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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PETER JEFFREY WURTZ, Defendant and Appellant.	H028217 (Santa Cruz County Super.Ct.No. F10216)

At issue in this case is whether probable cause existed to support the warrant under which deputies searched defendant's home and found, among other things, three American Express convenience checks that had apparently been stolen out of a victim's mailbox some eight weeks before. Defendant challenges probable cause on the ground that the affidavit submitted in support of the warrant contained stale information. Statements that defendant had forged and attempted to deposit a fourth check into his own bank account shortly after the checks were stolen were asserted in the deputy's affidavit as a basis for the existence of probable cause in support of the warrant. Following the search of his residence, defendant, along with two codefendants, was arrested and charged with various forgery and identity-theft violations. The trial court rejected his challenge to the warrant as lacking in probable cause and he pleaded guilty to some of the charges. The remaining charges were dismissed. The court imposed a stipulated 16-month prison sentence and a $400 restitution fund fine.

On appeal, defendant reprises his challenge to the warrant. He primarily contends that the information contained in the supporting affidavit about his prior unsuccessful attempt to negotiate the stolen check was stale for purposes of establishing probable cause, and that the search later conducted under the warrant was consequently in violation of his Fourth Amendment rights. He further contends that the *Leon*[1] good faith exception does not apply, and that on these bases, the trial court erred by denying his challenge to the warrant and his motion to suppress under Penal Code section 1538.5.[2] He finally urges error in the court's imposition of the restitution fund fine. Finding no error, we affirm the judgment.

STATEMENT OF THE CASE

I. Procedural Background

Defendant was charged by second amended complaint in count 1 with conspiracy to possess a forged driver's license (§§ 182, subd. (a)(1), 470b); in count 2 with possession of counterfeiting materials (§ 480, subd. (a)); in counts 3 and 4 with forgery (§ 470, subd. (d)); in counts 5 and 6 with forgery of a driver's license (§ 470a); in counts 7 and 8 with possession of a forged driver's license (§ 470b); in count 9 with identity theft (§ 530.5, subd. (a)); in count 10 with receiving stolen property (§ 496, subd. (a)); in counts 11 through 14 with deceptive government document activity (§ 529.5, subd. (a)); and in counts 15 through 31 with theft of personal identifying information (§ 530.5, subd. (d)).

After being advised of and waiving his constitutional rights, defendant conditionally pleaded guilty to counts one, two, four, and five, subject to the trial court's disposition of his motions to quash/traverse the search warrant and to suppress evidence under section 1538.5. The remaining counts were to be dismissed at sentencing. All counts were to be dismissed if the motions were granted. The trial court later denied the

[1] *United States v. Leon* (1984) 468 U.S. 897 (*Leon*).

[2] All further unspecified statutory references are to the Penal Code.

motions. In so doing, the court rejected defendant's argument that the warrant had issued without probable cause and declined to reach the question whether the *Leon* good faith exception applied to overcome the asserted absence of probable cause and unconstitutionality of the warrant. The parties waived a probation report. The court then denied probation and defendant received a stipulated 16-month, state prison sentence.

The trial court also imposed a restitution fund fine under section 1202.4 in the amount of $400, along with a parole revocation fine under section 1202.45 in like amount that was suspended. In so doing, the court rejected the People's suggestion that the restitution fine should instead be $800. Defendant did not raise any objection to either the imposition or the amount of the fines. Prior to either the defendant's plea or the imposition of these fines, the trial court had neither advised him of the various consequences of his plea (e.g., immigration, penal, or financial) nor advised him of the circumstances under which he would be permitted to withdraw his plea under section 1192.5. But after sentencing, which included the imposition of the restitution fund fine, defendant withdrew his earlier plea to count two and substituted his guilty plea to count three in its place. The sentence for his guilty plea to all four counts remained the same, once again without objection to the restitution fine. Defendant then appealed from the judgment of conviction.[3]

II. Facts[4]

The following facts were included in the affidavit and statement of probable cause with attached exhibits submitted by Santa Cruz County Sheriff's Office Detective Paul Van Horsen with his application on September 15, 2004 for a warrant to search

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[3] This court granted defendant's motion for relief from default for his failure to have timely filed his notice of appeal.

