

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ANTHONY SILVA,

Defendant and Appellant.

F062975

(Super. Ct. No. 1063491)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Levy, Acting P.J., Kane, J., and Detjen, J.

## STATEMENT OF THE CASE

Appellant, David Anthony Silva, was convicted of 40 counts of, inter alia, first degree robbery, attempted robbery, assault with a firearm, assault likely to cause great bodily injury, conspiracy to commit robbery, being a felon in possession of a firearm, and receipt of stolen property. There were also multiple enhancements for using a gun and one for a prior serious felony conviction. On May 15, 2009, this court issued an opinion in case No. F052296, affirming appellant's convictions. The case was remanded after we reversed firearm use enhancements as to counts 2 and 3, ordered an "in concert" finding stricken on count 31, and stayed appellant's sentence pursuant to Penal Code section 654<sup>1</sup> as to counts 14 and 35.<sup>2</sup>

On October 5, 2009, the trial court held a hearing on remand and issued an amended abstract of judgment incorporating all of our directions from the first appeal. The amended abstract of judgment had the original restitution fine of \$10,000 imposed pursuant to section 1202.4, subdivision (b). On May 11, 2011, appellant filed a motion to modify the court's sentence asserting that the trial court erred in imposing a restitution fine of \$10,000 pursuant to section 1202.4, subdivision (b), without making a finding that appellant had an ability to pay the fine.

The trial court filed a written order finding that appellant waived this issue at sentencing by failing to object and the court considered the possibility of appellant's earning future in prison in denying the motion. Appellant filed a notice of appeal.

## APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also

---

<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> Appellant's total prison term is 142 years.

includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on September 26, 2011, we invited appellant to submit additional briefing. Appellant replied with a letter brief asserting that the trial court erred in denying his motion because it did not conduct an ability to pay hearing and prison wages are too low, making it impossible for him to pay a \$10,000 fine. We find several procedural bars to appellant's motion to the trial court, as well as to this appeal.

Appellant's motion initially focuses on the failure of the trial court to conduct an ability to pay inquiry as part of the original sentencing hearing. The trial court found that appellant waived this issue by failing to raise it at the original sentencing hearing. (See *People v. Forshay* (1995) 39 Cal.App.4th 686, 689-690.) Appellant further failed to raise this issue in his first appeal to our court. Appellant's motion was made long after his first appeal was final and long after the trial court conducted a hearing on remand to correct the abstract of judgment. (*People v. Murphy* (2001) 88 Cal.App.4th 392, 396-397 [issues before superior court on remand from first appeal limited to those presented by the appellate court].)

To the extent that appellant is challenging the original sentencing procedures of the trial court, we lack jurisdiction to review matters that are not timely brought to our attention. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.]" (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) Where a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal. This is especially true, as in this case, where the issue was ripe for decision by the appellate court at the time of the previous appeal, there has been no change in the underlying facts or applicable law, and the defendant fails to offer reasonable justification for the delay. (*People v. Senior* (1995) 33 Cal.App.4th 531, 538.)

Appellant argued in the second part of his motion that prison wages are so low, except for a very small percentage of inmates, that it is impossible for him to pay the fine. At first blush this appears to be a contention concerning appellant's present ability to pay the restitution fine. We find, however, that it is a direct attack on the trial court's original sentence, which included the restitution fine. Although defendants can appeal orders after judgment that affect their substantial rights (§ 1237, subd. (b)), trial courts generally lack jurisdiction to resentence a criminal defendant after sentence is executed. (*People v. Howard* (1997) 16 Cal.4th 1081, 1089.) Prior to the execution of a sentence, a trial court retains power to modify a sentence. (*People v. Karaman* (1992) 4 Cal.4th 335, 344-352.) Section 1170, subdivision (d) provides that a trial court can recall a sentence on its own motion within 120 days after committing a defendant to prison. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 455.) Courts can also correct clerical errors, but not judicial error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

In *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1205-1206 (*Turrin*), a defendant, like appellant, was sentenced to state prison, the prison sentence began, and the defendant sought a modification or reduction of a restitution fine. The trial court did not recall the sentence on its own motion and lacked the statutory authority to do so because the court did not act within 120 days. (*Id.* at p. 1206.) The *Turrin* court found that the defendant could not raise the issue of restitution for the first time on appeal. The court found an exception where the order was for direct victim restitution because trial courts' retain continuing jurisdiction to modify orders for direct victim restitution. (*Id.* at p. 1207.) *Turrin* held that because a trial court lacks jurisdiction to modify a restitution fine made pursuant to section 1202.4, the defendant's motion requesting a modification of the fine did not affect his substantial rights and is not an appealable postjudgment order. (*Turrin, supra*, 176 Cal.App.4th at pp. 1207-1208.) The *Turrin* court ordered the appeal dismissed. (*Id.* at p. 1209.)

Appellant's motion was an attack on the section 1202.4 restitution fine imposed as part of his sentence. The trial court did not have jurisdiction to recall appellant's

sentence nor did it have jurisdiction to hear the motion. Appellant's motion does not affect his substantial rights under section 1237, subdivision (b). Accordingly, we will order the dismissal of this appeal.

**DISPOSITION**

The appeal is dismissed.