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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER ROSE KAGOSHIMA

Defendant and Appellant.

A131428

(Solano County  
Super. Ct. No. FCR277911)

Following defendant's entry of a no contest plea to a charge of receiving stolen property (Pen. Code, § 496, subd. (a)),<sup>1</sup> the trial court placed her on formal probation for three years, on the condition that she serve 140 days in county jail, and imposed a restitution fine, along with a court security fee and a criminal assessment fee. In this appeal defendant claims that the 140-day county jail term resulted in imprisonment that exceeded the promised 90-day maximum sentence, and thereby contravened the terms of her plea agreement. She seeks "a chance to withdraw her plea," or "specific performance" of the plea bargain through a reduction of her three-year probation period, and elimination of the restitution fine, the security fee, and the criminal assessment fee. We conclude that the imposition of a 140-day county jail term did not constitute a significant variance from the plea agreement. We further conclude that defendant's restitution fine must be stricken by application of sentence credits for her excess time

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

served, but she is not entitled to any credits against her probation period or the fees imposed on her. We therefore modify the judgment to strike the restitution fee, but otherwise affirm the judgment.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

At a change of plea hearing on January 28, 2011, defendant entered a negotiated no contest plea to a charge of receiving stolen property, in exchange for dismissal of three other felony charges, and the promise of “a 90 day lid” on a county jail term. Sentencing was scheduled for February 25, 2011. As of the date of defendant’s change of plea, she had served 42 days in custody and had 42 days of presentence credits.

When defendant appeared for sentencing on February 25, 2011, her total of custody and conduct credits was 140 days (Pen. Code, § 4019). Imposition of sentence was suspended and defendant was placed on formal probation for a period of three years upon the condition, among others, that she “serve 140 days in county jail,” with credit for that amount of time already served. The court declined defense counsel’s request to credit the balance of “50 days” beyond the 90-day maximum term stated in the plea agreement to “any fines and fees that would be imposed” by the court. A restitution fund fine of \$200 (Pen. Code, § 1202.4, subd. (m)) was imposed as a condition of defendant’s probation, along with restitution to the victim. The court also imposed a \$40 court security fee (Pen. Code, § 1465.8) and a criminal conviction assessment fee of \$30 (Gov. Code, § 70373), both contingent on defendant’s ability to pay.

### **DISCUSSION**

Defendant argues that the trial court violated the terms of the plea agreement. The court ordered defendant to serve “140 days in county jail,” which exceeded the specified 90-day maximum sentence. Defendant asserts that the court’s change in the “terms of the plea agreement” without offering her an opportunity “to withdraw her plea,” was reversible error. She also objects to the trial court’s refusal to apply the days of custody she served and sentence credits she earned in excess of the “agreed sentence” to “reduce the amount of fines” imposed upon her. Finally, defendant maintains that because she served “more time than can be offset” by a reduction in her fines and fees, her period of

probation must be shortened by the remaining excess custody and credits. Defendant asks that we “specifically enforce the plea bargain” to “reduce the sentence,” strike the fines and fees, and reduce her three-year probationary period by 32 days.

***I. Defendant’s Failure to Object to the Sentence.***

We first confront the Attorney General’s claim that defendant’s acceptance of a grant of probation with a county jail condition of the time already served “binds her” to the sentence imposed by the trial court. Defendant neither objected to the 140-day sentence nor moved to withdraw her plea on the ground that her punishment exceeded the plea agreement. Despite the lack of an objection by the defense, however, we find no waiver or forfeiture under the facts presented in the case before us.

“Pursuant to Penal Code section 1192.5, a defendant must be informed by the trial court prior to the negotiated plea of guilty or no contest that the trial court’s approval of the plea bargain is not binding and may be withdrawn. The defendant must also be advised that if approval of the bargain is withdrawn, the defendant has the right to withdraw the plea of guilty or no contest. [Citation.] If a defendant, who has been admonished concerning the right to withdraw the plea, does not object to punishment in excess of the bargain, the defendant relinquishes the right to withdraw the plea. [Citation.] If a defendant has not been properly admonished, a failure to object to increased punishment does not waive the defendant’s right to the benefit of the bargain.” (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 640, citing *People v. Walker* (1991) 54 Cal.3d 1013, 1024–1025.)

