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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES NELSON, Defendant and Appellant.	H029738 (Santa Clara County Super.Ct.No. CC590029)

The sole issue in this case is whether the post-plea restitution fund fine of $4,000 that the trial court imposed under Penal Code section 1202.4,[1] and the like amount imposed but suspended under section 1202.45,[2] violated the terms of defendant's plea bargain under *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*). As it appears that defendant's plea bargain did not include any provision concerning the mandatory restitution fund fine, and that the amount of the fine was left to the discretion of the trial court, defendant has not demonstrated that the fine exceeded his bargain. We accordingly affirm the judgment.

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

[2] Defendant for the most part treats the two distinct fines of $4,000 each as one restitution fund fine of $8,000. For purposes of our analysis, and except as noted, we do so as well.

STATEMENT OF THE CASE

A detailed recitation of the facts leading to the criminal charges in this case is not necessary to the resolution of the appeal. The district attorney filed an initial felony complaint in April 2005 against defendant and others. The complaint was amended twice, the second time in June 2005. The second amended complaint charged defendant with three counts of vehicle theft in violation of Vehicle Code section 10851, subdivision (a) (counts 1, 4 & 5); one count of receiving stolen property in violation of section 496, subdivision (a) (count 12); two counts of using a forged, expired, or revoked access card in violation of sections 484g, subdivision (a) through 487 (counts 13-14); one count of possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a), a misdemeanor (count 17); and one count of using or being under the influence of a controlled substance in violation of Health and Safety Code section 11550, subdivision (a), also a misdemeanor (count 18).

The amended complaint also alleged that defendant had suffered two prior strike convictions within the meaning of sections 667, subdivision (b) through (i) and 1170.12, both of which convictions included all the elements of a violent or serious felony as defined in sections 667.5, subdivision (c) and 1192.7, subdivision (c). The amended complaint finally alleged that defendant had separately served two prior prison terms for felony convictions within the meaning of section 667.5, subdivision (b).

In July 2005, under a plea bargain, defendant pleaded guilty to counts 5, 12, 13, and 17, and he admitted having suffered two prior strike convictions and two prison priors. The remaining counts were to be dismissed and defendant would be subject to a maximum prison term of 25 years to life with the court to entertain his *Romero* motion.[3] Defendant was told prior to his plea that his actual sentencing exposure on all counts to

[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

which he would plead guilty, with all admitted enhancements, was 100 years to life in prison, in the absence of the plea bargain.

Prior to entering his guilty plea and admitting the special allegations, defendant confirmed that he had had the opportunity to discuss with counsel the elements of the offenses, the possible defenses, and the consequences of the pleas and admissions. Defendant further confirmed that he was not under the influence of any substance that would have interfered with his ability to understand the proceedings, and that no one had threatened him or had made him any promises, other than the express terms of the bargain, to induce his plea, which he was entering freely and voluntarily. He was also advised of his constitutional rights and waived them.

Prior to entering his plea, defendant and his codefendants were all collectively advised by the court that at sentencing, they would each need to complete a statement of assets and "pay a mandatory ten dollar fine; actual restitution to the victim; [a] restitution fund fine of not less than two hundred dollars [and] no more than $10,000 with an equal amount imposed but suspended, and a general fund fine of up to ten thousand [dollars]. And the Department of Revenue [would] have a hearing to determine [each defendant's] ability to make any payments." Appellant indicated his understanding that a restitution fine would be imposed. Defendant was not advised of his right to withdraw his plea under section 1192.5[4] if the court were to withdraw its approval of the plea bargain at

[4] This statute reads, in relevant part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea." Paragraph three of section 1192.5 further requires that the court advise 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." The consequence of the trial court's failure to have given the advisement is that, even in absence of an objection raised at sentencing below,

sentencing. The court found a knowing, voluntary, and intelligent waiver of defendant's constitutional rights and further found that his guilty plea and admissions were likewise freely, knowingly, voluntarily, and intelligently entered into.

A probation report was prepared per the court's order. As pertinent here, it recommended that defendant be ordered to pay victim restitution in the court's discretion; that a restitution fund fine in the full amount of $10,000 be imposed under section 1202.4, subdivision (b); that a like amount be imposed but suspended under section 1202.45; and that various other miscellaneous fines and fees such as a criminal laboratory analysis fee, a drug program fee, and an AIDS education fine also be imposed.

At the combined hearing on defendant's *Romero* motion and sentencing, the court stated that it had read and considered the probation report, among other things. Neither defendant nor his counsel objected to any aspect of the probation report, including its recommendation that the court impose a $10,000 restitution fund fine and a $10,000 parole revocation fine. The court then in part granted defendant's *Romero* motion, striking one of his prior strike convictions and dismissing the allegations concerning his prior prison terms, and sentenced defendant to a total prison term of 10 years. The court furthered ordered defendant to pay restitution to one particular victim under section 1202.4, subdivision (f) in the amount of $10,635.72. Veering from the recommendation in the probation report, the court also imposed a $4,000 restitution fund fine under section 1202.4, subdivision (b), coupled with a parole revocation fine in like amount under section 1204.45, that fine to be suspended. Neither defendant nor his counsel objected to the court's imposition of either the restitution fund fine or the parole revocation fine on

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defendant has not waived or forfeited his claim on appeal that his sentence does not adhere to the plea bargain, or that he has been deprived of the benefit of his bargain. (*Walker, supra,* 54 Cal.3d at pp. 1024-1026, 1029; *People v. Johnson* (1974) 10 Cal.3d 868, 872.)

any basis, including that the fines exceeded the terms of defendant's plea bargain or that defendant lacked the ability to pay.

