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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE POGUES,

Defendant and Appellant.

B239628

(Los Angeles County  
Super. Ct. No. TA118620)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed as modified.

Jonathan B. Steiner and Ann Krausz, 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, Senior Assistant Attorney General, Shawn McGahey Webb and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Willie Pogues contends the court violated the terms of his plea bargain when it imposed a restitution fine and a parole revocation fine of \$1,000 each. We find merit in this contention and will remand this matter with instructions to the trial court to reduce Pogues's restitution fine and parole revocation fine to the \$220 each that Pogues and the prosecution agreed upon, and the trial court approved when Pogues was sentenced in November 2011. In all other respects, the judgment remains unchanged.

### **PROCEDURAL BACKGROUND**

An information charged Pogues with one count of making criminal threats. (Pen. Code, § 422.<sup>1</sup>) The information also alleged that Pogues suffered a prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1), and a prior conviction for a serious or violent felony under the Three Strikes Law, sections 667, subdivisions (b)–(i), and 1170.12, subdivisions (a)–(d).

Pogues pleaded not guilty and denied the allegations. A jury trial was held. The jury was unable to reach a verdict, and the court declared a mistrial. Pogues withdrew his not guilty plea and pleaded no contest to the crime of making criminal threats. As part of the plea agreement, the prosecution agreed to strike the priors allegations. The trial court accepted the plea agreement, part of which provided that the court would impose a victim restitution fine of \$220, pursuant to section 1202.4, subdivision (b), and a parole revocation fine, suspended, in an equal amount (§ 1202.45).

Pogues was sentenced to the low term of 16 months in state prison, and given custody credits. The court also imposed various fines and fees, including a \$1,000 victim restitution fine (§ 1202.4, subd. (b)), and a suspended \$1,000 parole revocation fine (§ 1202.45). This appeal followed.

### **FACTUAL BACKGROUND**

At the preliminary hearing, Pogues's ex-wife Amiyoko Moore Pogues (Amiyoko) testified that she called the police saying Pogues was at her house against her wishes.

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<sup>1</sup> All Statutory references are to the Penal Code.

She told the officer who arrived that Pogues had left her a phone message saying he was coming to take her and her friend Tamu “out.” Based on the extremely violent nature of their marriage, Amiyoko understood the message to mean that Pogues planned to kill her and her friend. Amiyoko played several messages for the officer in which Pogues, who had a history of gang membership, had threatened physical violence against Amiyoko or Tamu. Amiyoko feared for her safety and for her friend’s safety.

### **DISCUSSION**

Pogues argues that his due process rights were violated because he did not receive the benefit of his plea bargain. The Attorney General agrees that the trial court inadvertently deviated from the terms of the plea agreement, when it imposed a restitution fine of \$1,000, an amount much higher than the agreed-upon fine of \$220. The parties agree the proper remedy is specific performance of the original plea agreement. We also agree.

After a mistrial was declared, Pogues was arraigned on one count of making criminal threats. He waived his constitutional rights and entered a no contest plea. In return for the plea, the prosecution agreed to strike the priors allegations. Pogues agreed to accept the low term of 16 months in state prison, and understood his conviction would qualify as a strike offense in any future proceeding. The court announced it would impose a restitution fine of \$220, pursuant to section 1202.4, the following exchange occurred:

“[Prosecutor]: . . . [¶] . . . [¶] The court is going to impose a restitution fine of [sic] this case of \$200 [under § 1202.4]; is that correct, Your Honor?

“The Court: Yes.

“[Prosecutor]: . . . .

“The Court: I think it’s [\$]220 actually now. November 1st, it went up.

“[Prosecutor]: . . . .

“The Court: Minimum.

“[Prosecutor]: \$220. And also a parole—[¶] Let the record reflect that [Pogues] is conferring with counsel.

“(Whereupon client and counsel confer sotto voce.)

“[Defense Counsel]: I guess [Pogues’s] concern regarding the restitution is that he didn’t cause any damage.

“[Prosecutor]: Understand what I’m talking about is a restitution fine that is not related to any damages caused to any property. It’s a statutorily created fine that every person convicted of a felony offense is required to pay. It’s just called a restitution fine.

“The Court: Called the victim’s—victim fund restitution. And I have the discretion to charge you the minimum, which is \$220, or the maximum, \$10,000.

“[Prosecutor]: Your Honor, is the court going to charge him \$220 if he pleads?

“The Court: Yes.

“[Prosecutor]: As the court just stated, he’s going to charge you \$220 based on his plea. [¶] There’s also other court security fees and fines that the court will tell you about. [¶] If you violate your parole and are sent back to prison, there is also a parole revocation fine [under § 1202.45] that the court will discuss with you.”

