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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME G. DELRIO,

Defendant and Appellant.

H028615

(Santa Clara County

Super. Ct. No. BB405741)

Defendant Jaime Guzman Delrio was sentenced to prison following a no contest plea to charges of false imprisonment and exhibiting a deadly weapon. As part of his sentence, the court ordered defendant to pay a restitution fund fine of \$800. Defendant challenges the court's imposition of that fine on appeal. He asserts that the fine was not part of his plea bargain, and he asks us to reduce it to the statutory minimum.

We reject defendant's contentions and we affirm the judgment. As we explain, there is no violation of the plea bargain because defendant was aware of the restitution fine before entering his plea.

**BACKGROUND**

Because the sole issue in this appeal concerns sentencing, a brief recitation of the facts will suffice. As indicated in the probation report, the victim was defendant's ex-girlfriend; until their break-up in November 2003, the two had lived together, and they also had a child together. Defendant was arrested in the early morning hours of February 1, 2004, after the victim reported to Mountain View police that he had accosted

her that evening, first pulling her bodily into his car against her wishes, and later carrying her away and threatening her with a knife.

### ***Charges***

On February 3, 2004, a felony complaint was filed in Santa Clara County, charging defendant with one count of stalking, two counts of false imprisonment, and one count of exhibiting a deadly weapon other than a gun. (Pen. Code, §§ 646.9, subd. (a) [count 1]; 236/237 [counts 2 and 3]; 417, subd. (a)(1) [count 4]; further unspecified statutory references are to the Penal Code.) The complaint also included special allegation that defendant had a prior strike conviction. (§§ 1170.12; 667, subds. (b)-(i).)

### ***Change of Plea***

In July 2004, defendant entered a plea of no contest to counts 2, 3, and 4, and he admitted his prior strike conviction. In exchange, the prosecution agreed to the dismissal of count 1, and the parties agreed to a sentencing range of 32 months to four years in prison.

Before the court accepted defendant's plea, it sought and obtained his acknowledgement that he would be required "to pay a restitution fine of no less than \$200 and no more than \$10,000." But the court failed to advise defendant of the circumstances under which he would be permitted to withdraw his plea. (See § 1192.5.)<sup>1</sup>

The matter was then set for sentencing.

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<sup>1</sup> Section 1192.5 provides in pertinent part: "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." (§ 1192.5.)

### ***Sentencing***

A probation report was prepared for defendant's sentencing hearing. The probation report recommended a prison term of 32 months and a restitution fund fine of \$800. At the sentencing hearing, held in November 2004, defendant's counsel stated: "We'll be submitting on the probation report and agree with the recommendation."

Consistent with the recommendation in the probation report, the court sentenced defendant to a prison term totaling 32 months. It then imposed a restitution fund fine of \$800. (§ 1202.4.) The court also imposed an equivalent parole revocation fine, which it stayed. (§ 1202.45.)

### ***Defendant's Appeal***

In May 2005, after this court granted defendant's application to file a late notice of appeal, he brought this appeal. In July 2005, defendant filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. In February 2006, this court requested and received supplemental briefing on the issue of whether the restitution fine violated defendant's plea agreement.

## **CONTENTIONS**

Defendant contends that imposition of the \$800 restitution fund fine violated his plea bargain. He asks us to reduce the fine to \$200, the statutory minimum, under the authority of *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*). The Attorney General defends imposition of the fine.

Defendant acknowledges that this court rejected a similar argument in *People v. Dickerson* (2004) 122 Cal.App.4th 1374. (See also *People v. Knox* (2004) 123 Cal.App.4th 1453; *People v. Sorenson* (2005) 125 Cal.App.4th 612.) Defendant maintains that *Dickerson* was wrongly decided, that it conflicts with the holding of *Walker*, and that it should not be followed. As defendant acknowledges, this issue is

presently pending in the California Supreme Court, in *People v. Crandell* (review granted August 24, 2005, S134883).

## DISCUSSION

At the threshold, we explain that defendant's claim is cognizable on appeal. Reaching the merits, we reject the claim.

### ***The claim is preserved for appeal.***

As noted above, the trial court failed to advise defendant of the circumstances under which he would be permitted to withdraw his plea, as required by section 1192.5. "Absent a section 1192.5 admonition, we cannot assume the defendant knew he had a right to withdraw his plea." (*Walker, supra*, 54 Cal.3d at p. 1026.) For that reason, when the statutory admonition is not given, the defendant's plea bargain claim is preserved for appellate review. (See *id.* at pp. 1024-1025.)

### ***The fine does not violate the plea agreement.***

We extensively reviewed the principles that govern plea bargains and restitution fines in *Dickerson*, *Knox*, and *Sorenson*. We need not repeat that discussion here. We simply reiterate this key conclusion: in determining whether a restitution fine is encompassed by the plea bargain, "the critical consideration is whether the challenged fine was within the 'defendant's contemplation and knowledge' when he entered his plea." (*People v. Knox, supra*, 123 Cal.App.4th at p. 1460, quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 86.)

As we explained in *Knox*, plea agreements have "contractual qualities." (*People v. Knox, supra*, 123 Cal.App.4th at p. 1459; see also, e.g., *People v. Shelton* (2006) 37 Cal.4th 759, 767 ["plea agreement is a form of contract"].) Plea agreements also have "a constitutional dimension." (*People v. Knox*, at p. 1459.) "A criminal defendant's constitutional due process right is implicated by the failure to implement a plea bargain according to its terms." (*Ibid.*) The question presented in this case concerns the

contractual aspect of plea agreements: at issue here “is whether specific terms or consequences became part of the plea bargain.” (*Ibid.*)

In this case, we conclude, the restitution fund fine did become part of defendant’s plea agreement. Various aspects of the agreement were reflected in the colloquy that preceded defendant’s plea. As relevant here, the restitution fund fine was among them. Defendant entered his plea only after acknowledging that he was subject to a statutory restitution fund fine of up to \$10,000. As in *Knox*, “we have analyzed defendant’s understanding that his plea would result in a restitution fine, as disclosed by the pre-plea timing of the advisement and by defendant’s acknowledgement that the fine would be imposed.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1461.)

Nor are we persuaded to a different conclusion by the court’s later determination of the amount of the fine. As stated in *Knox*: “The fact that the precise amount of the fine was not specified prior to the entry of defendant’s plea does not change the analysis. To the contrary, it represents defendant’s implicit recognition that the amount of the fine will be left to the sentencing court’s discretion.” (*People v. Knox, supra*, 123 Cal.App.4th at p. 1461, fn. omitted. See *People v. Dickerson, supra*, 122 Cal.App.4th at p. 1385.)

As fully explained in this court’s recent cases, our conclusion does no violence to *Walker*. (See *People v. Sorenson, supra*, 125 Cal.App.4th at pp. 618-619; *People v. Knox, supra*, 123 Cal.App.4th at pp. 1461-1462; *People v. Dickerson, supra*, 122 Cal.App.4th at pp. 1384-1385.) We therefore reject defendant’s contentions to the contrary.

**DISPOSITION**

The judgment is affirmed.

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McAdams, J.

I CONCUR:

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Rushing, P.J.

MIHARA, J., dissenting.

Since I believe that the imposition of an \$800 restitution fund fine in this case was a violation of the plea bargain, I dissent for the same reasons I dissented in *People v. Knox* (2004) 123 Cal.App.4th 1453. (*Knox* at pp. 1463-1465, Mihara, J., dissenting.) I would modify the judgment to reduce the restitution fund fine to \$200.

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Mihara, J.