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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ASHLEY GARCIA, Defendant and Appellant.	B231887 (Los Angeles County Super. Ct. No. MA051325)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven D. Ogden, Judge. Modified and, as so modified, affirmed.

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr. and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph Ashley Garcia appeals from the judgment entered following his guilty plea to commercial burglary. The trial court sentenced Garcia to a term of three years in prison. Garcia's sole contention on appeal is that the court violated the terms of his plea bargain by imposing a $600, rather than a $200, restitution fine. We modify the judgment to reduce the fine to $200, and otherwise affirm.

PROCEDURAL BACKGROUND

According to a probation report, on December 19, 2010, Garcia left a Winco Foods store without paying for merchandise he had concealed in a suitcase and in his pants. He was charged in a single-count information with second degree commercial burglary (Pen. Code, § 459).[1] The information further alleged that Garcia had a prior juvenile adjudication for committing a lewd act upon a child by force, a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had suffered prior convictions for grand theft person and petty theft, for which he had served prison terms within the meaning of section 667.5, subdivision (b).

On January 11, 2011, Garcia appeared before Judge Carol Koppel and pleaded guilty to the burglary as part of a negotiated disposition. Defense counsel informed the court, "Mr. Garcia is going to be entering a plea of no contest to count one for the agreed term of three years which is the high term and there will be a motion by the People to strike the strike allegation . . . ." After informing Garcia of his rights to trial, confrontation, and against self-incrimination, the prosecutor stated: "[Y]ou will be entering a plea to 459 of the Penal Code which is second degree commercial burglary. You will receive three years in state prison." The prosecutor further advised, "there are going to be certain fines and penalties imposed upon you for entering this plea[.]" Garcia stated that he understood. After additional colloquy and advisements, the prosecutor asked Garcia whether he had any questions. The following transpired:

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

"[Garcia]: Yes, I have one question and that's related to the fines. I would like to request the minimum fine.

"[The Prosecutor]: It's okay with me, but that's up to the judge, but it usually is the minimum fine when you go to prison.

"The Court: $200 fine plus penalty assessment which is what; about [$]900, [$]600? The $200 is [the] restitution fine . . . . [¶]

"[The Prosecutor]: And also, Mr. Garcia, I have to tell you the court has to impose a parole revocation fine and that's a minimum of $200, but that is stayed unless you actually violate your parole.

"[Garcia]: I understand.

"[The Prosecutor]: Do you have any other questions?

"The Court: There is a $30 court security fine, a $10 plus penalty assessments crime prevention fine and a court construction fine of $30. Those will be the fines.

"[Garcia]: So to clarify it will be $230?

"The Court: No, it will be more than that. It will be 30, 30, 10 plus PA, $200 restitution fund fine and a $200 parole revocation fine which is presently stayed. If you go through parole and you don't have any problem, it won't be imposed, that one, but all the rest are.

"[Garcia]: I understand. I have no further questions."

The prosecutor then took Garcia's plea. Sentencing was continued at Garcia's request. Before the hearing concluded, the trial court asked Garcia, "you have the right to have this judge—that is I—do the sentencing, but do you agree that any judge *so long as it's the agreed upon amount* can do the sentencing?" (Italics added.) Garcia agreed. Judge Koppel did not advise Garcia of his right to withdraw the plea should the sentencing court subsequently withdraw its approval, as required by section 1192.5.

On February 15, 2011, Judge Steven D. Ogden conducted the sentencing hearing. At that point a probation report had been prepared; it did not recommend a specific restitution fine amount. In accordance with the plea agreement, Judge Ogden imposed the high term of three years for the offense. Contrary to the parties' previous discussions,

however, he imposed a $600, rather than a $200, restitution fine, and a suspended parole restitution fine in the same amount. Garcia queried, "Sir . . . I believe my plea bargain was I was going to be given a $200 fine." The following discussion transpired:

"The Court: Yeah, I did say that. So you either take the $600 fine or we set your plea aside and go back to where we were. What do you want to do?

"[Garcia]: I don't know. I mean, I was under the impression I was getting a $200 fine.

