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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ALLAN VEST,

Defendant and Appellant.

H030128

(Santa Clara County

Super. Ct. No. CC589538)

Defendant David Allan Vest was sentenced to prison following a no contest plea to a charge of residential burglary. As part of defendant's sentence, the court ordered him to pay a restitution fund fine of \$1,800. On appeal, defendant challenges the imposition of that fine, asserting that it was not part of his plea bargain. As explained below, we reject defendant's challenge and we affirm the judgment.

BACKGROUND

Because the sole issue in this appeal concerns sentencing, our recitation of the facts will be brief. The facts are drawn from the transcript of the preliminary hearing in this case.

Facts

The criminal charge against defendant arose from an incident in San Jose, which took place on April 21, 2005. The San Jose Police Department received a call from a

resident, who stated that an unknown white male was in her backyard, trying to hit her dog with a broom. A police officer responded to the call, but found no one in the yard at the time. After further investigation at the complex, the officer discovered defendant in a garage attached to one of the housing units. Defendant matched the description of the male from the earlier call. He told the officer that he just planned to get a blanket and then go sleep in his truck. According to the resident of the attached unit, defendant did not have permission to be in her garage.

Charges

By information filed in November 2005, defendant was charged with one count of residential burglary. (Pen. Code, § 459; further unspecified statutory references are to the Penal Code.) The information specially alleged the presence of a person other than an accomplice during the burglary, making the charge a violent felony. (§ 667.5, subd. (c)(21). In addition, the information alleged two prior burglary convictions as serious felony enhancements. (§ 667, subd. (a).) One of the two prior conviction allegations was charged as a “strike.” (§§ 667, subd. (b)-(i), 1170.12.)

Change of Plea

On January 10, 2006, pursuant to a plea agreement, defendant pleaded guilty to the burglary charge and admitted the factual allegation that made it a violent felony. He also admitted the prior strike allegation and one prior serious felony conviction. The remaining serious felony enhancement was taken under submission for dismissal and was later dismissed. Under the plea agreement, defendant was to serve a prison term of “nine years top and bottom.”

Before the court accepted defendant’s guilty plea, it sought and obtained his acknowledgement that he would be required to “pay a general fund and a victim restitution fund fine, not less than 200 [nor] more than \$10,000.”

After accepting defendant’s plea, the court scheduled sentencing for March 2006.

Sentencing

On March 9, 2006, pursuant to the plea agreement, the court sentenced defendant to nine years in prison. The court also ordered defendant to pay a restitution fund fine of \$1,800. (§ 1202.4.) In addition, the court imposed but suspended an equivalent parole revocation fine. (§ 1202.45.)

Defendant's Appeal

In April 2006, defendant brought this timely appeal.

ISSUE

Defendant's sole contention on appeal is that imposition of the \$1,800 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 People defend the fine.

DISCUSSION

As defendant acknowledges, this court has rejected the same arguments that he presents here, in at least three recent published cases: *People v. Dickerson* (2004) 122 Cal.App.4th 1374; *People v. Knox* (2004) 123 Cal.App.4th 1453 [majority opinion]; and *People v. Sorenson* (2005) 125 Cal.App.4th 612. Defendant nevertheless maintains that those three decisions are in conflict with *Walker* and that they were wrongly decided. As defendant points out, this issue is presently pending in the California Supreme Court, in *People v. Crandell* (review granted August 24, 2005, S134883).

The claim is preserved for appeal.

In this case, the trial court failed to advise defendant of the circumstances under which he would be permitted to withdraw his plea, as required by section 1192.5.¹

¹ 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

“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.

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.)

Defendant entered his plea only after acknowledging that he was subject to a statutory restitution fund fine of up to \$10,000. Contrary to defendant's assertion, the imposition of a fine within the statutory range does not constitute an additional discretionary penalty beyond that contained in the plea agreement. 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.) Nor does it offend federal constitutional law, as expressed in *Santobello v. New York* (1971) 404 U.S. 257. As defendant recognizes, *Santobello* involved the violation of an express term of the plea agreement (that the prosecutor would make no sentence recommendation). (*Id.* at p. 262.) Here, by contrast, the fine was an implied term of the plea bargain; as such, its imposition did not violate the agreement. Our case thus is distinguishable from *Santobello*.

For all of these reasons, and based on our prior decisions in *Dickerson*, *Knox*, and *Sorenson*, we reject defendant's contentions of error.

DISPOSITION

The judgment is affirmed.

McAdams, J.

I CONCUR:

Bamattre-Manoukian, Acting P.J.

MIHARA, J., dissenting.

Since I believe that the imposition of a \$1800 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.

Mihara, J.