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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES THOMAS HINKLE,

Defendant and Appellant.

A103315

(San Mateo County
Super. Ct. No. SCO51602A)

I. INTRODUCTION

By an information filed May 31, 2002, appellant was charged with committing 18 felony sexual offenses against the same minor between June 1, 1997, and June 30, 1999. After a trial in early 2003, a jury convicted appellant of 13 of those offenses, and the trial court sentenced him to a total of 31 years in state prison. Appellant claims this sentence was erroneous in that, under Penal Code section 1170.1, subdivision (a),¹ as that section read at the time of the charged offenses, appellant could receive a maximum sentence totaling only five years on some of the counts on which he was convicted. As a consequence, he argues, his sentence was eight years too long on those counts and, thus, his maximum sentence should have been 23, not 31, years.

Via a supplemental letter brief, appellant also contends that the trial court's sentence is contrary to *Blakely v. Washington* (2004) 542 U.S. ____, [124 S.Ct. 2531]

¹ All subsequent statutory references are to the Penal Code.

(*Blakely*), in two respects, namely, in its use of the upper term on the count it selected for the principal term and also by its imposition of consecutive sentences.

We agree with appellant's contention regarding the application of section 1170.1, subdivision (a) and, under *Blakely*, the court's imposition of the upper term on the principal count. We disagree with him regarding the application of *Blakely* to consecutive sentences. Accordingly, we remand the case to the trial court for resentencing.

II. FACTUAL AND PROCEDURAL BACKGROUND²

In the summer of 1997 the victim, Sean L., was 11 years old. Appellant, who worked with Sean's father, a contract painter, was visiting at the father's house in Murphys in Calaveras County. At that time, the first sexual contact occurred between Sean and appellant when, according to Sean's testimony at trial, appellant asked Sean to both lick his penis and then masturbate him, both of which Sean did.

In the spring of the following year, 1998, appellant moved into Sean's father's Millbrae home. By this time, Sean was 12 years old. The sexual contact between the two resumed, as appellant regularly invited Sean to smoke cigarettes and watch pornographic movies with him in appellant's room in that house. Appellant had Sean masturbate him and perform oral sex on him over an extended period, sometimes as often as twice a month. Sean also testified that appellant twice inserted his penis in Sean's anus and, on another occasion, asked Sean to do the converse; Sean attempted to do so but could not.

With one exception, these contacts ended when appellant moved out of the house; Sean testified that this occurred "[a] couple of months" after Sean's grandfather died, which was in early September 1998. Other testimony confirmed that appellant moved out of the Millbrae house in late November or early December 1998.

Appellant was charged with seven counts of engaging in lewd and lascivious conduct with a child under the age of 14 (§§ 288, subd. (a) & 1192.7, subd. (c)(6)), eight

² Because this appeal pertains only to appellant's sentence, we will abbreviate the underlying factual background of the case.

counts of oral copulation of a child under the age of 14 and more than 10 years younger than the defendant (§ 288a, subd. (c)), two counts of sodomy upon a person under the age of 14 and more than 10 years younger than the defendant (§ 286, subd. (c)(1)), and one count of an attempted violation of the same statute. (§ 286, subd. (c)(1)/§ 664.) The information specifically alleged (with two exceptions)³ that the offenses occurred “on and between 06/01/1997 and 06/30/1999.”

The jury found appellant guilty of all charges except two of the section 288, subdivision (a), counts and three of the section 288a, subdivision (c), counts; as to those, it found appellant not guilty. The jury also found true the allegations accompanying the section 288, subdivision (a), counts alleging that such were serious felonies.

A sentencing hearing was held on June 6, 2003. Before the court pronounced sentence, both appellant’s trial counsel and the deputy district attorney argued, among other things, as to whether the version of section 1170.1 in effect prior to January 1, 1999, and which contained a five-year maximum limitation on the combined subordinate term sentences for “offense[s] which are not ‘violent felonies’ as defined in subdivision (c) of section 667.5” applied in this case. Appellant’s counsel argued that it did, noting that the testimony “established all the conduct was either [in] 1997 or 1998” and hence “the five year limitation would apply” Citing two cases she contended were applicable, the deputy district argued that “a five year cap does not apply to violent felonies, which include child molestation.”

