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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM A. ZAVALETA-PALACIOS, Defendant and Appellant.	2d Crim. No. B229127 (Super. Ct. No. F421050) (San Luis Obispo County)

William A. Zavaleta-Palacios appeals from judgment after conviction by jury of 90 felony counts for sexually abusing his stepson over a period of seven years. The jury convicted him of one count of committing a forcible lewd act upon a child under age 14 (Pen. Code, § 288, subd. (b));[1] 44 counts of committing lewd acts upon a child under age 14 (§ 288, subd. (a)); 24 counts of committing lewd acts upon a person 10 years younger and under age 18 (§ 288, subd. (c)); and 19 counts of sodomy upon a person under age 18. (§ 286, subd. (b)(1).) The trial court dismissed 1 count of sodomy on a child under age 14 (§ 286, subd. (c)) on the prosecutor's motion after the court declared a mistrial because the jury was unable to reach a verdict on that count. The court sentenced Zavaleta-Palacios to 134 years 8 months in state prison.

Zavaleta-Palacios contends his counsel provided ineffective assistance by not moving to dismiss 88 counts that were charged in the information, but not named in

[1] All statutory references are to the Penal Code unless otherwise stated.

the commitment order, on the ground that they did not arise out of the transaction which was the basis for the commitment. (Cal. Const., art. I, § 14; Pen. Code, § 739.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Zavaleta-Palacios sexually abused his stepson at least once a week from the time the boy was 10 years old in 2001 until he was 17 in 2008. The abuse began as masturbation and oral copulation, and progressed to sodomy by the time the boy was 16.

A criminal complaint charged Zavaleta-Palacios with three counts of sexual abuse occurring between 2001 and 2003 as follows: one count of continuous sexual abuse in 2001, when the boy was 10 (§ 288.5); one lewd act in 2002, when he was 11 (§288, subd. (a)); and (3) one act of sodomy in 2003, when he was 12. (§ 286, subd. (c).) Zavaleta-Palacios was held to answer on all charges.

Zavaleta-Palacios was eventually tried on a fourth amended information that charged 91 counts of sexual abuse between 2001 and 2008 as follows: one forcible lewd act in 2001 (§ 288, subd. (b); 11 lewd acts per year for each of the years 2001 through 2004, when the boy was under 14 (§ 288, subd. (a)); 12 lewd acts per year for each of the years 2005 and 2006, when the boy was 14 or 15 (§ 288, subd. (c)); and 12 acts of sodomy in 2007, and 7 in 2008, when the boy was under 18. (§286, subd. (b)(1).)

At the preliminary hearing, the boy testified to sexual abuse from 2001-2008. He testified his stepfather molested him three times a week, and began sodomizing him when he was 12 or 13 years old. Zavaleta-Palacios admitted that he had molested the boy from about 2001 to 2008, including sodomy after the boy was about 14, but said it occurred once or twice a week. An investigating detective testified to Zavaleta-Palacios' admissions at the preliminary hearing.

When the magistrate held Zavaleta-Palacios to answer, he commented, "I think the case could probably be charged differently to set forth the specific dates set forth by [the boy] today. Also sounds like there [are] more specific charges that could be filed based on his testimony in specificity with regards to the dates."

The initial information charged 27 counts of sexual abuse between 2001 and 2003. The scope of the information increased with each amendment. The third amended information charged 91 counts between 2001 and 2008. Zavaleta-Palacios' counsel moved to dismiss 88 counts of the third amended information pursuant to section 995, on the ground that they were "not named in the Order of Commitment or shown by sufficient evidence to have occurred." He argued that the evidence at the preliminary hearing was too vague to support the once-per-month charging formula that was used in the information. The trial court denied the motion.

DISCUSSION

Zavaleta-Palacios claims his trial counsel was ineffective because he did not move to dismiss 88 of the 91 offenses charged in the information on the ground they violated article I, section 14 of the California Constitution and section 739 of the Penal Code. He contends the additional offenses were not related to the transaction which was the basis for the commitment. We disagree.

