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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.

MIGUEL AYON,

Defendant and Appellant.

G048070

(Super. Ct. No. 07NF3968)

O P I N I O N

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

Patrick E. DuNah, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \*

An amended information charged defendant Miguel Ayon with attempted murder (Pen. Code §§ 664, subd. (a) & 187, subd. (a), counts 1 & 2; all further references

are to this code), conspiracy to commit murder (§ 182, subd. (a), count 3), shooting at an inhabited dwelling (§ 246, count 4), aggravated assault (§ 245, subd. (a)(1), count 5), active participant in a criminal street gang carrying a loaded firearm in public (§ 12031, subds. (a)(1), (a)(2)(c), count 6), and active participation in a criminal street gang (§ 186.22, subd. (a), count 7). It further alleged the following enhancements: criminal street gang (§ 186.22, subd. (b)) as to counts 1, 2, 3, 4, 5 and 6, personal discharge of a firearm (§ 12022.53, subd. (c)) as to counts 1, 2, 3 and 4, gang member vicarious discharge of a firearm (§ 12022.53, subds. (c), (e)(1)) as to counts 1, 2 and 3, and personal use of a firearm (§ 12022.5, subd. (a)) as to counts 1, 2 and 5.

On November 21, 2012 Ayon pleaded guilty to counts 1, 5 and 7, and admitted the personal discharge of firearm enhancement as to count 1 only, while the remaining counts and enhancements were dismissed, all pursuant to a disposition negotiated with the prosecutor. On December 27, 2012 Ayon was sentenced to the agreed upon term of 26 years in state prison, consisting of the 5-year low term and the 20-year firearm enhancement on count 1, together with a consecutive 1-year term (1/3 of the 3-year middle term) on count 3. Sentencing on count 5 was stayed under section 654. The oral pronouncement of judgment reveals the trial court assessed a restitution fine (§ 1202.4, subd. (b)(1)) in the amount of \$200. However, the guilty plea form, the minute order, and the abstract of judgment, all reflect a restitution fine in the amount of \$240, and a parole revocation fine (§ 1202.45, subd. (a)) in the same amount.

Ayon filed a timely notice of appeal, but he did not obtain a certificate of probable cause as required by section 1237.5.

After Ayon appealed we appointed counsel to represent him. Counsel filed a brief which set forth the facts and the disposition of the case. He did not argue against Ayon, but advised he had not found any issues to argue on Ayon's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) He suggested two issues to assist us in our independent review of the record, as set out below. Ayon was given 30 days to file written argument

in his own behalf. That period has passed and we have received no communication from him. We have examined the entire record to determine if any arguable issues are present, including those suggested by counsel and found none. (*Id.* at pp. 441-442; *People v. Johnson* (1981) 123 Cal.App.3d 106, 111-112.)

## FACTS

Attachment No. 1 to the guilty plea form states the following: As to counts 1 and 5, “On 11/1/07, in Orange County, I knowingly, willfully and unlawfully did the following: personally discharged a firearm at John Doe with [the] specific intent to kill him, and I assaulted Jane Doe with a deadly weapon, a gun.” As to count 2, “On 11/1/07, in Orange County, I knowingly and actively participated in a criminal street gang called Hard Times, which is an informal gang with more than three members, that has, in the last three years, engaged in a pattern of criminal gang activity and which commits, as some of its primary activities, crimes such as Robbery, Aggravated Assault, and sales of controlled substances. [¶] I willfully promoted, aided and abetted and furthered the interest of that gang and its members by committing the felonious conduct previously described in paragraph #1 above. [¶] The above factual statements are true and correct and are the basis for my plea of guilty. By signing this document, I acknowledge that I read and write the English language and I understand **everything** written and typed in this document. [¶] I declare under penalty of perjury the above is true and correct.” Attachment No. 1 and the guilty plea form itself are both signed and dated by Ayon.

The guilty plea form also states, “I waive and give up my right to appeal from my guilty plea. I waive and give up my right to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.”

## DISCUSSION

### *1. Constitutionality of Plea*

Appellate counsel first suggests we consider whether Ayon’s negotiated plea in exchange for a stipulated sentence is constitutionally valid. But, as we noted above, Ayon did not obtain the certificate of probable cause required by section 1237.5 which governs a defendant’s right to appeal “from a judgment of conviction upon a plea of guilty or nolo contendere.” It specifies that, “[n]o appeal shall be taken” unless, “[t]he defendant has filed with the trial court a written statement . . . showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings[,]” and “[t]he trial court has executed and filed a certificate of probable cause for such appeal . . . .” (§ 1237.5, subs. (a), (b); see also Cal. Rules of Court, rule 8.304(b).)

The scope of section 1237.5 is a recurrent issue. The Supreme Court has addressed the issue with some regularity (see *People v. Mendez* (1999) 19 Cal.4th 1084; *People v. Lloyd* (1998) 17 Cal.4th 658; *People v. Panizzon* (1996) 13 Cal.4th 68), as have the courts of appeal (*People v. Young* (2000) 77 Cal.App.4th 827; *People v. Cole* (2001) 88 Cal.App.4th 850). Various courts have taken different approaches in making the ultimate decision to dismiss the appeal or allow the defendant to proceed with an appeal after a guilty plea.

However, the Supreme Court has articulated a test to be applied in such instances: “In *Panizzon*, we recognized that, even if it purportedly challenges the sentence only, a defendant’s appeal from a judgment of conviction entered on a plea of guilty or nolo contendere must be dismissed in the absence of a statement of grounds by the defendant and a certificate of probable cause by the trial court if, *in substance*, it challenges the validity of the plea. [Citation.] It does so if the sentence was part of a plea bargain. [Citation.] It does not if it was not [citation] — especially so if the claim or

claims in question were ‘reserved as part of the plea agreement’ [citation].” (*People v. Lloyd, supra*, 17 Cal.4th at p. 665.)

There is no question that in substance Ayon challenges the validity of the plea. “Further, even if it is assumed that defendant’s claim does not challenge the validity of the plea, the claim still is not reviewable on appeal because the terms of the plea bargain preclude any appeal of the negotiated sentence.” (*People v. Panizzon, supra*, 13 Cal.4th at p. 89.) Therefore, the appeal must be dismissed

## 2. *Restitution and Parole Revocation Fines*

Appellate counsel next suggests the \$240 restitution and parole revocation fines violated ex post facto principles and thus should be reduced to \$200, which is the minimum authorized by the statutes at the time the crimes were committed. (Former §§ 1202.4, subd. (b)(1), 1202.45, subd. (a).) We need not reach the ex post facto issue because, as noted above, the oral pronouncement of judgment reflects the amount of the restitution fine actually assessed was \$200, and “[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Furthermore, the parole revocation fine must be “the same amount as” the restitution fine. (Former § 1202.45, subd. (a).) Therefore, the restitution and parole revocation fines must both be reduced to \$200.

## DISPOSITION

For the reasons stated above we conclude the appeal must be dismissed.<sup>1</sup>

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.

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<sup>1</sup> The abstract of judgment misstates the restitution and parole revocation fines as \$240, instead of \$200. The abstract must accurately reflect the sentence, and the trial court retains the authority to correct clerical errors in abstracts. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The trial court should prepare and forward to the Department of Corrections and Rehabilitation a corrected abstract in this case.