[4] There was no preliminary hearing and no testimony was taken. We accordingly take the relevant facts from the affidavit offered in support of the warrant, and from the stipulated facts agreed to by the parties in connection with the defense motions.

defendant's residence. Preceding these facts in the affidavit was a recount of Van Horsen's experience as a law enforcement officer. This experience included specific reference to forgery and identity theft investigations.

In July 2004, Gregory Carter of Santa Cruz was contacted by American Express. He was informed that someone had attempted to negotiate one of four convenience checks that had been issued and mailed to Carter by American Express, none of which he had received. The check had been made out to "Peter Wortz" in the amount of $1,200 over Carter's forged signature. It had been deposited into a bank account but American Express, apparently alerted to the fraud through its own internal mechanisms, did not honor it. The American Express representative told Carter that no further information about the check could be relayed to him but could be relayed to law enforcement.

On July 20, 2004, Carter contacted the Santa Cruz County Sheriff's Department to report the incident. He spoke with Deputy Moore and informed him that someone using the name "Peter Wortz" had attempted, without Carter's knowledge or permission, to deposit a $1,200 American Express convenience check that had been issued by mail to Carter but which he had never received. He also informed the deputy that about one week before being contacted by American Express regarding the check, his sons had noticed a suspicious man lurking around their unlocked mailbox. The man had told Carter's sons that he had some of Carter's property, including checks in Carter's name, and he wanted Carter to contact him. The man left the email address "todd83one@yahoo.com" but Carter never attempted to contact him. On July 20, 2004, a sheriff's deputy sent an email to this address requesting that the recipient make contact but no response was ever received.

Deputy Moore provided his report containing the information received from Carter to Detective Van Horsen, who took over the investigation on July 26, 2004. A month later, Van Horsen requested and received from American Express a copy of the front and back of the forged check. The check had been made out to "Peter Wortz" and had been

endorsed on the back with a unique, star-shaped signature.[5] American Express did not know where the check had been "cashed and had no way to track it."

Detective Van Horsen spoke to Lieutenant Parker, Commander of the Investigations Bureau for the Santa Cruz County Sheriff's Office, about the case on September 2, 2004. Parker said that he recognized the name "Peter Wortz" from a previous case. Parker ran a driver's license check and defendant's license came up bearing the same unique, star-shaped signature. Van Horsen then conducted a criminal history on defendant and learned that he had previously been arrested and had served time in the county jail.[6] Van Horsen compared the signature on defendant's driver's license with that on defendant's previous jail paperwork and concluded that the unique signatures matched, and that both signatures also matched the endorsement on the back of the forged check.

On September 14, 2004, Van Horsen met with Gregory Carter, who relayed that as far as he knew, only one of the checks had yet been "cashed." Carter did not know if any of his mail had been stolen but he told Van Horsen that there had been " 'a rash of mail thefts' " in his neighborhood recently.

That same day, Van Horsen spoke with Sergeant Carney. Carney told Van Horsen that the day before, Carney and two detectives had gone to the same address listed on defendant's driver's license in the course of an unrelated investigation.[7] When Carney knocked on the front door of the residence, a male, later identified as defendant, asked Carney to wait while he put a shirt on before answering the door. Some three to five

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[5] Defendant's last name is spelled "Wurtz" but the name of the payee written on the front of the check could be read as either "Wurtz" or "Wortz."

[6] The detective's statement of probable cause in support of the warrant did not say for what crimes or infractions defendant had previously been in jail.

[7] The detective's statement of probable cause in support of the warrant did not indicate the nature of that investigation.

minutes later, defendant opened the door and stood in the doorway. He told the deputies that he lived in that apartment.

