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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRES RUBALCABA,

Defendant and Appellant.

H030220

(Santa Clara County

Super. Ct. No. CC505741)

On March 7, 2006, defendant Andres Rubalcaba pled no contest to one count each of unlawful sexual intercourse with a minor at least three years younger than he, misdemeanor inflicting corporal injury on a cohabitant, and misdemeanor violating a protective order; he also pled no contest to three counts of furnishing a minor with a controlled substance, and admitted the allegation on each count that the minor was at least four years younger than he. In exchange, instead of 19 years and two months in state prison he was to receive a maximum prison term of four years, eight months. While taking the plea, the trial court informed defendant that he would be ordered to pay actual restitution to the victim if there was any, and a restitution fund fine of a minimum of \$220 and a maximum of \$10,000.

At sentencing, the court imposed the agreed-upon sentence and among other fines and fees, also ordered defendant to pay a restitution fund fine of \$3,200 and suspended an

additional \$3,200 restitution fund fine. (Pen. Code, §§ 1202.4, subd. (b), 1202.45.)¹

Defendant contends on appeal that the restitution fines exceeded the punishment contemplated by the plea bargain and must be reduced to the statutory minimum. He also claims the court failed to advise defendant that he would have an opportunity to withdraw his plea if the court failed to follow the terms of the plea bargain. (§ 1192.5.)

DISCUSSION

Defendant states that “the issue [whether the restitution fund fines not being an express term of the plea agreement violates the plea bargain] is being raised and preserved because the same claim is now pending in the California Supreme Court in *People v. Crandell*, No. S134883, rev. gtd. 8-24-05.” Defendant recognizes that this court “considered and rejected the same claim in three published cases, *People v. Dickerson* (2004) 122 Cal.App.4th 1374, *People v. Knox* (2004) 123 Cal.App.4th 1892 [sic, page should be 1453], and *People v. Sorenson* (2005) 125 Cal.App.4th 612.” Defendant relies on *People v. Walker* (1991) 54 Cal.3d 1013, for the proposition that a defendant is entitled to enforcement of the plea bargain where a restitution fine (in that case, \$5,000) was a significant variance from the plea bargain, notwithstanding that defendant was on notice that he *could* receive a restitution fine. (*Id.* at pp. 1024, 1029-1030.)

Defendant states that in his case, “any Restitution Fund fine greater than \$220 was obviously not included as part of the plea negotiations in the present case. Therefore, under *Walker*, the \$3,200 fine . . . exceeded the terms of the plea bargain. . . . Since there was no . . . section 1192.5 admonition, there was no waiver of this error because of the absence of an objection.”

As defendant rightly states, we have found that the imposition of a restitution fine did not violate the plea agreement even though the plea bargain announced in court was

¹ Further statutory references are to the Penal Code unless otherwise stated.

silent on the amount of the restitution fine. (*People v. Dickerson, supra*, 122 Cal.App.4th at pp. 1384-1385.) We remain persuaded that this reasoning is correct. The \$3,200 restitution fund fine did not breach the plea agreement.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.