Here, the trial court neglected to admonish defendant as required by section 1192.5 of her right to withdraw the plea if a sentence greater than that agreed to in the plea agreement was imposed. “Absent compliance with the section 1192.5 procedure, the defendant’s constitutional right to the benefit of his bargain is not waived by a mere failure to object at sentencing.” (*People v. Walker, supra*, 54 Cal.3d 1013, 1025; see also *People v. Crandell* (2007) 40 Cal.4th 1301, 1308; *People v. Collins* (2003) 111 Cal.App.4th 726, 730–731; *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879.) Nor did defendant expressly agree to a sentence in excess of the 90-day maximum articulated

in the plea agreement. (Cf. *People v. Martin* (2010) 51 Cal.4th 75, 82.) Defense counsel specifically requested a reduction in the fines or period of parole by the “50 days additional” time in custody served by defendant. We find no waiver or forfeiture of defendant’s challenge to the sentence.

## ***II. The Imposition of Additional Jail Time.***

Proceeding to the substance of the contention that the sentence violated the terms of the plea bargain, the Attorney General concedes that the promised “90-day jail lid” was exceeded by the 140-day sentence, but argues that the deviation from the agreement was not material and does not render the plea invalid.

“Under section 1192.5, if a plea agreement is accepted by the prosecution and approved by the court, the defendant ‘cannot be sentenced on the plea to a punishment more severe than that specified in the plea . . . .’ ” (*People v. Masloski* (2001) 25 Cal.4th 1212, 1217.) “In addition to their contractual qualities, plea agreements also have a constitutional dimension. A criminal defendant’s constitutional due process right is implicated by the failure to implement a plea bargain according to its terms.” (*People v. Knox* (2004) 123 Cal.App.4th 1453, 1459.) “ ‘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.’ [Citation.] It is well settled that a disposition harsher than that agreed to by the court or the prosecution may not be imposed on a defendant.” (*In re Jermaine B.*, *supra*, 69 Cal.App.4th 634, 639.) A trial court may not accept a proffered plea bargain, then attach a new provision or condition to the final bargain without the defendant’s consent. (*People v. Jensen* (1992) 4 Cal.App.4th 978, 981; *People v. Morris* (1979) 97 Cal.App.3d 358, 363.) “Failure of the state to honor the agreement violates the defendant’s due process rights for which the defendant is entitled to some remedy.” (*People v. Lopez* (1998) 66 Cal.App.4th 615, 636; see also *People v. Campbell* (1994) 21 Cal.App.4th 825, 829.)

A defendant has the “established right to withdraw his or her guilty plea if the plea bargain is not honored . . . .” (*People v. Casillas* (1997) 60 Cal.App.4th 445, 450.) When the trial court errs by imposing punishment that significantly exceeds that which the parties have agreed upon, “relief may take any of three forms: a remand to provide the defendant the neglected opportunity to withdraw the plea; ‘specific performance’ of the agreement as made [citation]; or ‘substantial specific performance,’ meaning entry of a judgment that, while deviating somewhat from the parties’ agreement, does not impose a ‘punishment significantly greater than that bargained for’ [citation].” (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362.)

“ ‘This does not mean that *any* deviation from the terms of the agreement is constitutionally impermissible. . . .’ [Citation.]” (*People v. Collins, supra*, 111 Cal.App.4th 726, 731.) “[T]he imposition of an additional sentence term does not constitute a violation of a plea agreement if the term was not encompassed by the parties’ plea negotiations. [Citations.] Moreover, ‘the variance must be “significant” in the context of the plea bargain as a whole to violate the defendant’s rights. A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations.’ [Citation.]” (*People v. Lopez, supra*, 66 Cal.App.4th 615, 636.) Statutory and due process concerns are not “offended by minor deviations from the bargain; to warrant relief, the variance must be ‘ “significant” in the context of the plea bargain as a whole.’ [Citation.]” (*People v. Kim, supra*, 193 Cal.App.4th 1355, 1359; see also *People v. Brown* (2007) 147 Cal.App.4th 1213, 1221–1222.)