While talking with defendant at the upstairs front door of the two-story apartment building, the deputies heard a loud crash coming from the back of the building. Two of the deputies then went to check on the noise and learned from neighbors that a man had just jumped from the second-floor deck of defendant's apartment, had scaled the fence, and had fled the area in a car. The deputies returned to the front of the apartment and spoke again with defendant, who told them that the person who had just fled was a man named David Harris, a name that Deputy Carney recognized in connection with another pending case involving stolen mail. Defendant told the deputies that Harris had a criminal case pending against him but he did not believe that Harris was "wanted" at the time. Defendant then allowed the deputies to search the residence for Harris, who was not found inside.

Deputy Carney later relayed all of this information to Detective Van Horsen, who had participated in David Harris's arrest, along with that of Kathryn Juraka, the month before. Numerous items of stolen mail had been recovered from the garbage cans at Harris's Live Oak residence as part of that investigation or arrest. Juraka had been arrested for possession of stolen mail and on a warrant for credit card theft and possession of drug paraphernalia.

On September 15, 2004, Van Horsen spoke with American Express Security. He was told by its representative that the company mails convenience checks to its account holders in sets of three, four, or ten, and that Carter had been sent four checks, only one of which had been "cashed and had cleared in the amount of $1200.00" and that the other three checks were still outstanding.

Based on all of this information, as well as his own training and experience, Van Horsen formed the belief that it was defendant who had "forged and cashed" the American Express convenience check issued in the name of Gregory Carter some eight

weeks before. In Van Horsen's view, the fact that David Harris had previously been arrested in connection with stolen mail, had associated with defendant, and had fled defendant's apartment when the sheriff's deputies had appeared for an unrelated reason all corroborated Van Horsen's belief that defendant was involved in criminal activity, that he had forged the American Express check and was in possession of the other three American Express checks that had been issued to Gregory Carter, and that these checks would likely be found in defendant's apartment. The statement of probable cause concluded with Van Horsen's request to search defendant's residence in order to seize the three checks, along with any computers; computer programs relating to copying, scanning or duplicating documents; scanners; and printers found in the residence, all of which, from Van Horsen's experience, were commonly used by persons engaged in criminal activity "such as mail theft and check fraud."

The search warrant was signed by Judge Almquist of the Superior Court on September 15, 2004. This was 57 days from the date that Gregory Carter had first contacted law enforcement and reported that the $1,200 American Express convenience check issued in his name had been negotiated without his knowledge or permission. The warrant specified that the area to be searched was the property, garage, and storage areas associated with defendant's residence.

In addition to the above facts, which appeared from the four corners of the search warrant and affidavit, the trial court also had before it on the motions the following other facts.

Sheriff's deputies executed the search warrant on the same day it issued. From the residence and defendant's vehicle they seized a multitude of items, including the three American Express checks that had been issued to Gregory Carter and loads of other victims' mail, bank statements, credit cards and credit card applications, driver's licenses, and other personal and identifying documents, along with other personal property. The

deputies arrested defendant along with Athena Gallegos, who also lived at the apartment, and David Harris, all of whom were present during the search.

Finally, as shown by defendant's bank statement subpoenaed by his counsel, the $1,200 American Express check that had been made out to defendant as payee and forged in Gregory Carter's name had been deposited to defendant's account on July 15, 2004. The account was credited in this amount on that day, and then debited in like amount (plus returned check fee) on July 22, 2004, when the check was apparently returned unpaid by American Express.

DISCUSSION

I. Issues on Appeal

Defendant raises two central issues on appeal. First, he contends that his Fourth Amendment rights were violated because probable cause was lacking to support the issuance of the search warrant, the information in the affidavit and statement of probable cause being stale.[8] Secondary to this contention, he asserts that because the warrant was so lacking in probable cause, the *Leon* good faith exception does not apply to the deputies' search of his residence and that for both these reasons, his suppression motion should have been granted. Finally, he contends that the trial court erred in imposing the $400 restitution fund fine under section 1202.4 as this term violated his plea bargain and he urges that we should reduce the fine to the $200 statutory minimum under *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*).

