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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

RACHEL CORRIEN SMITH,

Defendant and Appellant.

C067325

(Super. Ct. No.
CRF10350)

After methamphetamine was found during a search of her house, defendant Rachel Corrien Smith pleaded no contest to one count of possession of methamphetamine for sale in exchange for a prison sentence no longer than two years and dismissal of five other charges.

On appeal, defendant contends the trial court should have instituted proceedings to commit her to the California Rehabilitation Center (CRC); imposed a \$30, rather than a \$40, court penalty assessment/court security fee; and imposed a \$15, rather than a \$35, penalty assessment under Government Code

section 76000. The People concede the last contention only. We agree with the People.

DISCUSSION¹

I. Defendant has forfeited any claim the trial court abused its discretion in failing to initiate CRC proceedings.

Welfare and Institutions Code section 3051 provides, in pertinent part: "Upon conviction of a defendant for a felony, or following revocation of probation previously granted for a felony, and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section." As the parties acknowledge, CRC is the "narcotic detention, treatment, and rehabilitation facility" referred to in the statute. Whether a defendant is to be referred to the CRC is a matter within the trial court's discretion. (*People v. Masters* (2002) 96 Cal.App.4th 700, 703-704; *People v. Moreno* (1982) 128 Cal.App.3d 103, 107.)

¹ In view of the contentions on appeal, we need not recite the details of defendant's offense.

The record reveals that defendant agreed to imposition of a prison sentence no greater than two years and did not raise the issue of a CRC commitment in the trial court at sentencing. A defendant's failure to raise the issue of a CRC commitment in the trial court forfeits a claim on appeal that the trial court erred in failing to determine whether a CRC referral was warranted. (*People v. Lizarraga* (2003) 110 Cal.App.4th 689, 691-692 (*Lizarraga*); see also *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1302, 1310-1312 (*Planavsky*) [holding same].)

Defendant argues in her reply brief that *Lizarraga* and *Planavsky* "wrongly apply the waiver doctrine articulated in *People v. Scott* [(1994) 9 Cal.4th 331] to CRC commitments" because Welfare and Institutions Code section 3051 presents "a mandatory sentencing scheme not a discretionary one." To the contrary, we find the reasoning of *Lizarraga* and *Planavsky* persuasive. Defendant advances no reason in law or logic why the general waiver principle adopted in *Scott* cannot or should not encompass the discretionary sentencing decision of committing a defendant to CRC. Because defendant did not request the trial court to order such a commitment, she cannot raise the issue for the first time here.

Defendant also contends that finding forfeiture here would frustrate the legislative intent behind Welfare and Institutions Code section 3051, which she claims is to "provide treatment for those addicted or in danger of becoming addicted to narcotics." She acknowledges that *Planavsky* and *Lizarraga* rejected similar

arguments, but asserts those cases are wrong. We are unpersuaded. As stated in *Planavsky*, and reiterated in *Lizarraga*, "there is no necessary relationship behind a policy in favor of rehabilitation and a mandate that a request for CRC commitment may be raised for the first time on appeal."

(*Planavsky*, *supra*, 40 Cal.App.4th at p. 1313; see *Lizarraga*, *supra*, 110 Cal.App.4th at p. 692.)

II. The court security fee of forty dollars does not violate the plea agreement.

On October 10, 2010, defendant signed the plea form indicating her desire to plead no contest. The form includes her written acknowledgement that the court would order her to pay a "\$30 court security fee[]." On that date, Penal Code section 1465.8, former subdivision (a)(1) provided, in relevant part: "To ensure and maintain adequate funding for court security, a fee of thirty dollars (\$30) shall be imposed on every conviction for a criminal offense" (Stats. 2009, 4th Ex. Sess., ch. 22, § 29.)

Defendant actually entered her no contest plea a month later, on November 10, 2010. In the interim, the Legislature amended Penal Code section 1465.8 to increase the court security fee from \$30 to \$40, effective October 19, 2010. (Stats. 2010, ch. 720, § 33.) At defendant's sentencing on January 21, 2011, the court imposed a court security fee in the new amount of \$40. Because defendant was convicted after the increase in the security fee became effective, she was properly subject to the

increase. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1000-1001.)

Defendant insists the court erred in imposing a court security fee \$10 higher than the fee to which she had agreed without first giving her an opportunity to withdraw her plea. Defendant's failure to object at sentencing to the \$40 court security fee does not constitute a forfeiture of the issue, because defendant was not advised of her right to withdraw her plea under Penal Code section 1192.5 if the court at sentencing imposed a "punishment more severe" than that specified in the plea agreement.²

The People respond that the minor fee increase does not violate the plea agreement. We find the People's position more persuasive.

As a general rule, a "violation of the [plea] bargain by an officer of the state raises a constitutional right to some

² Penal Code section 1192.5 provides, in relevant part, that "[w]here 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."

The consequence of the trial court's failure to have given the advisement is that, even in the absence of an objection raised at sentencing below, defendant has not waived or forfeited her claim on appeal that her sentence does not adhere to the plea bargain, or that she has been deprived of the benefit of her bargain. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024-1026, 1029 (*Walker*).)

remedy." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860; accord, *People v. Crandell* (2007) 40 Cal.4th 1301, 1307.) But not every deviation from the terms of a plea bargain is constitutionally impermissible. (*Walker, supra*, 54 Cal.3d at p. 1024.) To warrant a remedy, 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." (*Ibid.*, citing *Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433].)

Here, the judgment deviated \$10 from the plea bargain. Defendant makes no attempt to argue that paying \$10 more in a court security fee was significant in the context of the plea bargain as a whole. In light of the plea agreement, by which she secured the dismissal of three felonies and two misdemeanors, and which allowed the court to impose a victim restitution fund fine of an unspecified amount between \$200 and \$10,000, a \$10 statutory increase in the court security fee can be viewed only as an insignificant variance from the plea agreement, for which no relief is required.

III. The Government Code section 76000 fee must be reduced.

Defendant also challenges the amount of the county penalty assessment levied pursuant to Government Code section 76000 upon the \$50 base fine imposed; she contends the county penalty assessment should have been \$15, not \$35. The People correctly concede the error and we agree.

Government Code section 76000 authorizes Yuba County to levy an additional penalty in the amount of \$3 for every \$10 imposed and collected by the trial court as a fine, penalty, or forfeiture for criminal offenses. (§ 76000, subds. (a)(1), (e).) Here, however, the trial court imposed an assessment of \$7 per every \$10 in penal fines. Because the assessment imposed pursuant to section 76000 exceeded the amount authorized by statute, it must be stricken and reimposed in the correct amount.

DISPOSITION

The judgment is modified to reduce the county penalty assessment levied pursuant to Government Code section 76000 from \$35 to \$15. In all other respects, the judgment is affirmed. The trial court shall prepare a new abstract of judgment reflecting this modification and forward a certified copy to the Department of Corrections and Rehabilitation.

RAYE, P. J.

We concur:

BLEASE, J.

BUTZ, J.