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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES FRANCIS KEITH,

Defendant and Appellant.

B300189

(Los Angeles County
Super. Ct. No. NA075391)

APPEAL from an order of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Appeal dismissed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant and defendant James Francis Keith appeals the denial of his “ex parte motion for the disposition of fine and restitution.” We have conducted an independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We conclude that no arguable issues exist. Moreover, because the order denying Keith’s motion was not appealable, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

We provide the following relevant background of this case. (*People v. Kelly* (2006) 40 Cal.4th 106, 110, 124 (*Kelly*).)

A jury convicted Keith of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)¹), two counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1);² counts 2 and 3), criminal threats (§ 422, subd. (a); count 4), and corporal injury upon a cohabitant (§ 273.5, subd. (a); count 5). Keith admitted status enhancements for a prior violent or serious felony conviction (§ 667, subd. (d)), a prior serious felony conviction (§667, subd. (a)), and two prior felony convictions for which he had served separate prison commitments (§ 667, subd. (b)).

On August 28, 2008, the trial court sentenced Keith to 38 years 4 months. The trial court also imposed a \$7,600 restitution fine (§ 1202.4, subd. (b)) and other fees and penalties.

¹ All further undesignated statutory references are to the Penal Code.

² In 2012, section 245 was amended to proscribe assault by means of force likely to produce great bodily injury in subdivision (a)(4).

In a nonpublished opinion, we affirmed the judgment, but struck a \$760 penalty under section 1464, subdivision (a)(1). (*People v. Keith* (May 7, 2010, B210378) [nonpub. opn.].)

On May 10, 2019, Keith filed an “ex parte motion for the disposition of fine and restitution,” which requested modification of the restitution fine based on his inability to pay. On June 10, 2019, the trial court denied Keith’s motion, stating that he failed to show he would not receive any money from labor while in custody or gifts from family or friends, which could be applied to the restitution fine. On July 30, 2019, Keith filed a timely notice of appeal.

DISCUSSION

Keith appeals from the post-judgment order denying his motion to modify the restitution fine imposed as a part of his August 28, 2008 sentence.

On November 22, 2019, Keith’s appointed appellate counsel filed a *Wende* brief raising no issues and asking us to independently review the record. Counsel advised Keith that he may file a supplemental brief with this court within 30 days of the filing of his opening brief. More than 30 days have elapsed. Keith has not filed a supplemental brief.

We have independently reviewed the entire record. We are satisfied that no arguable issues exist and Keith has received effective appellate review of the order of denial of his motion. (*Smith v. Robbins* (2000) 528 U.S. 259, 277–279; *Kelly*, *supra*, 40 Cal.4th at pp. 123–124; *Wende*, *supra*, 25 Cal.3d at p. 443.)

Section 1170, subdivision (d) permits recall of a sentence within 120 days of the original commitment. Beyond this 120-day period, the trial court is without jurisdiction to vacate or modify the sentence. (*Portillo v. Superior Court* (1992) 10

Cal.App.4th 1829, 1834–1835; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 464.) Keith filed his motion nearly ten years after the trial court imposed the sentence in this case. Thus, the trial court lacked jurisdiction under section 1170, subdivision (d) to modify Keith’s restitution fine.

Moreover, we are not addressing an unauthorized sentence. Section 1202.4, subdivision (b) authorized the amount of the restitution fine imposed. Keith merely contested the amount and propriety of an authorized order. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207 (*Turrin*).)

An order made after judgment is only appealable if it affects a defendant’s substantial rights. (§ 1237, subd. (b).) Because we have concluded the trial court no longer had jurisdiction to recall Keith’s sentence when it denied his motion, the denial could not have affected his substantial rights. (*People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726; *People v. Chamizo* (2019) 32 Cal.App.5th 696, 701.) Accordingly, we dismiss the appeal. (*Turrin, supra*, 176 Cal.App.4th at p. 1208.)

DISPOSITION

The appeal is dismissed.

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HANASONO, J. *

We concur:

EDMON, P.J.

DHANIDINA, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.