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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY DAVID WARREN,

Defendant and Appellant.

C069736

(Super. Ct. No. CM034988)

Defendant Timothy David Warren pled no contest to child abuse (Pen. Code, § 273a, subd. (a)) and misdemeanor battery (§ 242). He was sentenced to a state prison term of six years.¹ On appeal, defendant contends the abstract of judgment erroneously reflects a section 294, subdivision (a) child abuse prevention restitution fine that the trial court did not orally impose during the pronouncement of sentence. Defendant also contends that the abstract reflects penalty

¹ A six-month concurrent term was imposed on the misdemeanor battery.

assessments, fees and surcharges associated with the child abuse prevention restitution fine that are not authorized by law.

Because we agree with the first contention, we order the restitution fine and its corresponding assessments, fees and surcharges stricken.

DISCUSSION

The abstract of judgment indicates that, among the fines and fees imposed at sentencing was a \$1,000 child abuse prevention restitution fine, imposed pursuant to section 294, subdivision (a), which states "[u]pon conviction of any person for a violation of Section 273a, . . . the court *may* . . . order the defendant to pay a restitution fine *based on the defendant's ability to pay* not to exceed five thousand dollars (\$5,000), upon a felony conviction . . . to be deposited in the Restitution Fund to be transferred to the county children's trust fund for the purposes of child abuse prevention."

(Italics added.) Attendant to this fine, the abstract indicates that the trial court also imposed the following: a \$200 court surcharge (Pen. Code, § 1465.7, subd. (a)), a \$500 state court construction fund penalty (Gov. Code, § 70372, subd. (a)), a \$1,000 state penalty assessment (Pen. Code, § 1464), a \$700 county penalty assessment (Gov. Code, § 76000, subd. (a)(1)), a \$100 DNA penalty assessment (Gov. Code, § 76104.6), a \$100 DNA fund penalty (Gov. Code, § 76104.7), and a \$20 collection fee (Pen. Code, § 294, subd. (d)). The abstract of judgment and the minute order of the sentencing proceedings indicate defendant's

total obligation based on the section 294, subdivision (a) fine and its attendant assessment, fees and surcharges is \$3,620.

At the oral pronouncement of sentence, however, the trial court did *not* impose a Penal Code section 294, subdivision (a) child abuse restitution fine or its attendant assessments, fees and surcharges. Rather, during the recitation of fines and fees, the following exchange occurred:

"[PROBATION OFFICER]: Your Honor, on -- are you item [sic] number six?

"THE COURT: I'm on number eight, the fine pursuant to 294(a) [recommended by the probation department]. I see that often on a probation recommendation, but not nearly as often in a state prison commitment.

"[PROBATION OFFICER]: I believe you're correct. Many -- as you noted earlier today -- many of our fines and fees we are now incorporating into our state prison/county jail recommendation page as well.

"THE COURT: All right. Well, *in this matter*, the Court will recommend that defendant enter and complete a child abusers['] treatment program pursuant to [section] 1203.097 as a condition of his parole. . . ." (Italics added.)

The trial court never expressly imposed the child abuse prevention restitution fine; nor did it impose any of the attendant assessments, fees and surcharges. Furthermore, the court made no finding of defendant's ability to pay. We conclude the trial court declined "in this matter" to exercise

its discretion to impose the Penal Code section 294, subdivision (a) restitution fine recommended by the probation department.

"In a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment." (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324, citing *People v. Mesa* (1975) 14 Cal.3d 466, 471.) "To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error." (*Scott, supra*, 203 Cal.App.4th at p. 1324.) "Likewise, the abstract of judgment 'cannot add to or modify the judgment which it purports to digest or summarize.'" (*Ibid.*, quoting *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) As with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal. (*Mitchell, supra*, 26 Cal.4th at p. 185.)

The Attorney General concedes that the penalty assessments, fees and surcharges, with the exception of the collection fee (Pen. Code, § 294, subd. (d)), could not be imposed attendant to the child abuse prevention restitution fine, but suggests that "it should not be concluded that the trial court failed to orally pronounce the discretionary fine" We disagree with the Attorney General's assessment of the record, and her suggestion that the matter should be remanded back to the trial court for clarification. The decision to impose a child abuse prevention restitution fine pursuant to Penal Code section 294,

subdivision (a) is discretionary and, on appeal, we do not presume a failure to exercise discretion to impose a fine on a silent record. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.)

Accordingly, the child abuse prevention restitution fine and the attendant assessments, fees and surcharges must be stricken.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment striking the imposition of the Penal Code section 294, subdivision (a) child abuse prevention restitution fine and each of its attendant assessments, fees and surcharges. The trial court shall forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

_____ MURRAY _____, J.

We concur:

_____ NICHOLSON _____, Acting P. J.

_____ BUTZ _____, J.