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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARDO BAEZ,

Defendant and Appellant.

H029224

(Santa Clara County

Super. Ct. No. CC331753)

Defendant Bernardo Baez was sentenced to prison following a no contest plea to a charge of attempted murder. As part of his sentence, the court ordered defendant to pay a restitution fund fine of \$2,200. Defendant challenges the court's imposition of that fine on appeal, asserting that it was not part of his plea bargain. For reasons explained below, we reject defendant's challenge and we affirm the judgment.

**BACKGROUND**

Because the sole issue in this appeal concerns sentencing, our recitation of the facts will be brief.

As indicated in the probation report, the criminal charge against defendant arose from an incident in San Jose, which took place on October 27, 2003. Defendant and two others (Garcia and Cruz) attacked the 16-year-old victim, Jose R., who was dressed in blue. After attempting to determine whether the victim was affiliated with a rival gang, defendant and Garcia struck him with plastic milk crates, while Cruz kicked and hit the

victim with his feet and hands. The victim suffered a skull fracture and lacerations; he was transported to San Jose Hospital, where he underwent emergency surgery.

### ***Charges***

In August 2004, by felony complaint, defendant was charged with one count of attempted premeditated murder for his part in the October 27th attack on Jose R. (Pen. Code, §§ 664, subd. (a)/187; further unspecified statutory references are to the Penal Code.) As sentence enhancements, the complaint specially alleged infliction of great bodily injury, perpetration of the crime for the benefit of a criminal street gang, and personal use of a deadly weapon. (§§ 12022.7, subd. (a), 1203, subd. (e)(3) [great bodily injury]; 186.22, subd. (b)(1) [gang enhancement]; 12022, subd. (b)(1) [personal use of a weapon].) A felony information was filed in November 2004.

### ***Change of Plea***

On April 29, 2005, defendant entered a plea of no contest to the count of attempted murder and he admitted the great bodily injury, personal weapon use, and gang allegations. In exchange, the prosecution agreed to strike the allegation of premeditation.

Before the court accepted defendant's plea, it sought and obtained his acknowledgement that he would be required to "pay a restitution fund fine between [\$]200 and \$10,000." But the court failed to advise defendant of the circumstances under which he would be permitted to withdraw his plea. (See § 1192.5.)<sup>1</sup>

The court then set the matter for sentencing.

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<sup>1</sup> Section 1192.5 provides in pertinent part: "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." (§ 1192.5.)

### ***Sentencing***

In July 2005, after conducting an extensive evidentiary hearing, the court imposed sentence. The court sentenced defendant to the middle term of seven years in prison, with additional consecutive sentences of three years for the great bodily injury enhancement and one year for the personal weapon use enhancement. The court struck the gang enhancement allegation. The court also ordered defendant to pay a restitution fund fine of \$2,200. (§ 1202.4.) In addition, the court imposed but suspended an equivalent parole revocation fine. (§ 1202.45.)

### ***Defendant's Appeal***

In August 2005, defendant brought this timely appeal. In October 2005, defendant filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In February 2006, this court requested and received supplemental briefing on the issue of whether the restitution fine violated defendant's plea agreement.

### **ISSUE**

Defendant's sole contention on appeal is that imposition of the \$2,200 restitution fund fine violated his plea bargain. He asks us to reduce the fine to \$200, the statutory minimum, under the authority of *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*). The People defend the fine.

### **DISCUSSION**

As defendant acknowledges, this court has rejected arguments identical to those that he presents here. We have done so in at least three recent published cases: *People v. Dickerson* (2004) 122 Cal.App.4th 1374; *People v. Knox* (2004) 123 Cal.App.4th 1453 [majority opinion]; and *People v. Sorenson* (2005) 125 Cal.App.4th 612. Defendant nevertheless maintains that those three decisions conflict with *Walker* and were wrongly decided. Defendant thus urges us to abandon the reasoning of *Dickerson*, *Knox*, and

*Sorenson* and to instead adopt the views expressed by Justice Mihara in his dissent in *Knox*.

