Filed 3/8/06 P. v. Romero CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARIO RAMIREZ ROMERO, Defendant and Appellant.	H028708 (Santa Cruz County Super.Ct.No. F10294)

The sole issue in this case is whether the post-plea restitution fund fine of $4,700 that the trial court imposed under Penal Code section 1202.4[1] 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. Based on the parties' agreement and the supporting record that the abstract of judgment mistakenly states the amount of the restitution fund fine to be $4,800, $100 in excess of what was intended, we also modify the abstract to correct this error.

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

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 single issue on appeal. The district attorney filed a complaint in September 2004 charging defendant with seven counts of committing lewd acts upon a child in violation of section 288, subdivision (a), (counts 1-4, 6, 8, & 9), and three counts of committing forcible lewd acts upon a child in violation of section 288, subdivision (b)(1), (counts 5, 7, & 10). The complaint also alleged that defendant had used force, violence, duress, and menace within the meaning of section 1203.066, subdivision (a)(1), in connection with counts 5, 7, and 10, and that he had had substantial sexual contact with the victim within the meaning of section 1203.066, subdivision (a)(8), in connection with counts 5 through10.

Defendant initially pleaded not guilty and denied the special allegations. Later, the district attorney and defense counsel announced in open court that they had agreed upon a disposition of the case. Defendant would enter a plea of no contest to counts 6, 7, and 10 and be sentenced to a prison term of 24 years. The remaining counts would be dismissed. Defendant would receive 15 percent "worktime credits" under section 2933.1, requiring him to serve at least 85 percent of his sentence, and would waive his right to appeal.

Defendant confirmed that he had had sufficient time to discuss the plea agreement with counsel. He was advised of his constitutional rights and waived them, and he also confirmed that he had understood that he would be sentenced by the court to 24 years in prison. He was further advised of certain direct consequences of his plea, including that the conviction could later be used against him if he were to be charged with another offense in the future, that he could be deported if he were not a citizen, that he would have to register as a sex offender, and that he "would have to pay restitution for any financial loss caused to the victim; for instance if the victim needed counseling, that sort

of thing, [he] would have to pay for that."[2] Defendant was not advised that a mandatory restitution fund fine of between $200 and $10,000 would be imposed under section 1202.4, subdivision (b). Nor was he advised of his right to withdraw his plea under section 1192.5[3] if the court withdrew its approval of the plea bargain at sentencing.

Before entering his plea, defendant confirmed that he had not been promised anything other than what had already been discussed in exchange for it and that he had not been threatened in any way as an inducement. Defendant finally stated that he was admitting the charges because he had in fact committed those particular offenses. Defendant then pleaded no contest to counts 6, 7, and 10 and the court found a factual basis for the plea.

A probation report was later prepared per the court's order. It recommended that defendant be sentenced to 24 years in prison and that he not be required to pay restitution to the victim under section 1202.4, subdivision (f), since none had been requested. But

---

[2] This latter advisement appears to have been a reference to section 1202.4, subdivision (f), which provides for payment of direct restitution to a victim who has suffered economic loss.

[3] 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, 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.) It is not, as defendant contends, automatic reduction of the restitution fund fine to the statutory minimum of $200.

the report did recommend that a restitution fund fine under section 1202.4, subdivision (b), be imposed in the amount of $4,800. At sentencing, neither defendant nor his counsel objected to the report's recommendation concerning imposition of the restitution fund fine as exceeding the plea bargain, despite counsel's corrections to two other aspects of the report. In this regard, counsel specifically stated, "I have read and [understood] the probation officer's report and have no other corrections."

The court then imposed the total stipulated prison term of 24 years, which was based on the upper term of eight years for each of the three charges, to run consecutively. Defendant was again advised that he would be required to register as a sex offender under section 290 for the rest of his life. The court finally imposed a restitution fund fine of $4,700 under section 1202.4, subdivision (b), and a $200 parole revocation fine under section 1202.45, to be suspended.[4] In so doing, the court confirmed that there was no other issue relating to restitution, presumably to the victim under section 1202.4, subdivision (f). Neither defendant nor his counsel objected to the imposition of the restitution fund fine.

An abstract of judgment was later filed. It referenced the clerk's minute order for specification of "restitution fine and fees." The minute order had incorrectly stated that defendant had been "ordered to pay $4,800.00 Restitution Fine per 1202.4 PC" when the actual fine imposed was $4,700.

Despite his plea agreement, defendant, acting in pro per, filed a notice of appeal along with an application for a certificate of probable cause in which he asserted that incompetence of counsel had resulted in his waiver of constitutional rights and no contest plea. He also contended that he would have received a lesser sentence if his rights had been protected and that he had "paid his attorney $15,000.00 to defend his rights and, in

[4] Defendant does not challenge on appeal the imposition of the parole revocation fine.

exchange, counsel had him plead guilty with an exposure of 24 years at 85 [percent], all of which the court imposed." Defendant did not mention the restitution fine in the application, which the court later denied. Defendant then filed an amended notice of appeal based on sentencing error.