This appeal followed.

DISCUSSION

Relying on *Walker, supra*, 54 Cal.3d 1013, defendant contends that the trial court erred in imposing the combined $8,000 restitution fund and parole revocation fines. He asserts that this violated the terms of his plea bargain since no fine was specified as part of that bargain.[5] Defendant further contends that this error requires reduction of each of the fines to the $200 statutory minimum. We reject these contentions.

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, critically, *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.[6] 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.

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[5] We recognize that the California Supreme Court has granted review in *People v. Crandell* (May 20, 2005, H027641) [nonpub. opn.] review granted August 24, 2005, S134883. As described on the court's docket, the issue presented in that case is "Does the imposition of a restitution fine under . . . section 1202.4, subdivision (b), violate a defendant's plea agreement if the fine was not an express term of the agreement?" (See the court's website at http://appellatecases.courtinfo.ca.gov/search/mainCaseScreen.cfm?dist=0&doc_id=376320&doc_no=S134883.) The Supreme Court's disposition of this issue in *People v. Crandell, supra,* would in all likelihood affect the analysis in the instant appeal in which resolution of the same issue is dispositive.

[6] The court was apparently referring to the discretionary $10,000 penal fine generally available under section 672 after any felony conviction for which no other fine is prescribed.

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, it was error for the trial court to have failed to give defendant a pre-plea advisement concerning his obligation to pay a restitution fine, part of the direct consequences of his plea. Defendant does not claim that error here, as he was advised that a restitution fund fine and a parole revocation fine would be imposed.

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 had advised the defendant of the right to withdraw the plea upon court withdrawal of plea approval (see . . . § 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*, [54 Cal.3d] 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 (1992) Cal.App.4th 1876, 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 $8,000 in fines 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.* at 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*, 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 also 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? (*Id.* at p. 1460.)

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, a restitution fund fine of at least $200 is statutorily mandated—unless exceptional circumstances are found—and, to that extent, it is no more the proper subject of negotiation than parole terms and sex offender registration. (§ 1202.4, subd. (b); see also § 1202.45.) The fine is instead simply a necessary incident 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*).)

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. Here, defendant argues that because neither the parties nor the court specified anything about the subject of a restitution fine when reciting the express terms of the plea agreement, 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 amount of any fine. '[I]t would appear that [this topic] was not a 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 a restitution fine 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 a restitution fund fine 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; *Sorenson, supra*, 125 Cal.App.4th at p. 619.) 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*, at p. 619.)

On this latter point, defendant here contends that the court's statements that he would need to "complete a statement of assets" at sentencing and that the "Department of Revenue [would] have a hearing to determine [his] ability to make any payments" led defendant to believe that any restitution fines would be set at the minimum. But neither statement was a representation that defendant's ability to pay was a condition precedent to the imposition of mandatory restitution fines under section 1202.4, subdivision (b) and 1202.45, or that the fines would be set at the minimum amounts.[7] And defendant was expressly advised that the fines could be set as high as $10,000 each, in addition to victim restitution.

Moreover, the trial court did not impose under either section the maximum fine of $10,000 as recommended by the probation report, or even the $8,000 that was available as a restitution fund fine as derived by application of the statutory formula under section

[7] Indeed, inability to pay does not constitute a "compelling and extraordinary reason[]" so as to avoid the imposition of a restitution fine. (§ 1202.4, subd. (c).)

1202.4, subdivision (b)(2), with the same amount imposed but suspended under section 1202.45. Instead, the court in its discretion set each fine at $4,000. The court was not required to state its reasons for setting this amount of fines (§ 1202.4, subd. (d)) and the record does not reveal the specific factors that bore on the trial court's decision in this regard. The court did refer defendant to the Department of Revenue with respect to the payment of fines and fees. Yet, the record does not divulge that defendant established his inability to pay the fines, a matter which it is his burden to show. (*Ibid.*) If, as defendant contends, imposition of a minimal restitution fine was truly part of the plea bargain based on defendant's limited ability to pay, then one would expect the record to show that defendant pursued the avenue that was available to him to demonstrate his impoverished state. This evidentiary void in the record confirms that contrary to defendant's contention, there was no promise that the court would impose only the statutory minimum restitution fines of $200 each, based on a determination that $400 was the only amount that defendant could pay.

The conclusion that the fines 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 objection to the recommendation in the probation report that a restitution fund fine be imposed and the further absence of objection when the $8,000 in fines was actually imposed by the court. 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 the restitution fines violated the terms of the plea bargain.

These circumstances, as in *Dickerson*, *supra*, 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 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.) Defendant has failed to show that his plea bargain contemplated either "no fine or . . . a minimum fine within a statutory range." (*Sorenson, supra*, 125 Cal.App.4th at p. 619.) We accordingly conclude that defendant has not established that the trial court's imposition of the $8,000 in restitution fines either violated his plea agreement or deprived him of due process.

DISPOSITION

The judgment is affirmed.

Duffy, J.

I CONCUR:

McAdams, J.

MIHARA, Acting P.J., dissenting.

Since I believe that the imposition of a $4000 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, Acting P.J.