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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL ANDRE JONES,

Defendant and Appellant.

F063120

(Super. Ct. Nos. F11900172,
F10905634)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Franson, J.

On June 23, 2011, appellant, Darrell Andre Jones, pursuant to a plea agreement, entered no contest pleas and admissions in two separate cases. In Fresno County Superior Court case No. F11900172, he pled no contest to two counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c); counts 3 & 6)¹ and three counts of attempted second degree robbery (§§ 211, 212.5, subd. (c), 664; counts 1, 2 & 4), and admitted enhancement allegations that in committing each offense he personally used a deadly and/or dangerous weapon (§ 12022, subd. (b)(1)) and that he committed each offense while released on bail or his own recognizance (§ 12022.1). In Fresno County Superior Court case No. F10905634, he pled no contest to possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1; count 1), carrying a loaded firearm (§ 12031, subd. (a)(1); count 5) and receiving stolen property (§ 496, subd. (a); count 7), and admitted a special allegation that he was not the registered owner of the firearm upon which count 5 was based.

On July 22, 2011, the court imposed sentence on both cases as follows: In case No. F11900172, a term of 10 years four months, and in case No. F10905634, concurrent terms of three years, two years and two years on counts 1, 5 and 7, respectively. The court also imposed various fines and fees, including a \$50 laboratory analysis fee (lab fee) (Health & Saf. Code, § 11372.5, subd. (a)), a restitution fine of \$2,400 (§ 1202.4, subd. (b)), and a “parole revocation restitution fine” of \$2,400 (§ 1202.45). The court suspended the section 1202.45 fine pending successful completion of parole.²

On appeal, appellant contends (1) imposition of the two \$2,400 restitution fines violated the plea agreement, and (2) the lab fee was not authorized by statute. The People concede the latter point. We strike the lab fee and otherwise affirm.

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

² We sometimes refer to the restitution fine imposed under section 1202.4, subdivision (b) and the parole revocation restitution fine imposed under section 1202.45, collectively, as the restitution fines.

DISCUSSION

Restitution Fines

Appellant, relying chiefly on *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), argues that the court, in imposing the two \$2,400 restitution fines, violated the plea agreement, and therefore this court should reduce each of the fines to the \$200 statutory minimum.

At the outset, we summarize the statutory provisions that control restitution fines. Section 1202.4, subdivisions (a) and (f) require every person convicted of a crime to pay restitution directly to the victim in an amount equal to the economic loss suffered by the victim as a result of the defendant's conduct. Separate and apart from restitution, section 1202.4, subdivision (b) requires every person convicted of a crime to pay a restitution fine: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." A restitution fine is not paid by the defendant directly to the victim. Instead, it "shall be deposited in the Restitution Fund in the State Treasury" (§ 1202.4, subd. (e)), from which crime victims may obtain compensation through an application process (see Gov. Code, §§ 13950-13960).

If a person is convicted of a felony, as appellant was here, under the present version of the statute "[t]he restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred forty dollars (\$240) ... and not more than ten thousand dollars (\$10,000)...." (§ 1202.4, subd. (b)(1), as amended by Stats. 2011, ch. 358, § 1.)³ In addition, section 1202.45 requires every person who "is convicted of a crime and whose sentence includes a period of parole" to pay "an additional parole revocation restitution fine in the same amount as"

³ At the time of appellant's sentencing the statutory minimum under section 1202.4, subdivision (b) was \$200.00.

the restitution fine under section 1202.4, subdivision (b). (§ 1202.45.) This fine “shall be suspended unless the person’s parole is revoked.” (*Ibid.*)

As stated earlier, appellant relies in large part on *Walker*. In that case, the defendant plead guilty to one felony count in exchange for dismissal of another charge and a five-year prison term with credit for time served. (*Walker, supra*, 54 Cal.3d at pp. 1018-1019.) In taking the plea, the trial court advised the defendant that “the maximum penalties provided by law for this offense are either 3 years, 5 years, or 7 years in state prison and a [penal] fine of up to \$10,000, followed by a period of parole.” (*Id.* at p. 1019; see § 672 [if no fine is otherwise prescribed, the court may impose a penal fine of up to \$10,000 for a felony conviction].) At sentencing, the court imposed the agreed-upon prison term, as well as a \$5,000 restitution fine. (*Walker*, at p. 1019.) “The probation report prepared before the plea, and supplied to the defense, recommended a \$7,000 restitution fine; the record discloses no other mention of the possibility of such a fine prior to sentencing.” (*Ibid.*)

On appeal, the defendant claimed that the fine exceeded the terms of the plea bargain. Our Supreme Court, agreed, observing that “the \$5,000 restitution fine was a significant deviation from the negotiated terms of the plea bargain.” (*Walker, supra*, 54 Cal.3d at p. 1029.) The proper remedy, the court concluded, is “to reduce the fine to the statutory minimum,” an amount that “[i]n the context of felony pleas, ... is not, as a matter of law, ‘significant.’” (*Id.* at pp. 1029-1030, 1027.).

