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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN LEROY CLEMONS,

Defendant and Appellant.

A111628

(Lake County
Super. Ct. No. CR904849)

I.

INTRODUCTION

John Leroy Clemons (appellant) pled guilty to charges of possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378) and driving with a suspended license (Veh. Code, § 14601.1). The court sentenced him to serve a total of five years in state prison, and imposed fines totaling \$3,900, with a \$1,200 fine stayed pending completion of parole. The court later modified the restitution component of the sentence, reducing the total fines to \$2,900, with a \$1,000 fine stayed pending completion of parole.

On appeal, appellant contends the trial court erred by: (1) denying his motion to suppress evidence; (2) imposing a sentencing enhancement for appellant's prior drug conviction under the mistaken belief that it was mandatory to do so; (3) imposing a laboratory fee, drug program fee and fine for the Vehicle Code section 14601.1 conviction, and associated penalty assessments; and (4) imposing a restitution fine.

As to all of the grounds for this appeal, appellant failed to raise the issues in the trial court, and accordingly they have been waived. However, respondent concedes that the penalty assessment associated with the Vehicle Code section 14601.1 conviction was \$10 in excess of that authorized by law. Therefore, we direct the court below to amend the abstract of judgment to reflect a \$10 reduction, and affirm the judgment in all other respects.

II.

BACKGROUND

In May 2005, Clearlake Police Officer Tomas Riley stopped a car with darkly tinted windows and a cracked windshield after the driver of the vehicle rolled through a stop sign. Once he stopped the vehicle, Officer Riley noticed that the driver, appellant, was moving constantly, sweating, and speaking rapidly. He also learned that appellant's driver's license was suspended.

Officer Riley asked appellant to step out of the car and perform a series of tests, which led the officer to believe that appellant was under the influence of a combination of drugs. Officer Riley then placed appellant under arrest for being under the influence of methamphetamine and driving with a suspended license. A subsequent search of the vehicle revealed two bags of methamphetamine and a methamphetamine pipe.

Appellant filed a Penal Code section 1538.5 motion to suppress the evidence taken from the vehicle on the grounds that his initial detention was not supported by reasonable suspicion, and that the search was conducted without a warrant. The prosecutor argued that the detention was supported by probable cause, and that the search was valid because Officer Riley had probable cause to believe the vehicle contained contraband. Additionally, the prosecutor noted that the search should be upheld as an inventory search of a vehicle impounded incident to arrest.

At the August 15, 2005 hearing on the Penal Code section 1538.5 motion, appellant argued that the driver's side window of his vehicle was permanently stuck in the down position, making it impossible for Officer Riley to have seen a tinted driver's side window before the traffic stop. He also argued that he had come to a complete stop

at the stop sign. Therefore, appellant argued, “there was insufficient cause” to conduct the traffic stop. Appellant offered no argument on the issue of the validity of the subsequent search.

The prosecutor presented testimony from Officer Riley confirming that the search of the car was “an inventory search done before an impound.” Appellant did not contest this characterization or challenge the validity of the inventory procedure. Rather, as the prosecutor noted, “the primary issue” addressed at the suppression hearing was the justification for “the initial stop.” Because of that singular focus, the prosecutor told the court “I’m going to address that only,” submitting on the briefs any question as to “what happened afterwards.”

The court denied appellant’s motion to suppress, concluding that probable cause existed for the initial stop, and that “the subsequent investigation conducted by the officer was justified after the proper detention.”

On August 30, 2005, appellant pled guilty to charges of possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378) and driving with a suspended license (Veh. Code, § 14601.1). At the plea hearing, the court told appellant that he could be “looking at six years and six months” incarceration, and that he would be assessed a restitution fine between \$2,000 and \$10,000. The court did not mention any other fines or fees.

On September 26, 2005, the court sentenced appellant to a total of five years in state prison: two years for the Health and Safety Code section 11378 conviction, a consecutive three-year term for a prior drug conviction pursuant to Health and Safety Code section 11370.2, and a concurrent term of 180 days for the violation of Vehicle Code section 14601.1. In imposing this sentence, the court noted: “I don’t believe the Court has any choice in regard to the [Health and Safety Code section 11370.2] enhancement. It must be imposed.”