The court agreed with the latter argument. It sentenced appellant to the upper term of eight years on count 17 (one of the § 286, subd. (c)(1), counts) and imposed consecutive sentences of one-third the middle base term, or two years, on 11 of the remaining 12 counts on which appellant had been convicted, and added a one-year consecutive sentence for count 18, the attempted sodomy count. Appellant’s sentence thus totaled 31 years.

³ Counts one and two of the information were limited to the period June 1 to September 15, 1997, i.e., addressed the offenses allegedly occurring in Murphys.

Appellant filed a timely notice of appeal.

III. DISCUSSION

We must first deal with the statutes applicable to the subordinate term sentences. During all of 1997 and 1998, section 1170.1, subdivision (a), the statute which describes the computation of the principal and subordinate terms for cases where consecutive sentences are imposed, contained the following provision: “In no case shall the total of subordinate terms for these consecutive offenses which are not ‘violent felonies’ as defined in subdivision (c) of Section 667.5 exceed five years.” (See Historical and Statutory Notes, 50C West’s Ann. Pen. Code (2004 ed.) foll. § 1170.1, p. 202.) A provision to this effect, or substantially similar to this, had been in the statute since 1980. (*Id.* at p. 199.) However, effective January 1, 1999, this provision was deleted from section 1170.1, subdivision (a), and thus the five-year limitation for consecutive sentences for non-violent felonies no longer obtained. (*Id.* at p. 204; see also Stats. 1998, ch. 926.)

As noted above, appellant was convicted of violating three separate and distinct child molestation statutes, namely section 288, subdivision (a), section 288a, subdivision (c), and section 286, subdivision (c)(1). Only the first, the violations of section 288, subdivision (a), are or were listed as “violent felonies” under section 667.5, subdivision (c). (See § 667.5, subd. (c)(6) and Historical and Statutory Notes, 49 West’s Ann. Pen. Code (2004 ed.) foll. § 667.5, pp. 536-537.) The offenses described in section 286 (sodomy) and in section 288a (oral copulation) are not so defined and, in the one reported case on point, the Third District unanimously held that they are not violent felonies. (*People v. Mena* (1988) 206 Cal.App.3d 420, 425-429 (*Mena*).) No court has held to the contrary. In fact, in one of the two decisions cited to the trial court by the prosecution at sentencing in this case, *People v. Sutton* (1990) 220 Cal.App.3d 1325, 1327-1328 (*Sutton*), the Third District reaffirmed *Mena* in the course of holding that violations of section 288, subdivision (a), were clearly covered by section 667.5, subdivision (c), and

thus not within the purview of the *Mena* holding.⁴ (See also *People v. Cortez* (1986) 187 Cal.App.3d 1152, 1155-1157.)

In light of this, appellant argues that the trial court erred in ignoring the five-year cumulative limitation on consecutive subordinate sentences for non-violent felonies contained in the 1997 and 1998 version of section 1170.1, subdivision (a).

In response, the People acknowledge the holding in *Mena*, concede there is no contrary authority, but contend we may affirm the trial court's sentence by finding that the trial court's imposition of its sentence "implies a finding that the limitation did not apply to at least three of the non-violent felonies." They go on to argue that, because appellant resided in the same house with Sean "over an extended period of time, including the first six months of 1999, when there was no five-year sentencing limitation on consecutive non-violent felonies," we can affirm the trial court by affirming its "implied conclusion that at least three of the six non-violent subordinate felonies on which appellant was sentenced occurred after January 1, 1999." Three times the two-year term prescribed by the combination of sections 286, 288a, and 1170.1 equals six years, the People note, and adding these six years to the five-year "cap" governing the same type of felonies in 1997 and 1998 would permit us to affirm the 11-year sentence imposed by the court for the consecutive subordinate terms attributable to the section 286 and 288a violations.

Appellant answers this by noting that there is nothing in the record from which we can infer that *any* of appellant's sections 286 or 288a convictions occurred in 1999 and that it would be a violation of the ex post facto clause of the United States Constitution

⁴ The other case cited to the trial court by the deputy district attorney was *People v. Stephenson* (1984) 160 Cal.App.3d 7.

