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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY JOHN CURLEE,

Defendant and Appellant.

H029700

(Santa Cruz County

Super. Ct. No. F11065)

Appellant Larry Curlee pleaded no contest to two counts of lewd and lascivious conduct with a child under 14 years old (Pen. Code, § 288, subd. (a)) and admitted a prior strike conviction. In exchange for his plea, appellant was promised a sentence of no less than six years and no more than 20 years in prison and the dismissal of four more counts and enhancement allegations.¹

¹ In total, appellant was charged with six counts of lewd and lascivious conduct with a child under 14 years old (Pen. Code, § 288, subd. (a)) and one count of annoying or molesting a child (Pen. Code, § 647.6, subd. (a)). The information alleged that appellant had suffered six prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), four violent felony convictions (Pen. Code, § 667.5, subd. (a)), that, previously, he was convicted of committing lewd acts upon a minor (Pen. Code, §§ 667.51, subd. (a)(1), 667.6, subd. (a)) and that he was eligible for sentencing under the "One Strike Law" (Pen. Code, § 667.61, subds. (a) & (b)).

On November 9, 2005, the court sentenced appellant to serve double the mid-term of six years on one count and a concurrent doubled six-year term for the second count, for a total of 12 years in state prison. In addition, the court imposed a \$6400 restitution fund fine pursuant to Penal Code section 1202.4 and imposed, but suspended, a parole revocation fine in the same amount. (Pen. Code, § 1202.45.)

Appellant filed a timely notice of appeal.

Appellant's sole issue on appeal relates to the imposition of the restitution fund fine and the parole revocation fine. We will affirm the judgment.

Facts and Proceedings Below

A summary of the facts underlying appellant's offenses is unnecessary to address the appeal. However, we set forth in detail the proceedings below relevant to the plea agreement.

Before appellant entered his plea of no contest, the prosecutor spelled out the terms of the plea agreement as follows:

"Your Honor, I believe we may have a resolution today. The People have made an offer of what would amount to pleading to two counts of 288 subdivision (a) admitting a felony conviction as a strike and the agreement -- that I believe your Honor sets up a maximum term of 20 years in state prison. It would be eight plus two times -- well, doubled for each. . . . [¶] And the only stipulation between the parties in addition to that would be that there would be a six to 20-year sentence and we would get a probation report and have the Court sentence according to the law"

The court asked for clarification, which the prosecutor gave explaining that the sentence would have "a lower lid essentially, a floor to the agreement. . . ." Thereafter, the prosecutor explained that the sentence would have a "low [of] six [years] and the high would be the 20 [years]." Then the court asked defense counsel if that was his understanding of the agreement. Defense counsel confirmed that that was his

understanding and went on to say that as part of the agreement "all other special allegations are dismissed – all other strikes are dismissed other than the one strike."

The court went on to advise appellant of the rights he was giving up by pleading. Appellant confirmed that he understood and gave up his rights to a jury trial, to remain silent, cross-examine witnesses and subpoena witnesses. Both the prosecution and defense counsel stipulated that there was a factual basis for the pleas.

Subsequently, the court repeated the terms of the plea agreement as follows: "Okay. Now, the maximum under this sentencing agreement is 20 years in state prison. The minimum is six years." The court went on to advise appellant that he "could be placed on parole up to ten years on the basis of these two counts that it's anticipated that you are going to enter a plea to. If you violated any of the terms and conditions of parole you could be sent back to state prison for one additional year for each violation. A restitution fine of not less than \$200 or more than \$10,000 would be imposed. In addition pursuant to Section 290.3 there would be \$300 for each offense and you would have to register as a sex offender pursuant to 290 of the Penal Code and that is for life"

The court asked appellant if anyone had promised him anything other than what had been stated in the record. Appellant said they had not. Before taking appellant's pleas of no contest, the court found that that there was a knowing and intelligent waiver by appellant of his constitutional rights and that there was a factual basis for the plea.

The probation report prepared for appellant's sentencing hearing recommended a 20-year prison term and a restitution fine "of \$8,000.00 pursuant to Section 1202.4 (b) of the Penal Code."²

² Penal Code section 1202.4, subdivision (b) provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the

As noted, at appellant's sentencing hearing, the court imposed a 12-year prison term, a \$6400 restitution fund fine and a \$6400 parole revocation fine. Appellant did not object to the imposition of the fines.

Discussion

Appellant's sole issue on appeal is that the imposition of the restitution fund fine and the parole revocation fine violated the terms of the plea agreement. Accordingly, he argues that the fines must be reduced to the statutory minimum of \$200.

Appellant recognizes that this issue is pending before the California Supreme Court,³ and acknowledges this court's decisions in *People v. Dickerson* (2004) 122 Cal.App.4th 1374 (*Dickerson*), *People v. Knox* (2004) 123 Cal.App.4th 1453 (*Knox*) and *People v. Sorenson* (2005) 125 Cal.App.4th 612 (*Sorenson*). However, appellant asserts that *Dickerson*, *Knox* and *Sorenson* were wrongly decided.

