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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FIDEL RODRIGUEZ GAYTAN,

Defendant and Appellant.

H037919

(Santa Clara County

Super. Ct. No. F1138985)

Appellant Fidel Gaytan pleaded no contest to one count of kidnapping to commit a sexual offense (Pen. Code, § 209, subd. (b)(1), count one) and one count of lewd or lascivious act on a child under the age of 14 years (Pen. Code, § 288, subd.(a), count two).¹ The probation report prepared for appellant's sentencing hearing recommended that the court impose an "AIDS Education" fine pursuant to "Section 288a (m) of the Penal Code."

On December 15, 2011, the court sentenced appellant to seven years to life in prison and among other things imposed the recommended AIDS Education fine. The

¹ In taking appellant's plea it appears that Judge McCracken asked appellant what was his plea to count one, "kidnapping for the purpose of a sexual offense in violation of Penal Code section 289 (b)(1)." Since appellant was charged with a violation of Penal Code section 209, subdivision (b)(1) and a violation of Penal Code section 289 is sexual penetration with a foreign object, we must assume that the judge misspoke or there is a typographical error in the reporter's transcript.

only issue in this appeal is the imposition of said fine. Respondent concedes that the fine should not have been imposed in this case. For reasons that follow, we accept respondent's concession and strike the fine.

Discussion

Penal Code section 1463.23 provides that "fifty dollars (\$50) of each fine imposed pursuant to Section 4338 of the Business and Professions Code; subdivision (c) of Section 11350, subdivision (c) of Section 11377, or subdivision (d) of Section 11550 of the Health and Safety Code; or subdivision (b) of Section 264, subdivision (m) of Section 286, subdivision (m) of Section 288a, or Section 647.1 of [the Penal] code, shall be deposited in a special account in the county treasury which shall be used exclusively to pay for the reasonable costs of establishing and providing for the county, or any city within the county, an AIDS (acquired immune deficiency syndrome) education program under the direction of the county health department, in accordance with Chapter 2.71 (commencing with Section 1001.10) of Title 6, and for the costs of collecting and administering funds received for purposes of this section."

Thus, Penal Code section 1463.23 authorizes the imposition of an AIDS education fine for only specified offenses. There is no statutory authority to impose an AIDS education fine for the offenses of which appellant was convicted. Simply put, Penal Code section 288, and Penal Code section 209, do not authorize the imposition of an AIDS education fine.

Certainly, Penal Code section 288a, subdivision (m), authorizes the imposition an AIDS education fine not to exceed \$70 for persons convicted of violating Penal Code section 288a, which is oral copulation. Appellant, however, was convicted of violating Penal Code section 288, subdivision (a)—lewd or lascivious act on a child under the age of 14 years.

Disposition

We modify the judgment to strike the AIDS Education fine imposed pursuant to Penal Code section 288a, subdivision (m). As so modified the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.