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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC ANTHONY VELASQUEZ,

Defendant and Appellant.

G045661

(Super. Ct. No. 02WF0793)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed.

Lewis A. Wenzell, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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In October 2009, as part of a negotiated plea agreement, defendant Eric Anthony Velasquez pleaded guilty to kidnapping (Pen. Code, § 207, subd. (a); all statutory references are to the Penal Code), grand theft (§ 487), automobile theft (§ 496d), and receipt of stolen property (§ 496, subd. (a)) committed in March 2002. He also admitted a deadly weapon was used during the kidnapping. (§ 12022, subd. (b)(1).) We appointed counsel to represent Velasquez on appeal. Counsel filed a brief setting forth a statement of the case. Counsel did not argue against his client, but advised this court he found no issues to support an appeal. We provided Velasquez 30 days to file his own written argument, and he has filed a supplemental opening brief. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

The transcript of the preliminary hearing is not part of the record, but according to Velasquez's factual statement accompanying his guilty plea, he "willfully . . . took and kidnapped [the victim] while using a metal pipe" and "held [the victim] for the purpose of ransom. [He] also stole [the victim's] vehicle, [his] credit cards and other personal property." As part of his plea agreement, Velasquez agreed to pay restitution as follows: "Proposed disposition: I understand the court will . . . [¶] (d) Order me to pay restitution on counts 6-9, . . . in an amount to be determined by the Probation Department. If I disagree with the amount of restitution determined by the Probation Department, I may request a court hearing to determine the amount of restitution." The court advised Velasquez on the record that he had agreed to pay victim restitution.

In January 2010, the court imposed an 11-year aggregate prison term. The court also ordered Velasquez to reimburse the State Victim Compensation Board (the

Board)<sup>1</sup> \$2,562 for its restitution payments to the victim for lost income. The order reflects Velasquez “stipulated to the amount of restitution to be ordered.” The court also imposed a restitution fine of \$200. Velasquez did not appeal from the judgment or restitution order.

In July 2011, Velasquez, representing himself, filed a motion in the trial court “for Restitution Hearing for Reconsideration of Ability to Pay and Constitutionality of Excessive Fines,” citing section 1202.4 and the Eighth and Fourteenth Amendments to the United States Constitution. He argued the court did not consider his ability to pay in determining the amount of the \$2,562 “restitution fine.” He earned no income in prison and could not pay. He asked the court to “modify the judgment and reduce [the] fine” to \$200.

The trial court denied the motion: “Having received a motion or request from Defendant for modification, conversion, reduction or waiver of court-ordered restitution fines and/or fees, and/or a hearing on the issue of restitution, the court finds and orders as follows: [¶] Defendant seeks to raise a factual question about ability to pay in a case which is final. This court therefore has no jurisdiction to consider the request. [Citation.] The Court will take no further action.”

Velasquez’s appellate lawyer identifies three potential issues for our consideration: (1) whether ability to pay is a factor in determining restitution to the Board; (2) whether an order to pay \$2,562 to the Board constitutes an excessive fine in violation of the state or federal Constitutions; and (3) whether the trial court erred in denying the motion for lack of jurisdiction, and if so, whether the error was prejudicial.

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<sup>1</sup> The statute refers to the government entity as the California Victim Compensation and Government Claims Board.

In his supplemental brief, Velasquez does not dispute the amount of restitution due the Board. He claimed to have paid \$400 so far, and estimates it will take him another nine years to pay off the balance.<sup>2</sup> But he contends he should not have the “sole burden” in paying restitution, arguing that his “codefendants . . . should have been equally burdened with this amount,” and the “restitution amount for each defendant in the original case, should have been \$1,281.00 (half of \$2,562.00), plus \$200.00 minimum fine.” He also asserts because it will “take 11 years to pay the restitution fine, the fine has since become excessive and unconstitutional under the Eighth Amendment . . . .”

