

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
KENNETH JAMES ADAMS,  
  
Defendant and Appellant.

C050911  
  
(Super. Ct. No.  
MF028072A)

The sole issue in this case is whether a victim restitution payment imposed by the court after defendant's guilty plea violated the terms of his plea bargain. Defendant obtained a certificate of probable cause. We shall conclude defendant has not demonstrated that the imposition of the victim restitution payment violated the terms of his plea bargain, a fact that distinguishes this case from the leading case of *People v.*

*Walker* (1991) 54 Cal.3d 1013 (*Walker*). Accordingly, we shall affirm the judgment and sentence.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant was accused of stabbing Kathleen Tompkins with a 15-inch sword, puncturing her lung and liver, and piercing her arm with a "through and through wound." Her injuries required surgery, and she was hospitalized for 12 days.

After initially entering a not guilty plea to charges of attempted murder, and assault with a deadly weapon, defendant pleaded guilty to the charge of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)<sup>1</sup> He also admitted three enhancements to that count, namely two enhancements for conviction of a prior serious felony (§§ 1170.12, subd. (b), 667, subds. (a) and (d)) and one enhancement for infliction of great bodily injury (§ 12022.7, subd. (a)).

No written plea agreement or waiver appears in the record. The trial court recited the terms of the agreement in court as follows:

"Mr. Adams, what I have been told is you're going to plead to Count 2, the assault by means of force likely to produce great bodily injury, a felony, and that is also a strike. [¶] That you are going to admit the prior strike from January 28th, 2002, and you are also going to admit the prior serious felony offense, which was that strike. [¶] And you will also admit the infliction of great bodily injury. [¶] The

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<sup>1</sup> References to an undesignated section are to the Penal Code.

remaining counts and enhancements will be dismissed. I'm going to sentence you to the upper term of four years in State Prison. That would be doubled because of the strike to eight years. [¶] You will receive an additional five years for the serious felony, an additional three years for the great bodily injury, for a total sentence of sixteen years in State Prison. [¶] Is that your understanding of what's going to happen today?"

Defendant answered in the affirmative, and in response to questioning informed the court no one had made any threats or any other promises to him to get him to enter a plea. He also indicated he had been given enough time to discuss his case with his attorney, and that he had no questions before sentencing.

The trial court proceeded to inform defendant of the consequences of his plea including the possibility of parole and deportation if he was not a citizen. The trial court did not advise defendant that he could be required to make a restitution payment to the victim, nor did the court advise defendant of any possible fines. The court did not advise defendant pursuant to section 1192.5 that the court could not sentence him to a punishment more severe than the one specified in the plea.

The trial court advised defendant of his constitutional rights and took defendant's waiver of those rights. The court took defendant's guilty plea. The victim made a statement on the record, and immediately thereafter the trial court sentenced defendant. After specifying the prison term, the court ordered defendant to pay a restitution fine of \$200 and a parole revocation fine of \$200, which the court stayed on the condition

defendant not violate parole. The court then ordered defendant to pay restitution to the victim "in an amount and manner to be determined by Probation and to be collected by the Department of Corrections." Defendant raised no objection to the sentence.

#### DISCUSSION

Defendant argues the restitution payment must be stricken because it was not part of his plea bargain.<sup>2</sup> Defendant's argument rests entirely on the California Supreme Court decision in *Walker*. In that case, the defendant signed a change of plea form, initialing his understanding of the agreement. (*Walker, supra*, 54 Cal.3d at p. 1019.) He agreed to be sentenced to prison for five years. The court orally explained that "the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a fine of up to \$10,000, followed by a period of parole." (*Ibid.*) The court sentenced defendant to a five-year prison term, but also imposed a restitution fine of \$5,000, even though the plea agreement did not mention such a fine. (*Ibid.*) The defendant did not object to the fine at sentencing, but argued on appeal that the restitution fine should be stricken because it was not a part of the plea bargain. (*Ibid.*)

The court explained that there were two principles at work. The first was a defendant's right to be advised of the direct

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<sup>2</sup> Defendant filed a notice of appeal based in part on the imposition of the restitution order, and the trial court granted his request for a certificate of probable cause.

consequences of the plea, a "'judicially declared rule of criminal procedure[,]" which may be forfeited absent a timely objection, and which requires a showing of prejudice by the appellant.<sup>3</sup> (*Walker, supra*, 54 Cal.3d at pp. 1020, 1022-1023.) The second was the principle that the parties must adhere to the terms of a plea bargain. (*Id.* at p. 1020.) This latter right cannot be forfeited by mere failure to object at sentencing, unless the trial court specifically informed the defendant pursuant to section 1192.5 prior to making the plea that the defendant may not receive a punishment more severe than that specified in the plea, that the court may withdraw its approval at the time of application for probation or pronouncement of judgment, and that in such case the defendant could withdraw the plea. (*Id.* at pp. 1024-1025.) A violation of a plea bargain is not subject to a harmless error analysis. (*Id.* at p. 1026.) The remedy is to reduce the fine to the statutory minimum. (*Id.* at p. 1027.)