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[8] We reject respondent's contention that defendant's staleness claim was waived in the trial court for the failure to have asserted it. The record makes clear that defendant's counsel was not waiving the claim but was instead joining the same argument asserted by a codefendant's counsel, who was in a better position to articulate it. Accordingly, we need not address defendant's alternate contention of ineffective assistance of counsel.

II. Probable Cause Supporting The Warrant

Defendant argues that probable cause was lacking in the issuance of the search warrant. He primarily contends this to be the case on the basis that the information offered by Detective Van Horsen in the affidavit and statement of probable cause was stale. Defendant characterizes the information as stale since law enforcement first learned of the forged American Express convenience check on July 20, 2004, and Van Horsen did not apply for or obtain the warrant until September 15, 2004, a period of some eight weeks. In so doing, defendant incorrectly discounts the relevant information received by Van Horsen in the several days just preceding the issuance of the warrant—information that not only connected defendant to the prior crime but corroborated Van Horsen's reasonable belief that defendant was engaged in criminal activity and that he remained in possession of the three outstanding American Express checks.

Whether an affidavit establishes probable cause to support a warrant is assessed by the "totality of the circumstances" presented to the magistrate. (*Illinois v. Gates* (1983) 462 U.S. 213 (*Illinois*). "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois, supra*, 462 U.S. at pp. 238-239.)

Our task on review is to determine "whether the magistrate [issuing the warrant] had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing." (*People v. Kraft* (2000) 23 Cal.4th 978, 1040.) The supporting affidavit will be held invalid by a reviewing court only if, as a matter of law, it fails to set forth sufficient competent evidence to support the magistrate's finding of probable cause, giving full weight to the magistrate's function as finder of fact. (*Id*. at p. 1041.) This standard of review is deferential to the magistrate's determination. (*Illinois, supra*, 462 U.S. at p. 236; *People v. Thuss* (2003) 107 Cal.App.4th 221, 235.) "In assessing the affidavit's facts it is possible to imagine '[s]ome innocent explanation . . . . But "[t]he

possibility of an innocent explanation does not deprive the [magistrate] of the capacity to entertain a reasonable suspicion . . . ." ' [Citation.]" (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784.) "Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.] The burden is on [the defendant] to establish invalidity of [a] search warrant[]." (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

Where the challenge to the warrant is that the affidavit rests on stale information, the question is not a rote rejection of information dating back further than a certain period of time. It is instead whether the information, though less than fresh, was nevertheless sufficient to allow the magistrate to independently decide that there was a fair probability that defendant continued to possess the items to be seized. Here, the application for the warrant came at a point some eight weeks after the forgery of the single American Express convenience check but near in time to the detective's discovery of other corroborating information concerning defendant's connection to the forgery, his association with codefendant Harris—suspected to be involved with mail theft and other related crimes, and the fact that three American Express checks issued in Carter's name remained outstanding.

The time element factors into the probable cause determination because "[a]n affidavit supporting a search warrant must provide probable cause to believe the material to be seized is still on the premises when the warrant is sought." (*People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.) "As a general rule, information is stale, and hence unworthy of weight in the magistrate's consideration of an affidavit, unless the information consists of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.' (*Sgro v. United States* (1932) 287 U.S. 206, 210; accord, *People v. Sheridan* (1969) 2 Cal.App.3d 483, 490.) No clear cut rule, of course, tells us when the time span must be deemed too attenuated. 'The length of the time lapse alone is not controlling since even a brief delay may preclude an

inference of probable cause in some circumstances while in others a relatively long delay may not do so. Nonetheless, there are obviously some limits.' [Citation.]" (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393.) Delays of more than four weeks have been held to be generally insufficient to demonstrate probable cause. (*Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 434 [delay of 34 days between controlled sale of heroin and officer's affidavit held insufficient].)