Ineffective assistance is established if the defendant can demonstrate: 1) "that counsel's performance was deficient," and 2) that "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Here, Zavaleta-Palacios' counsel did move under section 995 to dismiss 88 counts of the information on the ground they were not shown at the preliminary hearing to have occurred by evidence presented to the magistrate. Zavaleta-Palacios argues that counsel's performance was nevertheless deficient, because he did not argue that the additional counts violated section 739. We need not determine whether counsel's motion was deficient for failure to cite section 739 because the alleged deficiency could not have prejudiced Zavaleta-Palacios. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.)

A motion to dismiss the additional counts based on section 739 would have been without merit. Section 739, read together with article I, section 14 of the California Constitution, provides that an information which charges the commission of an offense not named in the commitment order will not be upheld unless (1) the evidence before the magistrate shows that such offense was committed, and (2) that the offense "'arose out of

the transaction which was the basis for the commitment" on a related offense." (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665, quoting *Parks v. Superior Court* (1952) 38 Cal.2d 609, 614.)

There can be no question that the evidence before the magistrate established probable cause that the additional 88 offenses were committed. Zavaleta-Palacios does not contend otherwise on appeal. Instead, he argues that the 88 additional offenses were not transactionally related to the counts named in the committing order.

An offense is not transactionally related for purposes of article I, section 14, of the California Constitution if it is "unrelated to or unconnected with the transaction which was the basis for the commitment order." (*Parks v. Superior Court, supra,* 38 Cal.2d at p. 612.) It is not enough that the offenses are of a common scheme or plan; the transactions must be "related or connected." (*Id.* at 613.)

An act of sexual abuse is related or connected to other acts of sexual abuse against the same victim if they are each part of a course of conduct of molesting a single victim over a long period of time. (*People v. Downer* (1962) 57 Cal.2d 800, 809-810.) In *Downer,* the commitment order charged defendant with incest and forcible rape of his daughter on December 5. She testified at the preliminary hearing that he forced her to have intercourse about twice a month over a period of two years, that he forced her to have sex with him on December 5, and that he tried "the same sort of thing" on December 16 but they had a fight and he did not succeed. (*Id.* at pp. 811, and see also p. 805.) The information added one count of attempted incest on December 16. That count was "related to and connected with the transaction which formed the basis of the commitment order, [because] [i]t was part of defendant's course of conduct which he had engaged in with his daughter over a long period of time." (*Id.* at p. 809.) The transactional relationship arose from the "continued series of illicit relations between the same parties." (*Id.* at p. 810.)

Here, as in *Downer,* the additional offenses were transactionally related because they were part of Zavaleta-Palacios' continuous course of conduct with his

stepson over a long period of time. Each offense was part of a series of illicit relations between him and his single victim.

Zavaleta-Palacios argues that *Downer* should not apply because of the scope of the additional charges in this case. He points out that the charges increased from 3 to 91, the timeframe increased from 3 to 8 years, and his exposure increased from 20 to 134 years in prison. He contends that the purpose of section 739 is to correct the magistrate's legal errors and its use must be restricted or the prosecutor's charging decisions will be shielded from oversight.

It is true that the number of additional counts and the period over which they occurred is far more extensive here than in *Downer*. Section 739 plainly permits the information to charge "any offense or offenses shown by the evidence taken before the magistrate to have been committed," and the only constitutional limit imposed by article I, section 14 is that additional offenses must be related to the transaction that is the basis of the commitment order. Both requirements were met here. "There is no constitutional objection to the filing of an information charging a different but related crime shown by the evidence taken before the magistrate bearing on the same transaction involved in the commitment order." (*People v. Downer, supra,* 57 Cal.2d at p. 810.) Zavaleta-Palacios has not established that he was prejudiced by deficient performance of counsel.

DISPOSITION

The judgment appealed from is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

John A. Trice, Judge

Superior Court County of Santa Barbara

David P. Lampkin, 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, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Tita Nguyen, Deputy Attorney General, for Plaintiff and Respondent.