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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LON WARREN CURTIS, Defendant and Appellant.	H030035 (Santa Clara County Super. Ct. No. CC579198)

Following a jury trial, appellant was sentenced to 450 years to life. He contends, "Appellant was denied his federal constitutional right to a jury trial because he was sentenced to tripled consecutive terms based on facts beyond those found true by a jury." We affirm.

Background

In July 1996, the victim, who was 17 years old and working as a prostitute with an escort service, met with appellant at Vickers Concrete Sawing where he worked. After discussing their financial arrangements, they went into an office. There appellant pulled out a knife, put it to her throat, and threatened to kill her if she made noise. He took her to a warehouse area and bound her hands behind her back with duct tape. He taped her hair into a ponytail. He obtained a flashlight from his truck, took her back to the office, and inserted the flashlight into her vagina. After about five minutes, he inserted the

flashlight into her rectum. He removed it so she could use the bathroom. When she returned, he put the flashlight into her vagina again. Then he removed the flashlight and put his hand into her vagina. He made her walk into the parking lot and put his hand in her rectum. At some point, he put his hand into her vagina again. The victim, now bleeding, used the bathroom again and appellant told her to clean up the bathroom and that he would kill her if any blood was left behind. He put her into the trunk of her car and told her that he hoped that she would fall asleep so that he could kill her. At trial, a victim of rape and sodomy committed by appellant in 1979 also testified.

Appellant testified that he believed that everything that he did with the victim was done with her consent.

Appellant was convicted of six counts of penetration with a foreign object. (Pen. Code, § 289, subd. (a).) The jury found true enhancements as to two counts that the victim had been tied or bound and, as to all counts, that appellant had used a weapon and had been convicted of a prior sex offense. (Pen. Code, § 667.61, subds. (a), (b), and (e).) The trial court found true the allegations that appellant had five prior strike convictions. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.)

Before sentencing, defense counsel filed a "request for court to exercise discretion under Penal Code section 1385 – [Statement in Mitigation]."[1]

The prosecution's opposition to appellant's motion explained that in 1974, appellant beat and raped a 19-year-old hitchhiker and was convicted of assault by means of force likely to produce great bodily injury and rape by force. Appellant was released from prison in 1978. In 1979, he committed rape, forcible sodomy and forcible oral copulation, as well as burglary, and was sentenced to 16 years in prison. He was released

[1] In this motion, defense counsel incorporated by reference much of the probation report and stated, "The nature of the current offenses offers ample reason for the Court to exercise its discretion under Penal Code section 1385. The offense involved no harm or violence to another person."

in 1991. In 1996, appellant was arrested for the present offenses but, because the victim could not be located, he was released. In 2002, appellant was convicted of failing to register as a sex offender. He was then committed as a Sexually Violent Predator. During that commitment, this case was refiled.

The probation report recommended that the maximum prison term be imposed, stating that appellant "has an extensive criminal history, which dates back to 1974. With six prior felony convictions and one prior misdemeanor conviction, the defendant's felony offenses include Forcible Rape, Forcible Rape with Use of a Weapon, Forcible Sodomy, Forcible Oral Copulation, Residential Burglary and Escape from Prison." The report said that "Since the crimes occurred both within and outside of the Vicker's Concrete Sawing Warehouse, wherein the defendant had ample opportunity to reflect on the wrongfulness of his actions, the crimes were committed on differing occasions and consecutive sentencing pursuant to [the] Strike Law is mandatory. Further, since the crimes are all violent sex crimes, consecutive sentencing is also required pursuant to Section 667.6 (d) of the Penal Code. As to each count, 75 years to life is recommended pursuant to Section 667(e)(2)(i) of the Penal Code. This term was derived by tripling the 25 year to life term pursuant to 667.61(a)/(d) of the Penal Code." Parts of the probation report bear what appear to be the trial court's notations in pen, including underlining of the phrase "all violent sex crimes" in the above passage.

At the time of sentencing, both parties submitted the motion and sentencing without argument. The trial court said that it had prepared a tentative ruling on appellant's motion that it was going to adopt. The court reviewed appellant's criminal history. The court said, "The facts of this case eerily resemble some of the conduct he demonstrated in the past on an ever-increasing scale of inhumanity." The court described the present offense and stated, "Mr. Curtis is a sexual predator in every sense of the phrase and of the worst kind. [¶] His cruelty knows no boundaries. [¶] He should never be released from prison again." The court said, "For all the foregoing reasons, Mr.

Curtis's motion to strike the strikes is denied. [¶] More clearly than most, Mr. Curtis is precisely the individual contemplated by the three strikes law."

