSB-902633, defendant admitted he sought to place the ads in the Alpenhorn and that one of the purposes of doing so was “to let everybody else know if they’ll lie on me, they’ll lie on you.” In other words, and as the court pointed out, defendant admitted he wanted to let people in the Crestline area know that Kristin Flowers and Ricky Neria, who had been identified as potential witnesses against defendant in case No. FSB-902633, were “rats.”

We understand that the present case involved defendant’s custodial possession of a weapon, a shank, and unlike case No. FSB-902633, did not involve any “civilian witnesses.” Rather, it involved two sheriff’s deputies from the West Valley Detention Center who witnessed defendant’s possession of the weapon. Nonetheless, the trial court

was in a position to judge defendant's demeanor at the hearing on his *Faretta* motion (*People v. Welch, supra*, 20 Cal.4th at p. 735) and reasonably determined that defendant would have used his in propria persona status to intimidate the deputies who testified against him in the present case, directly undermining the integrity of the trial, had the court allowed him to represent himself. The court said it had no doubt that defendant would not follow the rules and regulations of the West Valley Detention Center, the sheriff's department, or the directives of the court, if he were granted in propria persona status. More specifically, the court had no doubt that defendant would have written letters and made other contacts from jail in an attempt to intimidate the witnesses against him, all under the guise of representing himself and investigating his case.

Defendant maintains that "alternative sanctions" were available and should have been imposed in lieu of denying his *Faretta* motion. To be sure, courts should consider "the availability and suitability of alternative sanctions" in determining whether to grant or deny a *Faretta* motion or terminate the defendant's self-representation. (*People v. Carson, supra*, 35 Cal.4th at p. 10.) "Misconduct that is more removed from the trial proceedings, more subject to rectification or correction, or otherwise less likely to affect the fairness of the trial may not justify complete withdrawal [or denial] of the defendant's right of self-representation. [Citations.] The trial court should also consider whether the defendant has been warned that particular misconduct will result in termination of in propria persona status." (*Ibid.*)

But here, defendant blatantly attempted to undermine the integrity of the trial in case No. FSB-902633 by intimidating two witnesses against him. The court reasonably determined that there were no feasible, alternative means of preventing defendant from attempting to intimidate the witnesses against him in this case, short of denying his *Faretta* motion. In ruling on a *Faretta* motion, or in determining whether to revoke a defendant's in propria persona status, "a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful[,] or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*People v. Welch, supra*, 20 Cal.4th at p. 735.) Given defendant's attempt to intimidate witnesses in case No. FSB-902633, the court reasonably determined that there were no alternative means of ensuring he would not undermine the integrity of the present trial by using his in propria persona status and privileges to attempt to intimidate the deputies who ultimately testified against him. The court specifically considered limiting or monitoring defendant's use of the telephones and the mail, but reasonably found that such alternative sanctions would be insufficient to prevent further abuse because defendant could not be trusted to follow any rules, regulations, or court orders.

Lastly, defendant's reliance on *Doss, supra*, 230 Cal.App.4th 46 is misplaced. There, the trial court applied an incorrect standard in revoking the defendant's in propria persona status, because (1) it evaluated the defendant's misconduct in jail under *Wilson v. Superior Court* (1978) 21 Cal.3d 816, which allows a defendant's in propria persona

*privileges*, as opposed to his or her in propria persona status, to be revoked based on the defendant's out-of-court misconduct "without regard to the misconduct's effect on the court proceedings," and (2) it failed to consider the availability and suitability of alternative sanctions to revoking the defendant's in propria persona status (*Doss, supra*, at p. 57, italics omitted). As a result of its reliance on *Wilson*, the trial court in *Doss* did not determine whether, under the standard for revoking a defendant's in propria persona status, the defendant's misconduct amounted to "serious and obstructionist misconduct" (*People v. Butler, supra*, 47 Cal.4th at p. 825) that "seriously threaten[ed] the core integrity of the trial" (*People v. Carson, supra*, 35 Cal.4th at p. 11). The *Doss* court thus remanded the matter to the trial court to determine whether the defendant's in propria persona status was revocable under the proper legal standard. (*Doss, supra*, at pp. 57-58.) Indeed, the *Doss* court recognized that the defendant's intimidation of a witness may have justified revoking his in propria persona status. (*Id.* at pp. 56-57.) But the trial court here, unlike the trial court in *Doss*, relied on the proper legal standard in denying defendant's *Faretta* motion. The trial court here also considered the feasibility of imposing alternative sanctions, including limiting or monitoring defendant's telephone calls and mail, but reasonably found them insufficient.