"The Court: Okay. I'm not going to change it. I made a mistake. I told you $200.[2] It's really $600. So I gave you your choice: You can take the $600 or you can withdraw your plea and go to trial and find out where you wind up." Garcia conferred with his attorney, who subsequently indicated Garcia would "accept the $600."

DISCUSSION

Garcia contends the imposition of a $600, rather than a $200, restitution fine violated the terms of his plea agreement. He also asserts that his waiver of his right to have the same judge who took the plea sentence him (*People v. Arbuckle* (1978) 22 Cal.3d 749) was conditioned upon the sentencing judge's adhering to the terms of the plea agreement as set forth by Judge Koppel. Garcia seeks to either have the fine reduced to the agreed-upon amount of $200, or the sentence vacated and the matter remanded to Judge Koppel for resentencing.

1. *Applicable legal principles.*

a. *Restitution fines.*

Section 1202.4, subdivision (b), provides: "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 . . . ." (§ 1202.4, subd. (b).) The restitution fine is to be set at the court's discretion, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) At the time Garcia was

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2 Judge Ogden subsequently corrected himself, observing, "Oh, that was Judge Koppel, not me" who had originally discussed the $200 amount with Garcia.

sentenced, the minimum fine for a felony conviction was $200 and the maximum was $10,000. (Former § 1202.4, subd. (b)(1).)[3] The court may determine the amount of the fine as the product of $200 multiplied by the number of years of imprisonment the defendant is ordered to serve. (§ 1202.4, subd. (b)(2).) Although the purpose of a restitution fine is not punitive, its "consequences to the defendant are severe enough that it qualifies as punishment" for purposes of sentencing and plea negotiations. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*).) The parties to a criminal proceeding " 'should take care to consider restitution fines during the plea negotiations,' " and are free to reach an agreement concerning the amount of a restitution fine. (*People v. Crandell* (2007) 40 Cal.4th 1301, 1309, 1310; *Walker, supra,* at p. 1024.)

b. *Principles governing plea agreements.*

"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." (*Walker, supra,* 54 Cal.3d at p. 1024; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1359.) This is a rule of constitutional dimension, implicating due process concerns. (*Walker, supra,* at p. 1024; *People v. Crandell, supra,* 40 Cal.4th at p. 1307; *People v. Kim, supra,* at p. 1359.) "The rule is not offended by minor deviations from the bargain; to warrant relief, the variance must be ' "significant" in the context of the plea bargain as a whole.' " (*People v. Kim, supra,* at p. 1359; *Walker, supra,* at p. 1024.)

" 'The imposition of sentence and exercise of discretion are fundamentally and inherently judicial functions. [Citation.] While no bargain or agreement can divest the court of the sentencing discretion it inherently possesses [citations], a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] "A plea agreement is, in essence, a contract between the defendant and the

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3 Section 1202.4 has since been amended to increase the minimum fine to $240. (Stats. 2011, ch. 358, § 1.)

prosecutor to which the court consents to be bound." [Citations.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.]' " (*People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333, 1337 (*Gifford*); *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217.) Thus, once the court has accepted the bargain, the parties are bound by it. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 345.) Pursuant to section 1192.5,[4] however, the court retains the authority, following the plea hearing but prior to imposing sentence, to withdraw its approval of the negotiated plea as long as the parties can be restored to their original positions. (*Gifford, supra,* at p. 1338; *People v. Kim, supra,* 193 Cal.App.4th at p. 1360.) Implicit in section 1192.5's language " 'is the premise that the court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea.' [Citation.]" (*Gifford, supra,* at p. 1338.) Such withdrawal is permitted, for example, when the court becomes more fully informed about the case, or concludes that the bargain is not in the best interests of society. (*Ibid.*)

Walker explained the application of these principles when a court imposes a restitution fine that was not part of a plea agreement. There, before the defendant pleaded guilty, the court correctly informed him of the maximum sentence and penalty fine, but neglected to mention that he was also subject to a mandatory restitution fine. (*Walker, supra,* 54 Cal.3d at p. 1019.) At sentencing, the court imposed a $5,000 restitution fine. The defendant appealed, seeking to have the fine stricken as it was not

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[4] Section 1192.5 provides in pertinent part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

part of the plea agreement. (*Ibid.*) *Walker* concluded that the sentencing court had committed two distinct, but related, errors. First, the court had failed to advise the defendant of the direct consequences of his plea, that is, the mandatory restitution fine, in violation of a judicially-declared rule of criminal procedure. (*Id.* at pp. 1020, 1022.) Second—and relevant to the issues presented here—the court failed to adhere to the terms of the plea bargain. (*Id.* at p. 1020.)