We assess whether the sentencing discrepancy “was significant in the context of the entire plea bargain.” (*People v. Arata* (2007) 151 Cal.App.4th 778, 788.) To have the plea set aside a defendant “must demonstrate that he would not have agreed to the terms had he been aware of the additional punishment.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1386.)

Of paramount significance in our evaluation of the plea agreement and ensuing sentence is that when defendant accepted the bargain with the stated maximum term, and

entered her plea, she was aware that her days of custody, with credits, would exceed 90 days by the date of her scheduled sentencing four weeks hence. Thus, defendant's expectation was that her county jail term of no greater than 90 days would be completed with the addition of credits before she appeared for pronouncement of sentence.

Defendant obtained dismissal of most of the charged offenses against her, and was granted formal probation, just as she bargained for in the plea agreement. Her sentence of 140 days with credit for time served, and immediate release, reflected her anticipated term and conformed in great measure to the plea bargain. Defendant requested a reduction in fines, but did not object to the stated jail term. In the context of the entire plea agreement, the inconsequential variation in the county jail term, which did not result in additional time served, was not a significant or impermissible deviation from the bargain. Defendant is not entitled to withdraw her plea or obtain modification of her sentence.

### ***III. The Trial Court's Denial of Defendant's Request to Strike the Fines and Reduce Her Period of Probation.***

We turn to the issue of defendant's entitlement to a reduction in the amount of the fines and fees imposed by the trial court due to the additional time served. Defendant argues that the "not only clear, but mandatory" language of section 2900.5 grants her a reduction in the amount of fines and her period of probation commensurate with her excess custody credits.

Subdivision (a) of section 2900.5 provides that "when the defendant has been in custody, including, but not limited to, any time spent in a jail" or related facility, "all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, *credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence. If the total number of days in custody exceeds the number of days of the term of imprisonment to be imposed, the entire term of*

imprisonment shall be deemed to have been served. In any case where the court has imposed both a prison or *jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines.*” (Italics added.)

Defendant asserts that she “served 25 more days in jail than the agreed sentence, which multiplied by \$30 per day pursuant to Penal Code section 1205, subdivision (a),” equals a total of \$750 that must be “applied to the fines.”<sup>2</sup> She points out that the amount of monetary credit she is due for her excess custody exceeds the \$270 in fines and fees imposed on her. She therefore argues that the fines and fees must be entirely stricken, and the “remaining 32 custody credits” must be deducted from her three-year term of probation.

We agree with defendant that by its explicit terms section 2900.5, subdivision (a), requires a grant of credit against her restitution fine. The statute provides that “all days of custody,” specifically including all days “credited to the period of confinement pursuant to Section 4019,” shall be applied first to reduce the “term of imprisonment imposed,” and thereafter to “any fine” imposed “on a proportional basis, including, but not limited to, base fines and restitution fines,” at a specified rate of not less than \$30 dollars per day, or more in the discretion of the court. The language of section 2900.5, subdivision (a), does not apply excess days of sentence custody and credit to reduce the

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<sup>2</sup> Subdivision (a) of section 1205 reads: “A judgment that the defendant pay a fine, with or without other punishment, may also direct that he or she be imprisoned until the fine is satisfied and may further direct that the imprisonment begin at and continue after the expiration of any imprisonment imposed as a part of the punishment or of any other imprisonment to which he or she may theretofore have been sentenced. Each of these judgments shall specify the extent of the imprisonment for nonpayment of the fine, which shall not be more than one day for each thirty dollars (\$30) of the fine, nor exceed in any case the term for which the defendant might be sentenced to imprisonment for the offense of which he or she has been convicted. A defendant held in custody for nonpayment of a fine shall be entitled to credit on the fine for each day he or she is so held in custody, at the rate specified in the judgment. When the defendant has been convicted of a misdemeanor, a judgment that the defendant pay a fine may also direct that he or she pay the fine within a limited time or in installments on specified dates and that in default of payment as therein stipulated he or she be imprisoned in the discretion of the court either until the defaulted installment is satisfied or until the fine is satisfied in full; but unless the direction is given in the judgment, the fine shall be payable forthwith.”

