Filed 5/15/12 P. v. Letele CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PESAMINO PRINCE LETELE,<br><br>Defendant and Appellant. | B230426<br><br>(Los Angeles County<br>Super. Ct. No. MA047880) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Reversed in part; affirmed in part.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Senior Assistant Attorneys General, Taylor Nguyen, Susan Sullivan Pithey and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Pesamino Prince Letele, appeals after he was convicted of two counts of sodomy in violation of Penal Code section 286, subdivision (e).[1] Defendant was convicted as charged in counts 6 and 7 of the information. The jury was unable to agree as to the charges in counts 1 though 5. In addition, defendant admitted he had previously been convicted or adjudicated as a minor of two serious felonies. (§§ 667, subds. (b)-(i), 1170.12.) Finally, defendant admitted he had served a prior prison term. (§ 667.5, subd. (b).) Defendant received two concurrent sentences of 25 years of life.

First, defendant argues there was insufficient evidence the victim, a fellow cellmate in the California State Prison, Los Angeles County, suffered two penetrations. This contention has no merit. During the acts of sodomy occurring on February 27, 2008, the victim testified his rectum was penetrated by skin which had been lubricated. The victim said the hard skin object was "moving in and out of" him. This constituted substantial evidence of sodomy and separate anal penetrations. (*People v. Harrison* (1989) 48 Cal.3d 321, 331-332; *People v. Marks* (1986) 184 Cal.App.3d 458, 464-467 & fn. 8.)

Second, defendant argues defense counsel was ineffective. Defendant testified and essentially admitted he committed the offenses listed in counts 6 and 7. Defendant argues the decision to permit him to testify was constitutionally ineffective. However, there is no evidence as to the reasons for defense counsel's litigation decisions. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) This ineffective assistance contention has no merit.

Third, defendant argues the trial court relied on improper factors in denying his motion to reduce the convictions to misdemeanors and to strike the prior serious conviction and adjudication. The trial court denied the motions because: the two acts of sodomy, which the victim testified were forcible, were egregious; the victim was

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[1] All future statutory references are to the Penal Code. Section 286, subdivision (e) states: "Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility, as defined in Section 6031.4, shall be punished by imprisonment in the state prison, or in a county jail for not more than one year."

particularly vulnerable; defendant's adjudications and convictions were numerous and of increasing seriousness; defendant's prior performance on probation and parole was unsatisfactory; and defendant's sentence was not outside the spirit of the enhanced sentencing scheme in sections 667, subdivisions (b) through (i) and 1170.12. We review this contention for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375; see *In re Large* (2007) 41 Cal.4th 538, 550.) No abuse of discretion occurred because: the victim was alone in a cell with defendant; there is evidence even the sodomy counts resulted from undue influence; defendant was the prior subject of six sustained delinquency petitions which resulted in multiple camp placements and youth authority commitments ; and he had been previously convicted of two felonies as an adult for carjacking and weapons possession while in custody. Given our conclusion, we need not address any forfeiture or ineffective assistance contentions concerning the trial court's exercise of discretion.

Fourth, defendant admitted the truth of a section 667, subdivision (a)(1) five-year prior conviction allegation. Defendant made his admission after the jury had convicted him of two sodomy counts. A violation of section 286, subdivision (e), which does not involve force, is not a serious felony for purposes of section 667, subdivision (a)(1). (§ 1192.7, subd. (c).) This was done with the acquiescence of defense counsel. Defendant reasons this constituted ineffective assistance of counsel.

As noted, the jury was unable to reach a verdict as to counts 1 through 5 which charged: forcible sodomy (§ 286, subd. (c)(2) (counts 1 and 3); forcible oral copulation (§ 288a, subd. (c)(2) (counts 2 and 4); and foreign object sexual penetration (§ 289, subd. (a)(1)(A) (count 5). The forcible oral copulation and sodomy counts are both serious felonies. (§1192.7, subd. (c)(4)-(5).) When the admission was made, the sodomy guilty verdicts had been returned but the prosecutor had not yet decided whether to retry counts 1 though 5. It was only after defendant received the two concurrent indeterminate terms the prosecution announced it would not seek a retrial of the first five counts. Thus, the prior conviction admission was made while there were still four outstanding serious felonies to be retried. Had defendant been convicted on retrial of any of the serious

felonies, section 667, subdivision (a)(1) would have been applicable. The admission would have no effect if there were no retrial.

There is no basis for concluding the decision to admit the allegation prior to the retrial was ineffective. It would have no effect if there were no retrial which is what occurred. This is not conduct which falls below prevailing professional norms. (*In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) And as we are reviewing this matter on direct appeal, we cannot reverse on ineffective assistance grounds because there is no evidence as to the advice given by defense counsel to defendant. (*Hill v. Lockhart* (1985) 474 U.S. 52, 58-59; *People v. Vargas* (2001) 91 Cal.App.4th 506, 536.) Defendant has failed to demonstrate ineffective assistance.

Moreover, there is no reasonable probability of a different result had the admission not been made. The trial court expressly found that section 667, subdivision (a)(1) was inapplicable because defendant was not convicted in this case of a violent or serious felony. That finding, which is eminently correct, is now final as the prosecution did not appeal. Thus, the admission has no legal effect. Ineffective assistance of counsel is not established if there is no reasonable probability of a different result. (*Wiggins v. Smith* (2003) 539 U.S. 510, 521; *People v. Cowan* (2010) 50 Cal.4th 401, 493, fn. 31.) No prejudice has resulted from defendant's admission.

Fifth, defendant argues that the abstract of judgment must be corrected to indicate only a single prior prison term enhancement has been imposed and stayed pursuant to section 654, subdivision (a). We noted that there was no basis for staying the prior prison term finding pursuant to section 654, subdivision (a). We requested briefing on the subject. The trial court had a duty to impose sentence in accord with the law. (§ 12; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588-1589; *People v. Floyd P.* (1988) 198 Cal.App.3d 608, 612.) The trial court did not have the legal authority to stay the prior prison term enhancement. (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1231; *People v. Cattaneo*, *supra*, 217 Cal.App.3d at pp. 1588-1589; see *People v. Alexander* (1992) 8 Cal.App.4th 602, 604.) An improper stay order pursuant to section 654, subdivision (a) is a legally unauthorized sentence subject to correction on direct appeal.

(*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Perez* (1979) 23 Cal.3d 545, 549-550, & fn. 3; *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1569.) The prior prison term enhancement must be either imposed or stricken pursuant to section 1385, subdivision (a). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; see *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561-1562.) Upon remittitur issuance, the trial court is to impose or strike the prior prison term enhancement. Also, the trial court should personally insure the abstract of judgment correctly reflects its decision in this regard. We express no opinion as to whether defendant had completed a prior prison term when he committed the present offenses. (§ 667.5, subd. (g); *People v. Johnson* (2006) 145 Cal.App.4th 895, 907-908.)

The order staying the prior prison term enhancement is reversed. Upon remittitur issuance, the trial court is to impose or strike the prior prison term, if it is legal to do so. The clerk is to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.