As to the latter error, *Walker* concluded the violation of a plea agreement is not subject to harmless error analysis. (*Walker, supra,* 54 Cal.3d at p. 1026.) Where the restitution fine "significantly exceeds" the terms of a negotiated plea, the section 1192.5 admonition was not given, and the breach of the plea agreement is brought to the trial court's attention at sentencing, the court must exercise its discretion to either reduce the fine or allow the defendant to withdraw the plea. (*Walker, supra,* at pp. 1028, 1030.) The goal is to provide a remedy for breach of the bargain without prejudicing either party " 'or curtailing the normal sentencing discretion of the trial judge.' " (*Id.* at p. 1028.) The appropriate remedy " 'will vary depending on the circumstances of each case.' " (*Ibid.*) The factors for the trial court's consideration in making this determination are: (1) the importance of imposing a greater restitution fine; (2) the interests of the parties and victims; (3) whether circumstances have changed between entry of the plea and the sentencing hearing; and (4) "whether reducing the fine would constrain the court to a disposition that it determines to be inappropriate." (*Ibid.*) Either party may seek specific performance. (*Ibid.*) *Walker* observed that allowing withdrawal of the plea is often undesirable: "Although the imposition of a restitution fine constitutes an important benefit to crime victims, so too does the orderly and considered entry of a plea bargain. Negotiated pleas facilitate the efficient disposition of causes and allow victims to avoid the trauma and inconvenience of trial. Allowing a defendant to withdraw a guilty plea will often run counter to the interests of crime victims. The benefit in enforcing a negotiated plea may far exceed the value of the restitution fine, whatever its amount." (*Id.* at p. 1027.)

2. *Application here.*

The People do not appear to dispute that the $200 restitution fine was a negotiated term of the plea agreement. Prior to pleading, Garcia queried whether the court would impose the minimum fine, and the court promised that it would do so. The parties clearly did not contemplate that the amount of the restitution fine would be left to the discretion of the sentencing court; the issue was negotiated and made a part of the agreement. (Cf. *People v. Crandell*, *supra*, 40 Cal.4th at p. 1309.)

It is less clear whether the increase from $200 to $600—an additional $400—constituted a significant variance in light of the bargain as a whole. *Walker* observed that a defendant who pleads guilty to a felony generally does so to avoid prison time, reduce the maximum term, or have other charges dismissed. Thus, "[i]n the context of felony pleas, a $100 fine is not, as a matter of law, 'significant.' " (*Walker, supra*, 54 Cal.3d at p. 1027.) In the same discussion, however, *Walker* admonished that "[c]ourts should generally be cautious about deeming nonbargained punishment to be insignificant" and stressed that "normally the defendant should not receive any more punishment than that bargained for." (*Id.* at pp. 1027-1028, fn. 3.) The court also observed that the test of whether a punishment is "significant" for due process purposes is "stricter than the prejudice test for a mere failure to advise"; "[p]unishment that is not prejudicial, i.e., when it is not reasonably probable the defendant would not have pleaded guilty if informed of the punishment [citation], may well be 'significant' if imposed after a negotiated plea." (*Id.* at p. 1028, fn. 3.) Certainly, $400 is not a particularly large sum. On the other hand, Garcia points out that to him, the $400 increase was significant: he was unemployed and, as the probation report stated, motivated to commit the instant crime "by a desire to provide necessities for himself." Garcia repeatedly raised the issue during the proceedings, demonstrating its importance to him. Furthermore, pursuant to section 1202.45, a parole restitution fine was imposed in the same amount, and could prove financially burdensome should Garcia be adjudged to be in violation of parole in the future. Under these circumstances, we cannot say the $400 variance was de minimis.

