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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DEWAYNE NEELYBAKER,

Defendant and Appellant.

H038073

(Santa Clara County

Super. Ct. No. C1074790)

Anthony Dewayne NeelyBaker, the defendant herein, appeals from his conviction for petty theft with a prior conviction for grand theft that, at the time of his original sentencing, made the offense a felony.

Counsel for defendant originally filed an opening brief that stated the case and facts but raised no issues. We notified defendant of his right to submit written argument on his own behalf. Defendant did not do so.

We then, as required by *People v. Wende* (1979) 25 Cal.3d 436, and *People v. Kelly* (2006) 40 Cal.4th 106, reviewed the entire record. In doing so, we noticed that the sentence appeared to be subject to revision in defendant's favor, and so we requested supplemental briefing from both parties, which they provided.

We now set forth the facts, the procedural background (including a description of the crimes of which defendant was convicted), and the disposition of defendant's case. We will affirm the judgment.

## FACTS AND PROCEDURAL BACKGROUND

Because defendant pleaded no contest, we take the facts from the probation report.

On April 14, 2010, defendant and a juvenile worked together to remove antitheft devices from four jackets in a Burlington Coat Factory store. They concealed the jackets and carried them away to the store's shoe department, where they removed the antitheft device from a pair of shoes, which defendant donned. They left the store without paying for the items. Defendant was arrested with a marijuana cigarette on his person, and he admitted to the police that he had stolen the shoes.

Defendant pleaded no contest to petty theft with a prior conviction of grand theft for which he had been imprisoned as a condition of probation (Pen. Code, § 666). At the time, that state of affairs made the offense a felony. (Stats. 2000, ch. 135, § 134, p. 1991.) The trial court accordingly convicted defendant of a felony violation of Penal Code section 666. It placed him on probation and ordered him to serve 90 days in county jail as one condition thereof.

Thereafter the probation office filed a petition to modify defendant's probation. It alleged that defendant had violated probation by (1) not reporting to jail, (2) violating subdivision (a) of Penal Code section 273.5, and (3) failing to report to the probation authorities in a timely manner. A supplemental memorandum further alleged that defendant had been convicted in Alameda County of felony violations of Health and Safety Code section 11351 and former section 12021, subdivision (a)(1), of the Penal Code (Stats. 2010, ch. 689, § 3, No. 3 West's Cal. Session Laws, p. 3746).

On January 26, 2012, defendant admitted a violation of probation and was sentenced to serve the mitigated term of 16 months in the county jail under the prisoner custody realignment program (Pen. Code, §§ 18, subd. (a), 1170, subd. (h); see *People v. Cruz* (2012) 207 Cal.App.4th 664, 668, 669-670). He was also ordered to pay a \$200 probation revocation restitution fine under Penal Code section 1202.44. The trial court

stated during a court session for defendant's original sentencing that the fine would be \$220, but stated in the probation revocation proceedings that it would be \$200.

Defendant filed his *Wende* appeal, and our review of the record suggested that the trial court had imposed a sentence under a more severe version of Penal Code section 666 than the one now in effect. We wrote the parties, asking for supplemental briefing on "whether defendant is entitled to have his sentence reduced because of an amendment to Penal Code section 666 (Stats. 2010, ch. 219, § 15) that occurred after his conviction and sentencing on this charge. (See *People v. Vinson* (2011) 193 Cal.App.4th 1190; *People v. Vieira* (2005) 35 Cal.4th 264, 306.)"

We also asked, "Does the 10 percent administrative fee that may apply to a restitution fine under Penal Code section 1202.4 (*id.*, subd. (l)) apply to defendant's \$200 probation revocation restitution fine under Penal Code section 1202.44?"

Before defendant filed his supplemental brief, he returned to the trial court, evidently with our inquiry in hand. The court set aside his sentence and resented him for a misdemeanor violation of Penal Code section 666, committing him to 12 months in county jail. With custody credit, defendant's time in confinement exceeded the length of commitment. Accordingly, the court released defendant from custody.

Defendant then filed his supplemental brief, describing these events, and on the same day filed a motion to augment the record to include the minute order reflecting the July 23, 2012 proceedings that led to defendant's release. We granted that motion. Thereafter the People filed their supplemental brief. The July 23, 2012 minute order was silent on the amount of fines due under Penal Code sections 1202.4 and 1202.44.

## DISCUSSION

We have, as noted, reviewed the entire record and examined it for any possible arguable issues on appeal that could benefit defendant. Now that the trial court has changed the Penal Code section 666 conviction to a misdemeanor and imposed sentence accordingly, there is no issue on appeal regarding the commitment to jail. (Stats. 2010,

ch. 219, § 15.) There was also the question whether a restitution fine under Penal Code section 1202.44 could legally include a 10 percent administrative fee, which would raise it to \$220, or whether it should be \$200. The parties have agreed that it should be \$200, as stated by the court at the probation revocation sentencing hearing, which obviates that issue. We agree with counsel for defendant that no arguable issues remain. Therefore, we will affirm the judgment.

DISPOSITION

The judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Elia, Acting P. J.

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Mihara, J.