In addition to the prison term, the court’s sentence included four types of fines: a \$350 fine for the section 14601.1 violation, with an \$870 penalty assessment; a lab fine of \$50 with a \$120 penalty assessment; a drug program fine of \$150 with a \$360 penalty

assessment; and a restitution fine of \$1,200, with an additional \$1,200 fine stayed pending completion of parole. This sentence tracked the recommendations of the probation report almost exactly, the only difference being that the court imposed a two-year sentence for the Health and Safety Code section 11378 conviction where the probation report recommended three years. Appellant made no objection to any portion of this sentence.¹

III.

DISCUSSION

A. The Motion to Suppress

On appeal, appellant contends that his motion to suppress the evidence taken from his vehicle was improperly denied because the inventory search was pretextual and was not carried out according to a standardized procedure. Because this issue was not raised in the trial court, it is waived on appeal.

For a suppression ruling to be reviewable, the underlying objection, contention or theory must have been urged and determined in the trial court. (*People v. Manning* (1973) 33 Cal.App.3d 586, 600.) This principle is “an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party’s contentions. [Citations.]” (*Id.* at p. 601.) Appellant did not challenge the validity of the inventory search in the trial court. Therefore, he is now barred, as a matter of law and basic fairness, from raising that challenge on appeal.

In response to respondent’s waiver argument, appellant claims that “the prosecution actually put itself on notice by asserting the inventory search in its response to motion to the suppress evidence, thus placing that justification in issue,” citing *People v. Smith* (2002) 95 Cal.App.4th 283 (*Smith*). But the point is that appellant made no attempt to challenge or contradict the prosecutor’s reliance on the inventory search, and the prosecution was consequently given no notice that the legitimacy of the procedure was disputed. By contrast, in *Smith*, the defendant not only challenged the evidentiary

¹ Three days after the sentence was imposed, the court sua sponte reduced the restitution fine and the stayed fine to \$1,000 each.

basis for claiming an inventory search at his initial suppression hearing, but he also filed a supplemental motion in the trial court specifically attacking the inventory search rationale relied on by the prosecution. (*Id.* at pp. 290-291.) Appellant here only challenged the legality of his initial detention. Because the trial court found the traffic stop and appellant’s arrest to be supported by reasonable suspicion and probable cause, appellant’s failure to contest the validity of the subsequent inventory search prevents him from raising the issue for the first time in this court.²

B. The Health and Safety Code Section 11370.2 Enhancement

Appellant claims that remand is required because the court increased his sentence under the mistaken belief that it had no discretion to waive the Health and Safety Code section 11370.2 enhancement. Appellant points out that the court did have discretion under Penal Code section 1385 to waive this enhancement in the interest of justice, a point conceded by the Attorney General.

A sentencing court has the authority under Penal Code section 1385 to strike prior convictions for sentencing purposes “either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice.” However, “any failure on the part of a defendant to invite the court to dismiss under section 1385 . . . waives or forfeits his or her right to raise the issue on appeal. [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.) The doctrine of waiver “should apply to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices.” (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*)). “[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Id.* at p. 354.)

While appellant is correct that the court had sentencing discretion to strike the enhancement, this claim of error has been waived because the defendant did not invite the trial court to exercise that discretion at sentencing, and the record indicates that appellant

² On appeal, appellant does not claim error in the court’s determinations that the traffic stop was supported by reasonable suspicion, and appellant’s arrest by probable cause.

had sufficient opportunity to raise the matter at sentencing. (*Scott, supra*, 9 Cal.4th at p. 356.) Prior to the hearing, a probation report was submitted which recommended the imposition of the three-year enhancement. In addition, it recommended that appellant receive the upper term of three years for the principal felony violation to which he pled guilty. Accordingly, the failure to point out that the court had the discretion to strike the enhancement and to request the court to exercise that discretion, waives the issue for purposes of this appeal.

C. Lab Fee, Drug Program Fee and Vehicle Code Section 14601.1 Fee as Violation of the Terms of the Plea Agreement

Appellant further contends that the court violated the terms of his plea agreement by imposing a lab fee, drug program fee, Vehicle Code section 14601.1 fee, and associated penalty enhancements—a set of fines totaling \$1,900. He argues the imposition of these fees constitutes a denial of due process because they were not part of the agreement he made with the government.

