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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY DAVID CRANDELL, Defendant and Appellant.	H027641 (Santa Clara County Super. Ct. No. CC268506)

Following defendant Crandell's no contest plea to residential robbery and his admission that he personally used a firearm in the commission of that offense, the trial court sentenced him to 13 years in prison. (Pen. Code §§ 211-212.5, subd. (a); 12022.53, subd. (b).)[1] The trial court also ordered defendant to pay certain fines, including a restitution fund fine of $2,600. Defendant challenges the imposition of that fine on the grounds that it was not part of his plea bargain. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to the probation report, in November 2002, defendant entered an apartment where the two victims were watching television, brandished a .45 caliber handgun at them and ordered them not to move. Defendant's two co-participants then entered the apartment and began ransacking it. Defendant demanded the victims' wallets

[1] Unless otherwise indicated, all references are to the Penal Code.

while continuing to brandish the gun; the victims complied with his demands. Defendant and one of the others then taped the victims' ankles and wrists with duct tape. Using a blanket, the robbers collected stereo and video components to take with them. They also took marijuana plants. They were apprehended by the police and identified by the victims.

Charges

Defendant and two others were jointly charged by complaint with two counts of residential robbery, each alleging a different victim. The complaint also alleged that defendant personally had used a firearm during the commission of the offenses.

Change of Plea

In September 2003, defendant waived preliminary hearing and entered into a negotiated disposition. The Santa Clara County District Attorney amended the first count of robbery to allege both victims and moved to dismiss the second count of robbery. In exchange, defendant pleaded no contest to the amended first count and admitted the gun enhancement, with the understanding that he would receive a sentence of 13 years in state prison. The court accepted the negotiated disposition and, before taking the plea, advised defendant of the direct consequences of his plea, including the fact that he was required "to pay a restitution fund fine of a minimum of $200, a maximum of $10,000. The amount of that fine will depend on your ability to pay the fine." The court asked defendant if he understood, and he said that he did.

Post-Plea Motion

Defendant moved to withdraw his plea in December 2003, apparently on the grounds that he was under the influence of prescription medication for a psychiatric disorder and because the court did not fully advise him of his rights vis-a-vis the firearm allegation. (See § 1018.) The motion was not addressed to the proposed imposition of a restitution fine. The motion was heard and denied on April 30, 2004.

Sentencing

Immediately thereafter, the court sentenced defendant to 13 years in prison in accordance with the plea bargain, as follows. The court imposed the mitigated three-year term for the robbery, and a 10-year term for the gun use enhancement. The court also imposed a restitution fine of $2,600 and an equivalent parole revocation fine, which it suspended. (§§ 1204, 1202.45.)[2] The probation report, dated November 7, 2003, had recommended imposition of a $2,600 restitution fine pursuant to "the formula permitted by [] section 1202.4."[3] Defendant's counsel unsuccessfully asked for a reduction of that amount, but did not object to the fine itself as outside the parameters of the plea bargain.

Appellate Proceedings

Defendant timely appealed and obtained a certificate of probable cause.

ISSUE ON APPEAL

Defendant's sole claim on appeal is that the trial court violated the plea agreement by imposing a restitution fund fine of $2,600. He argues that the fine was not a term of his plea bargain. He therefore asks us to reduce the fine to $200, the statutory minimum, under the authority of *People v. Walker* (1991) 54 Cal.3d 1013. In his reply brief, defendant acknowledges that this court has, in *People v. Dickerson*, *supra*, 122

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[2] Section 1202.4 provides in relevant part that "[t]he trial court shall impose [a] restitution fine 'unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. (Subds. (b), (c).) In the absence of extraordinary reasons, a minimum fine of $200 is mandatory after a felony conviction (subds. (b)(1), (c), (d)) . . . . The sentencing court has discretion to impose a fine of up to $10,000 in light of all relevant factors. 'Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.' (Subd. (d).)" (*People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1379-1380, fns. omitted.)

[3] The court may use a statutory formula to calculate the amount of the fine, which involves multiplying $200 by the number of years of imprisonment and then by the number of counts. (§ 1202.4, subd. (b)(2).)

Cal.App.4th 1374 (petition for review denied Jan. 19, 2005) rejected this same argument on analogous facts. (See also *People v. Knox* (2004) 123 Cal.App.4th 1453 (petition for review denied Jan. 19, 2005).) He argues that *Dickerson* is distinguishable because there the trial court failed to advise the defendant of the restitution fine. He also argues that *Dickerson* is "simply wrong." He does not cite or discuss *Knox* in either brief. Defendant's argument does not persuade us to change the views expressed in those opinions. We therefore reject his claim.

DISCUSSION

The principles governing plea bargains and restitution fines have been extensively reviewed in two recently published cases from this court, *People v. Knox,* and *People v. Dickerson,* and we will not repeat that discussion here. We do reiterate that, in our view, 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.)