Appellant suggests that imposition of the restitution fines was, as in *Walker*, a violation of the plea agreement because there was “no mention of the court setting a restitution fine above the statutory minimum” at the hearing at which appellant entered his no contest pleas, there was no agreement between the parties that the court would impose restitution fines in excess of the statutory minimum, and “the trial court never advised appellant that it intended to or would impose” such fines.

Appellant's statements regarding the state of the record, as set forth above, are accurate. As appellant asserts, insofar as the record reveals, the restitution fines "were not agreed upon in the plea agreement." Nonetheless, appellant's argument fails.

As the Supreme Court explained in the recent case of *People v. Villalobos* (2012) 54 Cal.4th 177 (*Villalobos*), decided after briefing was completed in the instant case, "when a restitution fine is not mentioned in the plea agreement or in the trial court's plea colloquy, '[t]he restitution fine shall be set at the discretion of the court' (§ 1202.4, subd. (b)(1).)" (*Id.* at p. 183.) Referring to *In re Moser* (1993) 6 Cal.4th 342 (*Moser*) and *People v. McClellan* (1993) 6 Cal.4th 367 (*McClellan*), the court stated, "Since *Walker*, we have said that a plea agreement is not violated by imposition of a statutorily mandated term that was omitted from the agreement." (*Villalobos*, at p. 183.) In *Moser*, the court stated: "In the present case, if (as appears from the record) the subject of parole was not encompassed by the parties' plea negotiations, imposition of the statutorily mandated term of parole would not constitute a violation of the parties' plea agreement." (*Moser*, at p. 357.) And in *McClellan*, the *Villalobos* court explained: "We held ... that imposition of a sex offender registration requirement on a defendant who pleaded guilty to assault with intent to rape did not violate the terms of a plea bargain, even though the trial court erroneously failed to advise the defendant of the requirement at the change of plea hearing. [Citation.] We said that 'the trial courts *omission* ... did not transform the court's error into a *term of the parties' plea agreement*' [citation] because 'the sex offender registration requirement ... is, like the parole term in *Moser*, a statutorily mandated element of punishment for the underlying offense' [citation]." (*Villalobos*, at p. 184.)

The court concluded: "In *Moser* and *McClellan*, failure to make a statutorily mandated punishment an express term of a defendant's plea agreement did not render imposition of such punishment a violation of the plea agreement. With regard to statutorily mandated restitution fines, we have said that parties are free to negotiate the

amount of those fines. [Citations.] However, *where the parties have not mentioned the amount of the fine during the plea negotiation, and where the trial court has not threatened or promised any particular amount of fine during the plea colloquy, the amount of the fine is not part of the plea agreement*, and the trial court is free to impose a fine within the statutory range. Absent an expressly negotiated term in the plea bargain concerning the fine, we see no basis to conclude that imposition of a fine within the statutory range constitutes more punishment than what the defendant bargained for.” (*Villalobos, supra*, 54 Cal.4th at p. 184, italics added.) “[W]here neither the parties nor the trial court have specified the fine amount in the context of a plea bargain, ‘[t]he restitution fine shall be set at the discretion of the court...’ (§ 1202.4, subd. (b)(1).)” (*Id.* at p. 186.)

Here, no specific amount of fine was expressly negotiated or otherwise made a part of the plea agreement.⁴ Therefore, it cannot be said that a \$2,400 restitution fine and a \$2,400 parole revocation fine violated the plea agreement.

Lab Fee

Health and Safety Code section 11372.5, subdivision (a) mandates the imposition of a lab fee of \$50 for each conviction of certain drug-related offenses. Appellant stands

⁴ The People point out that in both case No. F11900172 and case No. F10905634, appellant executed pre-printed forms entitled “FELONY ADVISEMENT, WAIVER OF RIGHTS, AND PLEA FORM” in which he affirmed he wished to plead no contest, and acknowledged, by initialing a statement on the form, “I can ... be fined \$10,000 and ordered to pay restitution in the minimum amount of \$200, and up to \$10,000.” We note first that although the plea waiver form, by its reference to the statutory range of \$200 to \$10,000, is apparently meant to refer to restitution *fin*es, it in fact mentions only *restitution*. As the court in *Villalobos* pointed out, “‘restitution’ and ‘restitution fines’ are distinct, nonoverlapping penalties and that advisement of one does not entail advisement of the other. (See § 1202.4, subd. (a) [describing defendant’s obligation to pay ‘restitution’]; § [1202.4], subd. (b) [describing a ‘restitution fine’ as a ‘separate and additional’ penalty].)” (*Villalobos, supra*, 54 Cal.4th at p. 185.) But regardless of whether appellant acknowledged the range of any restitution fine that could be imposed, there is nothing in the plea waiver form, or in any other part of the record, that indicates that the parties agreed upon a specific amount of the restitution fines.

convicted of one drug-related offense in the instant case—possession of a controlled substance while armed with a firearm in violation of Health and Safety Code section 11370, subdivision (a)—but that offense is not among those listed in the statute. Therefore, as appellant contends, and the People concede, imposition of the \$50 lab fee was unauthorized. We will therefore strike that fee.

DISPOSITION

The judgment is modified to provide that the \$50 laboratory analysis fee is stricken. As modified, the judgment is affirmed.