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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. DELFINO CARDENAS MACHADO, Defendant and Appellant.	B231653 (Los Angeles County Super. Ct. No. BA123888)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Elliott Veals, Judge. Affirmed in part, vacated in part, and remanded with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Delfino Cardenas Machado appeals[1] from the judgment entered following his convictions by jury on count 1 – forcible rape (Pen. Code, § 261, subd. (a)(2))[2] with a finding appellant committed the offense against multiple victims (former § 667.61, subd. (e)(5)), and three counts of forcible lewd act upon a child (former § 288, subd. (b)(1); counts 2 through 4) with findings as to each of the three counts that appellant committed kidnapping (former § 667.61, subd. (e)(1)), personally used a deadly weapon (former §§ 667.61, subd. (e)(4), 12022.3, subd. (a)), and committed the offense against multiple victims (former § 667.61, subd. (e)(5)), and with court findings that appellant suffered two prior felony convictions (§ 667, subd. (d)) and two prior serious felony convictions (§ 667, subd. (a)). The court resentenced appellant to prison for 210 years to life. We affirm the judgment, except we vacate appellant's resentence and remand the matter for resentencing with directions.

FACTUAL SUMMARY

The facts of appellant's offenses are more fully set forth in *Machado II*.[3] Suffice it to say that, viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence presented at appellant's July 2008 retrial established that on October 12, 1995, 20-year-old Maria M. (Maria) was at the Union Station in Los

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[1] This is appellant's third appeal. In his first, we affirmed the judgment (*People v. Machado* (May 23, 2000, B130741 [nonpub. opn.] (*Machado I*)), but a federal court later granted appellant habeas corpus relief and remanded the matter for retrial. Following his convictions at the July 2008 retrial, appellant again appealed and we affirmed the judgment, vacated his December 18, 2008, sentence, and remanded for resentencing (*People v. Machado* (August 11, 2010, B213262 [nonpub. opn.] (*Machado II*)). Appellant's third appeal follows his January 27, 2011, resentence.

[2] Statutory references are to the Penal Code.

[3] We take judicial notice of the record in *Machado I* and *Machado II*. (Evid. Code, §§ 452(d)(1), 455(a), 459(a), (c).) If a party disputes said taking of judicial notice, said party may furnish this court with appropriate information in a petition for rehearing. This procedure is deemed sufficient compliance with the requirement of Evidence Code section 459, subdivision (c). (*People v. Hallman* (1973) 35 Cal.App.3d 638, 641, fn. 1.)

Angeles. Appellant, with a child, approached and offered to help Maria find a bus. Maria walked with appellant to his apartment, he dropped off the child, and Maria and appellant left. The two walked towards an embankment near a freeway. Appellant threw Maria down, held her in bushes, and raped her.

During the morning of February 28, 1997, 12-year-old Alma S. (Alma) was at a bus stop waiting for a bus to take her to school. Appellant approached with a child and asked Alma a question. Later that day, Alma returned to the bus stop en route home. Appellant was there, seemed to have been waiting for her, and still had the child. Appellant asked Alma for help and they walked to an apartment building. The three entered and went to an apartment.

Appellant, using a key, opened the apartment's door and pushed Alma inside. He threatened Alma with a knife and pushed her to the floor. Appellant subsequently removed Alma's shorts and underwear from one of her legs, covered her mouth, and spread her legs. He later orally copulated Alma, then touched her vagina with his hands. Appellant exposed his penis and Alma, trying to delay him, asked him to use protection. Appellant put on a condom while Alma was trying to persuade him to stop his attack. He unsuccessfully attempted to penetrate Alma's vagina with his penis.

ISSUE

Appellant claims the trial court violated his right to counsel at the January 27, 2011, resentencing hearing by refusing to allow him sufficient time to consult with his counsel before the court resentenced appellant.

DISCUSSION

There Is No Need to Reach Appellant's Right to Counsel Claim Because This Case Must Be Remanded for Other Reasons.

1. *Pertinent Facts.*

A probation report prepared for an August 21, 2008, hearing reflects appellant, who was born in 1956, suffered a July 7, 1987, misdemeanor conviction for obstructing a person's movement in a public place (§ 647c), for which a court placed him on probation

for one year. On July 29, 1987, he was arrested for a violation of former section 288, subdivision (a), and, on July 31, 1987, he suffered in that case a misdemeanor conviction for annoying or molesting children (former § 647a), for which a court placed him on probation for two years. In December 1988, he was arrested for burglary and, in March 1989, he suffered in that case a felony conviction for attempted first degree burglary for which a court sentenced him to prison for two years. (This was one of appellant's two strikes.) He was released on parole in 1990, returned to prison in 1991 for a parole violation, and later released on parole.