#### *Victim Restitution*

Section 1202.4 provides that “a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.” (§ 1202.4, subd. (a)(1).) The restitution paid to the victim or victims shall be enforceable as if the order were a civil judgment. (§ 1202.4, subd. (a)(3)(B); § 1202.4, subd. (i).)

Section 1202.4, subdivision (f), provides “the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.”

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<sup>2</sup> Velasquez states that under California regulations, 55 percent deposited into his prison trust account gets rerouted to the restitution fund.

Ordinarily, “the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant’s criminal conduct, including, but not limited to” “[w]ages or profits lost due to injury incurred by the victim” or “due to time spent as a witness or in assisting the police or prosecution.” (§ 1202.4, subd. (f)(3)(D)-(E).)

“Restitution . . . shall be ordered to be deposited to the Restitution Fund to the extent that the victim, as defined in subdivision (k), has received assistance from the Victim Compensation Program . . . .” (§ 1202.4, subd. (f)(2).) The “amount of assistance provided shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.” (§ 1202.4, subd. (f)(4)(A).)

Section 1202.4, subdivision (g), provides, “The court shall order full restitution 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 order, nor shall inability to pay be a consideration in determining the amount of a restitution order.*” (Italics added.)

A “restitution order pursuant to subdivision (f) shall not affect the right of a victim to recovery from the Restitution Fund as otherwise provided by law, except to the extent that restitution is actually collected pursuant to the order. Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained against the defendant arising out of the crime for which the defendant was convicted.” (§ 1202.4, subd. (j).)

A “defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. *The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant.* If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion.” (§ 1202, subd. (f)(1), italics added.)

Here, Velasquez stipulated to the amount of victim restitution in the trial court, did not appeal from the restitution order, and does not challenge the amount owed to the fund on behalf of the victim. He did seek in the trial court to modify the restitution order based on his inability to pay. But, as explained above, Velasquez’s ability to pay is not a consideration in determining the amount of the restitution order. (§ 1202.4, subd. (g).) Nor is victim restitution a “fine” or punishment subject to constitutional provisions against excessive fines. (See *People v. Rivera* (1989) 212 Cal.App.3d 1153, 1159; *People v. Harvest* (2000) 84 Cal.App.4th 641.) We also note Velasquez appears to have the ability to reimburse the fund, albeit slowly over time, based on his payments from prison wages and upon his eventual release from incarceration.

Finally, Velasquez failed to ask the trial court to apportion the restitution order among any codefendants in the trial court either at the time of the original restitution order or in his modification motion; he may not do so for the first time on appeal. No rigid guidelines cover apportionment; joint and several liability is allowed. (*People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1050; *People v. Goss* (1980) 109 Cal.App.3d 443, 460.) In any event, the restitution order does not reflect any other

persons were found jointly and severally liable for the crimes entitling the victim to restitution.<sup>3</sup>

Our independent review of the record discloses no arguable issues.

#### DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

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<sup>3</sup> Generally, a trial court lacks jurisdiction to resentence a criminal defendant after execution of a sentence has begun. (*People v. Howard* (1997) 16 Cal.4th 1081, 1089.) An unauthorized sentence, however, may be corrected at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) In *People v. Turrin* (2009) 176 Cal.App.4th 1200, the defendant attempted to challenge a *restitution fine* in the trial court, after the court had lost jurisdiction over the matter, by claiming it was an unauthorized sentence because the court had failed to determine his ability to pay. The court held a trial court's failure to determine a defendant's ability to pay a fine does not constitute an unauthorized sentence, thus an objection must be made in the trial court to fines based on the defendant's ability to pay or any claim of error on this basis is forfeited on appeal. Here, any error by the trial court in relying on *Turrin* in determining it did not have jurisdiction to modify the restitution order pursuant to section 1202.4, subdivision (f)(1), is not prejudicial for the reasons expressed in the body of the opinion. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)