But where the circumstances "justify a person of ordinary prudence to conclude that the alleged illegal activity had persisted from the time of the stale information to the present, then the passage of time has not deprived the old information of all value." (*People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1718.) Thus, the fact that the activity is likely to be ongoing negates the staleness of older information. (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1655 [delay of almost two months "between the sale [of drugs] and the search … evidences a lack of probable cause to search [drug dealer's home] *absent additional factors*, such as proof of ongoing transactions, suspicious activity at the premises to be searched, or other evidence indicating ongoing criminal activity." (Italics added.) Older activity may be coupled with more recently obtained information so as to justify the finding of probable cause. (*U.S. v. Vaandering* (9th Cir. 1995) 50 F.3d 696, 700.) Pertinent here, a determination of staleness "depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." (*United States v. Harris* (3d Cir. 1973) 482 F.2d 1115, 1119.) And, in any event, the issue of staleness turns on the facts of each particular case. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.)

Defendant's assertion of staleness here comes down to saying that the nature of the criminal activity at issue—check fraud, forgery, identity and mail theft—is readily analogous to drug sale activity, a conclusion with which we disagree. In short, the transitory nature of discrete drug sales transactions may compel a shorter time frame between the illegal activity and the issuance of the warrant in order to establish probable

cause. (See *People v. Brown* (1985) 166 Cal.App.3d 1166, 1169-1170.) On the other hand, crimes in the nature of check fraud, forgery, identity and mail theft that all involve personal, private, and financial information of the victim are inherently less transitory. This kind of sensitive information is also capable of being criminally used in a myriad of different and ongoing ways, subject only to the creative or entrepreneurial limits of the thief.

It was thus reasonable for the magistrate here to have concluded on the entire affidavit that evidence of criminal activity, including the presence of the three remaining checks, would still likely exist at defendant's residence two months after he had deposited the first stolen check. And as respondent suggests, the fact that the forged check had been returned unpaid, something that Detective Van Horsen had received conflicting information about, did not reduce the likelihood that defendant might still use the remaining checks in another manner, such as by passing them off to purchase merchandise from an unsuspecting vendor. Moreover, his knowledge of the fact that the first check did not actually clear would not have lessened the reasonableness of Van Horsen's suspicion that defendant also had in his possession other items of stolen mail and checks that could be used in the course of future criminal activity. Indeed, with the "rash of mail thefts" that had recently occurred in Carter's neighborhood, along with the likelihood that defendant had come into possession of Carter's forged check in the first place by having stolen his mail, it was more than reasonable to conclude that defendant possessed Carter's stolen mail inside his residence where it was being hidden.

We also remain unpersuaded to find staleness here by defendant's citation to *Roberts v. State* (Okl.Cr.1973) 506 P.2d 613 [1973 OK CR 47]. In that case, the reviewing court, with little analysis, concluded that 23 days from the time a stolen credit card was believed to have been on the defendant's premises was too remote to establish probable cause that the card remained there. "In this age [more than 30 years ago] of rapid communication, it is not logical to assume that a person using a stolen credit card

would retain it in his possession, or attempt to use it, after the lapse of this period of time." (*Id.* at p. 615.) Suffice it to say that at the present time, criminals engaged in identity theft, forgery, and check fraud through the mechanism of stolen mail have many sophisticated methods and uses of personal and financial information at their disposal that were not available in 1973 to further that kind of criminal enterprise. These possibilities, electronic and otherwise, distinguish the temporal component here from the single passing of a stolen credit card at a jewelry store in 1973 where there was no hint that the card was even obtained through the means of stolen mail. It is also not insignificant to us that the court in *Roberts* deemed the search warrant there to be "in other respects, shaky, at best" such that on the totality of circumstances, it could be determined that probable cause had not been established. (*Ibid.*) That is not the case on the facts presented here.

Defendant's contention of staleness is also dependent upon the erroneous assumption that a finding of probable cause in this case required a reasonable belief that defendant was likely in the near future to use the three remaining checks in the same way as he had the first check, i.e., that there had to be impending circumstances that suggested that he would attempt to deposit the checks into his bank account. But exigency is not required in the context of a warrant. Moreover, probable cause was properly established on the single basis that evidence of past criminality would still be present at the location to be searched. The deputy was not required to additionally assert that defendant was about to attempt negotiation of the three remaining checks or that defendant believed that the checks were still viable for passing in order to establish probable cause.

