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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
CARLOS MARTIN TOLEDO,  
Defendant and Appellant.

A160088  
(Sonoma County  
Super. Ct. Nos. SCR699212,  
SCR729451, & SCR729843)

After defendant Carlos Martin Toledo, pursuant to a negotiated disposition, pleaded no contest to crimes being prosecuted in three cases, the trial court sentenced him to 10 years in state prison, suspended execution of sentence, and placed him on five years' probation subject to numerous conditions, including serving nine months in the county jail and completing a two-year residential drug rehabilitation program.

His appellate counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief but has not done so.

For reasons we now explain, we dismiss defendant's appeal.

On September 11, 2019, defendant pleaded no contest to one count of felony grand theft, two counts of felony identity theft, and three counts of misdemeanor identity theft in case No. SCR699212; to one count of felony receiving stolen property (a motor vehicle) and one count of felony driving or taking of a vehicle without consent in case No. SCR729451; and to one count of failing to appear while on bail, a felony, in case No. SCR729843. Less than a month later, on October 8, the trial court sentenced defendant to 10 years in state prison, suspended execution of sentence, and placed him on five years' probation as described above. In the event space was not immediately available in the drug rehabilitation at the end of defendant's jail term, he waived his "right not to be [in jail] more than one year" until a space became available. Defendant did not appeal from either his convictions or his sentence.

Five months later, on February 14, 2020, defense counsel "calendared" the cases to notify the court of an issue pertaining to defendant's ability to transition to the rehabilitation program. Counsel reported defendant, who was still serving his county jail time, could not move to the treatment program "because of jail time that he owe[d] in Sacramento County." Counsel proposed a removal order, allowing defendant to be transferred to Sacramento, where she thought he would "essentially be given credit for time served." Once that happened, defendant could be sent to the treatment program. The trial court proposed releasing defendant on his own recognizance, thereby giving Sacramento County five days in which to "pick him up"; if the county did not do so, then the "hold" would be "lifted." Although the prosecutor objected, the court released defendant on his own recognizance. The court further instructed that if Sacramento County failed to "pick him up," defendant was to return to court the following week.

Defendant also signed an “Agreement . . . to Appear” at the next hearing date. (Capitalization omitted.)

Defendant failed to appear, and the trial court issued bench warrants.

At a subsequent hearing on March 19, defense counsel explained the case was not on for any “violation.” The probation department, likewise, explained the case was not on for “sentencing.” Rather, since the Sacramento case “ha[d] since been resolved,” probation was “asking for reinstatement and release upon bed space” to the treatment program. Reminding defendant execution of his sentence remained suspended, the trial court recalled the bench warrants and ordered that he remain in custody until a space in the treatment program became available, at which point he would be released to probation or a representative of the program for placement.

A month later, on April 14, defendant, in propria persona, filed a notice of appeal in all three cases. His notice (identical in each case) states: “This letter is to serve notice of appeal for convictions in Case numbers SCR-699212-1, SCR-729451-1, and SCR-729843-1 for ineffective assistance of counsel and a conflict of interest by the presiding judge.”

Thus, according to the plain language of his notice of appeal, defendant is appealing from the trial court’s September and October 2019 orders wherein the court accepted his no contest pleas and imposed, but suspended execution of, sentence and placed him on five years’ probation.

In the “Docketing Statement for Criminal Notice of Appeal,” the Sonoma County Superior Court appeals clerk indicated defendant was appealing from the court’s March 19, 2020 order, described as a “NOLO Plea.” (Capitalization omitted.)

In defendant’s *Wende* brief, appointed counsel provided a “Statement of Appealability” that states this “appeal is from a sentence following a guilty

plea and is authorized by rule 8.304(b) of the California Rules of Court based upon grounds occurring after entry of the plea that do not challenge its validity.”<sup>1</sup>

To the extent defendant purports to appeal from the September and October 2019 orders, defendant’s appeal is untimely. An order imposing, but suspending execution of, sentence and granting probation is an appealable order. (Pen. Code, § 1237; *People v. Martinez* (2015) 240 Cal.App.4th 1006, 1011 [“order imposing sentence, the execution of which is suspended and probation granted, is an appealable order”].) A notice of appeal in a criminal case “must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.” (Cal. Rules of Court, rule 8.308(a); *People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9 [judgment in criminal case

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<sup>1</sup> California Rules of Court, rule 8.304(b) provides, “(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court—with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal ‘Inoperative,’ notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea’s validity. [¶] (5) If the defendant’s notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).” (Cal. Rules of Court, rule 8.304(b)(1)—(5).)

Here, there was no certificate of probable cause contained in the record. (Pen. Code, § 1237.5, subd. (b).)

is rendered when orally announced in court].) Accordingly, defendant's appeal, filed six months after he was convicted and sentenced, is untimely. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (*In re Jordan* (1992) 4 Cal.4th 116, 121.)

To the extent defendant may have appealed from the March 2020 order (a reading of his notice of appeal we think highly implausible), the order is not appealable. " "It is settled that the right to appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.' " (*People v. Totari* (2002) 28 Cal.4th 876, 881.) Penal Code section 1237 states, in pertinent part, an appeal may be taken from either "an order granting probation" or "[f]rom any order made after judgment, affecting substantial rights of the party." (Pen Code, § 1237, subds. (a) & (b).) As we have recited above, defendant did not file a timely notice of appeal from the order imposing, but suspending execution of, sentence and placing defendant on probation. And while the March 2020 order was rendered "after judgment," it did not affect his "substantial rights." On the contrary, the trial court's March order placed defendant in exactly the same position he was in the moment he was sentenced—that is, the court declared defendant's probation reinstated and enabled him to move into the residential rehabilitation program. The court did not revoke defendant's probation. Nor did it modify the terms of his probation. Indeed, defense counsel stated the March hearing was not about any "violation," and the probation department similarly explained the March hearing was not a "sentencing" hearing. An order reinstating probation which does not modify the terms or revoke probation is not an appealable order. (See *People v. Glass* (1966) 244 Cal.App.2d 451,

4520-453 [where defendant's appeal from original probation order had been dismissed for failure to prosecute, allowing defendant to appeal from order reinstating probation, which made no change to terms and condition, would effectively, and impermissibly, "grant her a double appeal"].)

Even if the March 2020 order were appealable, we discern no issues that would, if resolved favorably to defendant, result in reversal or modification of judgment. Defendant was ably represented by counsel. And the court's order ensuring defendant's transfer into the rehabilitation program as soon as a bed became available was well within the court's sound discretion.

#### **DISPOSITION**

The appeal is dismissed.

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Banke, J.

We concur:

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Humes, P.J.

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Sanchez, J.

A160088, People v. Toledo