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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANTONIO INFANTE, Defendant and Appellant.	H030376 (San Benito County Super. Ct. No. CR0600089)

I. INTRODUCTION

After entering into a plea agreement, defendant Jose Antonio Infante pleaded no contest to two felonies, resisting an executive officer by means of threats and violence (Pen. Code, § 69)[1] and carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)). He also admitted a prior prison term allegation (§ 667.5, subd. (b)). The trial court sentenced defendant to the agreed-upon aggregate term of two years, four months.

On appeal, defendant contends that (1) the People's failure to file an information deprived the trial court of jurisdiction; and (2) the $400 restitution fine must be reduced to the statutory minimum of $200 because the restitution fine was

[1] All further statutory references are to the Penal Code unless otherwise indicated.

not specified in the plea agreement. For reasons that we will explain, we find no merit in defendant's contentions and therefore we will affirm the judgment.

We ordered defendant's related petition for writ of habeas corpus, which asserts a claim of ineffective assistance of counsel, to be considered with this appeal. We have disposed of the petition by separate order filed this day. (See Cal. Rules of Court, rule 8.264(b).)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

The complaint filed January 13, 2006, charged defendant with two felonies, resisting an executive officer by means of threats and violence (§ 69; count 1) and carrying a concealed dirk or dagger (§ 12020, subd. (a)(4); count 2).[2] The complaint also included a special allegation that defendant had served three prior prison terms.

B. *The Preliminary Hearing*

The witnesses at the preliminary hearing held January 30, 2006, included Sergeant Juan Carlos Reynoso and Officer Heather Dorman of the Hollister Police Department.

Sergeant Reynoso testified regarding his contact with defendant on January 11, 2006. At that time, Sergeant Reynoso was wearing his police uniform and badge and driving a police vehicle. Immediately before contacting defendant, Sergeant Reynoso was advised over his radio that a "Mr. Jose Infante" had been seen in the area of the 100 block of San Felipe Road and there was "a possibility of him having a warrant for his arrest." When Sergeant Reynoso arrived at that

[2] The record on appeal reflects that at an unspecified time defendant was also charged with third count, misdemeanor failure to appear (§ 166, subd. (a)(4)). Count 3 was dismissed at the time of sentencing. No issues pertaining to count 3 have been raised in this appeal.

location, he saw Jose Infante, whom he identified in court as defendant. Defendant was walking in front of a pizza restaurant.

Sergeant Reynoso stopped his vehicle, got out, and called to defendant, "Hey, how are you doing," in order to make contact with him. As described by Sergeant Reynoso, defendant responded as follows: "[H]e immediately took a fighting stance . . . . [¶] . . . [¶] [Defendant] clinched his hands into a fist, took a fighting stance and said 'fuck you, Holmes [*sic*]. What do you want?' And then he motioned with his hands and went like--moved his fists up and down in a threatening manner and said . . .'come on. Come on, fucker,' as he held his hands and fists in front of me."

Sergeant Reynoso demonstrated defendant's posture for the magistrate, who then described it for the record: "Squared off, fists clinched, the elbows bent, raising up the forearms to almost a parallel position, parallel to the ground and then actually pivoting at the elbows up and down in a preparatory fighting manner as would be represented by boxing."

After defendant assumed a fighting stance, Sergeant Reynoso took his tazer out of the holster and ordered defendant to put his hands on the hood of the police vehicle. Defendant continued to be "verbally confrontational," but he eventually complied with the order. Sergeant Reynoso then conducted a patdown search and discovered a leatherman tool in defendant's shirt pocket. He also found a pocket knife locked in the open position in defendant's left front pants pocket. Defendant told Sergeant Reynoso that he needed the knife to cut lemons.

During their contact, defendant advised Sergeant Reynoso that there was no outstanding arrest warrant for him. Sergeant Reynoso later learned that the arrest warrant for "a Mr. Jose Infante" was not actually for defendant.

Officer Dorman arrived when Sergeant Reynoso was handcuffing defendant. She searched defendant and found a folded pocket knife in defendant's

right front pants pocket. At that time, defendant was confrontational and hostile. Officer Dorman also noticed that defendant's speech was rapid and his conduct was erratic. When Officer Dorman attempted to check defendant's pulse, he said, "Why don't you take off the handcuffs and I'll bitch slap you?" He also told Officer Dorman that the knife was for cutting fruit.

At the conclusion of the preliminary hearing, defendant was held to answer on all charges set forth in the complaint. At the court's request, both parties stipulated to "the use of the complaint as the information."

C. *The Plea Agreement and Sentencing*

Defendant entered into a plea agreement on April 10, 2006. Before accepting defendant's plea, the trial court advised defendant that, among other things, he could be ordered to pay a restitution fine of a minimum of $200 to a maximum of $10,000. Thereafter, defendant pleaded no contest to all counts and one prison prior in exchange for an indicated aggregate sentence of two years, four months and dismissal of two prison priors.

