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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. RAMIRO VILLALOBOS, Defendant and Petitioner.	No. S176574 Court of Appeal No. F056729 Tulare County Trial Court No. VCF189886A

PETITION FOR REVIEW

Following Affirmance of Imposition of Restitution Fine
by the Fifth District of the Court of Appeal
State of California

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PETITION FOR REVIEW

Petitioner respectfully requests that this Court grant review of the Court of Appeal's affirmance of the trial court's imposition of a restitution fine in the amount of $4,000.

STATEMENT OF ISSUES

This petition raises the question whether a restitution fine may be imposed when the amount of the fine had not been agreed to or even mentioned during the acceptance of the negotiated plea.

NECESSITY FOR REVIEW

This Court should grant review to settle an important question of law: namely, whether *People v. Walker* (1991) 54 Cal.3d 1013 may properly be distinguished in the manner in which the Court of Appeal did in this case

so as to allow a court to impose a restitution fine in an amount not mentioned or agreed upon during the plea negotiations.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

Appellant entered a no-contest plea to violating Penal Code section 664/187 (attempted murder) and to violating Penal Code section 211. (CT 1:214-215.) He also admitted the Penal Code section 186.22, subdivision (b)(1)(C) allegation attached to Count 1. (CT 1:215; 217.)

Appellant agreed to a stipulated sentence of 17 years. (CT 1:194-195.) Appellant was sentenced in accordance with the terms of the plea.

However, appellant was also ordered to pay a restitution fine pursuant to Penal Code section 1202.4 in the amount of $4,000, and a similar parole revocation find under Penal Code section 1202.45, the latter stayed. (RT 1:7.) The fines had not been mentioned during the plea colloquy. The court simply advised appellant if he "under[stood] that as a result of the your plea, you may be required to pay restitution." The court also asked appellant, "Other than what I have told you regarding the consequences of your plea, has anyone threatened you or promised you anything today to enter into this plea." Appellant replied "No." No further advisements were given. (Exhibit A, decision of the Court of Appeal, p. 3.)

ARGUMENT IN SUPPORT OF REVIEW

In its decision (*People v. Villalobos* (2009) ___ Cal.App.4th ___,) the Court of Appeal stated that it was publishing it to "illustrate the application of *Walker* in light of our Supreme Court's most recent discussion of the issue in *People v. Crandell* (2007) 40 Cal.4th 1301." (*Villalobos, supra*, slip opn. at p. 2; citing to *People v. Walker, supra,* 54 Cal.3d 1013.)

The court concluded that "the important question is whether the parties actually negotiated and settled upon the issue or left it to the discretion of the court," citing to *Crandell, supra*, 40 Cal.4th at p. 1309. The court concluded that the agreement Villalobos entered into left the fines to the discretion of the court. (*Villalobos, supra*, slip opn. at pp. 7-8.)

The court distinguished *Walker*:

> Though the plea agreement in *Walker* also made no mention of restitution fines, the court here provided additional advisements to Villalobos. Further, Villalobos was asked whether anyone had made any other promises concerning his plea. In *Walker*, there was no such advisement. While Walker reasonably could have understood the plea agreement to indicate that no fine would be imposed, Villalobos was expressly told that he may have to pay restitution. He has pointed to nothing in the record that would support a reasonable belief on his part that restitution fines were barred by the plea agreement rather than left within the trial court's discretion. (*Villalobos, supra*, slip opn. at p. 9.)

The appellate court acknowledged that the trial court referred to restitution, that restitution fines were different, and governed by different standards. However, the court of appeal concluded that courts are not required to give a "detailed lecture on criminal procedure as it pertains to all the various dispositional devices available," (quoting *People v. Sorenson* (2005) 125 Cal.App.4th 612, 621). (*Villalobos, supra*, slip opn. at p. 8, internal quotations omitted.)