We reject Garcia's argument that the sentencing court was "without jurisdiction" to change the amount of the fine because Judge Koppel had already agreed to a $200 sum. While cursory, the sentencing court's comment that it felt the $200 fine was "a mistake" suggests it was withdrawing its approval of the plea. Such withdrawal was authorized by section 1192.5. (See *Gifford, supra,* 53 Cal.App.4th at p. 1338; *People v. Kim, supra,* 193 Cal.App.4th at p. 1360 ["the sentencing court is *not* bound by the bargain, but is empowered to disapprove it and deny it effect, at least so long as the parties can be restored to their original positions"].) As *Kim* cogently explained: "Some potential for confusion appears in broad statements to the effect that once a trial court has 'accepted' a plea bargain, it too is 'bound' by it. (See, e.g., *People v. Segura* (2008) 44 Cal.4th 921, 930 . . . ['Acceptance of the agreement binds the court and the parties to the agreement']; *People v. Ames* (1989) 213 Cal.App.3d 1214, 1217 [] ['a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain'] . . . . These pronouncements are sometimes marked by an unfortunate vagueness about the factual context in which they apply, and most particularly the *time* at which the court becomes 'bound' by the agreement. Taken out of context, they might suggest that the court surrenders its sentencing discretion the moment it accepts a negotiated plea. Such a view is of course irreconcilable with [section 1192.5.] The statements mentioned here are best understood as only prohibiting the court from unilaterally modifying the terms of the bargain without affording—or after it has become impossible to afford—an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off." (*People v. Kim, supra,* at p. 1361.)

The question then becomes whether the remedy chosen by the sentencing court—allowing Garcia to withdraw his plea—was sufficient. *Walker* did not mandate that the restitution fine must be reduced in all cases in which a negotiated term of a plea bargain is not honored, instead leaving the question of remedy to the trial court's discretion. We review a trial court's sentencing decision for abuse of discretion (*People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. King* (2010) 183 Cal.App.4th 1281, 1323; *People*

v. Mearns (2002) 97 Cal.App.4th 493, 499), and apply the same standard to the sentencing court's choice of remedy here.

The sentencing court did not address the factors set forth by *Walker,* and examination of them does not provide a compelling case for the court's decision to increase the fine. No circumstances appear to have changed between the plea and sentencing proceedings; the probation report did not disclose any new information that suggested an increase was prudent. (Cf. *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861 [withdrawal of a plea is an appropriate remedy when specific enforcement would limit the judge's sentencing discretion in light of the development of additional information or changed circumstances].) The interests of the parties do not seem to have been particularly furthered by the increase: the prosecutor indicated, at the plea proceeding, that the $200 amount was "okay" with him. Given that the prosecutor had already agreed to the $200 amount, imposition of that amount could not have prejudiced the People, at least absent new information gleaned in the interim between the two hearings. Garcia avers, and the record suggests, that the victim, a market, had no interest in a greater fine given that the items he stole were apparently recovered at the scene. Thus, there does not appear to be a compelling reason why the greater sum was required to be imposed. The court gave no reasons for its decision to increase the fine, nor did it explain why it believed the $200 amount was a mistake.

On the other hand, the trial court cannot be said to have acted entirely arbitrarily: it imposed the $600 amount in accordance with a mathematical formula permitted (but not required) by section 1202.4, subdivision (b)(2). Further, the court's decision to allow withdrawal of the plea, rather than reinstating the original $200 fine, provided an avenue to redress the harm without curtailing the sentencing judge's discretion. (*Walker, supra,* 54 Cal.3d at p. 1028; *People v. Mancheno, supra,* 32 Cal.3d at p. 861 [specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable].)