For reasons that are frankly perplexing to us, no one cited *Mena* to the trial court, even though (1) that case was discussed and distinguished in *Sutton*, which *was* cited to it, and (2) *Mena* deals directly with the pertinent issue before the trial court and now us, i.e., should violations of sections 286 and 288a be treated as "violent felonies" under the prior version of section 1170.1, subdivision (a) considered in tandem with section 667.5, subdivision (c)? The answer, clearly, is in the negative.

(art. I, §§ 9 and 10) to apply the post-January 1, 1999, version of section 1170.1, subdivision (a) to acts occurring in 1997 or 1998, citing *People v. Fulton* (1980) 109 Cal.App.3d 777, 783.

We need not reach appellant's intriguing ex post facto argument because we flatly reject the People's almost painful contention that we should affirm the consecutive sentences imposed for the convictions under section 286 and 288a (i.e., the "non-violent" felonies for section 667.5 purposes) on the basis of an "implied conclusion" by the trial court that three of those convictions were based on 1999 events.

First of all, the record plainly contradicts the "implied conclusion" argument. As noted above, before the trial court sentenced appellant, both counsel had argued the five-year limitation rule of the 1997 and 1998 version of section 1170.1, subdivision (a). Unfortunately, none of this argument was put into writing,⁵ but in any event when those arguments concluded the trial court flatly rejected defense counsel's position on the five-year limitation, stating: "Proceeding to the arguments set forth by counsel as it relates to the question of the limitations that are set forth under the determinate sentencing law in existence at the time of the commission of these offenses, I respectfully disagree with [defense counsel's] analysis as it relates to the application of sentence limitation set forth, either a five year limitation on any subordinate terms or the twice the base term limitation on aggregation."

With that, the court moved on to the selection of the principal term to use for the sentencing, and the subject was closed except for a concluding objection by defense counsel on the five-year limitation issue. Thus, the trial court's ruling in no way shape or form implied a finding that three of the section 286 or 288a felonies occurred in 1999. It was, to the contrary clearly siding with the prosecution's (erroneous) argument that all "child molestation is a violent felony" under section 667.5, subdivision (c).

⁵ The prosecution filed a sentencing memorandum, but the five-year limitation issue was never mentioned in it. Appellant's trial counsel apparently filed no similar memorandum, and only brought up the five-year limitation issue on the morning of the sentencing hearing.

Second, the record is almost totally devoid of any evidence of incidents resulting in the section 286 and 288a convictions which occurred in 1999. Sean testified that most of the sexual conduct between him and appellant occurred in 1998. More importantly, appellant moved out of Sean's father's house and into his girlfriend's apartment in late November or early December of that year. Sean testified to only one sexual incident with appellant after that date, an incident which took place after appellant had been out of the house "for about two months." No other testimony in the record establishes any other sexual incident between the two even arguably in 1999. For this additional reason, we reject the People's argument that the trial court impliedly found that three of the non-violent sexual offenses occurred in 1999.

But we also need to reverse for a separate reason. The trial court selected the upper term on one of the sodomy counts as the principal term, and did so in reliance on reasons that, under *Blakely*, must now be found by a jury. Via a supplemental brief, the People advance several arguments as to why *Blakely* doesn't apply here. We have addressed and rejected these arguments in several recent (albeit unpublished) decisions and we need not repeat our views here. Because, unlike in many of those decisions, this trial court had no prior conviction factor upon which to rely, the *Blakely* error here is not harmless.

Appellant also argues, as noted above, that *Blakely* precludes the consecutive sentences imposed by the trial court. We disagree; this is not the accepted California interpretation of *Blakely*. (See, e.g., *People v. Shaw* (2004) 122 Cal.App.4th 453, 458-459.)

IV. DISPOSITION

Appellant's sentence is vacated and the matter remanded to the trial court for the resentencing of appellant consistent with the foregoing opinion and *Blakely*. Otherwise, the judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Ruvolo, J.

A103315, *People v. Hinkle*