The appellate court repeated this Court's admonition in *Walker* about the importance of giving a full advisement on the applicable restitution fines.[1]

The distinction drawn between *Walker* and *Crandell* is not only incorrect, it is confusing. This Court should grant review to draw a clear line and to require, not just suggest, that trial courts make restitution fines a part of negotiated dispositions, and if they are not mentioned in the colloquy, they may not be imposed above the minimum. The distinction the court of appeal drew in this case will create confusion and spawn yet more litigation.

A negotiated disposition is a contract. In a contract, a party is not allowed to add conditions not discussed or agreed to. The same should hold for plea bargains.

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[1] Advice which obviously the trial court in this case ignored.

CONCLUSION

For the above-stated reasons, petitioner respectfully requests that this Court grant review.

DATED: _____

Respectfully submitted

_____

GRACE LIDIA SUAREZ
Attorney at Law
Counsel for Appellant/Petitioner

WORD COUNT CERTIFICATE

I certify that this document was formatted using Times New Roman 13-point type and contains 1,278 words, as computed by Apple Pages.

_____

Grace Lidia Suarez

EXHIBIT A - Decision of the Court of Appeal

CERTIFED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO VILLALOBOS, Defendant and Appellant.	F056729 (Super. Ct. No. VCF189886a) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Grace Lidia Suarez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

In return for a reduced sentence, defendant Ramiro Villalobos pled no contest to charges of attempted premeditated murder and second degree robbery. At sentencing, the court imposed a $4,000 restitution fine and a $4,000 parole revocation fine. On appeal,

Villalobos argues the fines violated his plea agreement. Our Supreme Court first examined the issue of fines added at sentencing to a plea-bargained sentence in *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*). We publish to illustrate the application of *Walker* in light of our Supreme Court's most recent discussion of the issue in *People v. Crandell* (2007) 40 Cal.4th 1301 (*Crandell*). So far as the record discloses, fines were not a subject of the parties' bargaining in this case, and the plea agreement left the issue of fines to the court's discretion. We affirm the fines.

Villalobos also appeals the concurrent gang enhancement sentence added to his sentence for second degree robbery. Because Villalobos never admitted the truth of the enhancement allegation for that count, we reverse this part of the sentence.

PROCEDURAL AND FACTUAL HISTORIES

Villalobos was charged in a three-count information alleging attempted premeditated murder, assault with a deadly weapon, and second degree robbery. All three counts included enhancements.[1]

The charges arose out of a brutal incident involving rival street gangs. The victim was a 16-year-old admitted gang member who was cornered and attacked by four or five opposing gang members. The victim was stabbed 17 times, one wound causing a collapsed lung. The attackers also stole the victim's shoes. Villalobos admitted taking part and stabbing the victim five or six times but claimed self defense.

Pursuant to a plea agreement, Villalobos pled no contest to attempted murder and second degree robbery. He also pled no contest to the street-gang enhancement on the attempted murder charge. All other allegations were dismissed. Villalobos would serve

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[1]The enhancements alleged he had personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)), used a deadly and dangerous weapon (Pen. Code, § 12022, subd. (b)(1)), and committed each offense for the benefit of a criminal street gang (Pen. Code, §§ 186.22, subd. (b)(1)(C), 186.30, subd. (a)).

17 years in state prison. As far as the record reveals, Villalobos did not sign a written change-of-plea form.

At the plea hearing, the People informed the court of the agreement. The People then added, "there are obviously the advisements. This is going to be a plea regarding gang registration and restitution, [a] strike and the deportation consequences pursuant to 186.30." The court responded, "Those will definitely be all incorporated." The court asked Villalobos whether he understood the maximum prison sentence to be 15 years to life. Villalobos said he understood. The court then asked whether he agreed to a term of 17 years. Villalobos said he understood. The court advised Villalobos of other consequences of his plea, including possible immigration consequences and the possibility that the plea would establish a parole or probation violation. Villalobos said he understood each advisement. The court asked if he "under[stood] that as a result of your plea, you may be required to pay restitution." Villalobos responded, "Yes, ma'am." The court asked Villalobos, "Other than what I have told you regarding the consequences of your plea, has anyone threatened you or promised you anything today to enter into this plea." Villalobos responded, "No." Villalobos waived his constitutional rights. He was given no further advisements.

