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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.

MIR MASSOUD KASHANI,

Defendant and Appellant.

G045796

(Super. Ct. No. 09HF0111)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,  
Daniel Barrett McNERNEY, Judge. Dismissed.

Kathleen Woods Novoa, 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, William M. Wood and  
A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Mir Massoud Kashani was found guilty by a jury of one count of committing grand theft.<sup>1</sup> On May 24, 2010, defendant filed a notice of appeal challenging the judgment of conviction. In *People v. Kashani* (Oct. 31, 2011, G043694) (nonpub. opn.), we affirmed the judgment of conviction; the California Supreme Court denied defendant's petition for review.

While defendant's appeal from his judgment of conviction was pending, on July 15, 2011, defendant filed a motion in the trial court, in which he requested that the trial court reduce his felony conviction to a misdemeanor under Penal Code section 17, subdivision (b) (the motion). On July 26, the trial court issued a minute order in which the court denied the motion. On September 15, defendant filed a notice of appeal as to the trial court's order denying the motion. In his opening brief, defendant argues the trial court abused its discretion by denying the motion.

For the reasons we will explain, we dismiss the instant appeal for lack of jurisdiction. In the respondent's brief, the Attorney General argues that the instant appeal must be dismissed because the trial court had no jurisdiction to rule on the motion during the pendency of the appeal from the judgment of conviction, and, thus, the court's order denying the motion is not appealable.<sup>2</sup> In his reply brief, defendant acknowledges it "may be true" the trial court was without jurisdiction to rule on the motion.

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<sup>1</sup> In a footnote in his opening brief, defendant requests that this court take judicial notice of the appellate record and briefs filed in *People v. Kashani*, case No. G043694. Defendant's request does not comply with rule 8.252(a)(1) of the California Rules of Court, which states: "To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order." Defendant also failed to identify or provide copies of any document filed in the action which he contends is relevant to this appeal or explain its relevance. (Cal. Rules of Court, rule 8.252(a)(2)(A).) Pursuant to Evidence Code section 459, subdivision (a) and section 452, subdivision (d), on our own motion, we take judicial notice of the appellate court file in *People v. Kashani*, case No. G043694 and the trial court file in *People v. Kashani*, Orange County Superior Court case No. 09HF0111.

<sup>2</sup> The Attorney General also argues that defendant's "failure to provide an adequate record also precludes relief on his claim." (Boldface & capitalization omitted.)

“As a general matter, ‘[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.’ [Citation.] By the same token, the notice of appeal divests the trial court of subject matter jurisdiction. [Citations.] ‘Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.]’” (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471.) None of the exceptions to this general rule, such as the trial court’s jurisdiction to correct clerical errors in the judgment or to recall a sentence under Penal Code section 1170, subdivision (d), applies in this case. (*Id.* at p. 1472.)

Here, the trial court lacked jurisdiction to rule on the motion during the pendency of defendant’s appeal from the judgment of conviction. Therefore, the order denying the motion did not affect defendant’s substantial rights and was not an appealable order. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1258.) As the instant appeal was taken from a nonappealable order, we must dismiss the appeal. (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208 [“Since the trial court lacked jurisdiction to modify the restitution fines, its order denying defendant’s motion requesting the same did not affect his substantial rights and is not an appealable postjudgment order,” thus, “[t]he appeal should be dismissed”].)

In his reply brief, defendant cites *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, in support of his argument that “the proper procedure is for this court to remand this matter back to the trial court to vacate its void order, and order it to hold a full and proper hearing on the motion when it is again vested with jurisdiction to do so.” *Andrisani* does not support defendant’s argument. In that case, the appellate court held that a judgment or order which is void on its face, “because its infirmity is determinable from an inspection of the judgment roll or the record, may be set aside on

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The appellate record does not include the motion. Because we dismiss the appeal due to a lack of jurisdiction, we do not need to further address this issue.

motion at any time after its entry by the court which rendered the judgment or made the order,” notwithstanding the pendency of an appeal. (*Id.* at p. 523.) The appellate court stated: “The setting aside of a void order by the trial court, while an appeal is pending, renders the appeal moot and subject to dismissal.” (*Ibid.*) The appellate court in *Andrisani* dismissed the appeal as moot under the circumstances presented in that case. (*Id.* at p. 527.) It did not remand the matter to the trial court with directions. (*Ibid.*) *Andrisani* therefore does not support defendant’s proposed disposition in the instant appeal.

#### DISPOSITION

The appeal is dismissed.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.