Finally, we reject defendant's suggestion that the information that Harris, who Van Horsen knew had been charged with crimes in connection with check fraud and stolen mail, had been present and had fled defendant's apartment when the deputies arrived there cannot be used to establish or corroborate the existence of probable cause to search defendant's residence. Defendant pitches this point citing the rule that a suspect's mere association with a known criminal "*by itself* is not reasonable cause for an arrest

and search." (*People v. Shelton* (1964) 60 Cal.2d 740, 745, italics added; see also *Greenstreet v. County of San Bernardino* (9th Cir. 1994) 41 F.3d 1306, 1309-1310 [visitor's criminal history, without nexus to suspects' residence, insufficient to establish probable cause to search the residence].) While a suspect's "mere propinquity to others independently suspected of criminal activity" will not, "without more, give rise to probable cause," in this case, there was more in that there was evidence that defendant himself had engaged in criminal activity with the first American Express check. (*Ybarra v. Illinois* (1979) 444 U.S. 85, 91.) Thus, the information about defendant's association with Harris was not used *by itself* to establish probable cause. Rather, this information corroborated and confirmed Van Horsen's independently developed and reasonable suspicions about defendant's own suspected criminal activity, which was the very same kind of criminal activity of which Harris was also accused. Contemporaneous association with known criminal activity may properly contribute to a finding of probable cause. (*United States v. Hillison* (9th Cir. 1984) 733 F.2d 692, 697.)

Especially in light of the preference for warrants that requires us to defer to the magistrate's decision, we reject defendant's contention that the warrant authorizing the search of his residence and seizure of specified items located therein was issued without probable cause. The nature of the items in question and the circumstances described in the affidavit provided support for an independent conclusion that there was a reasonable likelihood that defendant retained these items at his residence eight weeks after his deposit of the first of Carter's four checks into his bank account. The information contained in the affidavit was therefore not stale.[9]

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[9] This conclusion obviates the need for us to address the application to this case of the *Leon* good faith exception.

III. The Restitution Fund Fine

Relying on *Walker, supra*, 54 Cal.3d 1013, defendant finally contends that the trial court erred in imposing the $400 restitution fund fine under section 1202.4, subdivision (b), in that this violated the terms of his plea bargain since no fine was specified as part of that bargain. Defendant further asserts that this error requires reduction of the fine to the $200 statutory minimum. We reject these contentions.[10]

In *People v. Dickerson* (2004) 122 Cal.App.4th 1374 *(Dickerson)*, we considered the principles established in *Walker*, as refined by the high court in *In re Moser* (1993) 6 Cal.4th 342, and *People v. McClellan* (1993) 6 Cal.4th 367. In *Walker*, the defendant had 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 and no punitive fine. The trial court advised him that the maximum sentence he could receive was a seven-year prison term 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 under section 1192.5. Although the probation report recommended a $7,000 restitution fine, the court imposed a fine of $5,000. The defendant did not object to the imposition of the fine at sentencing.

The Supreme Court in *Walker* found that two distinct errors had occurred. First, as here, it was error for the trial court to have failed to give defendant a pre-plea advisement concerning the direct consequences of his plea, including the obligation to pay a restitution fine. But, as the court held in *Walker*, this error is waived on appeal if the defendant failed to raise it in the court below at or before sentencing. (*Walker, supra*, 54 Cal.3d at pp. 1020, 1022-1023.) Accordingly, to the extent defendant claims error in

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[10] Defendant raises no error with respect to the separate $400 parole revocation fine imposed under section 1202.45, which the court stayed. Accordingly, we need not address this issue, which defendant has waived on appeal.

this case for the trial court's failure to have advised him of the direct consequences of his plea, the error has been waived by defendant's failure to have timely raised the issue in the trial court. (*Ibid*.; see also *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879.) Even if this error were not waived, defendant has shown no prejudice here.

