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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CRISTIAN CRUZ, Defendant and Appellant.	H029302 (Santa Clara County Super. Ct. No. CC331753)

Appellant Cristian Cruz entered a no contest plea to charges of attempted murder and assault with a deadly weapon, and he admitted gang enhancement allegations. On appeal, he challenges his sentence on two grounds. First, appellant contends that the trial court's imposition of the upper term on the attempted murder charge violates his federal constitutional rights. Second, he argues that the court's assessment of a $6,400 restitution fund fine violates his plea bargain. For reasons explained below, we reject both of appellant's contentions and we affirm the judgment.

BACKGROUND

Because the sole issue in this appeal concerns sentencing, a brief recitation of the facts will suffice. As indicated in the probation report, the charges against appellant arose from two separate incidents, which occurred several days apart in October 2003.

On October 24, 2003, appellant and a co-defendant (Garcia) approached the 17-year-old victim, Jovanny G. Upon discovering that the victim was wearing a blue belt,

Garcia swung a metal dumbbell at his head. The victim ducked, avoiding the blow, then ran toward a nearby high school campus. Appellant gave chase, striking the victim on his left wrist with a metal bat.

On October 27, 2003, appellant, together with Garcia and another co-defendant (Baez), attacked another victim, 16-year-old Jose R., who was dressed in blue. Garcia and Baez pushed the victim to the ground and then struck him with plastic milk crates. Appellant 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

On October 30, 2003, a felony complaint was filed in Santa Clara County, charging appellant 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 gang, and personal use of a 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].)

On December 1, 2003, a first amended felony complaint was filed. The amended complaint added counts 2 and 3, charging appellant with assault for the October 24th attack on Jovanny G. (§ 245, subd. (a)(i).) Ten days later, a second amended felony complaint was filed, which added gang enhancement allegations to counts 2 and 3. (§186.22, subd. (b)(1)(B).) Third and fourth amended felony complaints were filed in 2004, which added criminal charges and sentence enhancement allegations against appellant's co-defendants, Garcia and Baez.

A felony information was filed in November 2004.

Change of Plea

On April 29, 2005, appellant entered a plea of no contest to counts 1 and 2, and he admitted the gang enhancement allegations as to both counts. (See § 186.22, subd. (b)(1)(B).) In exchange, the prosecution agreed to amend count 1 by removing the allegation of premeditation, by asserting a five-year rather than a 10-year gang enhancement, and by striking the other special allegations. The prosecution also agreed to dismiss count 3 altogether.

Before the court accepted the negotiated plea, it advised defendant about his possible prison term, stating: "Now there is no agreement as to the amount of time you will receive in state prison. The Judge will decide that at sentencing. It could be as little possibly as five years or as much as 16 years eight months. Do you understand that?" The court also sought and obtained appellant's acknowledgement that he would be required to "pay a restitution fund fine anywhere between [$]200 and $10,000" as well as other costs. But the court failed to advise appellant of the circumstances under which he would be permitted to withdraw his plea. (See § 1192.5.)[1]

The matter was then set for sentencing.

Sentencing

In July 2005, after conducting an extensive evidentiary hearing, the court imposed sentence on appellant. On count 1, the charge of attempted murder, the court sentenced appellant to the upper term of nine years in prison, with a consecutive five-year sentence on the gang enhancement. On count 2, the assault charge, the court imposed a consecutive sentence totaling two years, eight months. The court then assessed a

[1] 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.)

restitution fund fine of $6,400. (§ 1202.4.) It also imposed an equivalent parole revocation fine, which it stayed. (§ 1202.45.)

Defendant's Appeal

In August 2005, appellant brought this appeal.

CONTENTIONS

Appellant makes two arguments on appeal. First, he asserts that the court's imposition of the upper term for count 1 violated his federal constitutional trial rights, both as to burden of proof and as to trial by jury. Second, appellant contends that imposition of the $6,400 restitution fund fine violated his plea bargain. The People defend the sentence against both arguments.

DISCUSSION

We consider each of appellant's contentions in turn.

I. Federal Constitutional Claim

Appellant first challenges the trial court's imposition of the upper term of nine years for attempted murder. He argues that his federal constitutional rights were violated because the factual determinations supporting the upper term were made by the trial judge using the preponderance of the evidence standard, rather than by a jury employing the beyond a reasonable doubt standard. In making that argument, appellant relies on *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

The People counter appellant's argument on the merits. Furthermore, they urge, the argument is forfeited in any event for failure to raise it in the trial court. (See, e.g., *People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

As appellant acknowledges, the California Supreme Court considered *Blakely's* effect on California's determinate sentencing law, in the recent case of *People v. Black*

(2005) 35 Cal.4th 1238. In *Black*, our state's high court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.) Later in the *Black* opinion, the court reiterated that "a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker* [*United States v. Booker* (2005) 543 U.S. 220]." (*Id.* at p. 1254.)

Appellant's stated purpose in presenting this argument is to preserve his claim for federal court review. As he correctly recognizes, this court is bound to follow the California Supreme Court's holding in *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we reject appellant's constitutional claim of *Blakely* error on the merits. Having done so, we need not address the People's forfeiture argument.

II. Plea Bargain Claim

Appellant next challenges the trial court's imposition of a restitution fund fine in the amount of $6,400. 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*).

Appellant acknowledges that this court has repeatedly rejected similar arguments. (See *People v. Dickerson* (2004) 122 Cal.App.4th 1374; *People v. Knox* (2004) 123 Cal.App.4th 1453 [majority opinion]; *People v. Sorenson* (2005) 125 Cal.App.4th 612.) Appellant maintains that *Dickerson*, *Knox*, and *Sorenson* were wrongly decided and that they conflict with the holding of *Walker*. He urges us to adopt the views expressed by Justice Mihara in his dissent in *Knox*.

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

At the threshold, we observe, appellant's claim is cognizable on appeal.

As noted above, the trial court failed to advise appellant 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.)

Reaching the merits of appellant's claim, we reject it.

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 appellant's plea agreement. Various aspects of the agreement were reflected in the colloquy that preceded his plea. As relevant here, the restitution fund fine was among them. Appellant 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 find no merit in appellant's contentions to the contrary.

SUMMARY OF CONCLUSIONS

We reject appellant's federal constitutional claim based on the California Supreme Court's recent decision in *Black*. We reject his state law challenge to the restitution fund fine based on three recent decisions from this court, *Dickerson*, *Knox*, and *Sorenson*.

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 of the restitution fund fine issue, 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 simple. Defendant agreed to plead to the attempted murder and aggravated assault counts and admit the gang enhancements, and the prosecution agreed to dismiss the premeditation allegation, a second aggravated assault count and the remaining enhancement allegations. 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 $6,400 restitution fund fines did not exceed the punishment *specified in the plea agreement* and therefore did not violate the plea agreement. For this reason, I concur in the judgment.

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Mihara, J.