The court then cited various factors in aggravation and said, "The Court will multiply the terms by a factor of three pursuant to the three strikes law pursuant to section 667 subsection (e) subsection (2) subsection (A) subsection (i)." After sentencing on each count, the court said "The Court will order each of the counts to run consecutive to each other for the reasons previously stated." This resulted in a sentence of 75 years to life on each count consecutive to 25 years for counts one and two and 20 years each for counts three through six for a total sentence of 450 years to life consecutive to 130 years. The following week, the court modified appellant's sentence by striking the 130-year determinate term. The court said, "In reviewing the abstract of judgment, I [came] to the conclusion that I was acting beyond my jurisdiction in enhancing each of Mr. Curtis's sentences with a determinate portion, as if Penal Code section 667(A) had been charged by the district attorney's office, which it, in fact, had not been charged." The court said, "In each of the six counts, the court is going to delete the determinate portion of the sentence. [¶] All other portions of the sentence remain exactly the same." Appellant's total sentence was 450 years to life.

Discussion

Appellant asserts that "the court was not very specific in pronouncing sentence" in that the court "did not specify which section of law it relied on to impose consecutive sentences." Either the three strikes law (Pen. Code, §§ 667, 1170.12) or Penal Code section 667.6, which mandates full term consecutive sentencing for sex crimes, could have applied. Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Blakely v. Washington* (2004) 542 U.S. 296, appellant argues that the imposition of a consecutive sentence under either scheme requires specific circumstances to be shown and findings to be made and that these were not established by a jury beyond a reasonable doubt. Respondent argues that because appellant did not contend in the trial court that he was

entitled to a jury determination of the facts supporting the court's consecutive sentencing choice, he has waived the issue. Because appellant argues that if the issue was waived he received ineffective assistance, we consider appellant's argument.

Penal Code section 667.6, subdivision (d) provides "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions."[2] Subdivision (e) includes a violation of Penal Code section 669.

Penal Code section 667, subdivision (c)(6) provides, "Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following: . . . [¶] (6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." Appellant opines that because he was found to have been convicted of five strike priors, the court "presumably sentenced him consecutively under the provisions of the Three Strikes Law."

Blakely held that " 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Blakely*, *supra*, 542 U.S. at p. 301 [124 S.Ct. at p. 2536].) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely

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[2] Subdivision (d) of Penal Code section 667.6 continues, "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

on the facts reflected in the jury verdict or admitted by the defendant. (124 S.Ct. at pp. 2537-2538.) In *People v. Black* (2005) 35 Cal.4th 1238, our Supreme Court considered *Blakely* and stated "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.) Given this holding, we must conclude there was no constitutional infirmity in the imposition of consecutive terms based on an application of *Blakely*.[3] (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant recognizes that the court in *Black* said that "[n]o reason need be stated on the record for directing that indeterminate terms run consecutively to one another." (*Black, supra,* 35 Cal.4th at p. 1261, fn. 17.) Appellant argues, "the absence of a requirement to state reasons on the record is not the same as the absence of a legal basis for ordering consecutive sentencing." Because Penal Code section 669 mandates concurrent sentences in the absence of a finding that a consecutive sentence is appropriate, the court must have had a legal basis for imposing the terms consecutively.

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[3] In *People v. Groves* (2003) 107 Cal.App.4th 1227, decided after *Apprendi v. New Jersey* (2000) 530 U.S. 466 but before *Blakely*, the appellate court held that the trial court did not violate the defendant's right to trial by jury by finding by preponderance of the evidence and without submitting the matter to the jury the factual matters necessary for the operation of section 667.6, subdivision (d), and therefore did not err in imposing full-term consecutive sentences in accordance with that statute. (*Groves, supra,* 107 Cal.App.4th at pp. 1230-1231.) As noted, in *Black*, our Supreme Court observed that several cases had held that the right to jury trial was not implicated by the imposition of consecutive sentences and cited *Groves* with approval. (*Black, supra,* 35 Cal.4th at pp. 1263-1264, fn. 19.) In *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856], the high court held that California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt. *Cunningham* did not address the distinct issue of imposition of consecutive sentencing and we remain bound by *Black*.

Appellant observes that the probation report stated that appellant's offenses took place on separate occasions, which would make consecutive sentencing mandatory under Penal Code section 667.6, subdivision (d). The probation report stated, "Since the crimes occurred both within and outside of the Vicker's Concrete Sawing Warehouse, wherein the defendant had ample opportunity to reflect on the wrongfulness of his actions, the crimes were committed on differing occasions and consecutive sentencing pursuant to the Strike Law is mandatory." The "reflect on the wrongfulness of his actions" language comes from Penal Code section 667.6, subdivision (d) rather than section 667. Noting that the court in *People v. Deloza* (1998) 18 Cal.4th 585, 596-599, said that the "same [or different] occasions" for three strikes purposes does not have the same meaning as the "separate occasions" language in Penal Code section 667.6, appellant argues, "The probation officer's assumption that consecutive sentencing under the Three Strikes law is mandated by application of this [separate occasion] language was incorrect." Appellant argues, "If [the trial court] sentenced appellant under the Three Strikes law, it did not clearly demonstrate exercise of discretion because the record does not indicate it ever made a determination of facts that the counts of conviction arose on the 'same occasion' or from the same set of 'operative facts' or otherwise."