For count one (attempted murder), Villalobos was sentenced to serve the middle term of seven years, plus a consecutive term of 10 years for the street-gang enhancement, for a total of 17 years. For count three (robbery), he was sentenced to serve the middle term of three years, and 10 years for the gang enhancement, for a total of 13 years to run concurrently with count one. Following the recommendation of the probation department, the court ordered Villalobos to pay a $4,000 restitution fine pursuant to Penal Code[2] section 1202.4 and a $4,000 parole revocation fine pursuant to section 1202.45;

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[2]All subsequent statutory references are to the Penal Code.

the latter was suspended. The court ordered the victim restitution to remain open pending any future medical or counseling expenses. Villalobos did not make any objections.

DISCUSSION

Villalobos contends that the concurrent 10-year gang enhancement on count three should be stricken. The People concede this issue and we accept the concession. A sentence enhancement is "'an additional term of imprisonment added to the base term'" and, as such, must be admitted in open court or found true by a trier of fact before a defendant can be sentenced. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 898, quoting Cal. Rules of Court, rule 4.405, subd. (c); § 1170.1, subd. (e).) Villalobos never admitted the gang-enhancement allegation of count three and a trier of fact never found the allegation true.

Villalobos also argues that the $4,000 restitution fine and the $4,000 parole revocation fine violated the plea agreement. Pursuant to *People v. Walker, supra,* 54 Cal.3d 1013, he asks us to reduce both fines to the statutory minimum of $200.

Section 1202.4 requires a convicted criminal to pay both a restitution fine (subd. (a)(3)(A)) and restitution to the victim (subd. (a)(3)(B)). With a felony conviction, the "restitution fine shall be set at the discretion of the court" and shall be at least $200 and not more than $10,000. (§ 1204.4, subd. (b)(1).) Section 1202.45 requires a parole revocation fine "in every case where a person is convicted of crime and whose sentence includes a period of parole." This fine must be in the same amount as the restitution fine. (*Ibid.*)

In *Walker, supra,* 54 Cal.3d 1013, the trial court imposed a restitution fine after a defendant pled guilty pursuant to a plea agreement that did not mention restitution. (*Id.* at p. 1019.) The trial court advised Walker that he faced up to seven years in prison and a fine of up to $10,000. A "probation report prepared before the plea, and supplied to the defense, recommended a $7,000 restitution fine ...." (*Ibid.*) There was no other mention

of the fine prior to sentencing. Walker was sentenced to five years in prison and ordered to pay a $5,000 restitution fine. At sentencing, Walker did not object to the fine. (*Ibid.*)

Walker explained that "two related but distinct legal principles" are implicated when a defendant enters into a plea agreement and then challenges a fine imposed by the sentencing court. (*Walker, supra*, 54 Cal.3d at p. 1020.) First, there is a "'judicially declared rule of criminal procedure'" that, before a plea, a defendant must be advised "of the direct consequences of the plea." (*Id.* at pp. 1020, 1022.) This advisement is separate from and in addition to the advisement of constitutional rights. (*Id.* at p. 1022.) *Walker* held that a "possible $10,000 restitution fine constitutes such a direct consequence." (*Ibid.*) The trial court should have advised Walker of the minimum and maximum amounts of fines that would be imposed.[3] (*Ibid.*) However, he waived the issue on appeal by failing to object to the fine before sentencing. (*Id.* at p. 1023.)

The second principle requires "that the parties must adhere to the terms of a plea bargain." (*Walker, supra*, 54 Cal.3d at p. 1020.) "The punishment may not significantly exceed that which the parties agreed upon." (*Id.* at p. 1024; § 1192.5.) The court held that a restitution fine "qualifies as punishment for this purpose." (*Walker, supra*, at p. 1024.)