In *Dickerson, supra*, 122 Cal.App.4th 1374, this court rejected the same claim that appellant asserts. *Dickerson* negotiated a plea bargain to resolve three separate cases. In announcing the bargain, the court stated that *Dickerson* would plead no contest to various charges and receive a sentence of 12 years. When asked if he had been made any other promises, *Dickerson* said he had not. After *Dickerson* waived his rights, the court advised him that he would be subject to parole when released. *Dickerson* acknowledged the court's advisements that the court would order him to pay restitution he owed; it could impose fines up to \$50,000; and it would impose a restitution fine of between \$200 and \$10,000. Thereafter, the probation report prepared for *Dickerson's* sentencing hearing

person is convicted of a felony, and shall not be less than one hundred dollars (\$100), and not more than one thousand dollars (\$1,000), if the person is convicted of a misdemeanor. [¶] (2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

³ *People v. Crandell*, review granted August 24, 2005, S134883.

recommended, among other things, a restitution fine in each case, totaling \$6,800. It also recommended parole revocation fines in the same amount. At sentencing, the court imposed the 12-year term and the recommended fines. (*Id.* at p. 1378.)

On appeal, Dickerson claimed the fines violated the plea bargain. He argued that the bargain excluded the imposition of the two \$6,800 fines. In support of his claim, Dickerson noted that in reciting the terms of the bargain, the court did not mention restitution. (*Dickerson, supra*, 122 Cal.App.4th at p. 1384.) However, this court found that "[the lack of reference] simply shows that the parties reached no agreement on the imposition or amount of any fine. '[I]t would appear that [this topic] was not a part of the plea agreement.' [Citation.] Indeed, when asked by the court, defendant denied that any promises had been made other than fixing the prison term. The court's omission of another term cannot transform it 'into a term of the parties' plea agreement.' [Citations.] This omission does not imply that there was an agreement on no fine or a minimum fine." (*Id.* at p. 1385.) Instead, this court concluded that (1) this omission, (2) the defendant's acknowledgment that the court would have to impose a fine of between \$200 and \$10,000, (3) the recommendation for substantial fines in the probation report, and (4) the lack of objection when the fines were imposed indicated that the parties were concerned only with reaching an agreement on the term of imprisonment and expressly or implicitly agreed to leave the imposition and amount of restitution fines to the court's discretion. (*Id.* at pp. 1385-1386.) In other words, the bargain did not encompass an agreement concerning fines.

In addition, this court found Dickerson's reliance on *People v. Walker* (1991) 54 Cal.3d 1013, to be misplaced. In *Walker*, the California Supreme Court reiterated the principle that "the parties must adhere to the terms of a plea bargain. [Citation.]" (*Id.* at p. 1020.) Therefore, "[t]he punishment may not significantly exceed that which the parties agreed upon." (*Id.* at p. 1024.) The court concluded that a restitution fine

"qualifies as punishment for this purpose. Accordingly, the restitution fine should generally be considered in plea negotiations." (*Ibid.*)

In *Dickerson*, this court explained that "*Walker held* that '[t]he court should always admonish the defendant of the statutory minimum \$100 and maximum \$10,000 restitution fine as one of the consequences of *any* guilty plea, and should give the section 1192.5 admonition whenever required by that statute.' [Citation.] *Walker recommended* that '[c]ourts and the parties should take care to consider restitution fines during the plea negotiations.' [Citation.] The court '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.' [Citations, italics added.] [¶] But *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. 'The parties to a plea agreement are free to make any lawful bargain they choose.' [Citation.] *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." (*Dickerson, supra*, 122 Cal.App.4th at p. 1384.) Thus, this court opined that "*Walker* did not require [the parties] to negotiate--whether to resolution or impasse-- regarding the imposition or amount of restitution fines." (*Id.* at p. 1386.) Rather, as noted, the agreement focused solely on the length of imprisonment, and the parties implicitly agreed that fines would be left to the discretion of the sentencing court.

Finally, this court acknowledged that the court failed to advise *Dickerson* about a potential *parole-revocation fine* in an amount equal to the restitution fine. However, since the subject of fines in general was not covered by the bargain, the imposition of the parole revocation fine could not have violated it. (*Dickerson, supra*, 122 Cal.App.4th at pp. 1386-1387.) We pointed out that "[w]hen the complaint is simply that advisement of a direct consequence of a plea was omitted, and not that the plea bargain was breached, this 'error is waived if not raised at or before sentencing.' [Citation.] Since defendant did

not object at sentencing, we conclude that this advisement objection was forfeited."

(Ibid.)

This case is virtually indistinguishable from *Dickerson*. As noted, in reciting the bargain, the court noted the agreed-upon length of incarceration. Appellant indicated that no other promises had been made to him. The court advised appellant of the possibility of a restitution fine in an amount between \$200 and \$10,000.⁴ The probation report recommended restitution and parole revocation fines; and, when these were imposed, appellant did not object or otherwise suggest that the fines were not permitted under the plea bargain.

Finally, appellant fails to point to any evidence indicating that the bargain excluded fines greater than the statutory minimum. Under the circumstances, we conclude that the imposition of the restitution and parole revocation fines did not violate appellant's plea bargain.

⁴ The only difference that we can find between this case and *Dickerson* is that the court did not ask appellant if he understood when the court explained that it could impose a restitution fund fine. We do not find this to be a significant difference since, thereafter, the court asked appellant if anyone had promised him anything other than the terms of the agreement that the court had stated on the record. This gave appellant the opportunity to protest the imposition of any fine. Furthermore, at sentencing neither appellant nor his attorney objected to the recommendation in the probation report that appellant pay \$8000, nor to the imposition of the \$6400 restitution fund fine. As we pointed out in *Dickerson*, "[i]f these substantial restitution fines violated [appellant's] plea bargain, [appellant] or his attorney could be expected to object at sentencing." (*Dickerson, supra*, 122 Cal.App.4th at p. 1385.)

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.