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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES HERROSKI AKAO,

Defendant and Appellant.

H029821

(Santa Clara County

Super. Ct. No. CC457539)

Appellant was charged by information filed January 21, 2005, with one count of assault with a deadly weapon by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) The information contained the following allegations: (1) The offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1)(B)); (2) Appellant personally inflicted great bodily injury on Cesar Manriquez within the meaning of Penal Code section 12022.7, subdivision (a) and Penal Code section 1202.3, subdivision (e)(3); and (3) appellant suffered a serious felony conviction within the meaning of Penal Code sections 667, subdivisions (a) and (b) through (i), and 1170.12.

On April 12, 2005, appellant pleaded no contest to the felony assault charge and admitted the serious bodily injury and gang allegations on the condition that the serious felony strike allegation be dismissed and that he receive a seven-year prison sentence.

On November 17, 2005 appellant was sentenced to serve the aggravated term of four years for the substantive count, plus a consecutive three-year term for the great bodily injury enhancement. The court struck the five-year gang enhancement. The court imposed a \$1400 restitution fine pursuant to Penal Code section 1202.4 and an additional \$1400 probation revocation fine, which the court suspended. (Pen. Code, § 1202.45.)

Appellant filed a timely notice of appeal.

On appeal, appellant contends that the restitution fine must be reduced to \$200 because the trial court violated the terms of the plea agreement by imposing a restitution fine of \$1400 and a parole revocation fine in the same amount.

Facts

A summary of appellant's offenses is unnecessary to address the sole issue on appeal, which relates to the trial court's imposition of a restitution fine. However, we set forth in detail the proceedings below relevant to the plea agreement.

Before appellant entered his plea of no contest, the court asked the district attorney to outline the proposed disposition.

"MS. WELLS: Yes, Your Honor. Thank you. [¶] It's my understanding that the defendant will be pleading no contest to Count One, he will be admitting the allegation pursuant to 186.22(b)(1)(B) and admitting the great bodily injury enhancement for a sentence of seven years calculated as follows: Four years on the 245 count which is the aggravated term, plus three years for the great bodily injury, for a total of seven years. [¶] The People will move to dismiss the strike allegation as well as the allegation pursuant to Penal Code Section 667 (a).

"THE COURT: You are also asking the Court to stay any punishment for the allegation pursuant to 186.22 (b)(1)(B)?

"MS. WELLS: Yes, Your Honor.

"THE COURT: Is that your understanding?

"[DEFENSE COUNSEL]: It is, Your Honor. In addition I believe the prison prior will either be dismissed or stayed.

"THE COURT: I only see a Prop. 8 and strike prison alleged.

"[DEFENSE COUNSEL]: That's fine."

The court proceeded to explain to appellant that in order to accept appellant's plea, the court needed to be satisfied that appellant "fully understand all of the legal rights that [he was] giving up in order to do that as well as all of the consequences of the conviction that's going to result."

The court asked appellant if he was under the influence of any kind of drug or medication, if he had enough time to talk to his attorney, and was satisfied that he understood the discussions. Then, the court restated the terms of the plea bargain as follows:

"THE COURT: Now all the promises that go along with this change of plea today have been stated here in court on the record. They include the fact that the district attorney is going to move to dismiss the two allegations of prior conviction which greatly increase the sentence, and she is also going to ask the Court to stay the punishment for what's called the gang enhancement, and further it's been agreed that you will receive a term in state prison of seven years, no more, no less. [¶] What I need to know is whether or not anyone has made any promises to you off the record in order to try and get you to change your plea?"

Appellant replied, "No."

The court went on to explain the consequences of appellant's plea including that appellant would be "ordered to pay a restitution fund fine of between 200 and \$10,000." Appellant acknowledged that he understood.

Thereafter, appellant entered his plea. The probation report prepared for appellant's sentencing recommended a \$1400 restitution fine pursuant to the formula set forth in Penal Code section 1202.4, subdivision (b)(2). The court imposed the fine without objection.

Discussion

Appellant's sole issue on appeal is that the restitution fine does not comport with the terms of the plea agreement.

Appellant recognizes that this issue is pending before the California Supreme Court,¹ 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 and *People v. Sorenson* (2005) 125 Cal.App.4th 612. However, appellant asserts that *Dickerson* was wrongly decided and contrary to the conclusion "mandated based on the California Supreme Court's holding in *People v. Walker* (1991) 54 Cal.3d 1013, 1019."

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 recommended, among other things, a restitution fine in each case, totaling \$6,800. It also

¹ *People v. Crandell*, review granted August 24, 2005, S134883.

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 on 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 *Walker, supra*, 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, and appellant acknowledged this. 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.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.