An argument that a fine violated a plea agreement is forfeited when the trial court gives a section 1192.5 admonition and the defendant does not withdraw his plea or object at sentencing. (*Walker, supra*, 54 Cal.3d at p. 1026.) This is an admonition, given by the court before the change of plea is accepted, that the court's acceptance of the plea agreement is not binding, that the court may withdraw its approval of the agreement before sentencing, and that if it does, the defendant may withdraw the plea. Walker did

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[3]"The trial court only advised the defendant that a $10,000 fine was a possible consequence of the guilty plea. This was inadequate. The court should have advised defendant there was a possible $10,000 penalty fine *and* a mandatory restitution fine of between $100 and $10,000." (*Walker, supra*, 54 Cal.3d at p. 1029.)

not receive a section 1192.5 advisement, so his failure to object did not waive his claim that the fine violated the agreement.

Walker held that the fine violated the agreement. (*Walker, supra*, 54 Cal.3d at pp. 1029-1130) As the Supreme Court later explained in *In re Moser* (1993) 6 Cal.4th 342, 356, "the defendant in [*Walker*] reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed."

The Supreme Court again addressed the imposition of restitution fines in a plea-bargain case in *Crandell, supra*, 40 Cal.4th 1301. In *Crandell*, the defendant and the People entered into a plea agreement only encompassing possible prison sentencing. (*Id.* at p. 1305.) The agreement made no mention of restitution or restitution fines. At the plea hearing, the court advised the defendant of the various consequences of his plea, including possible state prison time. The court also "warned defendant he would 'have to pay a restitution fund fine of a minimum of $200, a maximum of $10,000.'" (*Ibid.*) The trial court further notified the defendant that it could impose a general fund fine of up to $10,000. Crandell stated he understood. After making further advisements, the court asked Crandell whether "'anyone made any promises to you other than what I promised you here today in open court?'" Crandell answered "'No, ma'am,'" and he acknowledged he was entering a plea "freely and voluntarily." (*Ibid.*) The trial court did not provide a section 1192.5 advisement. (*Id.* at p. 1306.)

Crandell was sentenced to prison in accordance with the plea agreement. (*Crandell, supra*, 40 Cal.4th at p. 1306.) The court ordered him to pay a $2,600 restitution fine and a $2,600 parole revocation fine. He did not object to the fines. (*Ibid.*)

In *Crandell*, the only issue was whether the restitution fines violated the plea agreement. (*Crandell, supra*, 40 Cal.4th at p. 1308.) Expounding upon *Walker*, the court found "'that the core question in every case is ... whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court.'" (*Id.* at p. 1309.) If it was negotiated, imposing a fine contrary to the terms

violates the agreement, and defendant is entitled to a remedy. (*Ibid.*) As *Walker* expressed, the remedy is to reduce the fine to the statutory minimum. (*Crandell, supra,* at p. 1308.)

Crandell found no violation of the plea agreement. (*Crandell, supra,* 40 Cal.4th at p. 1309.) The record demonstrated that the parties intended to leave the issue of the fine to the discretion of the court. The trial court advised Crandell he would have to pay a restitution fund fine of a minimum of $200 and a maximum of $10,000. (*Ibid.*) The court also asked if the People had made "'any other promises'" beyond the prison term sentence. (*Ibid.*) The court distinguished *Walker*, where "the court advised the defendant only that the "'maximum penalties provided by law"' for his offense included "'a fine of up to $10,000'" and obtained no assurance that the parties intended their plea bargain to leave the amount of the restitution fine to the court's discretion." (*Crandell, supra,* at p. 1310, quoting *Walker, supra,* 54 Cal.3d at pp. 1018-1019.) While Walker could reasonably have understood that no substantial fine would be imposed, Crandell could not because he was told that he *would* pay restitution. (*Crandell, supra,* at p. 1310.)

With *Walker* and *Crandell* in mind, we turn to Villalobos's contentions. He argues that the court's advisement as to the consequences of his plea was insufficient. That is, the court should have admonished Villalobos of the statutory minimum $200 and maximum $10,000 restitution fine as one of the consequences of his plea. We agree (see *Walker, supra,* 54 Cal.3d at pp. 1020-1022), but the omission does not entitle him to a remedy, as he concedes. The claim of error was forfeited when Villalobos failed to object before sentencing.