During the December 18, 2008, sentencing hearing that followed appellant's July 2008 retrial, the court articulated numerous aggravating factors and concluded there were no mitigating factors.[4] The court sentenced appellant to prison for 310 years to life. This consisted of (1) 45 years to life as to count 1 (15 years to life for the offense pursuant to the One Strike law, tripled pursuant to the Three Strikes law), (2) as to each of counts 2 through 4, a consecutive term of 75 years to life (consisting of 25 years to life for the offense pursuant to the One Strike law, tripled pursuant to the Three Strikes law) plus an upper term of 10 years for a section 12022.3, subdivision (a) weapon enhancement, plus (3) two five-year section 667, subdivision (a) enhancements.

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[4] The court stated, "There are . . . many factors in aggravation that the People actually set forth in their sentencing memorandum, and the Court does agree that they are applicable to this case. . . . [¶] Pursuant to California Rule of Court 4.421(a)(1), the crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness. [¶] Rule 4.421(a)(3), the victims were particularly vulnerable. [¶] Rule . . . 4.421(a)(8), the manner in which the crime was carried out indicates planning, sophistication or professionalism. [¶] Rule 4.421(a)(11), the defendant took advantage of a position of trust or confidence to commit the offense." The court continued, "Rule 4.421(b)(1), the defendant has engaged in a pattern of violent conduct which indicates a serious danger to society. [¶] Rule 4.421(b)(2), the defendant's prior convictions as an adult are numerous or of increasing seriousness. [¶] And rule 4.421(b)(3), the defendant has served a prior prison term . . . . In fact, there are two 5-year priors. Serious criminal conduct." We also note that, based on the probation report, appellant's prior performance on probation and parole was arguably unsatisfactory. (Cal. Rules of Ct., rule 4.421(b)(5).)

In *Machado II*, we held the trial court erred by retroactively applying to appellant's 1997 offenses at issue in counts 3 and 4, former section 667.61, subdivision (i), as amended in 2006, of the One Strike law, which mandated consecutive sentences for crimes involving "the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (Former § 667.61, subd. (i); *Machado II*, at pp. 12, 15.) We affirmed the judgment, except we vacated appellant's sentence and remanded for resentencing with directions.[5]

Following remand, the trial court, at the January 27, 2011, resentencing hearing (resentencing hearing), acknowledged *Machado II* and stated, "the error relates to counts 3 and 4. It's a simple correction that needs to be made pursuant to the decision." Appellant, in propria persona, advised the trial court he wished to be represented by counsel. The court later indicated it previously had imposed a prison sentence of 75 years to life on each of counts 3 and 4, but "the law as it has been interpreted" called for a sentence of 25 years to life on each of those counts. The court explained it would impose the reduced sentence whether or not appellant was represented by counsel, and stated "it's not a matter on which I would otherwise exercise any discretion."

Appellant personally told the court that he wanted to raise additional sentencing errors. The court stated, "Well, any other infirmity should be addressed to the court of appeals, not to me. I'm only here today with limited jurisdiction, and that is to correct the sentence as to counts 3 and 4 as I have outlined. And anything and everything else is beyond what I am authorized by the court of appeals to do." The court later told appellant, "I'm just doing what I am mandated to do under the circumstances. No more,

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[5] In *Machado II*, we "conclude[d] the amended section 667.61, subdivision (i), is not retroactive; therefore, the trial court erred by imposing sentence on counts 3 and 4 *pursuant to that subdivision*." (*Id*. at p. 15, italics added.) The disposition in *Machado II* was: "The judgment is affirmed, except that appellant's sentence is vacated and the matter is remanded for resentencing consistent with this opinion. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment." (*Id.* at p. 17, italics added.)

no less; that is, to correct your sentence in those two counts to 25 years to life. It's an automatic process; not something you would argue to me about one way or the other."