At the sentencing hearing held May17, 2006, the trial court imposed an aggregate sentence of two years, four months, which included imposition of the lower term of 16 months on count 1, resisting an executive officer by means of threats and violence (§ 69); a concurrent term of 16 months on count 2, carrying a concealed dirk or dagger (§ 12020, subd. (a)(4)); and a sentence of one year, to be served consecutively, on the special allegation of a prison prior. The trial court also imposed a restitution fund fine of $400 and another restitution fine in the same amount, suspended.

After the sentencing hearing, defendant filed a request for a certificate of probable cause, which the trial court granted on July 7, 2006. A notice of appeal was filed on July 3, 2006.

III. DISCUSSION

On appeal, defendant contends that the People's failure to file an information deprived the trial court of jurisdiction. Defendant also contends that the $400 restitution fine must be reduced to the statutory minimum of $200 because the restitution fine was not specified in the plea agreement. We will address each contention in turn.

A. *The Information*

" 'An information is a written accusation of crime made by a district attorney, without action by a grand jury, after a magistrate, at a preliminary hearing, has found sufficient cause to believe the defendant guilty of a public offense and has ordered him [or her] committed.' " (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132 (*Cartwright*.) Thus, the purpose of the information is "to notify the accused of the charge he [or she] is to meet at trial." (*People v. Adams* (1974) 43 Cal.App.3d 697, 705.)

In the present case, immediately after the magistrate had held defendant to answer all charges set forth in the complaint at the conclusion of the January 30, 2006, preliminary hearing, the following colloquy took place regarding the information:

"THE COURT: . . . Stipulate to the use of the complaint as the information, [defense counsel]?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: So stipulated to, [prosecutor]?

"[THE PROSECUTOR]: So stipulated."

The minute order for January 30, 2006, reflects the parties' stipulation that the complaint would be deemed the information.

However, defendant contends on appeal that the trial court lacked jurisdiction because an information was not filed by the district attorney and

therefore the judgment must be reversed. Defendant points out that the California Constitution, article I, section 14, requires that a felony be prosecuted either by information or indictment and section 739 mandates the filing of an information by the district attorney.

Defendant also relies on *People v. Smith* (1986) 187 Cal.App.3d 1222 (*Smith*) for the proposition that treating the complaint as the information does not confer jurisdiction on the trial court. In *Smith*, the superior court judge discovered at the time of arraignment that no information had been filed. However, the superior court and the parties apparently treated the municipal court complaint as the information and the court subsequently accepted the defendant's guilty plea. The appellate court ruled that the superior court lacked jurisdiction to enter a judgment in a case where no information was filed, because "[f]ailure to file an information is an irregularity of sufficient importance to the functioning of the courts that the parties cannot cure the irregularity by their consent to the proceedings." (*Smith, supra*, 187 Cal.App.3d at pp. 1224-1225.)

The People assert that *Smith*, *supra*, 187 Cal.App.3d 1222, is distinguishable from the case at bar and argue that the decision in *Cartwright*, *supra*, 39 Cal.App.4th 1123, is directly on point. In *Cartwright*, the magistrate deemed the complaint to be an information immediately after holding the defendant to answer. On appeal, the defendant objected that an information was never filed and, in reliance on *Smith*, *supra*, 187 Cal.App.3d 1222, claimed that the trial court lacked jurisdiction to try him. The appellate court rejected defendant's argument, finding that *Smith* was distinguishable and ruling that "[h]ere, the magistrate acting as a superior court judge, accepted the document on file as an information. At that point the information was filed. Unlike *People v. Smith*, *supra*, 187 Cal.App.3d 1222, this is not a case where the parties consented

in an after-the-fact attempt to cure the failure to file the proper document." (*Cartwright*, *supra*, 39 Cal.App.4th at p. 1132.)

Under the circumstances of this case, we determine that the trial court did not lack jurisdiction to accept defendant's no contest plea. While defendant is correct that an information is mandated by both the California Constitution (art. I, § 14)[3] and the Penal Code (§§ 682,[4] 739)[5] for the offenses with which he is charged, he has not shown that an information was lacking here.

Immediately after holding defendant to answer all charges set forth in the complaint, the magistrate in the present case obtained the parties' stipulation that the complaint would serve as the information. The magistrate, acting as a superior court judge, then deemed the complaint to be an information. At that point, there was an information on file in the superior court that notified defendant of the

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[3] Article I, section 14 of the California Constitution provides in pertinent part, "Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information."

[4] Section 682 provides, "Every public offense must be prosecuted by indictment or information, except: [¶] 1. Where proceedings are had for the removal of civil officers of the state; [¶] 2. Offenses arising in the militia when in actual service, and in the land and naval forces in the time of war, or which the state may keep, with the consent of Congress, in time of peace; [¶] 3. Misdemeanors and infractions; [¶] 4. A felony to which the defendant has pleaded guilty to the complaint before a magistrate, where permitted by law."

[5] Section 739 provides, "When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney of the county in which the offense is triable to file in the superior court of that county within 15 days after the commitment, an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed. The information shall be in the name of the people of the State of California and subscribed by the district attorney."

charges he was to meet at trial. Accordingly, the superior court had jurisdiction to try defendant.