The second error in *Walker* was the trial court's imposition of a significantly greater sentence than the one the defendant had bargained for—a $5,000 restitution fine. "If a *plea bargain is violated* through imposition of a punishment exceeding the terms of the bargain, the error is waived by the failure to object at sentencing if the court has advised the defendant of the right to withdraw the plea upon court withdrawal of plea approval (see Pen. Code, § 1192.5), but is not waived by failure to object and is not subject to harmless error analysis if that advisement was not given. (*Walker, supra*, at pp. 1024-1026.) If a restitution fine exceeding the statutory . . . minimum is imposed in violation of a plea bargain, and the error was not waived, the appropriate remedy on appeal is reduction of the fine to [the statutory minimum]." (*People v. DeFilippis, supra*, 9 Cal.App.4th at p 1879.) Here, defendant was not given the advisement under section 1192.5 and his claim of error that the fine exceeded his plea bargain is thus not waived. But in order to benefit from a reduction of the fine to the statutory minimum, he still must demonstrate that the imposition of the $400 restitution fine in this case violated the terms of his plea bargain.

The Supreme Court in *Walker* considered the imposition of a restitution fine a form of punishment and found that it "should generally be considered in plea negotiations." (*Walker*, *supra*, 54 Cal.3d at p. 1024.) Because the $5,000 restitution fine in that case 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, an amount that was not a significant deviation from the bargain.

In *In re Moser, supra,* 6 Cal.4th 342, 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 mandated by statute for second degree murder and that this was not subject to negotiation, the Supreme Court in *Moser* found nothing in the record of the plea proceedings that suggested that the erroneously described 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 court distinguished *Walker* as a case where "the defendant . . . reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed." (*Id.* p. 356.) Nevertheless, the court in *Moser* 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 *People v. McClellan, supra,* 6 Cal.4th 367, the defendant challenged the imposition of a sex offender registration requirement as a violation of his plea bargain. The Supreme Court there construed 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 negotiation." (*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 this evolution in authority concerning claims for violation of a plea bargain, we concluded in *Dickerson* that given all of the relevant circumstances surrounding the

guilty plea in that case, it did not reasonably appear that the parties had included imposition of fines in their plea negotiations; and consequently, the setting of the fines had been left to the court's discretion. The fact that the court did not mention the restitution fine when reciting the plea bargain suggested that, unlike in *Walker*, no agreement had been reached on the imposition or amount of any restitution fines. Additional facts in *Dickerson* further confirmed that "nobody in the trial court seemed to think that the imposition of restitution fines totaling $6,800 violated the terms of the bargain." (*Dickerson, supra,* 122 Cal.App.4th at p. 1385.)

We further reasoned in *Dickerson* 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. . . . [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.)

We agree with the implicit conclusion in *Dickerson* that *Moser* and *McClellan* changed the way we must view *Walker* in some respects, but not others. We further agree with *Dickerson's* analysis 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. "The [*Walker*] 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.] [¶] 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." (*Dickerson, supra*, 122 Cal.App.4th at p. 1384.)

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—and, to that extent, they are no more the proper subject of negotiation than parole terms and sex offender registration. They are instead simply the necessary incidents of a guilty plea. We do acknowledge that to the extent that *Walker* considered such fines punishment, the amount of the fine above the mandatory minimum is clearly negotiable. But the fact that the parties and the court omitted any mention of restitution fines as part of the plea agreement cannot be construed to imply that there was an agreement that the sentence would consist of no fines, or the minimum statutory fines. Rather than implying such agreement, this omission suggests that the parties intended to leave the imposition and amount of restitution fines to the court's discretion. (*Dickerson, supra*, 122 Cal.App.4th at p. 1385; *People v. Sorenson* (2005) 125 Cal.App.4th 612, 618-620 (*Sorenson).*)[11]

