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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY TOATELE TEVAGA,

Defendant and Appellant.

H039008

(Santa Clara County

Super. Ct. No. 203458)

Danny Toatele Tevaga was sentenced to 25 years to life on March 9, 2000. The court imposed a \$10,000 restitution fine as part of that sentence. On October 2, 2012, Tevaga filed a motion for modification of his restitution fine. He argued the trial court erred in imposing the maximum restitution fine without considering his ability to pay. On October 12, 2012, the superior court denied the motion on the basis that a defendant's ability to pay the fine is not a relevant consideration in setting the amount of the fine and that defendant waived the issue by failing to object when the fine was imposed. Defendant filed a timely notice of appeal from this order.

On appeal, we appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), but with a recognition of the limitation to *Wende* review set forth in *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*.) The opening brief states the case and the facts but raises no specific issues. *Wende* review is only available in a first appeal of

right. (*Serrano, supra*, 211 Cal.App.4th at p. 501.) Because defendant's appeal is from an order after judgment seeking to modify his sentence, and not a first appeal of right, he is not entitled to *Wende* review. (*Ibid.*) Therefore, we will proceed with this appeal pursuant to the standard we enunciated in *Serrano*.

Pursuant to *Serrano*, on January 25, 2013, we notified defendant of his right to submit written argument in his own behalf within 30 days. On February 11, 2013, we received a letter from defendant. In his letter defendant contends that he received ineffective assistance of counsel at trial because counsel failed to object to the restitution fine and failed to advise the defendant that he could challenge the proposed restitution amount based on an inability to pay. Nothing in defendant's letter suggests that there is an arguable issue on appeal from the order denying his motion for modification of sentence. Therefore, we decline to retain the appeal.

The appellant having failed to raise any arguable issue on appeal, we dismiss the appeal. (*Serrano, supra*, 211 Cal.App.4th at pp. 503-504.)

DISPOSITION

The appeal is dismissed.

MÁRQUEZ, J.

WE CONCUR:

RUSHING, P.J.

PREMO, J.