Appellant does not argue that the court's sentencing choice was an abuse of discretion or that there could be no factual support for a finding that his crimes were committed on separate occasions. Appellant's suggestion that the trial court was "misled" by the "assumption" that consecutive sentencing was mandated under the three strikes law ignores the fact that the trial court presided over the jury trial in this case and undoubtedly had a better sense of whether the crimes were committed on separate occasions than the probation report writer. The trial court listed several reasons for making its sentencing choice, and after imposing consecutive sentences, said it was doing so "for the reasons previously stated." The record does not demonstrate that the court

misunderstood the scope of its discretion in imposing consecutive sentences or failed to have a proper legal basis for imposing consecutive sentences.

Appellant argues his right to trial by jury under the Sixth Amendment included the right to have a jury decide the factual prerequisites for imposition of full-term consecutive sentences under section 667.6, subsection (d). There is nothing in section 667.6, subdivision (d) to indicate that the trial court must state reasons to support its finding of "separate occasions." Because imposition of the full, consecutive term for offenses that occur on "separate occasions" is mandatory under section 667.6, subdivision (d), there is no reason for the trial court to state its reasons. (*People v. Craft* (1986) 41 Cal.3d 554, 559; *People v. Thomas* (1990) 218 Cal.App.3d 1477, 1489.) Appellant argues that if he "were sentenced consecutively under section 667.6, subdivisions (c) or (d), current California law again requires the trial court to exercise sentencing discretion and make findings according to the rules of court before imposing the increased term." He contends "the current state of federal law requires those findings to be made by a jury beyond a reasonable doubt as *Apprendi* and *Blakely* . . . have held." We must reject his argument based on *Black.* Accordingly, the court's application of section 667.6 to impose consecutive sentences did not violate defendant's constitutional rights. Appellant also contends that the discretionary imposition of such sentences under Penal Code sections 667 and/or 667.6, subdivision (c) and/or (d) is constitutionally infirm if it rests on findings not made by the jury. This brings us back to the holding of *Black*, by which we are bound.

Disposition

The judgment is affirmed.

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ELIA, J.

I CONCUR:

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PREMO, J.

RUSHING, P.J., Concurring and Dissenting

Although I acknowledge that the late Justice Mosk's concurring opinion in *People v. Deloza* 18 Cal.4th 585, 600-602 (*Deloza*) is not binding precedent, and therefore agree the judgment should be affirmed, I write specially to voice my agreement with the principles Justice Mosk expressed in *Deloza* with respect to Curtis's sentence. As to Curtis, who was 52 years old at the time of sentencing, the trial court could have exercised its sentencing discretion to impose concurrent rather than consecutive sentences. This would have subjected Curtis to a sentence of at least 75 years to life, which would make him ineligible for parole until he is at least 127 years old, an age no human being can reach.[1] In these circumstances, I believe the trial court should have imposed a sentence of 75 years to life, rather than the sentence of 450 years to life the trial court imposed, and the failure to do so constitutes cruel and unusual punishment consistent with the sentiments expressed in *Deloza*.

In his concurring opinion in *Deloza*, Justice Mosk concluded that a sentence of 111 years constituted cruel and unusual punishment under both the United States and California Constitutions. He asked, "Is a sentence of 111 years in prison constitutional?

"Choosing to address this question myself, I believe that the obvious answer is no: A sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the

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[1] An online cooperative encyclopedia identifies Jeanne Calment as having the "longest unambiguously documented lifespan." (Wikipedia, The Free Encyclopedia, Oldest People <http://en.wikipedia.org/wiki/Oldest_people> [as of Mar. 20, 2007].) She reportedly lived some 122 and one-half years, from February 1875 to August 1997. (*Ibid*.)

United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution.

"Regrettably, multicentury sentences are becoming commonplace and generally remain unchallenged. Certainly there is understandable revulsion directed toward a defendant who has committed numerous counts of illegal conduct. Not infrequently the charges are sexual in nature; that conduct appears to draw the monstrous sentences.

