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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EVARISTO NAVA CHECCHIN,

Defendant and Appellant.

H042013

(Monterey County
Super. Ct. No. SS120754A,
SS141322A)

Defendant Evaristo Nava Checchin appeals the trial court's imposition of a \$240 restitution fine under Penal Code section 1202.4, subdivision (b).¹ He argues that because his felony conviction was later reduced to a misdemeanor, the fine should have been recalculated to \$120, the minimum restitution fine for a misdemeanor. For the reasons stated here, we will affirm the judgment.

I. TRIAL COURT PROCEEDINGS

A. FIRST CASE (NO. SS120754)

In May 2012, the district attorney filed an amended complaint charging defendant with one felony count of possessing hydrcodone (Health & Saf. Code, § 11350, subd. (a); count 1) and one misdemeanor count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2). Defendant pleaded no contest to both charges.

¹ Unspecified statutory references are to the Penal Code.

The matter was referred to the probation department, which recommended that probation be denied based on defendant's nine prior felony convictions. The probation report included an alternate recommendation of suspending imposition of sentence for three years and placing defendant on formal probation. The department recommended a \$240 state restitution fine for count 1, a \$120 restitution fine for count 2, and a suspended \$360 restitution fine "not to be paid unless and until probation is revoked and not reinstated. (PC § 1202.44)."

At the sentencing hearing, the trial court followed the alternate probation recommendation and placed defendant on three years' formal probation, including restitution fines of \$240 for count 1 and \$120 for count 2, and the suspended probation revocation fine. (§ 1202.44.)

B. NEW CASE (NO. SS141322) AND PROBATION VIOLATION

In May 2014, defendant was charged in a second case with evading a peace officer (Veh. Code, § 2800.2, subd. (a); count 1), possessing methamphetamine for sale (Health & Saf. Code, § 11378; count 2), destroying evidence (§ 135; count 3), and resisting arrest (§ 148, subd. (a)(1); count 4). The complaint alleged six prison priors (§ 667.5, subd. (b)) and two prior drug convictions (Health & Saf. Code, § 11370.2, subd. (c)). Based on the new charges, the district attorney also filed a notice and petition under section 1203.2, alleging defendant violated probation in his first case (No. SS120754).

In November 2014, defendant pleaded no contest to evading a peace officer (Veh. Code, § 2800.2, subd. (a)), and admitted three prior prison terms (§ 667.5, subd. (b)). The trial court found defendant in violation of probation in case No. SS120754 and revoked his probation. Sentencing in both cases was set for January 2015.

At the sentencing hearing, defendant filed a petition under section 1170.18 requesting that count 1 in his probation case (No. SS120754) be reduced to a

misdemeanor. The trial court first sentenced defendant in that case to a term of 16 months as to count 1 only, and ordered that the “previously imposed but suspended restitution fine in the amount of \$240 is imposed at this time.”² The court then granted defendant’s section 1170.18 petition, reducing count 1 to a misdemeanor. After granting the petition, the court modified the sentence to 364 days in jail and deemed the sentence served based on presentence custody credits. The court then stated, “the fines and fees still do need to be paid.” In the second case (No. SS141322), the trial court imposed the stipulated sentence of five years in prison (consisting of the two-year middle term plus one consecutive year for each of the admitted prior prison terms).

II. ANALYSIS

Section 1202.4, subdivision (b) gives the trial court discretion to set the mandatory restitution fine in proportion to the seriousness of the crime. In the case of a prison commitment, that subdivision also describes a formula which the trial court may use to determine the fine amount. The formula calls for multiplying three factors: “the minimum fine” as stated elsewhere in the statute; “the number of years of imprisonment the defendant is ordered to serve”; and “the number of felony counts of which the defendant is convicted.” (§ 1202.4, subd. (b)(2).) In the case of a grant of probation, section 1202.44 provides that a probation revocation fine, which is imposed at the time of sentencing but suspended unless probation is revoked, shall be in the same amount as the restitution fine assessed under subdivision (b) of section 1202.4.

When defendant committed his 2012 offenses in case No. SS120754, the minimum restitution fine for a felony was \$240, and the minimum restitution fine for a misdemeanor was \$120. (§ 1202.4, subd. (b)(1).) When the trial court granted defendant

² The minute order of the sentencing hearing incorrectly states that the fine was \$300 rather than \$240, as orally pronounced. Where there is a discrepancy between the oral pronouncement of judgment and the minute order, the oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

probation, it imposed the minimum restitution fines of \$240 for count 1 and \$120 for count 2 (and suspended probation revocation fines under section 1202.44 in the same amounts). In 2015, after terminating probation and sentencing defendant, the trial court reduced count 1 from a felony to a misdemeanor, but did not modify the restitution fine or the probation revocation fine to the corresponding minimum amount for a misdemeanor conviction.

Defendant contends that the restitution fine for count 1 must be reduced to \$120, the minimum fine for a misdemeanor committed in 2012. The Attorney General urges that because trial counsel did not object to the fine, defendant has forfeited the claim on appeal. Alternatively, the Attorney General argues that the trial court did not err in imposing the previously suspended fine in full because the court had the discretion to impose a fine on a misdemeanor in an amount up to \$1,000. (§ 1202.4, subd. (b)(1).)

In *People v. Martinez* (2014) 226 Cal.App.4th 1169 (*Martinez*), this court modified the restitution fine where the trial court erred by using the wrong minimum amount when calculating the restitution fine using the statutory formula. As in the present case, the trial counsel in *Martinez* did not object at the time the restitution fine was imposed. Although we determined that counsel had forfeited the claim by not objecting, we also found that counsel was ineffective, as the outcome likely would have been different had counsel made a timely objection. (*Martinez, supra*, at pp. 1190–1191; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). We therefore reviewed the restitution fine claim on its merits and concluded that since the sentencing court had committed to using the statutory formula, it should have used the minimum amount in effect when *Martinez* committed his offense. (*Martinez, supra*, at p. 1190.) We modified the restitution fine accordingly, based on the statutory formula under section 1202.4, subdivision (b)(2). (*Id.* at p. 1191.)

As in *Martinez*, we conclude that trial counsel here forfeited the claim by not objecting. In contrast to *Martinez*, however, defendant has not demonstrated that he was

prejudiced by his trial counsel's inaction. Given that defendant was initially granted probation rather than being committed to prison, the trial court did not arrive at the restitution fine amount in case No. SS120754 by utilizing the section 1202.4, subdivision (b)(2) formula, which incorporates the "minimum" fine amount. Nor did the court announce its intention to impose only the minimum statutory fine. To the contrary, immediately after granting defendant's section 1170.18 petition and modifying the prison sentence for count 1 to a misdemeanor sentence of 364 days jail, the court stated that "the fines and fees still do need to be paid." Given the substance and timing of that comment, we cannot conclude that a result more favorable to defendant was reasonably probable had trial counsel requested that the \$240 fine be reduced to \$120.

III. DISPOSITION

The judgment is affirmed.

Grover, J.

WE CONCUR:

Rushing, P.J.

Márquez, J.

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