In *Dickerson,* at the change of plea hearing, the trial court recited the terms of the agreement regarding the pleas to be entered, the charges to be dismissed and the sentence to be imposed. The defendant acknowledged that no other promises had been made to him. The court also accepted the defendant's waivers of his constitutional rights and advised him of the direct consequences of the pleas, including that the court " 'must impose a restitution fine of between $200 and $10,000.' " (*People v. Dickerson*, *supra*, 122 Cal.App.4th at p. 1378.) The defendant did not object to the fine. The trial court did not advise the defendant of his right, pursuant to section 1192.5, to withdraw his pleas if the court withdrew its approval of the plea bargain at sentencing. The probation report recommended restitution fines of $6,800 and, at sentencing, the court imposed restitution fines in that amount. Again, the defendant did not object.

The *Dickerson* court considered the facts before it in light of the principles established in *People v. Walker, supra*, 54 Cal.3d 1013, and refined in *In re Moser* (1993) 6 Cal.4th 342, and *People v. McClellan* (1993) 6 Cal.4th 367. In *Walker*, the defendant negotiated a plea bargain in which one of two felony charges was to be dismissed and defendant was to plead guilty to the other charge and receive a five-year sentence. The trial court advised the defendant that the maximum sentence he could receive was a seven-year sentence and a fine of up to $10,000. He was not advised of an additional mandatory restitution fine of at least $100 but no more than $10,000, nor was he advised of his right to withdraw his plea pursuant to section 1192.5. The probation report recommended a $7,000 restitution fine; the court imposed a $5,000 restitution fine. The defendant did not object to imposition of the fine at sentencing.

The *Walker* court found that two distinct errors had occurred. First, the trial court had not advised the defendant of a direct consequence of his plea, the restitution fine. However, this error was waived on appeal because the defendant had not objected in the trial court. The second error was the trial court's imposition of a significantly greater sentence than the one the defendant had bargained for. The court considered the imposition of a restitution fine a form of punishment for this purpose and found that it "should generally be considered in plea negotiations." (*People v. Walker, supra*, 54 Cal.3d at p. 1024.) As to this type of error, the court found, if the defendant had been advised of his right to withdraw the plea in the event his sentence significantly exceeds his bargain, he would have waived appellate review of the error by his failure to object at sentencing. Since he had not been advised in accordance with section 1192.5, however, he could challenge the discrepancy between the bargained-for sentence and the sentence imposed for the first time on appeal as a violation of the plea bargain. Because the $5,000 restitution fine was a significant deviation from the negotiated terms of the plea (i.e., an agreed-upon sentence of five years with no substantial punitive fine), the court

reduced the fine to the statutorily-mandated minimum of $100, which was not a significant deviation from the bargain.

In *Moser*, the defendant challenged the imposition of a lifetime period of parole as a violation of the plea bargain; the trial court had misadvised him that he faced only three or four years of parole. Noting that lifetime parole was statutorily mandated for second degree murder and not subject to negotiation, the *Moser* court found that nothing in the record of the plea proceedings suggested that the misdescribed length of the parole term was a subject of the plea negotiations or resulting agreement, such that imposition of the statutorily mandated lifetime term violated the plea bargain. The *Moser* court distinguished *Walker* as a case where "the defendant . . . reasonably could have understood the plea agreement to signify that no substantial fine would be imposed." (*In re Moser*, *supra*, 6 Cal.4th at p. 356.) Nevertheless, the *Moser* court remanded the case (a habeas proceeding) to the trial court for findings on "whether the length of petitioner's term of parole was an element of the plea negotiations." (*Id*. at p. 358.)

In *McClellan*, the defendant challenged the imposition of a sex offender registration requirement as a violation of his plea bargain. The *McClellan* court adopted the same view of the facts in *Walker* as it had in *Moser*, that is, as a case where the defendant could reasonably have understood his plea agreement to exclude a substantial fine. (*People v. McClellan*, *supra*, 6 Cal.4th at pp. 379-380.) Noting that sex offender registration was statutorily mandated for a conviction of assault with intent to commit rape, the court concluded that it was "not a permissible subject of plea agreement negotiations." (*Id.* at p. 380.) As such, "that requirement was an inherent incident of defendant's decision to plead guilty to that offense and was not added 'after' the plea agreement was reached." (*Ibid.*) Thus, imposition of "a statutorily mandated consequence of a guilty plea" does not violate the terms of a plea agreement. (*Id.* at p. 381.)

