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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H030533

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. CC513651)

v.

HENRY ULLOA,

Defendant and Appellant.

_____ /

The sole contention on appeal is that the trial court’s imposition of a \$400 restitution fund fine was a violation of an alleged plea bargain. We conclude that there was no plea bargain and the imposition of the fine did not violate the plea “understanding.”

I. Background

Defendant was charged by information with alternative counts of felony driving under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)) or driving with a .08 blood alcohol level and causing injury (Veh. Code, § 23153, subd. (b)) and misdemeanor driving with a suspended license (Veh. Code, § 14601.2, subd. (a)). It was further alleged that defendant had personally inflicted great bodily injury

(Pen. Code, §§ 1203, subd. (e)(3), 12022.7, subd. (a)) in the commission of the drunk driving counts and that he had served a prison term for a prior felony conviction (Pen. Code, § 667.5, subd. (b)).

At the commencement of the change of plea hearing, the court said “[i]t is my understanding that there is a proposed disposition in this case.” “The People had made an offer of two years, top and bottom, to the defendant. And after discussions, the Court made a Court offer of two years top and 16 months bottom. And it is essentially the People’s offer, essentially.” The court subsequently informed defendant that “[t]he understanding is that you would be committed to state prison for the term of no more than two years and no less than 16 months. And you would not be considered for probation. And that’s the only promise being made to you. And there’s no promise as to any certain amount of fines or fees imposed.”

Defendant thereafter pleaded no contest to the .08 count and the misdemeanor driving with a suspended license count, and he admitted the great bodily injury enhancement and the prison prior. The court dismissed the remaining count, imposed the two-year midterm for the admitted felony count and a six-month jail term (which it deemed served) for the misdemeanor count. It struck the punishment for the enhancements. The court imposed a \$400 restitution fund fine. Defendant filed a timely notice of appeal.

II. Discussion

Defendant’s challenge to the \$400 restitution fund fine fails for several reasons. First, although there was a plea “understanding,” there was no plea *bargain*. Second, the plea “understanding” explicitly encompassed the court’s statement that “there’s no promise as to any certain amount of fines or fees.” Finally, the \$400 fine did not significantly exceed the plea “understanding.”

A. No Plea Bargain With Prosecutor

People v. Walker (1991) 54 Cal.3d 1013 applies only where there is a violation of a “plea bargain” between the defendant and the prosecution. “When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.” (*People v. Walker, supra*, 54 Cal.3d at p. 1024.) “[O]nly a punishment significantly greater than that bargained for violates the plea bargain.” (*Walker*, at p. 1027.)

“The process of plea bargaining . . . contemplates an agreement negotiated by the People and the defendant and approved by the court.” (*People v. Orin* (1975) 13 Cal.3d 937, 942.) “Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment, by the People’s acceptance of a plea to a lesser offense than that charged, either in degree or kind, or by the prosecutor’s dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the ‘bargain’ worked out by the defense and prosecution. But implicit in all of this is a process of ‘bargaining’ between the adverse parties to the case — the People represented by the prosecutor on one side, the defendant represented by his counsel on the other — which bargaining results in an agreement between them. [¶] However, the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of ‘plea bargaining’ to ‘agree’ to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor’s consent to the proposed disposition, would

detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. In the instant case it is undisputed that the prosecution did not agree to the arrangement by which the charges against defendant were disposed of; it is therefore clear that the matter under consideration herein does not involve a plea bargain." (*Orin*, at pp. 942-943, citations and footnotes omitted.)

Defendant did not enter into a *plea bargain* with the *prosecutor*. He rejected the prosecution's offer of "two years, top and bottom" and instead accepted "a Court offer of two years top and 16 months bottom." Acceptance of a "Court offer" does not constitute a plea bargain and does not constitute an agreement with the prosecutor. Consequently, *Walker* is inapplicable.

B. Plea "Understanding" Explicitly Negated Agreement As To Amount of Fine

Even if the plea "understanding" was a plea bargain, it was not violated. One of the express terms of the plea "understanding," stated by the court on the record at the change of plea hearing, was that "there's no promise as to any certain amount of fines or fees imposed." Since the plea "understanding" explicitly negated any agreement as to the amount of any fines, the amount of the restitution fund fine imposed by the trial court could not possibly "exceed that which the parties agreed upon." (*People v. Walker, supra*, 54 Cal.3d 1013, 1024.)

C. Fine Did Not Significantly Exceed Plea "Understanding"

In *People v. Walker, supra*, 54 Cal.3d 1013, the California Supreme Court upheld the imposition of what was then the \$100 mandatory minimum restitution fund fine. It concluded that the imposition of the \$100 fine did not significantly exceed the

terms of the plea agreement even though the plea agreement did not mention any restitution fund fine. Here, defendant accepts that imposition of the \$200 mandatory minimum restitution fund fine would not be a significant deviation from the terms of the plea “understanding.” Like a \$100 fine and a \$200 fine, a \$400 fine will not violate a plea agreement that does not mention the amount of the fine because, it is not “significantly greater than” the punishment otherwise identified in such a plea agreement. (*Walker* at p. 1027.) In our view, a \$400 fine is just not significant in the context of a prison sentence.

III. Disposition

The judgment is affirmed.

Mihara, J.

I CONCUR:

Bamattre-Manoukian, Acting P.J.

I CONCUR IN THE JUDGMENT ONLY:

Duffy, J.