We are not persuaded by defendant's argument that the decision in *Smith*, *supra*, 187 Cal.App.3d 1222, compels a different result because *Smith* is distinguishable. In *Smith*, the superior court and the parties recognized that no information had been filed and apparently proceeded on the municipal court complaint. There was no stipulation that the complaint would serve as the information and the superior court did not deem the complaint to be an information. (*Smith*, *supra*, 187 Cal.App.3d at pp. 1224-1225.) Thus, in contrast to *Cartwright* and the present case, no document constituting an information was ever filed in *Smith*.

For these reasons, we conclude that the trial court did not lack jurisdiction due to the lack of a properly filed information.

B. *The $400 Restitution Fine*

Defendant contends that the trial court violated the terms of his plea bargain by imposing a $400 restitution fine to which he did not specifically agree. According to defendant, the restitution fine must be reduced to the statutory minimum of $200, pursuant to *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*).

Defendant acknowledges that this court rejected a similar argument in three cases (*People v. Dickerson* (2004) 122 Cal.App.4th 1374 (petn. for review den. Jan. 19, 2005) (*Dickerson*); *People v. Knox* (2004) 123 Cal.App.4th 1453 (petn. for review den. Jan. 19, 2005) (*Knox*); and *People v. Sorenson* (2005) 125 Cal.App.4th 612 (petn. for review den. Apr. 13, 2005) (*Sorenson*)). However, he contends that these decisions are inconsistent with *Walker*, *supra*, 54 Cal.3d 1013, and notes that the California Supreme Court will be considering the issue in *People v. Crandell* (review granted Aug. 24, 2005, S134883).

The People respond that, for the reasons stated in *Dickerson*, *Knox*, and *Sorensen*, the trial court did not violate the plea bargain by imposing a $400 restitution fine. We determine that imposition of the $400 restitution fine was lawful under *Walker* as well as our previous decisions in *Dickerson*, *Knox*, and *Sorensen*.

In *Walker*, the California Supreme Court did not rule that a plea bargain is violated whenever the trial court imposes a section 1202.4 restitution fine to which the defendant did not specifically agree as one of the terms of the plea agreement. Moreover, the *Walker* court did not require the parties to negotiate the amount of the restitution fine. (*Dickerson, supra*, 122 Cal.App.4th at p. 1386.) Instead, the court recommended that "the restitution fine should generally be considered in plea negotiations." (*Walker, supra*, 54 Cal.3d at p. 1024.)

As our Supreme Court subsequently explained in *In re Moser* (1993) 6 Cal.4th 342, "[i]n concluding that the imposition of [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.) The facts in *Walker* involved the trial court imposing a $5000 restitution fine without having advised the defendant, prior to accepting his guilty plea, that he was subject to a mandatory restitution fine. (*Walker, supra*, 54 Cal.3d at p. 1019.) Thus, as we stated in *Knox*, "*Walker* turned on the court's assessment of the defendant's reasonable understanding of the plea agreement, which in turn resulted from the lack of an advisement concerning the restitution fine." (*Knox, supra*, 123 Cal.App.4th at p. 1461.)

In the present case, before accepting defendant's no contest plea on April 10, 2006, the trial court advised defendant that he would be subjected to a mandatory restitution fine, as stated in the following colloquy:

"THE COURT: . . . You could be ordered to pay . . . a restitution fine of a minimum of $200 to a maximum of $10,000, and various other fees. You also will be ordered to make restitution to any victim for any economic injury suffered by that victim in an amount to be ordered by the Court. Do you understand that?

"THE DEFENDANT: Yes."

Defendant did not object to the imposition of a restitution fine above the statutory minimum of $200. Thereafter, at the time of the May 17, 2006, sentencing hearing, the trial court announced the following order regarding restitution fines: "Restitution fine in the amount of $400, and another restitution fine in the same amount is suspended unless parole is revoked." Defendant did not object to the restitution fine of $400 during the sentencing hearing.

We believe that defendant's failure to object to the imposition of the restitution fine, when he was advised prior to his plea that a restitution fine of $200 to $10,000 would imposed and again when the $400 fine was imposed at sentencing, indicates that imposition of the restitution fine did not violate the terms of his plea bargain. In *People v. McClellan* (1993) 6 Cal.4th 367, the California Supreme Court found that the defendant's failure to object to the requirement of sex offender registration under section 290 at the sentencing hearing suggested that the defendant "did not consider the registration requirement significant in the context of his plea agreement." (*Id.* at p. 378.)

Similarly, this court has previously determined that a defendant's failure to object to the imposition of a restitution fine at the time of sentencing indicates that imposition of the fine does not violate the terms of the plea bargain. (*Dickerson, supra*, 122 Cal.App.4th at p. 1385.) Additionally, failure to object "suggests an implicit agreement that the imposition and amount of any fines was left to the discretion of the sentencing court." (*Sorenson, supra*, 125 Cal.App.4th at p. 619.)

For these reasons, we conclude that defendant has not established that the trial court's imposition of a $400 restitution fine at sentencing violated his plea agreement.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

I CONCUR:

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DUFFY, J.

I CONCUR IN THE JUDGMENT ONLY:

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MIHARA, J.