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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD C. DONALDSON,

Defendant and Appellant.

B245801

(Los Angeles County
Super. Ct. No. MA052043)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Thomas R. White, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Jessica C. Owen and Chung Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Richard C. Donaldson appeals from his conviction of forgery following a no contest plea. He contends imposition of restitution and parole revocation fines greater than those agreed to in the negotiated plea was error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by felony complaint filed on March 3, 2011, with forgery. (Pen. Code, § 475, subd. (a).)¹ He pled not guilty and was released on bail. After defendant failed to appear, on March 22, 2011, a bench warrant was issued. When defendant appeared on April 25, 2011, he was remanded into custody.

At the preliminary hearing on May 5, 2011, defendant agreed to an “open plea” with an indicated sentence of 60 days in jail, followed by a six-month out-patient drug rehabilitation program and the following fines and fees: \$200 victim restitution fine, \$200 probation revocation fine, \$40 court security fee, \$30 criminal conviction assessment fine, \$10 fine plus penalties assessment. In accordance with section 1192.5, defendant was advised that if the sentencing judge “changes the terms in any way, you will be allowed to withdraw your plea.”

At the May 19, 2011 sentencing hearing, defendant agreed to a modified disposition: sentencing would be continued to July 21, 2011, pending which he would be immediately released to a six-month residential substance abuse program, upon successful completion of that program he would enroll in a six-month outpatient substance abuse program, “plus a number of standard terms, fines, fees and conditions.” Defendant agreed to a “Cruz waiver” (*People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*)) and stated his understanding that he would be sentenced to the three-year high term if he failed to appear at the continued sentencing hearing.

When defendant failed to appear at the sentencing hearing on July 21, 2011, the trial court issued a bench warrant and announced that it was no longer bound by the

¹ All future undesignated statutory references are to the Penal Code.

negotiated plea agreement. Defendant was a “walk-in” on July 25, 2011. Defense counsel explained that defendant failed to appear on July 21 because defendant’s residential treatment program prohibited defendant from leaving. The trial court set the matter for sentencing on July 27, 2011, pending which defendant was released. After several more continuances, defendant failed to appear at the sentencing hearing on November 16, 2011. A bench warrant was issued. Defendant was in custody when he appeared in court almost 10 months later, on August 17, 2012. Sentencing was set for September 5, 2012. Following several more continuances, on November 16, 2012, defendant was sentenced to the three-year high term. Without objection, the trial court imposed a \$600 restitution fine (§ 1202.4, subd. (b)), a \$600 parole revocation fine (§ 1202.45), a \$40 court operations fee and a \$30 criminal conviction assessment. Defendant timely appealed.

DISCUSSION

A. The People’s Motion to Dismiss

We begin with the People’s motion to dismiss defendant’s appeal on the ground that he did not obtain a certificate of probable cause. It is well settled that appeal of a restitution fine imposed *after* a guilty plea does not affect the validity of a guilty plea and no certificate of probable cause is required. (*People v. Kunitz* (2004) 122 Cal.App.4th 652, 657-658.) Here, defendant’s guilty plea was entered on May 5, 2011. The challenged fines were imposed over one year later, on November 16, 2012. Accordingly, no certificate of probable cause was required and the People’s motion is denied.

B. Defendant Waived Objection to Imposition of Restitution and Parole Revocation Fines Greater Than Those Set Forth in the Plea Bargain

Defendant contends it was error to impose a \$600 restitution fine and a \$600 parole revocation fine when the plea agreement expressly included a \$200 restitution fine and a \$200 probation revocation fine. He argues that the additional fines constitute

increased punishment, but the *Cruz* waiver encompassed only the period of incarceration, not any increased fines. We find defendant's failure at the sentencing hearing to object to the imposition of the fines and to withdraw his plea constitutes a waiver of the issue on appeal.

Generally, if the trial court withdraws approval of a plea disposition, "the defendant shall be permitted to withdraw his or her plea if he or she desires to do so." (§ 1192.5.) A defendant who fails to appear at sentencing does not lose the benefits of section 1192.5. (*Cruz, supra*, 44 Cal.3d at p. 1249.) But a defendant fully advised of his or her section 1192.5 rights, may "expressly waive those rights, such that if the defendant willfully fails to appear for sentencing the trial court may withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term. Any such waiver, of course, would have to be obtained at the time of the trial court's initial acceptance of the plea, and it must be knowing and intelligent." (*Cruz* at p. 1254, fn. 5; see also *People v. Masloski* (2001) 25 Cal.4th 1212, 1219.)

