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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME A. PLASCENCIA,

Defendant and Appellant.

H029862

(Santa Clara County
Super.Ct.Nos. CC589323 and
CC590481)

In this case, defendant Jaime A. Plascencia challenges the sentence imposed following his plea of guilty to two separate felony complaints. We find no error and affirm the judgment.¹

BACKGROUND

On May 3, 2005, defendant was charged by felony complaint in Santa Clara County case number CC590481, with four counts of nonsupport of his minor children (Vanessa, Alejandro, Ariana and James) (counts 1-4, Pen. Code, § 271a);² one count of

¹ Defendant has also filed a petition for writ of habeas corpus (No. H030392) which we have ordered considered with his appeal. We have requested an informal response from the Attorney General and will dispose of the habeas petition by separate order.

² All further statutory references are to the Penal Code.

false personation (count 5, § 529); and one count of using personal identifying information without authorization (count 6, § 530.5).

On May 24, 2005, defendant was charged by a second amended felony complaint in Santa Clara County case number CC589323,³ with one count of presentation of a false or fraudulent insurance claim (§ 550) and one count of attempted grand theft (§§ 664/484-487, subd. (a)). The complaint further alleged excessive takings for both counts (§ 12022.6, subd. (a)(4)).

On September 9, 2005, defendant pleaded guilty as charged. Sentencing memoranda were filed by both sides.

On January 18, 2006, the trial court sentenced defendant to a total term of 12 years, four months. In case number CC589323, the court sentenced defendant to the five-year upper term for presentation of a false insurance claim, plus a four-year consecutive term for the excessive takings enhancement, and stayed sentence under section 654 for attempted grand theft. In case number CC590481, the court sentenced defendant to eight-month consecutive terms for the four nonsupport counts and the false personation count, and to a two-year concurrent term for using personal identifying information.

Defendant timely appeals.

*Case Number CC590481*⁴

Between 1985 and 1995, defendant was married to Susana P. with whom he had two children. After the relationship ended in 1994, defendant was ordered to pay child support of \$1,255 per month. As of April 2005, he was \$133,187.03 in arrears. Between 1989 and 1994, defendant was also in a relationship with Bertha G. with whom he had

³ Defendant's wife Anna Ayala was also charged in this complaint. She is not a party to this appeal.

⁴ These background facts are taken from the Probation Report.

three children. He was ordered to pay child support of \$1,641 per month for those children, and as of April 2005, was \$300,400.79 in arrears.

From March 2001 to April 2002, defendant used his minor son's social security number while he was employed at various construction companies. His total wages for this period of time were \$126,303.63. Defendant had also used his son's social security number to acquire credit cards and loans. In September 2002, a credit report revealed outstanding balances on several credit cards, a loan for \$7,923 and a vehicle loan for \$37,000. Defendant admitted using his son's information to avoid having to pay child support.

Case Number CC589323

After defendant's coworker at an asphalt plant in Las Vegas severed the tip of his finger in a workplace accident, defendant purchased the recovered fingertip for \$100. He told his coworker that he would have his wife (Anna Ayala) put it in food.

On March 22, 2005, Ayala and other family members went to Wendy's restaurant in San Jose and ordered chili. Ayala claimed to have bitten into a fingertip found in her chili. She showed the fingertip to other restaurant patrons and warned them not to eat the chili. Ayala retained an attorney and garnered a great deal of publicity for her alleged injury. Defendant offered a quarter million dollars from the lawsuit to a coworker in exchange for his silence about the finger.

The Wendy's corporation lost an estimated one million dollars per day for at least a month. Sales were down at various Wendy's locations, and many employees lost significant wages and bonuses.

DISCUSSION

I. *Imposition of Upper Term*

In imposing the upper term on defendant's conviction for violation of section 550 (presentation of a fraudulent insurance claim), the trial court cited two reasons: (1)

defendant acted with a high degree of callousness, and (2) the crime demonstrated planning and sophistication.

Defendant first asserts that he was deprived of his Sixth and Fourteenth Amendment right to a jury trial and his Fifth and Fourteenth Amendment right to application of the proof beyond a reasonable doubt standard when the trial court imposed this aggravated sentence.

However, as defendant recognized, this issue has been decided against him by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*). The Supreme Court held 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.) The court explained that “in operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the ‘statutory maximum’ and a trial court’s imposition of an upper term sentence does not violate a defendant’s right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*.” (*Id.* at p. 1254.)

In the recent case of *People v. Jordan* (2006) 141 Cal.App.4th 309, this district upheld the imposition of an upper term in the face of a *Blakely* challenge. There, the trial court imposed the upper term after finding seven factors in aggravation and only one in mitigation. We concluded that under the authority of *Black*, the trial court exercised its discretion in a reasonable manner and validly imposed an upper term.