"A prime example occurred in Oklahoma in *Robinson v. State* (Okla.Crim.App. Apr. 1, 1996) F94-1377. In 1994, a trial judge sentenced the defendant to 30,000 years in prison. In 1996, in an unpublished opinion, a bare majority of the appellate court upheld the conviction, without discussing the length of the sentence. However, the dissenting justices declared: 'A sentence of this magnitude is shocking and absurd.' (*Id*. (dis. opn. of Lane, J.).) They added: 'We should work to regain the public's confidence in our penal system by implementing an honest system of imprisonment. If we don't, sentence 'inflation' will make a mockery of us all.' (*Ibid*.)

"What is the legal difference between prison sentences of 30,000 years and 111 years? The answer is: none. Both are impossible for a human being to serve.

"If a trial court were to impose as a condition of probation that a defendant report to his probation officer once a week for 111 years, an appellate court would not hesitate to strike it down as impossible to meet. How then could it sustain a prison sentence of that length? The United States Supreme Court has declared that the 'basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.' (*Trop v. Dulles* (1958) 356 U.S. 86, 100 . . . (plur. opn. of Warren, C. J.).) This provision is aimed at something more than merely curbing punishment designed to inflict great physical pain. As Justice Marshall stated, 'one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties.' (*Furman v. Georgia* (1972) 408 U.S. 238,

331 . . . (conc. opn. of Marshall, J.).) He further recognized that 'a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose.' (*Ibid*.) The same is true under article I, section 17 of the California Constitution.

"A grossly excessive sentence can serve no rational legislative purpose, under either a retributive or a utilitarian theory of punishment. It is gratuitously extreme and demeans the government inflicting it as well as the individual on whom it is inflicted. Such a sentence makes no measurable contribution to acceptable goals of punishment.

"What, then, is the answer if a defendant is convicted of numerous counts? The maximum sentence that should be imposed is one a defendant is able to serve: life imprisonment. In a particularly egregious case involving exceptionally numerous victims, the maximum could conceivably be life imprisonment without possibility of parole.

"Once we declare century-plus sentences invalid, I am confident that the Legislature will act to provide appropriate life sentences. Such sentences would serve the purposes of punishment, would be constitutional, and would avoid making the judicial process appear oblivious to life expectancy tables. (Mosk, *State's Rights—and Wrongs* (1997) 72 N.Y.U. L.Rev. 552, 556-559 [Brennan Lecture].)" (*Deloza, supra*, 18 Cal.4th at p. 600-602 (conc. opn. of Mosk, J.).)

When the trial court has discretion to impose concurrent or consecutive sentences, and when the imposition of concurrent sentences still results in a sentence longer than any human being can serve, then the trial court should exercise its discretion in favor of the lesser sentence. I believe the failure to do so constitutes cruel and unusual punishment.

In this case, the trial court could have chosen to impose concurrent rather than consecutive sentences on a number of the counts on the basis that many of the offenses were " 'committed on the same occasion.' " (*Deloza, supra*, 18 Cal.4th at p. 595.) Had

the trial court done so, Curtis would still have been subject to a sentence of at least 75 years to life, which is more than he can possibly serve.

I acknowledge that extremely long sentences are a reality flowing from the sentencing laws enacted by the Legislature. However, restraint is the hallmark of sound judicial administration. When possible, I believe courts should choose to impose sentences that do not fall within the area of complete absurdity. Faced with a choice ranging from 75 years to life to 450 years to life, the trial court here should have imposed the lesser sentence which, while still impossible for Curtis to serve, is at least more within the range of reality than the sentence the trial court actually imposed.

Choosing the lesser sentence in such circumstances reflects reasoned deliberation. A sentence of 450 years is gratuitously extreme, is not required under the sentencing laws, and adds nothing to either a utilitarian or retributive theory of punishment. What a sentence of 450 years does add is a sense that the courts condone a sentence which defies common sense and which is inimical to a justice system that prides itself upon being grounded in logic and reason.

Curtis cannot possibly serve the 450 years; neither can he possibly serve the 75 years. So let us in the name of judicial restraint impose the sentence that is the *least* absurd and demeaning. For these reasons, I believe the trial court should have chosen to impose concurrent rather than consecutive sentences. Consistent with *Deloza*, the court's failure to do so constitutes cruel and unusual punishment.

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RUSHING, P.J.

PREMO, J., Concurring

Our dissenting colleague points to a sentence that is so long it could not be fully served given the mortality of man. On the other hand the majority opinion carefully points out that the sentencing judge here in fact followed the requirements of the California sentencing law pertaining to multiple offenses which implicate mandatory consecutive sentences. The lengthy term resulting herein is the product of defendant's multiple serious crimes, and not an unfair sentencing process. If somehow a cap on the number of years imposed in a criminal sentence in horrendous cases such as this one is a more desirable solution, that determination should be made by the California Legislature.

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PREMO, J.