We need not decide this question, however, because even if the sentencing court's choice of remedy was not an abuse of discretion, Garcia's waiver of his *Arbuckle* rights was conditioned on imposition of a $200 fine. Generally, "whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea." (*People v. Arbuckle*, *supra*, 22 Cal.3d at pp. 756-757; see also *People v. Hsu* (2008) 168 Cal.App.4th 397, 408; *People v. Adams* (1990) 224 Cal.App.3d 1540, 1542-1543.) Where a defendant "has been denied that aspect of his plea bargain, the sentence imposed by another judge cannot be allowed to stand." (*Arbuckle*, at p. 757.) An *Arbuckle* right does not arise unless the record affirmatively demonstrates that the defendant had a reasonable expectation that the judge who accepted the plea would also impose sentence. (*People v. Adams, supra,* at p. 1543; *People v. Horn* (1989) 213 Cal.App.3d 701, 707.)

Here, the record shows that Garcia reasonably expected he had a right to be sentenced by the judge who took the plea, in that he was expressly advised of such a right. (See, e.g., *In re Mark L.* (1983) 34 Cal.3d 171, 177; *People v. Adams, supra*, 224 Cal.App.3d at p. 1543.) Unlike the typical *Arbuckle* waiver, Garcia's waiver was conditional. He responded affirmatively to the court's query, "do you agree that any judge *so long as it's the agreed upon amount* can do the sentencing?" (Italics added.) The language used by the court led Garcia to expect that he had a right to have either Judge Koppel conduct the sentencing, or to be sentenced by a second judge who would abide by the terms of the sentence agreed to by Judge Koppel. Garcia waived his right to have Judge Koppel conduct the sentencing *only on the condition* any other judge would impose the agreed-upon terms and fines. Because that condition was not met, his waiver was invalid.

The People contend that Garcia's *Arbuckle* claim has been forfeited because he failed to expressly object to sentencing by Judge Ogden at the sentencing hearing. The People are correct that a defendant's failure to object when faced with a different sentencing judge forfeits an *Arbuckle* claim. (*People v. Adams, supra*, 224 Cal.App.3d at p. 1544; *People v. Serrato* (1988) 201 Cal.App.3d 761, 765; but see *People v. Horn*, *supra*, 213 Cal.App.3d at p. 709.) Of course, at the sentencing hearing Garcia *did* object that Judge Koppel had committed to a $200 restitution fine. Assuming arguendo that this statement was insufficient to constitute an objection to sentencing by Judge Ogden, we agree with Garcia that his counsel was ineffective for failing to interpose a more explicit objection. "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) . . . there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) " 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Camino* (2010) 188 Cal.App.4th 1359, 1377.)

Here, both prongs of the *Strickland* test are met. Had counsel objected that Garcia had only conditionally waived his *Arbuckle* right, it is likely the matter would have been transferred to Judge Koppel, who would presumably have imposed the agreed-upon $200 fine; alternatively, once alerted to the conditional waiver, Judge Ogden would likely have imposed the $200 fine in accordance with the parties' previous agreement. No tactical basis for counsel's failure to object is discernable from the record. Thus, if a more explicit objection was necessary to avoid forfeiture of defendant's argument, counsel's failure to make such an objection constituted ineffective assistance of counsel, and we

must consider the merits of the claim. (See *People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1; *People v. Espiritu* (2011) 199 Cal.App.4th 718, 725-726.)

Garcia suggests that the remedy for violation of his conditional *Arbuckle* waiver is remand to Judge Koppel for resentencing. Given the small dollar amount at issue, and "[t]o avoid the anomaly of restitution fines costing more money than they generate" (*Walker, supra,* 54 Cal.3d at p. 1029), we deem it more prudent to simply modify the judgment to reflect the amount Judge Koppel promised to impose, $200.[5] We likewise modify the amount of the section 1202.45 parole restitution fine to $200. (See *People v. Soria* (2010) 48 Cal.4th 58, 62 [section 1202.45 requires an additional parole revocation restitution fine in the same amount as that imposed pursuant to section 1202.4, subdivision (b)].)

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[5] Given our resolution of this issue, we do not reach Garcia's argument that Judge Ogden's imposition of the $600 fine amounted to an unlawful interference with the judicial act of another court. (See *People v. Ellison* (2003) 111 Cal.App.4th 1360, 1366.)

DISPOSITION

The judgment is modified to reflect a $200 restitution fine (§ 1202.4) and a $200 suspended parole restitution fine (§ 1202.45). The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these modifications, and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.