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[11] We recognize that we held in *People v. Knox* (2004) 123 Cal.App.4th 1453 that the question whether a restitution fine exceeded the scope of a plea bargain comes down to this core inquiry: Was the imposition or amount of the restitution fine actually negotiated and made a part of the plea agreement, or was the imposition and range of the fine within the defendant's contemplation and knowledge when he entered his plea with the specific amount left to the discretion of the court? (*People v. Knox, supra*, 123 Cal.App.4th at p. 1460.) We also recognize that on the facts of the instant case, which include that no pre-plea advisement at all concerning the direct consequences of the plea was given, we would be hard pressed to conclude that the fine was indeed within the defendant's "contemplation and knowledge" at the time of his initial plea. But in light of our holdings in *Dickerson* and *Sorenson*, which stand on their own, we are not compelled to apply the specific *Knox* test in order to conclude that under the circumstances of this particular case, the imposition of a restitution fine did not violate the plea bargain. We also observe here that defendant ultimately withdrew his initial guilty plea to one count and substituted his guilty plea to a different count in its place *after* his knowledge of the court's having imposed the $400 restitution fine and without objecting to it. From this, it can be said that at least with respect to his guilty plea to count three, the restitution fine was indeed within the defendant's contemplation and knowledge at the time he ultimately entered his plea.

A review of a claim that the imposition of a fine violated the terms of a plea bargain begins with ascertaining the terms of the plea agreement. Defendant argues here that that the fact that neither the parties nor the court mentioned the subject of restitution fines at all when reciting the terms of the plea agreement means that such a fine was excluded. But, as we held in *Dickerson*, we think that the absence of a discussion concerning a restitution fine signifies instead that "the parties reached no agreement on the imposition or the amount of any fine. '[I]t would appear that [this topic] was not part of the plea agreement.' (*Moser, supra*, 6 cal.4th 342, 356.)" (*Dickerson, supra,* 122 Cal.App.4th at p. 1385.) The omission of a term concerning restitution fines cannot convert it "into a term of the parties' plea agreement." (*McClellan, supra*, 6 Cal.4th 367, 379; italics omitted.) Therefore, the fact that the parties and the court omitted any mention of restitution fines as part of the plea agreement cannot be construed to imply that, like in *Walker*, there was an agreement that the sentence would consist of no fines or the minimum statutory fines. Instead, this omission suggests that the parties intended to leave the imposition and amount of the fines to the court's discretion. (*Dickerson, supra*, at p. 1385.) Further, as we held in *Dickerson*, a "defendant cannot establish that a later imposed fine violated his or her plea agreement without evidence that the agreement was for no fine or for a minimum fine within a statutory range." (*Sorenson, supra*, 125 Cal.App.4th at p. 619.)

The conclusion that the fine here did not violate the terms of defendant's plea bargain is confirmed not only by his failure to establish with affirmative evidence that that the agreement was either for no fine or for the statutory minimum. It is further confirmed by the absence of an objection by defendant when the $400 restitution fine was raised by the court; by the People's suggestion that the fine should be doubled and the court's rejection of that suggestion along with its actual imposition of the $400 fine with no comment or objection by defendant; and by defendant's later withdrawal of his plea to one count substituted by his guilty plea for another count, again with no comment about

or objection to the sentence, which included the restitution fine. We mention the lack of objection in this context not to show waiver but to demonstrate that nobody in the trial court seemed to think that the imposition of a $400 restitution fine violated the terms of the bargain.

These circumstances indicate that "the parties to the plea bargain were concerned with reaching an agreement specifying [the] term[s] of imprisonment. *Walker* did not require them to negotiate—whether to resolution or impasse—regarding the imposition or amount of restitution fines. It appears that the parties at least implicitly agreed that additional punishment in the form of statutory fines and fees would be left to the discretion of the sentencing court." (*Dickerson, supra*, 122 Cal.App.4th at p. 1386.) The same holds true in this case and we accordingly conclude that defendant has not established that the trial court's imposition of the $400 restitution fine violated his plea agreement.

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.