

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM SHELBY,

Defendant and Appellant.

B292800

(Los Angeles County
Super. Ct. No. KA110265)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stacy L. Wiese, Judge. Affirmed with directions.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

William Shelby appeals the judgment entered following a negotiated plea in which he pleaded no contest to assault with a firearm (Pen. Code,¹ § 245, subd. (a)(2)) and admitted he personally used a firearm within the meaning of section 12022.53, subdivision (b).² On July 7, 2017, the trial court sentenced appellant in accordance with the plea agreement, imposing an aggregate sentence of 13 years in state prison, which included 10 years for the firearm enhancement under section 12022.53, subdivision (b). The court awarded a total of 817 days' credit, calculated as 711 actual days in custody plus 106 days' conduct credit. The court also ordered fines, fees, and assessments consisting of a \$300 restitution fine (§ 1202.4, subd. (b)), a \$300 parole revocation restitution fine, stayed unless parole is revoked (§ 1202.45), a \$30 criminal conviction fee (Gov. Code, § 70373), and a \$40 court operations assessment (§ 1465.8, subd. (a)(1)).

On May 29, 2018, appellant filed a motion in the superior court to amend the abstract of judgment and to modify his sentence. On August 24, 2018, the superior court ordered the abstract of judgment amended to show conviction by plea (rather than by jury) and to reflect imposition of the firearm enhancement under section 12022.5, subdivision (a) rather than

¹ Undesignated statutory references are to the Penal Code.

² Appellant was originally charged with one count of attempted premeditated murder (§§ 664/187, subd. (a)) and a firearm enhancement under section 12022.53, subdivision (b). As a result of the plea negotiations, the People moved to amend the information to add count 7, assault with a firearm under section 245, subdivision (a)(2). Based on the plea, the court dismissed the attempted murder charge.

section 12022.53, subdivision (b). Finding that the sentence was specifically negotiated as part of the plea, the court expressly ordered that the term for the enhancement remain the same at 10 years, and the total prison term remain 13 years. The court did not modify the credits awarded or any of the fines, fees, or assessments imposed. The abstract of judgment was amended to reflect imposition of the enhancement under section 12022.5, subdivision (a), but the indication that appellant's conviction was by jury rather than a plea was not corrected.

Appellant filed a notice of appeal and request for a certificate of probable cause, which the trial court granted.

Appellant now asserts: (1) the superior court erred in failing to recalculate custody credits when it modified the abstract of judgment; and (2) the trial court's imposition of the \$300 restitution fine, the \$30 criminal conviction fee, and the \$40 court operations assessment without a determination of appellant's present ability to pay violated his due process rights under the United States and California Constitutions. We reject these contentions and affirm. However, the trial court is ordered to correct the abstract of judgment to reflect that appellant was convicted by plea rather than by jury, and to forward a corrected abstract to the California Department of Corrections and Rehabilitation.

DISCUSSION

I. Appellant Is Not Entitled to Additional Custody Credits

Eight months after the August 24, 2018 hearing on appellant's motion to amend the abstract of judgment and strike the firearm enhancement, appellant submitted a letter to the superior court dated May 1, 2019, requesting a modification of appellant's custody credits. On May 15, 2019, the superior court

denied the credit modification request on the ground that appellant was not resentenced on August 24, 2018. Appellant now contends “[t]he trial court erred in failing to determine and award appellant with his time served.” He is mistaken.

In his motion to amend the abstract of judgment, appellant asked the superior court to strike the firearm enhancement and resentence him on the ground that a firearm enhancement under section 12022.53, subdivision (b) cannot attach to a section 245 conviction. The People and the court agreed that a section 12022.53, subdivision (b) firearm enhancement does not apply to a conviction under section 245. However, the superior court did not strike the firearm enhancement and determined that the appropriate remedy was to amend the abstract of judgment to reflect imposition of the 10-year firearm enhancement under section 12022.5, subdivision (a) rather than 12022.53, subdivision (b).³ In so ruling, the court reasoned that the parties had specifically bargained for a 10-year firearm enhancement as part of plea negotiations, and appellant’s 13-year sentence was

³ Section 12022.53, subdivision (b) provides in part, “any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years.” Section 12022.5, subdivision (a) also allows a defendant’s sentence to be enhanced based on the personal use of a firearm in the commission of a felony, but gives the sentencing court discretion to choose among three possible terms: “any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years.”