As the parties recognize, this issue is presently pending in the California Supreme Court, in *People v. Crandell* (review granted August 24, 2005, S134883).

***The claim is preserved for appeal.***

As noted above, the trial court failed to advise defendant of the circumstances under which he would be permitted to withdraw his plea, as required by section 1192.5. “Absent a section 1192.5 admonition, we cannot assume the defendant knew he had a right to withdraw his plea.” (*Walker, supra*, 54 Cal.3d at p. 1026.) For that reason, when the statutory admonition is not given, the defendant’s plea bargain claim is preserved for appellate review. (See *id.* at pp. 1024-1025.)

***The fine does not violate the plea agreement.***

We extensively reviewed the principles that govern plea bargains and restitution fines in *Dickerson, Knox*, and *Sorenson*. We need not repeat that discussion here. We simply reiterate this key conclusion: in determining whether a restitution fine is encompassed by the plea bargain, “the critical consideration is whether the challenged fine was within the ‘defendant’s contemplation and knowledge’ when he entered his plea.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1460, quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 86.)

As we explained in *Knox*, plea agreements have “contractual qualities.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1459; see also, e.g., *People v. Shelton* (2006) 37 Cal.4th 759, 767 [“plea agreement is a form of contract”].) Plea agreements also have “a constitutional dimension.” (*People v. Knox*, at p. 1459.) “A criminal defendant’s constitutional due process right is implicated by the failure to implement a plea bargain according to its terms.” (*Ibid.*) The question presented in this case concerns the

contractual aspect of plea agreements: at issue here “is whether specific terms or consequences became part of the plea bargain.” (*Ibid.*)

In this case, we conclude, the restitution fund fine did become part of defendant’s plea agreement. Various aspects of the agreement were reflected in the colloquy that preceded defendant’s plea. As relevant here, the restitution fund fine was among them. Defendant entered his plea only after acknowledging that he was subject to a statutory restitution fund fine of up to \$10,000. As in *Knox*, “we have analyzed defendant’s understanding that his plea would result in a restitution fine, as disclosed by the pre-plea timing of the advisement and by defendant’s acknowledgement that the fine would be imposed.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1461.)

Nor are we persuaded to a different conclusion by the court’s later determination of the amount of the fine. As stated in *Knox*: “The fact that the precise amount of the fine was not specified prior to the entry of defendant’s plea does not change the analysis. To the contrary, it represents defendant’s implicit recognition that the amount of the fine will be left to the sentencing court’s discretion.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1461, fn. omitted. See *People v. Dickerson, supra*, 122 Cal.App.4th at p. 1385.)

As fully explained in this court’s recent cases, our conclusion does no violence to *Walker*. (See *People v. Sorenson, supra*, 125 Cal.App.4th at pp. 618-619; *People v. Knox, supra*, 123 Cal.App.4th at pp. 1461-1462; *People v. Dickerson, supra*, 122 Cal.App.4th at pp. 1384-1385.) We therefore reject defendant’s arguments to the contrary.

**DISPOSITION**

The judgment is affirmed.

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McAdams, J.

I CONCUR:

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Bamattre-Manoukian, Acting P.J.

MIHARA, J., concurring in the judgment.

I do not agree with my colleagues' analysis, but I do agree that defendant has failed to establish that there was a violation of the plea agreement in this case.

“When a guilty [or no contest] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed *that which the parties agreed upon.*” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, emphasis added.) “[O]nly a *punishment significantly greater than that bargained for* violates the plea bargain.” (*Walker* at p. 1027, emphasis added.)

The plea agreement in this case was that defendant would plead to the attempted murder count and admit all of the enhancements except for the premeditation allegation. The only condition to which the prosecution agreed in exchange for defendant's plea and admissions was the dismissal of the premeditation allegation. There was no agreement as to punishment.

As the parties did not bargain for or agree to any particular punishment, the trial court's imposition of \$2,200 restitution fund fines did not exceed the punishment *specified in the plea agreement* and therefore did not violate the plea agreement. For this reason, and this reason alone, I concur in the judgment.

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Mihara, J.