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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE AURELIO AGUILAR,

Defendant and Appellant.

2d Crim. No. B235027
(Super. Ct. No. 2009024088)
(Ventura County)

Jose Aurelio Aguilar appeals an order of the trial court denying his motion to strike or modify court-ordered victim restitution and restitution fines. (Pen. Code, §§ 1202.4, subds. (b), (f), 1202.45.)¹ We dismiss the appeal because the trial court lacked jurisdiction to modify the order regarding victim restitution and restitution fines. (§§ 1202.4, subd. (g), 1237, subd. (b); *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207.)

FACTS AND PROCEDURAL HISTORY

Following a court trial, Aguilar was convicted of conspiracy to commit burglary, attempted first degree residential burglary, and being under the influence of a controlled substance. (§§ 182, subd. (a)(1), 664, 459; Health & Saf. Code, § 11550, subd. (a).) The court also found that Aguilar suffered a prior serious felony conviction, alleged

¹ All further statutory references are to the Penal Code unless stated otherwise.

for purposes of enhancement and recidivist sentencing. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On April 8, 2010, the trial court sentenced Aguilar to a prison term of 13 years, consisting of a concurrent term for each count. The court also ordered: "Restitution fine, both parts of it. Has no ability to pay the cost of presentence report. Restitution pursuant to the report, 550 bucks."² The victim of the conspiracy and attempted burglary crimes spoke during the sentencing hearing and explained that the \$550 restitution amount compensated him for the repair costs of a damaged sliding door. Aguilar neither objected to the imposition of victim restitution nor to the restitution fines. He also did not claim that he was unable to pay the restitution fines nor did he demand a hearing, although the trial court informed him that "[t]hat's subject to a hearing, if you like." (§ 1202.4, subd. (d) ["A defendant shall bear the burden of demonstrating his or her inability to pay"].)

Aguilar appealed. On June 1, 2011, we filed an opinion rejecting his sole contention that insufficient evidence supported his conviction. (*People v. Aguilar, supra*, B227384.) On appeal, Aguilar did not challenge the court-ordered victim restitution or the restitution fines.

On May 27, 2011, nearly one year after sentencing, Aguilar filed a motion in the trial court in propria persona "to strike or modify court ordered restitution, fees, or fines." Aguilar stated that he was indigent and could not pay the restitution and fines. He requested the court to modify the restitution fine from \$500 to \$200. On June 2, 2011, the court denied the motion in a written order without a hearing or a statement of reasons.

Aguilar appeals the denial of his motion. On September 14, 2011, we requested the parties to file letter briefs discussing whether denial of the motion is an appealable order. Following receipt of the letter briefs, we deferred resolution of the issue pending consideration of the merits of Aguilar's appeal.

² We have granted the Attorney General's motion requesting that we take judicial notice of the probation report filed in the underlying action and made a part of the appellate record in *People v. Aguilar* (June 1, 2011, B227384) [nonpub. opn.].

DISCUSSION

Restitution Fines (§§ 1202.4, subd. (b), 1202.45)

Aguilar argues that he may appeal imposition of the restitution fines because they are an unauthorized sentence and there was a clerical error in recording them. (*People v. Turrin, supra*, 176 Cal.App.4th 1200, 1205 [trial court retains jurisdiction to correct unauthorized sentence at any time].) He points out that the trial judge stated: "Restitution fine, both parts," but did not specify the amount thereof. Aguilar asserts that the court clerk improperly filled in the amount of \$500 in the court minutes and the abstract of judgment. (*People v. Zachery* (2007) 147 Cal.App.4th 380, 387-389 [neither court minutes nor abstract of judgment can add to or modify the oral pronouncement of judgment].)

The trial court's oral pronouncement of sentence does not conflict with the court minutes or the abstract of judgment. At sentencing, the court incorporated by reference the terms set forth in the probation report regarding restitution fines and victim restitution. This is obvious from the context of the trial judge's statements. The probation report recommends imposition of a \$500 restitution fine and a \$500 parole revocation restitution fine. (*Ante*, fn. 2.)

The trial court does not have continuing jurisdiction to reduce a lawfully imposed restitution fine or its corresponding parole revocation restitution fine. (*People v. Turrin, supra*, 176 Cal.App.4th 1200, 1207 ["A defendant may not contest the amount, specificity, or propriety of an authorized order of a restitution fine for the first time on appeal [citations] let alone in a motion to modify the same in the trial court after it has lost jurisdiction"]; *People v. Willie* (2005) 133 Cal.App.4th 43, 49 [a sentencing court's jurisdiction to modify a sentence expires after 120 days].) A defendant therefore does not have the right to make a post-judgment motion for a reduction of such lawful fines. Accordingly, he may not appeal from the denial of that motion because his substantial rights are not affected. (§ 1237, subd. (b); *People v. Turrin, supra*, 176 Cal.App.4th 1200, 1208.)

Victim Restitution

Aguilar contends that the trial court retained continuing jurisdiction to modify the victim restitution order and that the denial of his request to modify was an appealable

order for that reason. (§§ 1202.4, subd. (f)(1) ["The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant"], 1202.42, subd. (d) [court-ordered income deduction for purposes of victim restitution is effective until further court order]; *People v. Turrin*, *supra*, 176 Cal.App.4th 1200, 1207 ["[S]ection 1202.42 confers continuing jurisdiction to modify an order for *victim* restitution"].) He adds that section 1202.4, subdivision (f)(1) provides that "[t]he defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution."

Under the circumstances, Aguilar may not appeal the denial of his post-judgment motion to modify the victim restitution order because his only asserted basis for the modification was his inability to pay. Section 1202.4, subdivision (g) provides: "The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order."

Section 1237, subdivision (b) provides that a defendant may appeal "[f]rom any order made after judgment, affecting the substantial rights of the party." The trial court's order denying Aguilar's motion did not affect his substantial rights because the trial court lacked jurisdiction to modify the victim restitution amount based upon Aguilar's inability to pay. (§ 1202.4, subd. (g).)

Accordingly, the appeal is dismissed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Edward F. Brodie, Judge
Superior Court County of Ventura

Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.