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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR GUTIEREZ,

Defendant and Appellant.

H029793

(Santa Clara County

Super. Ct. Nos. CC466381, CC471404)

Defendant Oscar Gutierrez was sentenced to prison following a no contest plea to various criminal charges, including grand theft. As part of his sentence, the court ordered defendant to pay a restitution fund fine of \$1,200. 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. Two criminal cases were filed against defendant in Santa Clara County Superior Court. The charges in those cases arose out of two separate incidents that took place in September 2004 and November 2004 respectively. The facts summarized below are drawn from transcripts of the preliminary examinations in the two cases.

***Case Number CC466381***

*Facts:* On September 9, 2004, defendant approached the 14-year-old victim, Jorge Ruiz, who was pushing his small motorcycle on the street. Defendant told to give him the motorcycle or he would beat him up. Defendant then grabbed the motorcycle, pulled the victim's hands away, and left with the vehicle.

*Charges:* In May 2005, defendant was charged by information with a single count of carjacking. (Pen. Code, § 215; further unspecified statutory references are to the Penal Code.) As a sentence enhancement, the information specially alleged that defendant had served a prior prison term. (§ 667.5, subd. (b).) In November 2005, at the time of defendant's plea, the carjacking charge was effectively reduced to the lesser charge of grand theft. (§§ 484, 487.)

***Case Number CC471404***

*Facts:* On November 1, 2004, defendant attacked victim Robert Johnson with a metal pole. When a San Jose police officer approached, defendant ran away. The officer gave chase. When caught, defendant took a combative stance, at which point the officer used his baton to subdue defendant. Defendant was under the influence of drugs at the time, and he gave false identifying information to the officer.

*Charges:* In May 2005, defendant was charged by information with the following six offenses: [1] assault with a deadly weapon (§ 245, subd. (a)(1)); [2] being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)); [3] resisting, delaying, and obstructing a police officer, in violation of section 148, subd. (a)(1); [4] giving a false name to a police officer (§ 148.9); [5] possession of a billy club (§ 12020, subd. (a)(1)); and [6] attempted second degree robbery (§§ 664; 211; 212.5, subd. (c).) Once again, as a sentence enhancement, the information alleged that defendant had served a prior prison term. (§ 667.5, subd. (b).) In addition, as to count 1, the information alleged defendant's personal use of a deadly weapon. (§§ 667, 1192.7.)

### *Change of Plea*

On November 8, 2005, defendant entered a plea of no contest to charges in both cases. In case number CC466381, he pleaded no contest to a single count of grand theft. In case number CC471404, he entered a plea of no contest to counts 1, 3, 5, and 6. In each case, defendant admitted the special allegations. In exchange for defendant's plea, the prosecution agreed to strike the remaining counts against him. The agreed term of incarceration was "six years in State Prison, no more no less."

Before the court accepted defendant's plea, it sought and obtained his acknowledgement that he would be required to pay victim restitution and restitution fines. The court told defendant: "You would also be required to pay a general fund and a victim restitution fund fine, not less than 200 [nor] more [than] \$10,000. And you would be required to pay actual restitution to the victims in this matter. [¶] Do you understand that?" Defendant asked: "For what?" The court responded: "For any financial losses. [¶] Do you understand that?" Defendant responded in the affirmative.

After accepting defendant's plea, the court set the matter for sentencing.

### *Sentencing*

On December 15, 2005, the court imposed the agreed prison sentence of six years. The court also ordered defendant to pay a restitution fund fine in each of the two cases: \$1,200 in case CC466381, and \$2,400 in case CC471404. (§ 1202.4.) In addition, the court imposed but suspended equivalent parole revocation fines. (§ 1202.45.)

### *Defendant's Appeal*

In January 2006, defendant brought this timely appeal.

## **ISSUE**

Defendant's sole contention on appeal is that imposition of the \$1,200 restitution fund fine in case CC466381 violated his plea bargain. He asks us to reduce that 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.***

In this case, 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.<sup>1</sup> “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.)

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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.)

***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.

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MIHARA, J., dissenting.

Since I believe that the imposition of a \$1200 restitution fund fine in this case was a violation of the plea bargain, 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 would modify the judgment to reduce the restitution fund fine to \$200.

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Mihara, J.

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