At the subsequent sentencing hearing, the same judge imposed the agreed-upon sentence of 16 months in prison, but ordered Pogues to pay a \$1,000 victim restitution fine under section 1202.4 and imposed a suspended \$1,000 parole revocation fine under section 1202.45. Pogues did not object when the higher fines were imposed.<sup>2</sup>

Plea agreements are interpreted in accordance with the rules of contract. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 344.) “[B]oth parties . . . must abide by the terms of the agreement.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*), overruled on other grounds by *Villalobos, supra*, 54 Cal.4th at p. 183.) “[M]aterial terms of the agreement cannot be modified without the parties’ consent.” (*People v. Martin*

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<sup>2</sup> Pogues’s failure to object does not constitute forfeiture of his claim of error. The court failed to advise Pogues that, in the event it did not approve the plea agreement, he would be permitted to withdraw his plea. (See § 1192.5; *People v. Villalobos* (2012) 54 Cal.4th 177, 182 (*Villalobos*) [because the court did not give a “section 1192.5 admonition,” defendant’s failure to object at sentencing did not result in forfeiture of claim on appeal].)

(2010) 51 Cal.4th 75, 80.) The appellate court applies the standards of review applicable to contracts generally. (*Toscano*, at p. 345.) “[T]he ‘interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.’ [Citations.]” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520.)

Due process applies both to the procedure of accepting the plea and to implementation of the bargain itself. “[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled.” (*Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433, 92 S.Ct. 495].) This does not mean that any violation of the agreement is constitutionally impermissible. To violate due process, “the variance must be ‘significant’ in the context of the plea bargain as a whole.” (*Walker*, *supra*, 54 Cal.3d at p. 1024.)

“A violation of a plea bargain is not subject to harmless error analysis. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer. ‘Because a court can only speculate why a defendant would negotiate for a particular term of a bargain, implementation should not be contingent on others’ assessment of the value of the term to defendant. [¶] . . . [¶] Moreover, the concept of harmless error only addresses whether the defendant is prejudiced by the error. However, in the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. ‘At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice . . . .’” [Citations.]” (*Walker*, *supra*, 54 Cal.3d at p. 1026.)

Except in extraordinary circumstances, everyone convicted of a crime must pay a victim restitution fine. (§ 1202.4, subd. (b).) The amount of that fine is left to the court’s discretion, so long as the fine is within the statute’s minimum and maximum limits. At the time Pogues committed the crime in June 2011, the statutory minimum was actually \$200 and the maximum was \$10,000. (Former § 1202.4, subd. (b)(1).) In addition, every

person convicted of a crime and whose sentence includes a period of parole must pay a parole revocation fine in the same amount as the restitution fine. (§ 1202.45.) Payment of the parole revocation fine is suspended unless parole is revoked. (*Ibid.*)

Here, the court informed Pogues that if he agreed to the plea bargain, he would be required to pay a \$220 restitution fine under section 1202.4, and another \$220 under section 1202.45, to be suspended barring revocation of his parole. The Attorney General concedes that the imposition of \$2,000 total in restitution and parole revocation fines, constituted a significant deviation from the terms and conditions of the \$440 total fines to which Pogues had agreed under the terms of his plea. Because the court specifically discussed the imposition of the \$220 restitution fine under section 1202.4 at the pretrial hearing, it would be unreasonable to conclude that Pogues's plea did not "rest[ ] in any significant degree" on the prosecution's promise to seek only the \$220, which the court mistakenly believed to be the minimum.<sup>3</sup> (See *Santobello v. New York*, *supra*, 404 U.S. at p. 262.) The \$1,560 difference between the court-imposed fines significantly departs from the terms of the \$440 in fines agreed upon in the plea.

The Attorney General also concedes that the appropriate remedy in this case is to reduce the fines from a total of \$2,000 to a total of \$440. "The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860–861 (*Mancheno*).) "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 under all the circumstances." (*Ibid.*) When determining which remedy to apply, factors to be considered include "who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and

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<sup>3</sup> The trial court was mistaken when it said the minimum restitution fine under section 1202.4 was \$220 at the time of the offense. Nevertheless, both sides agreed that a fine of \$220 would be imposed.

whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate.” (*Id.* at p. 860.)

Specific performance is appropriate here because implementing the original plea bargain of two \$220 fines most accurately reflects “the reasonable expectations of the parties without binding the trial” court to a decision it finds “unsuitable.” (*Mancheno, supra*, 32 Cal.3d at p. 861.) This was the parties’ original agreement, and one the court believed was fair at the time. Nothing in the record suggests anything changed that would have motivated the court intentionally to alter the terms of the agreement between the acceptance of the plea and sentencing. (*Ibid.*)

### **DISPOSITION**

The amounts of the restitution fine and the parole revocation fine are reduced to \$220 each. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.