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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.

OSWALD PORTILLO,

Defendant and Appellant.

B271761

(Los Angeles County
Super. Ct. No. BA299877)

APPEAL from an order of the Superior Court of
Los Angeles County, William C. Ryan, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On July 13, 2007, following a jury trial, Oswald Portillo was found guilty of first degree murder with gun use and gang enhancements (Pen. Code, §§ 187, 12022.53, subd. (d), 186.22, subd. (b)),¹ and on May 2, 2008, he was sentenced to prison for a term of 50 years to life. As part of his sentence, Portillo was ordered to pay a \$2,500 restitution fine. Portillo’s conviction was affirmed by this court in 2009.²

On February 25, 2016, Portillo filed a “Petition for Modification of Sentence” in the superior court, complaining that the trial court (Ryan, J.) had unfairly imposed the \$2,500 restitution fine without a hearing, and that defense counsel had been ineffective for not objecting to the fine or requesting a restitution hearing. The superior court (Sandoval, J.) denied this petition on March 14, 2016, finding that a restitution hearing must be requested but that Portillo had failed either to request such a hearing at sentencing or raise the issue on appeal. The court also determined that Portillo’s ineffective assistance of counsel claim should have been raised at the time of his appeal, but addressed the merits anyway, concluding there was no resulting prejudice to Portillo because the trial court had imposed only a \$2,500 fine—whereas the statutory guidelines at that time would have prescribed a fine in Portillo’s case of \$10,000. (See former § 1202.4, subd. (b)(2).) Portillo filed a timely appeal.

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

² On his appeal, Portillo’s name was rendered as “Oswaldo Portillo.”

We appointed counsel to represent Portillo on appeal. After reviewing the record, counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441. We directed counsel to send the record on appeal and a copy of the opening brief to Portillo, and notified defendant he had 30 days within which personally to submit any contentions or issues that he wished us to consider. Portillo did not file a supplemental brief.

We are satisfied that appellate counsel has fully complied with her responsibilities and that no arguable appellate issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 278 [120 S.Ct. 746]; *People v. Kelly* (2006) 40 Cal.4th 106, 110.) It is clear from Portillo’s original Petition for Modification of Sentence that he has confused section 1202.4, subd. (f), with section 1202.4, subd. (b). The arguments he makes, the cases he cites, and the portions of the restitution statute he references have to do with subdivision (f), which concerns victim restitution, a penalty which does indeed give a defendant the right to dispute, at a hearing, the amount of restitution ordered. (§ 1202.4, subd. (f)(1).) However, as Judge Sandoval pointed out in denying Portillo’s petition, the \$2,500 he has disputed was imposed as a “restitution fine” under subdivision (b)—not “victim restitution” under subdivision (f)—and section 1202.4, subdivision (d) specifically provides that “[a] separate hearing for the fine shall not be required.”³ The superior court also fairly noted that a hearing

³ This language appears in the current version of the statute, as well as in the version applicable when Portillo committed his crime.

could have resulted in a \$10,000 restitution fine rather than the \$2,500 fine imposed by the sentencing court, and therefore Portillo had failed to demonstrate the prejudice prong of an ineffective assistance of counsel claim.

DISPOSITION

The superior court's order is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.