

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

No. S176574

Plaintiff and Respondent,

Court of Appeal

No. F056729

vs.

RAMIRO VILLALOBOS,

Tulare County

Trial Court No.

VCF189886A

Defendant and ^{Appellant}~~Petitioner~~.

APPELLANT'S OPENING BRIEF ON THE MERITS

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

SUPREME COURT

FILED

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APPELLANT'S OPENING BRIEF ON THE MERITS

RELEVANT FACTS

Following appellant's plea to attempted murder with a gang enhancement and robbery, the trial court sentenced appellant to a stipulated term of 17 years. (CT 1:194-195.) He was 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.) He was also ordered to pay direct restitution to the victim. (RT 1:7.)

The amount of the fine was not agreed to or even mentioned during the acceptance of the plea. (CT 1:194-222.) The sole use of the word "restitution" occurred when the trial court asked appellant if he understood that as a result of the plea he may be required to pay restitution. (CT 1:203.)

The court also asked appellant if anyone had threatened him or promised anything to enter into the plea. Appellant said "No." (CT 1:204.) The probation officer had recommended a \$4,000 fine in the report. (CT 1:242.) Defense counsel made no objection.

**THE RESTITUTION FINE MUST BE REDUCED TO THE
MINIMUM AMOUNT**

Penal Code section 1202.4, subdivision (b) provides that "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."

The amount of the fine is set at the discretion of the court and must be commensurate with the seriousness of the crime, but be no less than \$200 and not more than \$10,000. The court may determine the amount by multiplying \$200 by the number of years of imprisonment, and the number of felony counts. (Subdivisions (b)(1) and (2).)

Restitution fines are considered "punishment" for purposes of due process analysis, even though the purpose may not be punitive. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

In *Walker*, this Court identified two types of error that may be committed by a trial court in the course of imposing a restitution fine.

The first concerns the sufficiency of the advisement that the court must give the defendant before accepting a plea, and applies whether or not the plea is the result of a bargain. (*People v. Walker, supra*, 54 Cal.3d at p. 1020.)

The second error involves the violation of a plea bargain: "When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon." (*People v. Walker, supra*, 54 Cal.3d at p. 1024.)

In the present case, the second *Walker* error is present.¹ The trial court imposed a restitution fine "that had not been mentioned in the parties' plea bargain." (*People v. Walker, supra*, 54 Cal.3d at p. 1019.) In *Walker*, this Court held that the defendant was entitled to have the fine reduced to the minimum because he received more punishment than he bargained for. (*People v. Walker, supra*, 54 Cal.3d at pp. 1027; 1029-1030) That is what appellant seeks here.

In *People v. Crandell* (2007) 40 Cal.4th 1301, the trial court imposed a \$2,600 restitution fine that had not been mentioned by the prosecutor when he recited the plea agreement. However, the trial court had advised the defendant of various consequences, and warned him that he would "have to pay a restitution fund fine of a minimum of \$200, a maximum of \$10,000." Defendant said he understood. The probation officer's report recommended a \$2,600 fine. (*People v. Crandell, supra*, 40 Cal.4th at pp.

¹ The first error was forfeited by counsel's failure to object.

1305-1306.) This Court found the admonition sufficient to distinguish the situation from that of *Walker* and affirmed the judgment. (*People v. Crandell, supra*, 40 Cal.4th at p. 1310.)

In both *Walker* and *Crandell*, this Court warned that trial courts and the parties "should take care" to consider restitution fines during plea negotiations, the court "should always admonish" the defendant of the range of the fines as one of the consequences of a guilty plea, and should give the Penal Code section 1192.5 admonition. (*People v. Walker, supra* 54 Cal.3d at p. 1030.) In *Crandell* this Court added that the defendant should either be required to sign a written change of plea or the court should follow a "script." (*People v. Crandell, supra*, 40 Cal.4th at p. 1310.)

In its decision in this case (*People v. Villalobos* (2009) F056729, previously published at 177 Cal.App.4th 82, 99 Cal.Rptr.3d 90) the Court of Appeal 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 *People v. 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*, 98 Cal.Rptr.3d at p. 96.)

The court distinguished *Walker*, saying:

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. (*People v. Villalobos, supra*, 99 Cal.Rptr.3d at p. 97.)

The court acknowledged that the trial court had referred to restitution, and that restitution fines are different, and governed by different standards. However, it concluded that courts are not required to give a "detailed lecture on criminal procedure as it pertains to all the various dispositional devices available." (*People v. Villalobos, supra*, 99 Cal.Rptr. 3d at pp. 96-97.)

The appellate court repeated this Court's admonition about the importance of giving a full advisement on the applicable restitution fines and added that "Following this advice will avoid the needless creation of appealable issues in this area." (*People v. Villalobos, supra*, 99 Cal.Rptr.3d at p. 97.)

CONCLUSION

The distinction drawn in *Villalobos* between *Walker* and *Crandell* is not only incorrect, it is confusing, and will spawn yet more litigation. It is clear that years after *Walker* was decided, trial courts are either ignoring or misapplying the decision. This Court should require, not just suggest, that trial courts make restitution fines a part of negotiated dispositions, and hold that if they are not mentioned in the colloquy, they may not be imposed above the minimum. The burden this requirement would place upon trial courts would be *de minimus*, a few words at most. The burden it would lift from appellate courts would be substantial.

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 1,564 words, as computed by Apple Pages.

Grace Lidia Suarez

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