As the California Supreme Court noted in *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), a plea bargain that does not correspond to the defendant's expectations may come about either through (1) a violation of the plea agreement, or (2) a failure to advise the defendant of the consequences of the plea. (*Id.* at p. 1020.) “[T]he nature of the rights involved and the consequences of a violation differ substantially” between the two forms of error. (*Ibid.*) A violation of the plea agreement is not subject to harmless error analysis because it strikes at “ ‘the honor of the government[,], public confidence in the fair administration of justice, and the efficient administration of justice’ ” [Citation.]” (*Id.* at p. 1026.) A mere failure to advise the defendant of all the consequences of his plea, on the other hand, *is* subject to harmless error analysis because the requirement to advise the defendant of plea consequences “is not constitutionally mandated. Rather, the rule compelling such advisement is ‘a judicially declared rule of criminal procedure.’ [Citation.]” (*Id.* at p. 1022.) This type of error “is waived absent a timely objection.” (*Id.* at p. 1023.) Because no objection was made to the imposition of any of the fines or penalties at sentencing, appellant necessarily argues that their

imposition violated the terms of his plea agreement, and not simply that the court's admonitions concerning the plea consequences were deficient.

According to *Walker*, a critical factor differentiating a violation of the plea bargain from a failure to advise the defendant of the consequence of the bargain is that a violation of the plea depends in some “ ‘ ‘ ‘significant degree on *a promise or agreement of the prosecutor*, so that it can be said to be part of the inducement or consideration” ’ ’ ’ to plead guilty. (*Id.* at p. 1024, quoting *Santobello v. New York* (1971) 404 U.S. 257, 262, italics added.) In *Santobello*, a prosecutor promised not to make a sentencing recommendation in exchange for the defendant's agreement to plead guilty. When sentencing took place, however, a new prosecutor was handling the case and recommended that the judge impose the maximum sentence. (*Santobello v. New York*, *supra*, 404 U.S. at p. 259.)

Similarly, in *People v. Mancheno* (1982) 32 Cal.3d 855 a defendant pled guilty in exchange for the prosecutor's promise that he would be involved in a diagnostic study as part of his sentence. (*Id.* at p. 859.) The sentence imposed, however, contained no reference to the diagnostic study. (*Ibid.*) Therefore, both *Mancheno* and *Santobello* involved a promise by the prosecutor and a deviation from that promise that was considered by the court to be “ ‘ ‘ ‘significant’ in the context of the plea bargain as a whole.” (*Walker, supra*, 54 Cal.3d at p. 1024.) A violation of the plea agreement does not take place, however, unless the prosecutor has promised a particular sentence to the defendant and the sentence actually imposed deviates significantly from the one that was promised.

As a further example, in *People v. McClellan* (1993) 6 Cal.4th 367, 369, the trial court failed to notify the defendant that pleading guilty to a charge of assault with intent to commit rape would require him to register as a sex offender. The Supreme Court concluded that the imposition of the registration requirement was not a violation of the plea agreement because “defendant does not suggest that the challenged element of his sentence was a subject of negotiation (or even discussion) during the plea-negotiation process, or that the prosecutor made any promises or inducements relevant to the challenged element. [Citation.]” (*Id.* at p. 379.) The mere omission of an advisory on

the court's part at the plea hearing, "did not transform the court's error into a *term of the parties' plea agreement*." (*Ibid.*)

Similarly, here, appellant has not alleged that the disputed fees were the subject of any promise by the prosecution or even that the fees were discussed in the course of plea negotiation. Like the appellant in *McClellan*, he may have been unaware of the full consequences of his plea, but he was not affirmatively misled in any manner by the prosecution. Therefore, if there was error, it was in the failure to advise appellant of the plea's consequences, an error that was waived when appellant failed to raise any objection to the imposition of these fines and penalties at sentencing.

This case is also clearly different from *People v. Clark* (1992) 7 Cal.App.4th 1041, a case relied on by appellant in his appellate briefs. There, the defendant's written change of plea form noted that he had been "promised" he would be sentenced to "[p]robation and *no* more than 6 [months] jail provided diversion was successfully completed." (*Id.* at p. 1044.) Here, by contrast, neither the prosecution nor the court made any promise that no statutory fines or penalties would be imposed at sentencing. Therefore, while the *Clark* court concluded that the terms of defendant's plea were violated, the same cannot be said here.

This case is also factually distinct from *Walker, supra*, 54 Cal.3d at page 1019, another case relied on by appellant. In that case the defendant was assessed a \$5,000 restitution fine at sentencing that had not been discussed in the plea bargain. There, the court concluded that the defendant waived his challenge to the court's failure to advise concerning the fine but not his claim that its imposition violated his plea agreement. (*Id.* at pp. 1029-1030.) The *Walker* decision was later revisited by our Supreme Court in *In re Moser* (1993) 6 Cal.4th 342 (*Moser*). The *Moser* court explained: "In concluding that the imposition of such a substantial fine constituted a violation of the plea agreement in *Walker*, we 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." (*Id.* at p. 356.) This important inference was supported by the fact that in

Walker, the sentencing took place just moments after a plea was placed on the record during which no mention was made of restitution. (*Walker, supra*, 54 Cal.3d.at p. 1019.)