therefore integral to the plea agreement. Citing *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395–1396 [trial court properly substituted uncharged lesser included enhancement under section 12022.5 where charged enhancement under section 12022.53 that jury had found true did not apply to conviction for voluntary manslaughter], and *People v. Strickland* (1974) 11 Cal.3d 946, 961, the superior court determined that, because the same 10-year enhancement could be imposed under both statutes, the erroneous citation to section 12022.53 could be corrected by substituting section 12022.5 as the statutory basis for the 10-year enhancement in the abstract of judgment. (See *People v. Majors* (1998) 18 Cal.4th 385, 410 [when charged enhancement allegation does not apply to offense of conviction, uncharged but “‘lesser included enhancement’” may be imposed].)

Appellant does not challenge this ruling or the original credit calculation. Instead, appellant contends that by amending the abstract of judgment the court undertook a sentence modification which triggered the court’s duty to recalculate sentence credits. We disagree. In *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, our Supreme Court noted that even a remand for resentencing after an appeal from the judgment “does not necessarily operate . . . to vacate the original sentence.” (*Id.* at p. 1255.) The high court explained that “if, after a limited remand involving the sentence, ‘the trial court decide[s] not to exercise its discretion to modify the original sentence, that sentence would remain in effect, and the defendant need not be resentenced but should be remanded to continue serving the term previously imposed.’ [Citation.] Even when the trial court on remand exercises its discretion and modifies the sentence, the original sentence is not viewed as void *ab initio* and the

defendant's incarceration in state prison under the original sentence is not considered presentence custody." (*Ibid.*)

Here, although the matter was not before the superior court on remand, *Peracchi* compels the conclusion that the amendment to the abstract effected no modification of appellant's sentence. Appellant had asked the court to resentence him by striking the firearm enhancement altogether, but the superior court declined to do so, expressly stating that appellant's sentence would remain unchanged. Thus, appellant simply continues to serve the unaltered sentence that the court previously imposed, and his claim that the court erred in failing to recalculate custody credits when it ordered the abstract of judgment amended is without merit.

II. The Superior Court Had No Jurisdiction to Modify the Fines, Fees and Assessments, and Denial of Appellant's *Dueñas* Motion Is Not Cognizable in this Appeal

Along with the request to modify appellant's custody credits, appellate counsel filed a *Dueñas*⁴ motion requesting that the court-ordered assessments be vacated and the restitution fine be stayed. The superior court denied the motion on the grounds that appellant's failure to object to the fines, fees and assessments at sentencing forfeited the claim. The court further found that appellant had "not asserted that he does not have the ability to pay and the Department of Corrections and Rehabilitation can deduct the fines and assessments from [appellant's] prison wages."

⁴ *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

Relying on *Dueñas*, appellant now contends the trial court's imposition of the \$300 restitution fine and \$70 in assessments without a determination of his ability to pay violated due process. The claim is without merit.

We first note that the superior court had no jurisdiction to grant the relief appellant sought in his *Dueñas* motion. A judgment in a criminal case “is rendered when the trial court orally pronounces sentence,” and “may consist of a fine, a term of imprisonment, or both.” (*People v. Karaman* (1992) 4 Cal.4th 335, 344, fn. 9 (*Karaman*).) “‘[O]nce a judgment is rendered, except for limited statutory exceptions (§§ 1170.126, 1170.18), the sentencing court is without jurisdiction to vacate or modify the sentence, except pursuant to the provisions of section 1170, subdivision (d). [Citation.] Section 1170, subdivision (d), allows a sentencing court on its own motion to recall and resentence, subject to the express limitation that the court must act to recall the sentence within 120 days after committing the defendant to prison. [Citation.] Indeed, ‘the court loses ‘own-motion’ jurisdiction if it fails to recall a sentence within 120 days of the original commitment.’ ” (*People v. Hernandez* (2019) 34 Cal.App.5th 323, 326 (*Hernandez*), quoting *People v. Fuimaono* (2019) 32 Cal.App.5th 132, 134 (*Fuimaono*).) In addition, “[u]nder the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced. [Citations.] Where the trial court relinquishes custody of a defendant, it also loses jurisdiction over that defendant.” (*Karaman*, at p. 344; *People v. Antolin* (2017) 9 Cal.App.5th 1176, 1179, 1183.) In this case, the judgment was rendered on July 7, 2017. The superior court thus plainly lacked jurisdiction to vacate or otherwise modify appellant's sentence, the execution of which had begun long before appellant brought

his *Dueñas* motion in the superior court. (*Karaman, supra*, 4 Cal.4th at p. 344.)