Defendant contends that the imposition of the \$600 restitution and parole revocation fines was unlawful because in the original (but unexecuted) plea disposition those fines were set at \$200 each. We review the statutory basis for these two fines.

Imposition of a restitution fine is mandatory unless the trial court finds compelling and extraordinary reasons for not doing so. (§ 1202.4, subd. (c);² see *People v. Tillman* (2000) 22 Cal.4th 300, 302 (*Tillman*).) The amount of the restitution fine "shall be set at the discretion of the court and commensurate with the seriousness of the crime, but shall not be less than two hundred forty dollars (\$240) starting on January 1, 2012 . . . and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony." (§ 1202.4, subd. (b)(1).) "In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve,

² Section 1202.4 was amended effective January 1, 2013. All references to the statute are to the version in effect on November 16, 2012, the date of the sentencing hearing.

multiplied by the number of felony counts of which the defendant is convicted.”

(§ 1202.4, subd. (b)(2).) The amount of the restitution fine is a matter of trial court discretion as long as it is within the statutory limits. (*People v. Kramis* (2012)

209 Cal.App.4th 346, 350.) Defendants may negotiate the amount of a restitution fine as a part of a plea bargain. (*People v. Villalobos* (2012) 54 Cal.4th 177, 181 (*Villalobos*).)

The parole revocation fine is a separate fine but the amount is governed by the amount of the restitution fine. “In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation fine in the same amount as that imposed pursuant to subdivision (b) of section 1202.4.” (§ 1202.45, subd. (a); see *Tillman*, *supra*, 22 Cal.4th at p. 302.)

Defendant does not claim that the two fines ultimately imposed are outside statutory limits. Instead, he argues that his two fines were improperly increased after the original plea disposition. Although the fines were increased, we conclude he has waived any claim of error. *Villalobos* is instructive. There, the defendant pled no contest to attempted murder and second degree robbery in exchange for a 17-year prison term and dismissal of other allegations. The defendant was not informed that the direct consequences of his plea would include imposition of restitution and parole revocation fines. At sentencing, without any objection from the defendant, the trial court imposed a \$4,000 restitution fine and a \$4,000 parole revocation fine. On appeal, the defendant sought reduction of both fines to the statutory minimum, arguing that imposition of \$4,000 fines of which he was not informed violated the plea agreement. (*Villalobos*, *supra*, 54 Cal.4th at pp. 179-180.) Our Supreme Court affirmed the judgment. It explained that imposition of restitution and parole revocation fines in the context of a plea bargain implicates two separate legal principles. First, before taking a guilty plea, the trial court must admonish the defendant of the direct consequences of the plea, which includes imposition of a restitution fine; absent an objection at the sentencing hearing, the error in failing to admonish the defendant of the direct consequences of his or her plea is waived. (*Id.* at pp. 181-182.) Second, due process requires that the punishment imposed

pursuant to a plea agreement, including the amount of a restitution fine, may not exceed that which the parties agreed upon; a defendant “forfeits a claim that his punishment exceeds the terms of a plea bargain when the trial court gives a section 1192.5 admonition and the defendant does not withdraw his plea at sentencing.” (*Id.* at p. 182.)

Regarding the first principle, because the defendant in *Villalobos* did not object to the fines at sentencing, the court found he waived on appeal any claim of error based on failure to advise. (*Villalobos, supra*, 54 Cal.4th at p. 182.) Regarding the second principle, because the trial court did not advise the defendant of his section 1192.5 right to withdraw his plea, the defendant did not forfeit his claim that imposition of fines greater than the statutory minimum violated the terms of his plea bargain by failing to withdraw his plea or otherwise objecting to those fines at the sentencing hearing. (*Villalobos*, at p. 182.) However, the court concluded that because the plea bargain was silent on the amount of the mandatory fines, the bargain left the amount to the trial court’s discretion, and therefore the court in fact had enforced the plea bargain. (*Id.* at pp. 184-186.)

Here, defendant was informed of his section 1192.5 rights on May 5, 2011, at the time he agreed to the initial plea bargain, which expressly included a \$200 restitution fine and a \$200 probation revocation fine. When defendant agreed to a modified plea bargain on May 19, 2011, his *Cruz* waiver referred only to the possibility of an increased sentence, not to increased fines, if he failed to appear for sentencing. Defendant failed to appear for sentencing. At the subsequent sentencing hearing on November 16, 2012, defendant neither objected nor moved to withdraw his plea after the trial court imposed restitution and parole revocation fines greater than the restitution and probation revocation fines that were part of the plea bargain. Under *Villalobos*, defendant’s failure to do so constitutes a waiver and a forfeiture of any error.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.