Thus, a broken promise, essential to the outcomes of *Clark, Walker, Santobello* and *Mancheno*, is absent in appellant’s case. The prosecution made no specific offer related to the sentence. In fact, as noted in *Moser*, the prosecution *could not* properly have made any promise to waive the laboratory fee or the drug program fee because those fees are “a statutorily mandated element of punishment” for an individual convicted under Health and Safety Code section 11378.³ (*Moser, supra*, 6 Cal.4th at p. 357.) The fee imposed under Vehicle Code section 14601.1, though discretionary,⁴ was also not the subject of any promise by the prosecution. Therefore, the imposition of these fines was not a violation of the terms of the plea agreement.

As respondent concedes, the penalty assessment added to the fee imposed under Vehicle Code section 14601.1 was \$10 in excess of the statutorily allowed maximum.⁵ Therefore, though the imposition of the fines does not require reversal, the abstract of judgment must be amended to reflect a reduction in the penalty assessment from \$870 to \$860.

³ Health and Safety Code section 11372.5 states that an individual convicted under Health and Safety Code section 11378 “shall pay a criminal laboratory analysis fee in the amount of fifty dollars” Health and Safety Code section 11372.7 states that an individual convicted under Health and Safety Code section 11378 “shall pay a drug program fee in an amount not to exceed one hundred fifty dollars”

⁴ Vehicle Code section 14601.1 states that an individual convicted under that code section shall be punished by “jail for not more than six months or by a fine of not less than three hundred dollars (\$300) or more than one thousand dollars (\$1,000), or by both that fine and imprisonment.” (Veh. Code, § 14601.1, subd. (b)(1).)

⁵ The penalty assessment added to the fines, as respondent notes, may be derived from five separate statutory provisions, the combined effect of which is to authorize a penalty of as much as \$20 plus 240 percent of the base fine. With respect to the drug lab fee and drug program fee, the court imposed a slightly lower fee than the allowable maximum, while the fee under Vehicle Code section 14601.1 was \$10 higher than the allowable maximum.

D. Restitution Fee as Violation of the Terms of the Plea Agreement

Appellant' final argument is that the court violated the terms of his plea agreement by imposing a restitution fine. As was the case with his arguments with respect to the drug program fee, lab fee and the Vehicle Code section 14601.1 fee, however, appellant has not suggested that the prosecution made any promise to him or agreed to set any particular restitution fee. Therefore, no violation of the terms of his plea agreement has occurred.

In *People v. Dickerson* (2004) 122 Cal.App.4th 1374 (*Dickerson*), the court rejected the same claim appellant asserts. In *Dickerson*, restitution was not discussed as part of the plea disposition, but was nevertheless imposed at sentencing. In rejecting defendant's claim that doing so violated the terms of his plea agreement, the appellate court concluded: "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. Accordingly, we conclude that defendant has not established that the sentencing court's imposition of restitution fines pursuant to the statutory formula violated his plea agreement." (*Id.* at p. 1386.)

Appellant argues that *Dickerson* and cases that have followed it (such as *People v. Sorenson* (2005) 125 Cal.App.4th 612) "conflict with the California Supreme Court's decision in *Walker* and thus violate the rule of *stare decisis*." We disagree. As noted earlier, and as explained in both the *Dickerson* and *Sorenson* opinions, *Walker*'s analysis turned on the particular circumstances of that case, which permitted the court reasonably to infer that the plea precluded a restitution fee. However, "*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.)

In this case appellant was properly advised at the plea hearing that his plea would result in the imposition of a restitution fee between \$2,000 and \$10,000. This fee was also referenced in the probation report which recommended restitution be ordered

totaling \$2,500. Therefore, the imposition of restitution fees totaling \$2,000 at sentencing did not violate appellant's plea agreement.

IV.

DISPOSITION

The abstract of judgment is to be amended to reflect a \$10 reduction in the penalty assessment imposed in connection with the fee under Vehicle Code section 14601.1. In all other respects, the judgment is affirmed.

Ruvolo, P.J.

We concur:

Reardon, J.

Sepulveda, J.