duration of a *probationary term* specified by the trial court. “ “[T]erm of imprisonment” includes any period of imprisonment imposed as a condition of probation or otherwise ordered by a court in imposing or suspending the imposition of any sentence, . . .’ [Citations.]” (*People v. Long* (1987) 189 Cal.App.3d 77, 90.) A term of probation is not the same as a period of imprisonment; probation is “an alternative to imprisonment.” (*People v. Dorsch* (1992) 3 Cal.App.4th 1346, 1350.)<sup>3</sup> Probation is a form of leniency that grants the defendant the opportunity, by proving ability to comply with the requirements of the law and certain specified conditions, to avoid the separate, more severe sanction of imprisonment. (See *People v. Arnold* (2004) 33 Cal.4th 294, 303.) Defendant is not entitled to a reduction in her three-year probationary period.

Nor does the language of section 1202.4 allocate the credits resulting from excess presentence custody credit to the amount of *fees* imposed other than fines and criminal assessments. Under the statute, each dollar of monetary credit must be used proportionally to reduce each category of the base fine, penalty assessments and restitution fine. (*People v. McGarry* (2002) 96 Cal.App.4th 644, 646.) In light of section 1463, subdivision (*l*), pertaining to the distribution of the total fine or forfeitures imposed and collected for crimes,<sup>4</sup> the term “ ‘any fine’ ” in the portion of section 2900.5, subdivision (*a*) has been broadly construed to encompass “ ‘base fines and restitution

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<sup>3</sup> Even a period of parole, which was formerly considered a part of the term served in confinement, is presently imposed separately from the term of imprisonment. (*In re Wilson* (1981) 30 Cal.3d 438, 442.) Thus, while a parolee is deemed in constructive custody until the expiration of the parole period, the parole period is not part of the stated term of imprisonment. (*People v. Reed* (1993) 17 Cal.App.4th 302, 307; *People v. Mathews* (1980) 102 Cal.App.3d 704, 712.)

<sup>4</sup>Section 1463, subdivision (*l*), provides: “(*l*) ‘Total fine or forfeiture’ means the total sum to be collected upon a conviction, or the total amount of bail forfeited or deposited as cash bail subject to forfeiture. It may include, but is not limited to, the following components as specified for the particular offense: [¶] (1) The ‘base fine’ upon which the state penalty and additional county penalty is calculated. [¶] (2) The ‘county penalty’ required by Section 76000 of the Government Code. [¶] (3) The ‘DNA penalty’ required by Sections 76104.6 and 76104.7 of the Government Code. [¶] (4) The ‘emergency medical services penalty’ authorized by Section 76000.5 of the Government Code. [¶] (5) The ‘service charge’ permitted by Section 853.7 of the Penal Code and Section 40508.5 of the Vehicle Code. [¶] (6) The ‘special penalty’ dedicated for blood alcohol analysis, alcohol program services, traumatic brain injury research, and similar purposes. [¶] (7) The ‘state penalty’ required by Section 1464.”

finer' ” referred to in section 2900.5, subdivision (a), along with “state and county penalty assessments.” (*McGarry, supra*, at p. 648.) The statute makes no reference, however, to any “fees,” such as the \$40 court security fee and the \$30 criminal assessment fee imposed on defendant.

Where the Legislature has not seen fit to extend the scope of the statute to decrease defendant’s three-year term of probation or the court security and criminal assessment fees by the excess days of custody served, we decline to do so. “If the language contains no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the statute governs.” (*People v. Robles* (2000) 23 Cal.4th 1106, 1111; see also *Green v. State* (2007) 42 Cal.4th 254, 260.) We therefore conclude that pursuant to section 2900.5, defendant is entitled to credit against all of her \$200 mandatory restitution fine for her excess presentence days of custody served. She is not entitled to any credit against her three-year probationary term or any of the fees imposed on her if she is found to have the ability to pay.

**DISPOSITION**

The trial court is directed to modify the judgment to reflect that the mandatory \$200 restitution fine imposed on defendant under section 1202.4 has been satisfied in full by her excess days spent in custody. In all other respects the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.