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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN BRIGGS, Defendant and Appellant.	H040202 (Santa Clara County Super. Ct. No. C1240804)

Defendant Kevin Briggs entered an unconditional plea of no contest to one count of criminal threats (Pen. Code, § 422)[1] and admitted that he had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). The probation report recommended that the court impose a four-year prison term and a $960 restitution fund fine. The court refused to strike the strike and imposed a four-year prison term. As to the restitution fund fine, the court said, "given the defendant's position, I'm going to reduce the recommended restitution fine from $960 to $280 . . . ." Defendant's trial counsel made no objection to the amount of the restitution fund fine.

On appeal, defendant's sole contention is that his trial counsel was prejudicially deficient in failing to object to the amount of the restitution fund fine on the ground that the *minimum fine* was $240, not $280. An appellate ineffective assistance claim requires

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[1] Subsequent statutory references are to the Penal Code unless otherwise specified.

a defendant to establish that his trial counsel's performance was deficient and that his defense was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) Whenever counsel's conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and the defendant must overcome that presumption to establish ineffective assistance. (*Strickland*, at p. 689)

Defendant cannot establish either element of his claim. The court said nothing about imposing the minimum fine. Nothing in the record suggests or establishes that the trial court's decision to reduce the fine from $960 to $280, rather than to $240, was based on the court's mistaken belief that $280, rather than $240, was the minimum fine. The fact that the probation report recommended a $960 fine established that the court was aware that the minimum fine was $240, as that recommendation was based on multiplying the minimum fine by the number of years in prison ($240 times four equals $960). Since defendant's trial counsel was aware of this fact and that the trial court was exercising leniency in reducing the fine, he was not incompetent in deciding not to object. Similarly, since there is no indication that the court would have been willing to further reduce the fine, defendant cannot establish that there is a reasonable probability that the fine would have been further reduced if only his trial counsel had objected.

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Grover, J.