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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMON O'CONNOR,

Defendant and Appellant.

A127217

(San Francisco City & County
Super. Ct. No. 205198)

Defendant contends the abstract of judgment entered after revocation of his probation improperly assessed three restitution fines that the trial court failed to mention at his sentencing hearing. While we conclude the trial court should have mentioned the fines, their imposition as reflected in the abstract of judgment was mandated as a matter of law. Accordingly, we affirm.

I. BACKGROUND

Defendant was charged in a complaint, filed January 30, 2008, with possession of a concealed stolen firearm in a vehicle (Pen. Code,¹ § 12025, subs. (a)(1), (b)(2)), three counts of receiving stolen property (§ 496, subd. (a)), carrying a stolen loaded firearm (§ 12031, subs. (a)(1), (a)(2)(b)), resisting a peace officer (§ 148, subd. (a)(1)), possession of graffiti instruments (§ 594.2, subd. (a)), and possession of burglar tools (§ 466). Several of the counts were alleged to have been committed while defendant was released on bail for a felony offense. (§ 12022.1.)

¹ All statutory references are to the Penal Code.

Defendant pleaded guilty to an amended charge of possession of a concealed weapon. (§ 12025, subd. (a)(2).) Imposition of sentence was suspended, and defendant was placed on probation. The trial court also imposed \$200 restitution and probation revocation fines under sections 1202.4, subdivision (b) and 1202.44, the latter “stayed unless probation is revoked.”

On June 10, 2009, during a probation search of defendant’s car, San Francisco police found burglar tools and a weapon. Based on this incident, defendant’s probation was revoked on August 7, 2009. At a sentencing hearing on October 9, 2009, he was sentenced to the mitigated term of 16 months on the original concealed weapon charge. During this hearing, the court did not discuss or impose any fines. The clerk’s minutes for the hearing, however, state: “Defendant shall pay a restitution fine in the amount of \$200 pursuant to [Penal Code section] 1202.4. An additional restitution fine in the same amount is imposed pursuant to [Penal Code section] 1202.45. This additional restitution fine shall be suspended unless the person’s parole is revoked. [¶] The restitution fine in the amount of \$200 per [Penal Code section] 1202.44 is now due, probation having been revoked.”

Similar fines are reflected in the abstract of judgment. Under the heading “FINANCIAL OBLIGATIONS,” the abstract lists a \$200 fine under section 1202.4, a \$200 fine under section 1202.44, which is “now due, probation having been revoked,” and a \$200 fine under section 1202.45, which is “suspended unless parole is revoked.”

II. DISCUSSION

Defendant contends the restitution fines should be stricken because they were not pronounced in open court during the October 2009 sentencing hearing. The Attorney General contends that the fines under sections 1202.4, subdivision (b) and 1202.44 were not required to be announced in court because they had already been imposed at defendant’s probation sentencing and that any failure with respect to the section 1202.45 fine was harmless because imposition of the fine was mandatory.

Three different fines are at issue here. Section 1202.4, subdivision (b)(1) states that whenever a person is convicted of a crime, the court shall impose a restitution fine of

not less than \$200, “unless it finds compelling and extraordinary reasons for not doing so, and states those on the record.” Section 1202.44 states that whenever a person is placed on probation, the court shall, at the time a restitution fine is imposed under section 1202.4, subdivision (b), impose an additional fine of the same amount that “shall become effective” upon the revocation of probation. Again, this fine “shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on record [*sic*].” Finally, section 1202.45 states that whenever a person is given a sentence that includes a period of parole, the court shall impose, again at the time a restitution fine is imposed under section 1202.4, subdivision (b), an additional fine in the same amount that is “suspended unless the person’s parole is revoked.” Section 1202.45 contains no language authorizing the court to waive or reduce the fine.

In understanding the trial court’s actions, we are guided by the transcript of proceedings, rather than the court minutes. When there is a discrepancy between the two, the oral pronouncement controls. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) The transcript demonstrates the trial court did not impose, and did not purport to impose, any fines at the time of sentencing. The court minutes are in error in reflecting the imposition of these fines, and the minutes will be disregarded for purposes of our decision.

Despite recognizing the error in the court minutes, we find no reason to alter the abstract of judgment, largely for the reasons argued by the Attorney General.

