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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.

WALTER CHARLES COMMINEY,

Defendant and Appellant.

G046199

(Super. Ct. No. FVA023273)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of San Bernardino,  
Cara D. Hutson, Judge. Dismissed.

David McNeil Morse, under appointment by the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \*

A jury convicted Walter Charles Comminey of first degree felony murder (Pen. Code, § 187, subd. (a); all further statutory references are to the Penal Code unless noted otherwise) and found he personally used and discharged a firearm causing death (§ 12022.53, subds. (b), (c) & (d)). The trial court sentenced Comminey to 50 years to life for murder under the “Three Strikes” law, plus a mandatory consecutive term of 25 years to life for the use of a gun. In June 2009, we affirmed the judgment, rejecting defendant’s sole contention the trial court abused its discretion by admitting evidence of prior uncharged robberies to show he harbored a similar intent to rob the victim. (*People v. Comminey* (June 9, 2009, G040061) [nonpub. opn].)

In November 2011, Comminey filed a motion in propria persona in the trial court to reduce his “restitution fine to minimum amount provided by law.” He contended the trial court erroneously imposed a \$10,000 restitution fine at sentencing without determining his ability to pay. He asserts he was, and remains, indigent and unable to pay the fine. The trial court denied the motion in a minute order without providing a reason.

Comminey filed a notice of appeal from the order denying his motion. We appointed counsel to represent him 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 Comminey 30 days to file his own written argument, but we have received no response from him. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm the order.

#### *Restitution Fine*

Section 1202.4, subdivision (b), provides, “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those

reasons on the record.” The fine “shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony . . . .” (§ 1202.4, subd. (b)(1).) The “court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (§ 1202.4, subd. (b)(2).)

The court must “impose the restitution fine 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 fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the two hundred-dollar (\$200) . . . minimum.” (§ 1202.4, subd. (c).) “In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar (\$200) . . . minimum, the court shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant’s inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.” (§ 1202.4, subd. (d).)

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.) In *People v. Turrin* (2009) 176 Cal.App.4th 1200 (*Turrin*), the defendant attempted a postjudgment challenge to a restitution fine after the trial court had lost jurisdiction over the matter, claiming it was an unauthorized sentence because the court had failed to determine his ability to pay. The appellate 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 is forfeited on appeal. (*Ibid.*) The court also held section 1202.4 does not provide continuing jurisdiction to modify restitution fines. (*Turrin*, at p. 1207.)

Here, the trial court lacked jurisdiction to consider Comminey's motion to modify or reduce his restitution fine. Since the trial court lacked jurisdiction to modify the restitution fine, its order denying defendant's motion did not affect his substantial rights and is not an appealable postjudgment order. (*Turrin, supra*, 176 Cal.App.4th at p. 1208.)

### III

#### DISPOSITION

The appeal is dismissed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.