It is clear that the trial court's failure to advise defendant of the victim restitution payment is not a ground to strike the payment. Such an argument is forfeited if not raised at sentencing, and defendant has not established prejudice. (*Walker, supra*, 54 Cal.3d at pp. 1022-1023.)

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<sup>3</sup> Although *Walker* used the term "waiver," the Supreme Court has more recently indicated that the term "forfeiture" is more accurate. (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.)

The only possible ground for striking the payment is that the punishment imposed significantly exceeded that which the parties agreed upon.<sup>4</sup> Defendant admits the amount of the payment is not known, but asserts it is "likely to be a significant amount given that the victim was hospitalized for twelve days and continued to have lingering impairments at the time of sentencing."

In *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1382, (*Dickerson*) the basis for the defendant's appeal was the imposition of post-plea fines. The trial court did not specify the amount of any fines that might be imposed, but did advise the defendant prior to sentencing that he could be subject to fines of up to \$50,000 and that the court was required to impose a restitution fine of between \$200 and \$10,000. (*Id.* at p. 1378.) In resolving whether the fines imposed violated the defendant's plea bargain, *Dickerson* noted that later Supreme Court cases have clarified the application of *Walker*.

The high court has explained that, "[i]n *Walker*, the offense to which the defendant had agreed to plead guilty

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<sup>4</sup> We address this issue with the understanding that the Supreme Court has granted review in *People v. Crandell* (May 20, 2005, H027641) [nonpub. opn.] review granted August 24, 2005, S134883. The court's docket states that the issue presented in that case is whether the "imposition of a restitution fine under Penal Code section 1202.4, subdivision (b), [violates] a defendant's plea agreement if the fine was not an express term of the agreement[.]" (See the court's website at <[http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc\\_id=376320&doc\\_no=S134883](http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=376320&doc_no=S134883)>.)

carried a potential seven-year sentence and a \$10,000 punitive fine, but under the negotiated plea agreement the defendant was to receive a five-year term of imprisonment and no punitive fine. At the subsequent sentencing hearing, the trial court imposed the agreed-upon five-year sentence but also a substantial (\$5,000) restitution fine. [¶] In concluding that the imposition of such a substantial fine constituted a violation of the plea agreement in *Walker*, we implicitly found that the defendant in that case reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.” (*In re Moser* (1993) 6 Cal.4th 342, 356, italics added.)

In *People v. McClellan* (1993) 6 Cal.4th 367, the defendant sought to have his guilty plea set aside on the ground that the trial court had failed to inform him that upon conviction he would be required to register as a sex offender. (*Id.* at p. 370.) The court noted that the defendant was not contending that the challenged element of the sentence was a negotiated part of the agreement or that the prosecutor had made any promises in that regard. (*Id.* at p. 379.) The court concluded that the trial court’s omission of advice regarding the registration requirement did not transform the court’s error into a term of the parties’ plea agreement. (*Ibid.*)

In light of the Supreme Court cases explaining *Walker*, *Dickerson* concluded that under the circumstances the parties had not included the imposition of fines in their plea negotiation,

and the setting of the fines had been left to the court's discretion. (*Dickerson, supra*, 122 Cal.App.4th at p. 1385.) The fact that the court did not mention the restitution fine when reciting the plea bargain suggested that no agreement had been reached on the imposition or amount of any fine. (*Ibid.*) Also relevant to the court's decision was the fact that the defendant had indicated the district attorney had made no promises other than fixing the prison term, and the fact that no one in the trial court seemed to think that the imposition of restitution fines violated the terms of the bargain, as evidenced by their failure to object. (*Ibid.*)

As in *Dickerson*, we conclude that the fact that the parties and court omitted any mention of a restitution payment as part of the plea agreement cannot be construed to imply that there was an agreement that the sentence would include no payment. In fact, the language of section 1202.4 indicates that the payment of full restitution is mandatory unless the court "finds compelling and extraordinary reasons for not doing so, and states them on the record." (§ 1202.4, subd. (f).) Relevant to our decision is the lack of any affirmative evidence that the parties actually agreed there would be no restitution payment, the defendant's representation that no one had made any promises to obtain his plea except those related to the length of the prison term, and the absence of any objection when the payment was imposed.



DISPOSITION

The judgment and sentence are affirmed.

BLEASE, Acting P. J.

I concur:

CANTIL-SAKAUYE, J.

ROBIE, J.

I concur in the result.

For purposes of this case, direct victim restitution under subdivision (f) of Penal Code section 1202.4 is indistinguishable from the sex offender registration requirement in *People v. McClellan* (1993) 6 Cal.4th 367. Specifically, it is "a statutorily mandated element of punishment for the underlying offense" that, "unlike the amount of a restitution fine, . . . is not a permissible subject of plea agreement negotiation," and therefore it "was an inherent incident of defendant's decision to plead guilty." (*Id.* at p. 380.) For this reason, defendant is not entitled to have the restitution order stricken.

ROBIE, J.