DISCUSSION

Relying on *Walker, supra*, 54 Cal.3d 1013, defendant contends that the trial court erred in imposing the $4,700 restitution fund fine under section 1202.4, subdivision (b), in that this violated the terms of his plea bargain since no fine was specified as part of that bargain.[5] Defendant further asserts that this error requires reduction of the fine 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 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. He was not advised of an additional mandatory restitution fine of at least $100 but no more than $10,000. Nor was

[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 Penal Code 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...) The identical issue is presented in another case in which the court recently granted review and is holding for the lead case, *People v. Crandell, supra*. That case is *People v. Wurtz* (Nov. 22, 2005, H028217) [nonpub. opn.] review granted. February 22, 2006, S139968. 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.

he advised of his right to withdraw his plea under section 1192.5. 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, as here, 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. But, as the court held in *Walker*, this error is waived on appeal if the defendant failed to raise it in the court below at or before sentencing. (*Walker, supra*, 54 Cal.3d at pp. 1020, 1022-1023.) Accordingly, to the extent defendant claims error in this case for the trial court's failure to have advised him of the direct consequences of his plea, the error has been waived by defendant's failure to have timely raised the issue in the trial court. (*Ibid.*; see also *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879.) Even if this error were not waived, defendant has shown no prejudice here.

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 Pen. Code, § 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, supra*, 9 Cal.App.4th at p. 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 $4,700 restitution fine 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 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).) This 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)*.)[6]

---

[6] We 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 recognize that on the facts of the instant case, which include that the pre-plea advisements concerning the direct consequences of the plea did not include any reference to a restitution fund fine, we

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. Defendant argues here that the fact that neither the parties nor the court mentioned the subject of a restitution fund fine at all when reciting the terms of the plea agreement means that 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 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.)

The conclusion that the fine 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

---

would be hard pressed to conclude that the fine was indeed within the defendant's "contemplation and knowledge" at the time of his initial plea. But in light of our holdings in *Dickerson* and *Sorenson*, which stand on their own, we are not compelled to apply the specific *Knox* test in order to conclude that under the circumstances of this particular case, the imposition of a restitution fine did not violate the plea bargain.

confirmed by the absence of objection to the recommendation in the probation report that a restitution fund fine be imposed, coupled with his counsel's correction of other aspects of the report, and the further absence of objection when the $4,700 restitution fine was actually imposed by the court.[7] 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 a $4,700 restitution fine violated the terms of the plea bargain.

These circumstances 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.) The same holds true in this case. Defendant has failed to show that his plea bargain contemplated either "no fine or . . . a minimum fine within a statutory range." (*Sorenson, supra*, 122 Cal.App.4th at p. 619.) We accordingly conclude that defendant has not established that the trial court's imposition of the $4,700 restitution fund fine violated his plea agreement.

[7] We also observe that defendant was advised of the possibility of direct victim restitution, a fine that ultimately was not imposed, such that he was aware of the possibility that he would be required to make some form of restitution outside of the terms of the plea bargain. We further note that even though defendant was not required to obtain a certificate of probable cause in order to appeal a sentencing error (§§ 1237 & 1237.5), in his application for a certificate, he objected to other aspects of his sentence, but he did not mention the restitution fund fine as part of his grievance. Both of these more tangential facts also support that in fact, there was no agreement either for no fine or for the statutory minimum fine of $200.

DISPOSITION

The judgment and sentence are affirmed. The abstract of judgment is modified to reflect that the restitution fund fine imposed under section 1202.4 is $4,700 instead of $4,800.

Duffy, J.

I CONCUR:

Bamattre-Manoukian, Acting, P.J.

McAdams, J.

I respectfully dissent.

The facts of this case are unlike the facts in *People v. Knox* (2004) 123 Cal.App.4th 1453 and *People v. Dickerson* (2004) 122 Cal.App.4th 1374.

As the majority opinion concedes, in these proceedings "[d]efendant was not advised that a mandatory restitution fund fine of between $200 and $10,000 would be imposed under [Penal Code] section 1202.4, subdivision (b)." (Maj. opn. at p. 3.) There was no description of the potential restitution fund fine during the recitation of the specific counts to be admitted, the agreed-upon prison term and limitations on "credits" and the counts to be dismissed. Furthermore, at no time during the advisement of constitutional rights, the advisement of the consequences of his plea or the entry and acceptance of his plea was defendant advised of the fine.

Where the record is silent, I cannot conclude that the restitution fine was "within 'defendant's contemplation and knowledge' when he entered his plea." (*People v. Knox, supra,* 123 Cal.App.4th at 1461, quoting *People v. Panizzon* (1996) 13 Cal.4th 68, 86.) Such a complete omission of the judicial advisement concerning the restitution fund fine prior to the entry of the plea compels reduction of the fine to the statutory minimum of $200. (*People v. Walker* (1991) 54 Cal.3d 1013.)

_____

McAdams, J.