From the foregoing, the *Dickerson* court concluded that (1) because the trial court's had neglected to give the 1192.5 admonition, defendant had not forfeited his right to challenge the imposition of the restitution fines as outside of the plea bargain for the first time on appeal, but that (2) given all of the relevant circumstances surrounding the plea-taking, it did not reasonably appear that the parties had included imposition of fines in their plea negotiations. For example, the fact that the court did not mention the restitution fine when reciting the agreement suggested that no agreement had been reached on the imposition or amount of any restitution fines. Similarly, the fact that the defendant acknowledged that no promises had been made as to anything but the prison sentence, the lack of any reaction on defendant's part to the court's advice before the plea that the restitution fine was mandatory, and the failure to object when the fine was imposed, all suggested that "nobody in the trial court seemed to think that the imposition of restitution fines totaling $6,800 violated the terms of the plea bargain." (*People v. Dickerson, supra*, 122 Cal.App.4th at p. 1385.) The court reasoned that in light of *Moser*'s and *McClellan*'s view of *Walker*'s facts, "*Walker* should not be understood as finding that the restitution fine has been and will be the subject of plea negotiations in every criminal case . . . . *Walker* does not prohibit criminal defendants from striking whatever bargains appear to be in their best interests, including leaving the imposition of fines to the discretion of the sentencing court." (*Id.* at p. 1384.)

Because we agree with the *Dickerson* court's implicit conclusion that *Moser* and *McClellan* changed the way we must view *Walker* in some respects, but not others, we reject defendant's contention that that *Dickerson*'s reading of *Moser* and *McClellan* is "simply wrong." For example, we agree with *Dickerson* that *Walker*'s determination of which errors are reviewable on appeal and which are not, remains unchanged. We also agree that after *Moser* and *McClellan*, however, *Walker* can no longer be read as establishing a categorical rule that whenever a trial court imposes a restitution fine that was not mentioned in the recitation of the plea bargain, the trial court must have violated

the plea agreement. We note that like the length of a parole term and sex offender registration, restitution fines of at least $200 are statutorily mandated (unless exceptional circumstances are found). To that extent, they are no more the proper subject of negotiation than parole terms and sex offender registration, and are simply the necessary incidents of a guilty plea. However, to the extent that *Walker* considered such fines punishment, the amount of the fine above the mandatory minimum is clearly negotiable. *Moser* and *McClellan* teach that the core question in every case, then, is whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court.

Analysis

With this question in mind, we now consider whether the restitution fine was lawfully imposed in this case. We conclude that it was. 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; *People v. Panizzon* (1996) 13 Cal.4th 68, 86.) On that issue, the presence or absence of the advisement is a pivotal distinction.

Given the omitted advisement in *Walker*, the defendant there "reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed." (*In re Moser, supra*, 6 Cal.4th at p. 356.) Here, by contrast, at the time of the plea-taking, no mention was made of restitution fines in the context of the negotiated plea or sentence, but the defendant *was* advised, prior to entering his plea, that a restitution fine of between $200 and $10,000 would be imposed. The defendant acknowledged that no promises other than those recited by the court had influenced his decision to change his plea, and that he understood a restitution fine of at least $200 would be imposed. Moreover, defendant did not register surprise or indignation upon receiving this advice, and he did not object that no fine was included in his plea bargain.

From this scenario we cannot infer that the plea negotiations included a promise that the mandatory fines would not exceed $200, the statutory minimum. The fine thus was within "defendant's contemplation and knowledge" when he entered his plea. (*People v. Knox, supra*, 123 Cal.App.4th at p. 1460; *People v. Panizzon, supra*, 13 Cal.4th at p. 86.)

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. In our view, the more reasonable interpretation is that the amount of the fine was not a part of the plea negotiations but rather was to be left to the discretion of the trial court.

This inference is strengthened, not weakened by counsel's objection to the amount of the fine, rather than the imposition of the fine, at the sentencing hearing, and by the failure to include it as an additional ground for withdrawing the plea. In our view, had imposition of the fine, or the amount of the fine, been a subject of plea negotiations, different objections would most likely have been interposed at both junctures. As the record stands, it is impossible to conclude that the challenged fine was *not* within the "defendant's contemplation and knowledge" when he entered his plea. (*People v. Knox, supra*, 123 Cal.App.4th at p. 1460.)

CONCLUSION

Prior to accepting defendant's plea, the court advised him of its consequences, including the mandatory restitution fine. Because the fine was within defendant's contemplation when he entered his plea, its imposition was proper.

DISPOSITION

The judgment and sentence are affirmed.

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McAdams, J.

I CONCUR:

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Bamattre-Manoukian, Acting P.J.

MIHARA, J., dissenting.

I dissent for the same reasons I dissented in *People v. Knox* (2004) 123 Cal.App.4th 1453. (*Knox* at pp. 1463-1465, Mihara, J., dissenting.) I also note that the advisements in this case were not accurate. The court told defendant at the time of the plea that the "amount" of the restitution fund fine "will depend on your ability to pay the fine." However, when defendant's trial counsel objected to the $2600 restitution fund fine recommended by the probation department, the court acknowledged that it was setting the fine by multiplying the number of counts by the number of years and by $200 since "[t]hey take it out of their prison wages." It hardly seems accurate to assure a defendant that the fine will be based on his ability to pay and then to instead set it based on the number of years he will spend in prison on the assumption that his prison wages during his 13-year prison term will be adequate to pay the fine.

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Mihara, J.