The superior court's denial of appellant's *Dueñas* motion was also not an appealable order. (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208 (*Turrin*).) A defendant has 60 days to file a notice of appeal challenging the judgment, after which the judgment becomes final. (Cal. Rules of Court, rule 8.308(a); *People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.) But appellant never sought review of the judgment in this case, which became final on September 5, 2017. It was not until a year later, on September 20, 2018, that appellant obtained a certificate of probable cause and appealed the superior court's August 24, 2018 order denying his request to strike the firearm enhancement. But even then, appellant did not challenge the imposition of the restitution fine and assessments until May 2019, when he returned to the superior court seeking relief under *Dueñas*.

"The right to appeal is statutory only, and a party may not appeal a trial court's judgment, order or ruling unless such is expressly made appealable by statute." (*People v. Loper* (2015) 60 Cal.4th 1155, 1159.) An appeal by a criminal defendant is governed by section 1237, which provides that an appeal may be taken by the defendant "[f]rom any order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b); *People v. Totari* (2002) 28 Cal.4th 876, 882 (*Totari*).) Because the superior court lacked jurisdiction to grant the relief requested in appellant's *Dueñas* motion, the court's order denying that motion did not affect appellant's substantial rights, and he had no right to appeal under section 1237, subdivision (b). (*Hernandez, supra*, 34 Cal.App.5th at p. 326; *Fuimaono, supra*, 32 Cal.App.5th at p. 135.)

Section 1237, subdivision (b)'s provision for an appeal from any order after judgment that affects the "substantial rights" of a party also does not give a defendant license to turn back the clock by seeking relief in a postjudgment motion that could have been reviewed on appeal from the judgment. (*Totari, supra*, 28 Cal.4th at p. 882.) "In other words, 'an order ordinarily is not appealable when the appeal would merely bypass or duplicate appeal from the judgment itself.'" (*Ibid.*; *People v. Diaz* (2015) 235 Cal.App.4th 1239, 1245.) Indeed, to allow an appeal in such circumstances "would virtually give defendant two appeals from the same ruling and, since there is no time [limit] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment." (*People v. Thomas* (1959) 52 Cal.2d 521, 527.)

Neither the pendency of the appeal nor the certificate of probable cause that enabled appellant to file the instant appeal conferred any right to appellate review of the restitution fine or assessments, either. Although a certificate of probable cause under section 1237.5 "does not restrict the scope of inquiry into a cognizable error once a certificate has been issued," "filing a certificate cannot expand the scope of review to include a noncognizable issue." (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178; *People v. Cisneros-Ramirez* (2018) 29 Cal.App.5th 393, 404.) The judgment in this case, including the restitution fine and assessments, was final long before appellant sought review of the denial of his motion to strike the firearm enhancement. Appellant had lost any right to appeal the judgment; neither the certificate of probable cause nor this appeal changed that.

Finally, although an appellate court may correct an unauthorized sentence at any time (*People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13; *People v. Anderson* (2010) 50 Cal.4th 19,

26; *Turrin, supra*, 176 Cal.App.4th at p. 1205 [“An unauthorized sentence because of an error in restitution must be vacated and the proper sentence imposed whenever the matter is brought to the attention of the trial or reviewing court”]), this narrow exception to the waiver doctrine does not apply in this case. A sentence is “unauthorized” only if it “ ‘could not lawfully be imposed under any circumstance in the particular case’ ” (*Anderson*, at p. 26), as in the case of “obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings” (*People v. Smith* (2001) 24 Cal.4th 849, 852). But “[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.” (*Turrin*, at p. 1207, italics added.) Here, appellant seeks to challenge the propriety of a restitution fine and assessments that were authorized when judgment was entered. The unauthorized-sentence exception to loss of jurisdiction has no application in these circumstances. (*Ibid.*)

DISPOSITION

The matter is remanded to the trial court with orders to prepare a new abstract of judgment showing the conviction was by plea and to forward the same to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.