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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO ANTONIO RAMIREZ,

Defendant and Appellant.

C068462

(Super. Ct. No. 105904)

Defendant Pedro Antonio Ramirez pled no contest to assault by means of force likely to produce great bodily injury and admitted hate crime, great bodily injury, and prior strike enhancements. He was sentenced to a stipulated term of 13 years in state prison and ordered to pay \$66,139.91 in victim restitution.

Defendant obtained a certificate of probable cause. On appeal, he contends the victim restitution award violated the terms of his plea agreement. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 28, 2010, defendant, codefendant Morales, and their wives took a taxi to West Sacramento after drinking at a Sacramento club. Defendant and the driver, Harbhajan Singh, got into a dispute over the fare when they arrived at the destination. Defendant got out of the taxi, opened the driver's door, and started punching Singh in the head while he said: "Fuck you, Osama Bin Laden," "Fuck you, Arabian," and "Fuck you, Iranian." Singh tried to give money to defendant; defendant said that he did not want any money and began choking Singh while exclaiming, "I'll kill you." Morales punched Singh from the backseat at the same time. Singh lost consciousness and suffered numerous continuing injuries.

Defendant signed a plea form and entered an oral no contest plea in court. The oral plea and the plea form set forth the terms of the agreement -- defendant pleads no contest to the assault by means of force likely to produce great bodily injury count and admits the strike, hate crime, and great bodily injury enhancements, with a stipulated 13-year term and dismissal of the remaining counts. Victim restitution was not mentioned in the plea form or during the plea colloquy. On page 2 of the plea form, after the statement describing the terms of the agreement, defendant initialed the following statements: "My attorney has explained to me that if the court refuses to accept the above-stated agreement, I will be allowed to withdraw my plea," and "My lawyer explained this form and its entire

contents to me and I understand what I have said in this Declaration and the consequences thereof."

Defendant's plea was entered on March 7, 2011. The March 28, 2011, probation report recommended defendant pay victim restitution in an amount to be determined. On April 1, 2011, defendant moved to withdraw the plea based on ineffective assistance of counsel. On May 2, 2011, he moved to withdraw the plea because he did not admit the strike at the plea colloquy. The trial court later denied both motions.

At sentencing, the prosecutor asked the trial court to order the victim restitution recommended in the supplemental probation report.¹ Defendant's new counsel informed the court the supplemental probation report had been given to defendant's prior counsel and said "I'm not asking that the sentence be delayed, but if there's any issue on restitution to be able to bring a motion." The trial court subsequently ordered \$66,139.91 in victim restitution and reserved jurisdiction to modify the award on an appropriate motion. Defendant never objected to the victim restitution and never moved for a hearing to contest the award.

DISCUSSION

Defendant contends he should be allowed to withdraw the plea because the \$66,139.91 victim restitution award violated the terms of his plea agreement. He argues that punishment

¹ The supplemental probation report is not in the record.

which significantly exceeds the terms of the plea agreement violates the agreement and allows defendant to withdraw the plea. Since the restitution award is substantial and was not mentioned in the plea agreement, defendant contends he is entitled to withdraw the plea.

In *People v. Walker* (1991) 54 Cal.3d 1013, the California Supreme Court made the important distinction between an advisement error and the breach of a plea bargain. The first concept mandates that before taking a guilty plea, the trial court must advise the defendant of the direct consequences of his plea. This is not a constitutional doctrine, but a judicially declared rule of criminal procedure. (*Id.* at p. 1022.) Accordingly, a misadvisement error is forfeited if it is not raised at or before the time of sentencing. (*Id.* at p. 1023.)

On the other hand: "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.) The error is of constitutional dimension, and defendant's silence at sentencing will not waive the error unless the trial court advised him, pursuant to Penal Code section 1192.5, of his right to withdraw the plea if the court fails to adhere to the bargain. (*Walker*, at p. 1025.)

Victim restitution is considered punishment for the purposes of the plea agreement. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1221-1222.) A victim restitution order significantly exceeding the amount specified in a plea agreement violates the agreement. (*Id.* at p. 1224.) In such circumstances, the defendant should be allowed to withdraw his plea. (*Ibid.*)

In essence, defendant is claiming that the plea agreement's failure to mention restitution supports an implicit term that defendant is to pay no restitution. A sentence without victim restitution is not valid absent a finding of compelling and extraordinary reasons as set forth on the record by the trial court. (*People v. Brown, supra*, 147 Cal.App.4th at p. 1225; § 1202.4, subd. (f).) "Victim restitution may not be bargained away by the People. 'The Legislature left no discretion or authority with the trial court or the prosecution to bargain away the victim's constitutional and statutory right to restitution. As such, it cannot properly be the subject of plea negotiations.' [Citation.]" (*Brown*, at p. 1226.)

The parties could not bargain away the victim's right to restitution and the trial court could not accept such a bargain. Not mentioning victim restitution was merely a failure to advise defendant of a consequence of his plea. Since defendant did not object, his contention is forfeited.²

² Even if no restitution was part of the plea agreement, defendant's contention is still forfeited because the written

DISPOSITION

The judgment is affirmed.

ROBIE _____, J.

We concur:

BLEASE _____, Acting P. J.

DUARTE _____, J.

plea form satisfied Penal Code section 1192.5 by including an advisement of his right to withdraw if the trial court rejected the plea.