As the Attorney General points out, a \$200 section 1202.4 fine was imposed at the time defendant was placed on probation. The sentencing transcript demonstrates that no new section 1202.4 fine was imposed, and it would have been error to do so. (*People v. Arata* (2004) 118 Cal.App.4th 195, 201–202; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823 (*Chambers*).) We therefore interpret the abstract of judgment to refer to the earlier fine, not to a new or duplicative fine.

A similar situation was presented in *People v. Cropsey* (2010) 184 Cal.App.4th 961 (*Cropsey*). The trial court had imposed fines under sections 1202.4 and 1202.44 when placing defendant on probation. At sentencing following revocation of defendant’s

probation, the trial court stated that the earlier-imposed fines were “ ‘reimpose[d].’ ” (*Cropsey*, at p. 964.) On appeal, the defendant contended the court’s “reimposition” of the earlier fines constituted the imposition of a second set of fines, in violation of *Chambers*. While the Court of Appeal disapproved the trial court’s language in purporting to reimpose the earlier fines, it found no error and affirmed the judgment because the court did not intend to impose any new fines. As the court noted, it was unnecessary to reimpose the earlier fines because they “ ‘survive’ ” the revocation of probation. (*Cropsey*, at p. 965.) As a result, the trial court should have said, “ ‘The abstract of judgment should reflect the restitution fine(s) previously imposed.’ ” (*Id.* at p. 966.)

The entry in the abstract of judgment does not purport to impose an additional section 1202.4 fine. It merely states defendant’s outstanding “financial obligations” at the time of judgment. In the absence of any evidence defendant had paid the original section 1202.4 fine, we construe the abstract of judgment as incorporating and reiterating defendant’s preexisting fine—in the words of *Cropsey*, “ ‘reflect[ing] the restitution fine(s) previously imposed’ ”—and not as imposing an additional fine.² (*Cropsey, supra*, 184 Cal.App.4th at p. 966.)

The section 1202.44 fine was also imposed earlier. A section 1202.44 fine, once imposed, “become[s] effective upon the revocation of probation.” (§ 1202.44.) As a result, the trial court was required to lift the stay of this fine when defendant’s probation was revoked. (*People v. Guiffre* (2008) 167 Cal.App.4th 430, 435.) The abstract of judgment is therefore correct in listing the fine as due. If the abstract of judgment did not mention this fine as a financial obligation, the Attorney General would have been entitled to seek modification of the abstract from this court to reflect the fine. (*Ibid.*)

Although it would have been better practice for the trial court to have mentioned the section 1202.4 and 1202.44 fines at the sentencing, as noted in *Cropsey*, such a

² In the event defendant had already paid this fine at the time the abstract was entered, his payment will constitute a defense against any attempt to collect the fine a second time.

mention was not a legally required under *People v. Zackery* for the fines to become effective because they had already been pronounced at the earlier sentencing hearing and survived the revocation of probation.

The section 1202.45 fine is somewhat different, since it had not been imposed earlier. Because the trial court had already imposed a fine under section 1202.4, subdivision (b), however, it was required to impose a section 1202.45 fine in the same amount when it imposed a sentence with the possibility of parole. (*People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Rodriguez* (2000) 80 Cal.App.4th 372, 376.) When it failed to impose this mandatory fine at the sentencing hearing, the trial court rendered an unauthorized sentence, and the Attorney General was entitled to request imposition of the fine in this court. (*People v. Smith* (2001) 24 Cal.4th 849, 853; *People v. Rodriguez*, at p. 376.)

The abstract of judgment was in error in reflecting a fine under section 1202.45 that the court had not actually imposed (*People v. Vasquez Diaz* (1991) 229 Cal.App.3d 1310, 1316; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14), but the error is harmless. If the abstract of judgment did not already mention the section 1202.45 fine, we would be required to remand for modification of the abstract of judgment to reflect the fine. (E.g., *People v. Vasquez Diaz*, at p. 1316.)

Accordingly, while we find the trial court erred in failing to mention the fines at the sentencing hearing, the abstract of judgment accurately reflects the fines that have been or should have been imposed on defendant. We therefore have no reason to order any change to the judgment as reflected in the abstract of judgment.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Dondero, J.

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People v. O'Connor