### C. *The \$300 Fines Must Each be Reduced to \$200*

At sentencing on October 29, 2014, the court imposed a \$300 restitution fine (§ 1202.4, subd. (b)(1)), after expressly stating that it intended to impose the "minimum fines." The court said: "I will make the normal findings; minimum fines and normal

findings for state prison will be followed here.” The court also imposed but stayed a \$300 parole revocation fine. (§ 1202.45, subd. (a) [parole revocation fine must equal restitution fine].)

Defendant claims the \$300 restitution fine violated federal and state ex post facto principles because it was \$100 more than the minimum \$200 restitution fine the court could have imposed for his custodial weapon possession conviction. He also argues his due process rights were denied because the court ostensibly did not understand that it had discretion to impose a \$200 rather than a \$300 restitution fine as the minimum fine. Additionally, he claims his trial counsel rendered ineffective assistance in failing to object to the \$300 restitution fine on the ground it was \$100 more than the \$200 minimum fine.

It is well settled that the imposition of restitution fines constitutes punishment and, as such, is subject to state and federal constitutional proscriptions against ex post facto laws. (*People v. Souza* (2012) 54 Cal.4th 90, 143; *In re Vicks* (2013) 56 Cal.4th 274, 287 [“The purpose of the ex post facto doctrine is to ensure fair notice of the conduct that constitutes a crime and of the punishment that may be imposed for a crime.”].)

The parties agree that the version of section 1202.4 in effect on March 20, 2011, governs, because that is the date defendant committed the weapon possession offense, and under *that* version of former section 1202.4, \$200 was the minimum restitution fine the court could have imposed. (Stats. 2008, ch. 468, § 1, pp. 3340-3349.) At the time of sentencing in October 2014, section 1202.4 had since been amended to increase the

minimum restitution fine to \$300 (§ 1202.4, subd. (b)(1); Stats. 2012, ch. 873, § 1.5, pp. 7236-7242), but that amendment applied only to felonies committed after January 1, 2014.

The People argue that because defendant had “fair notice” that he could be ordered to pay a restitution fine of as little as \$200 or as much as \$10,000, based on the version of section 1202.4 in effect at the time of his offense, the court’s order that he pay a \$300 restitution fine does not violate the federal and state ex post facto clauses or his due process rights. Defendant counters that “[i]t is irrelevant to an ex post facto determination that a defendant *could have* received the same sentence under the old law as he definitely will under the new law” (*People v. Williams* (1987) 196 Cal.App.3d 1157, 1160) and he emphasizes that the court misunderstood its sentencing discretion.

We agree with defendant that his \$300 restitution fine must be reduced to \$200, the minimum restitution fine that the court *could* have imposed, because that is the minimum fine that the court ostensibly intended to impose. As noted, the court stated that it intended to impose the “minimum fines,” which was a \$200 restitution fine (former § 1202.4, subd. (b)(1)), and a \$200 parole revocation fine (§ 1202.45, subd (a)), which the court imposed but stayed. Because the parole revocation fine must equal the restitution fine, we amend the judgment to reduce each fine from \$300 to \$200. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473 [appellate court has authority to modify a defendant’s sentence under § 1260 in lieu of remanding the matter to the trial court for a new and unnecessary sentencing hearing].)

#### IV. DISPOSITION

The \$300 restitution fine (§ 1202.4, subd. (b)(1)), and the \$300 parole revocation fine which was imposed but stayed (§§ 1202.45, subd. (a), 654) are each reduced to \$200. The matter is remanded to the trial court with directions to prepare (1) a supplemental sentencing minute order and (2) an amended abstract of judgment, reflecting these modifications, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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CODRINGTON  
J.

We concur:

MILLER  
Acting P. J.

SLOUGH  
J.