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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH SMITH,

Defendant and Appellant.

B271656

(Los Angeles County  
Super. Ct. No. BA378233)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\* \* \* \* \*

Joseph Smith appeals from the judgment of conviction after pleading no contest to four counts of animal cruelty. Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), appellant's counsel filed an opening brief requesting this court review the record and determine whether any arguable issues exist on appeal. We have reviewed the entire record and find no arguable issue. We affirm.

### **BACKGROUND**

In 2011, appellant was charged with four counts of animal cruelty, along with weapon use allegations. (Pen. Code, §§ 597, subd. (a), 12022, subd. (b)(1).) It was alleged he had eight prior "strike" convictions and four prior prison terms. (Pen. Code, §§ 667, subds. (a)(1), (b)-(i), 667.5, subd. (b), 1170.12, subd. (a), 1203, subd. (e)(4).)

During pretrial proceedings, a doubt was declared as to appellant's mental competence pursuant to Penal Code section 1368. He was eventually found competent.

On December 6, 2011, he pled no contest to all four counts, and admitted the personal weapon use, a second strike, and the prior prison terms. He accepted the prosecution's offer of 13 years in prison. Among other fines and fees, he was assessed a \$200 restitution fine pursuant to Penal Code section 1202.4, subdivision (b).

More than four years later, appellant filed a motion for reconsideration of his restitution fine.<sup>1</sup> The court denied the motion, ruling:

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<sup>1</sup> The superior court clerk searched appellant's case file and was unable to locate appellant's motion.

“On December 6, 2011, the defendant was sentenced to a lengthy term in state prison and a \$2,000 [*sic*—\$200] restitution fine was imposed. No objection to the fine was made.

“Over four years later, the defendant has filed a so-called ‘boilerplate’ motion to challenge the imposition of the fine. The motion concludes it is the Court’s obligation to vacate the ‘judgment of restitution, fines and fe[es] and any obligations to wit’. No relevant citation of authority was cited to support this suggestion for relief. Indeed, it is a frivolous request.

“Gov. Code, § 13967, subd. (a) (imposition of restitution fine upon conviction of felony), does not require the trial court to make an express determination, on the record, of a defendant’s ability to pay the fine, and a court should not impose such a requirement by judicial fiat. (*People v. Frye* (1994) 21 Cal.App.4th 1483[.]) *Frye* held that after defendant pleaded guilty to possession of methamphetamine in state prison (Pen. Code, § 4573.6), the trial court did not err in imposing a restitution fine of \$ 200, even though defendant indicated that he did not have the ability to pay it, since, in the absence of any evidence that defendant was ineligible for prison work assignment, the court could presume the fine would be paid out of defendant’s prison wages. A synthesis of Gov. Code, § 13967, subd. (a) (upon conviction of felony, court must impose restitution fine of not less than \$ 200 subject to defendant’s ability to pay), and Pen. Code, § 1202.4, subd. (a) (upon conviction of felony, court must impose restitution fine as provided in Gov. Code, § 13967, subd. (a), regardless of defendant’s present ability to pay), leads to the conclusion that the trial court must consider a defendant’s ability to pay in imposing even a minimum restitution fine, but the court is not limited to a consideration of

the defendant's present financial circumstances and may consider his or her future financial prospects.

"The motion is denied."

Appellant appealed the denial of his motion to reconsider the restitution fine.

### **DISCUSSION**

We appointed counsel to represent appellant on this appeal. After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d at page 441. On April 13, 2017, we advised appellant he had 30 days to submit any contentions or issues he wished us to consider. Appellant did not file a supplemental brief.

We have examined the entire record. We are satisfied no arguable issues exist and appellant's counsel has fully satisfied his responsibilities under *Wende*. (*Smith v. Robbins* (2000) 528 U.S. 259, 279-284; *Wende, supra*, 25 Cal.3d at p. 441; see *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

### **DISPOSITION**

The order is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.