Villalobos also contends that the imposition of the two $4,000 fines violated the plea agreement. As a remedy, he asks for a reduction of both to the statutory minimum of $200. His self-described "bottom line" argument is that, because the fines were not mentioned in the plea bargain, their imposition violated the agreement. We disagree. The important question is whether the parties actually negotiated and settled upon the

issue or left it to the discretion of the court. (*Crandell, supra*, 40 Cal.4th at p. 1309.) As we explain, the fines were left to the discretion of the court.

As a preliminary matter, it is worth pointing out that, if the trial court had given Villalobos a section 1192.5 advisement, the issue he now raises on appeal would have been waived by his failure to object. (*Walker, supra*, 54 Cal.3d at p. 1026.) Because there was no advisement, the issue can be raised for the first time on appeal. (*Id.* at p. 1025.)

Neither fine violated the bargain. Nothing in the record indicates that the parties bargained or agreed on any terms regarding fines. To the contrary, the record supports the conclusion that there was no such bargaining or agreement. Asked to state the terms of the plea, the People only mentioned the prison sentence. Neither party spoke up to clarify any portion of the agreement. Neither party claimed the People had omitted provisions of the bargain. Villalobos did not claim that the fines recommended in the probation report conflicted with the terms of the agreement. Furthermore, the court expressly asked Villalobos, "Other than what I have told you regarding the consequences of your plea, has anyone threatened you or promised you anything today to enter into this plea." Villalobos responded, "No." In addition, the court asked Villalobos if he "under[stood] that as a result of your plea, you may be required to pay restitution." Villalobos responded, "Yes, ma'am."

Villalobos asserts that, because the court referred to restitution rather than restitution *fines*, our analysis should change. We disagree. He is correct that restitution to the victim and restitution fines are different and their imposition is governed by different standards (§ 1202.4, subds. (a)(3)(B), (a)(3)(A), (b), (c)), but courts are not required to give a "'detailed lecture on criminal procedure as it pertains to *all* the various dispositional devices available.'" (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 621.)

This case is distinguishable from *Walker*. Though the plea agreement in *Walker* also made no mention of restitution fines, the court here provided additional advisements

to Villalobos. Further, Villalobos was asked whether anyone had made any other promises concerning his plea. In *Walker*, there was no such advisement. While Walker reasonably could have understood the plea agreement to indicate that no fine would be imposed, Villalobos was expressly told that he may have to pay restitution. He has pointed to nothing in the record that would support a reasonable belief on his part that restitution fines were barred by the plea agreement rather than left within the trial court's discretion.

Although there is no reversible error in this case on the issue of fines, the Supreme Court's guidance on this recurring problem bears repeating: "Courts and the parties should take care to consider restitution fines during the plea negotiations. The court should always admonish the defendant of the statutory minimum [$200] and maximum $10,000 restitution fine as one of the consequences of *any* guilty plea, and should give the section 1192.5 admonition whenever required by that statute." (*Walker, supra,* 54 Cal.3d at p. 1030.) The Supreme Court also "encourage[d] trial courts either to require that defendants sign a written change of plea form specifying all significant elements of the plea or, when orally taking pleas, follow an informal 'script' that calls upon the parties to disclose all such for the record." (*Crandell, supra,* 40 Cal.4th at p. 1310.) Following this advice will avoid the needless creation of appealable issues in this area.

DISPOSITION

The concurrent 10-year sentence for the enhancement on count three is reversed. The trial court is directed to prepare an amended abstract of judgment and forward it to the appropriate authorities. The judgment is affirmed in all other respects.

Wiseman, Acting P.J.

WE CONCUR:

Dawson, J.

Hill, J.

PROOF OF SERVICE

I, Grace L. Suarez, say that I am over 18 years of age and not a party to the above action. My business address is 508 Liberty Street, San Francisco, California 94114.

On _____, _____, I served the attached on the following by placing true copies in a sealed envelope with postage fully paid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, _____ at San Francisco, California.

_____
Grace Lidia Suarez