In his reply brief, defendant asserts that because he contested the cited reasons for the upper term, he is entitled to a jury trial on those facts. However, imposition of an upper term is within the trial court’s discretion, and on this record, we see no abuse of that discretion.

Finally, as defendant correctly notes, this issue is pending before the United States Supreme Court in *Cunningham v. California*, certiorari granted February 21, 2006, No. 05-6551, ___ U.S. ___ [126 S.Ct. 1329].

II. *Consecutive Sentences*

Next, defendant asserts that his trial counsel was ineffective because he failed to object to the trial court's decision to impose consecutive sentences on defendant's four convictions for nonsupport of his children.

“The constitutional standard for determining whether counsel has failed to provide adequate legal representation is by now well known: First a defendant must show his or her counsel's performance was ‘deficient’ because counsel's ‘representation fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a ‘reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Gurule* (2002) 28 Cal.4th 557, 610.)

Defendant pleaded guilty to four counts of violating section 271a (nonsupport of a child) from 2002 to 2005, for four of his children. In sentencing him to eight-month consecutive terms on each of the four counts, the trial court found that “each of these offenses are separate—separate offenses and therefore [the court] will impose consecutive terms as prescribed by law as to each of them.”

In asserting that his attorney should have objected to the terms being imposed consecutively, defendant maintains that the trial court's reason—separate offenses—is not really encompassed within the California Rules of Court, rule 4.425. The pertinent part of rule 4.425, specifying criteria affecting the decision to impose consecutive rather than concurrent sentences, includes: “(a) [Criteria relating to crimes] Facts relating to the

crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” According to defendant, he had only one scheme in mind, i.e., to avoid paying child support that he could not afford. He points to the case of *People v. Robinson* (1992) 11 Cal.App.4th 609, disapproved on other grounds in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16, where the reviewing court concluded that several sexual acts committed with a minor over a two month period were not necessarily committed at separate times and reasonably could have constituted but one course of conduct. (*Robinson, supra*, 11 Cal.App.4th at p. 614.)

However, the decision to impose concurrent or consecutive terms is within the trial court’s discretion. (§ 669; *People v. Bradford* (1976) 17 Cal.3d 8, 20.) The rules of court are guidelines for exercising this discretion and are not mandatory in a specific application. (See *People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.)

Here, each child was individually harmed by defendant’s failure to pay child support to their mothers over a period of years. If each offense involved a separate victim who suffered a separate loss, consecutive sentences could properly be imposed. (See *People v. Leung* (1992) 5 Cal.App.4th 482, 506, 508; see also *People v. Neder* (1971) 16 Cal.App.3d 846, 852.)

Defendant attempts to import the trial court’s statement of factors in mitigation and aggravation as applied to the sentence in the insurance fraud case to demonstrate that the sentencing factors balanced, and thus the court was likely to sentence him to concurrent terms in this child support case if his counsel had objected. We disagree.

Because the trial court had the discretion to impose consecutive sentences here, and because the court stated that it had read and considered all the sentencing memoranda submitted, defense counsel was not deficient by failing to object. “[F]ailure to object

rarely establishes ineffectiveness of counsel.” (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) Moreover, in this case, defendant cannot show any reasonable likelihood that had counsel objected, the trial court would have imposed a lesser sentence. Consecutive sentences on separate offenses against separate victims were well within the discretion of the trial court.

III. *Section 654*

Finally, defendant claims that the court was required, under section 654,⁵ to stay the sentence imposed on his conviction for violation of section 530.5 (using personal identifying information without authorization). He states that he “had only a single goal: To use his son’s identity in order to obtain credit and loans.”

In *People v. Beamon* (1973) 8 Cal.3d 625, our Supreme Court explained, “The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*Id.* at p. 639.) The assessment of the defendant’s intent and objective is a factual question for the trial court and that finding will be upheld on appeal if there is substantial evidence to support it. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) As a reviewing court, we defer to the factual findings of the trial court, whether those findings are express or implied, as evidenced by the court’s decision to impose multiple punishments. (*People v. Coleman, supra*, at p. 162; *People v. Green, supra*, at p. 1085.)

⁵ Section 654 states, in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

Here the trial court imposed an eight-month sentence for defendant's violation of section 529 (false personation) and a concurrent eight-month sentence for defendant's violation of section 530.5 (using personal identification information without authorization). Although both crimes involved the illegal use of defendant's son's name and social security number, the false personation count involved the use of that information to obtain credit cards and loans. The use of personal identification count involved defendant's fraudulent use of his son's social security number for employment purposes in order to avoid garnishment of his wages for child support arrearages. These two crimes involved different intents and objectives and were committed against different victims. We have no trouble concluding that the trial court correctly sentenced defendant on both counts.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting, P.J.

McAdams, J.