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

THE PEOPLE,

Plaintiff and Respondent,

v.

KAMARI NELSON,

Defendant and Appellant.

H042548

(Santa Clara County

Super. Ct. No. 211266)

On November 3, 2008, appellant Kamari Nelson was convicted of 10 felony counts of sexual assault and other crimes and was sentenced to 164 years and 8 months to life. In appeal H034344, we reversed the judgment and remanded the case for resentencing. The trial court resentenced appellant to 150 years to life, and on September 27, 2012, in appeal H037688, we affirmed the judgment. After the California Supreme Court denied review on December 12, 2012 and the U.S. Supreme Court denied certiorari on May 13, 2013, the judgment became final.

On March 25, 2015, nearly two years after the judgment and sentence were final, appellant filed a motion for modification of his sentence, on the grounds that the trial court abused its discretion when it imposed a \$10,000 restitution fine, because there was no evidence that appellant could afford to pay such a fine. Appellant requested that the restitution fine portion be modified to the minimum of \$200, or otherwise reduced to an amount which the prosecution proves that appellant can afford. On March 27, 2015 the

trial court denied appellant's motion, finding the motion untimely under Penal Code section 1170, subdivision (d)(1), or in the alternative, that the trial court acted within its discretion in imposing a \$10,000 restitution fine.

On March 26, 2015, appellant filed a petition for writ of replevin requesting the return of certain property which the police had seized from his apartment. On April 9, 2015, the trial court denied the petition as untimely, and also found that the court lacked jurisdiction to consider the petition. The court directed appellant to seek return of his property from the appropriate governmental agency and/or pursue the matter administratively.

On June 25, 2015, appellant filed a notice of appeal from the March 27, 2015 order denying his motion for modification of restitution,¹ and attached to a request for certificate of probable cause. On July 6, 2015, the trial court denied the request for certificate of probable cause. On appeal, we appointed counsel to represent appellant in this court. Appointed counsel filed an opening brief pursuant to *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*), which states the case and the facts but raises no specific issues. In the opening brief appellant contends that he seeks to appeal both the March 27, 2015 order denying his motion to modify restitution *and* the April 9, 2015 order on the writ of replevin. However, the notice of appeal filed on June 25, 2015 lists only the March 27, 2015 order, and the request for certificate of probable cause also only refers to

¹ In order for the notice of appeal from the March 27, 2015 order to be timely filed, appellant would have had to file it no later than May 26, 2015. While the notice of appeal was not file stamped by the trial court until June 25, 2015, it was dated by appellant on May 13, 2015. The envelope in which appellant mailed the notice of appeal from prison is not part of the record on appeal. Therefore, we cannot say with any certainty that the appeal was timely filed, except that the trial court, which had access to the envelope, did not treat the appeal as inoperative, but instead filed it as timely. (Cal. Rules of Court, rule 8.308, subd. (d).) In any event, if the appeal had been untimely, we would have granted relief from default to appellant and treated the appeal as constructively filed as of the date he presented the notice of appeal to prison officials. Therefore, we need not dismiss the appeal as untimely.

the restitution order. Appellant has neither filed, nor requested to file an amended notice of appeal in this matter. As there is no appeal from the order on the writ of replevin, we are without jurisdiction to consider that order in this appeal. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.)

Pursuant to *Serrano*, on November 23, 2015, we notified appellant of his right to submit written argument in his own behalf within 30 days. On December 28, 2015, we received a supplemental brief from appellant. In his supplemental brief, appellant reargues his motion for modification of restitution, and asserts that he received ineffective assistance of trial counsel regarding the return of his property during the original proceedings. For the reasons already discussed we are without jurisdiction to address any error regarding the order denying appellant's petition for writ of replevin. In regards to the order denying his motion for modification of restitution, appellant contends that the sentencing court erred in setting the restitution fine at \$10,000 without considering his ability to pay, that the issue is not waived, and that the burden of this fine, in the context of the working conditions in California prisons, is tantamount to modern day slavery. Appellant's contentions are without merit, because he fails to identify any error made by the trial court in denying the motion to modify restitution as untimely. As nothing in appellant's supplemental brief raises an arguable issue on appeal, we must dismiss the appeal. (*Serrano, supra*, 211 Cal.App.4th at pp. 503-504.)

DISPOSITION

The appeal is dismissed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

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