The trial court later stated, "there is nothing that's before me to be argued. I simply enforce the sentence that the court of appeals has stated is the correct sentence in this case, and that is 25 to life on those two counts. [¶] So, there is nothing for me to do as far as exercising any discretion of any sort whatsoever." Appellant suggested there might be an issue if the court reimposed restitution.

Subsequently, the court indicated it would impose prison sentences of 25 years to life on each of counts 3 and 4. The court then stated, "anything else you must address to the court of appeals, not to me. I don't have jurisdiction to hear anything else regarding this case. I'm just here to enforce the proper sentence; to impose it, and to enforce the order of the court of appeals."

The court observed appellant was requesting counsel for the first time at the resentencing hearing. The court later stated it would have a "bar panel attorney" consult with appellant. The court observed, "It shouldn't take very long because he or she will very quickly realize that this is an automatic act on the part of this court, not one that involves any exercise of discretion or anything of that sort[.]" The court placed the matter on "very brief second call" to secure the attorney's presence.

When proceedings resumed, Attorney Daniel Nardoni stated he was representing appellant, and Nardoni acknowledged the matter had been remanded to the trial court for resentencing. Nardoni stated, "In briefly meeting [appellant] for the first time and talking with him, [appellant] is asking me to request from the court to put the sentencing over for a future date. He would like to discuss potential errors with me relevant to a resentencing. [¶] I would submit it to the court on that request reserving any and all possible appellate issues."

The court later stated, "The issue that is presented here, as I mentioned to him earlier, is that the sentence is automatic. This is merely a ministerial function that I'm fulfilling. His sentence before, 75 to life, it should have been 25 to life. [¶] It was sent

back to me to invoke the correct sentence and I'm here as a conduit and nothing more. So there is nothing to discuss with respect to the propriety of the sentence."

The court stated appellant wanted to delay the process given his past insistence on representing himself. The court added, "Plus, when you consider our purpose here today and the fact that my jurisdiction is so limited, there is no point in continuing this case."

Appellant, personally addressing the court, stated, "It would give me another consecutive sentence, the way when you made the previous error, and not giving the reasons for giving me consecutive sentences. [*Sic*.] So then the whole sentence was vacated." The court indicated appellant was in error. The court noted appellant was not then representing himself, and Nardoni indicated he was reserving any rights appellant might have had pertaining to resentencing.

The court later stated, "as I mentioned before, it's a simple matter of correction as to counts 3 and 4. So, sentence is imposed consistent with the decision of the court of appeals and changed then from 75 years to life as to each to 25 years to life. And the sentence in all other respects remains in full force and effect."

The following subsequently occurred: "[The Prosecutor]: And, your Honor, that is pursuant to Penal Code section 1170.12(a)(6), those counts still run consecutive to each other, and the first two counts -- [¶] The Court: Yes. [¶] [The Prosecutor]: Thank you. [¶] The Court: By operation of law."[6]

The result as to appellant's prison sentence was that the court modified it to 210 years to life, consisting of (1) 45 years to life as to count 1 (15 years to life for the offense pursuant to the One Strike law, tripled pursuant to the Three Strikes law), (2) as to count 2, a consecutive term of 75 years to life (consisting of 25 years to life for the offense pursuant to the One Strike law, tripled pursuant to the Three Strikes law) plus an upper

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[6] The court later stated, "I do want the record to reflect that the court does not have the legal file. Numerous efforts have been made to locate it. It has been archived and apparently not available to us. So I have had very little upon which to operate here apart from the notice of motion filed by the defendant, the opinion of the court of appeals, and the sentencing memorandum that the People previously submitted."

term of 10 years for a section 12022.3, subdivision (a) enhancement, (3) as to each of counts 3 and 4, a consecutive term of 25 years to life for the offense,[7] plus an upper term of 10 years for a section 12022.3, subdivision (a) enhancement, plus (4) two five-year section 667, subdivision (a) enhancements.

2. *Analysis.*

Appellant claims the trial court violated his right to counsel at the January 27, 2011, resentencing hearing by refusing to allow him sufficient time to consult with his counsel before the court resentenced appellant.[8] For the reasons discussed below, we conclude there is no need to reach appellant's claim.

In *Machado II*, we held as previously indicated, affirmed the judgment, vacated appellant's sentence, and remanded for resentencing. Our remand effectively did no more than require the trial court to resentence appellant absent the error we concluded had occurred.

At the resentencing hearing, at which the court reduced appellant's prison sentence to 210 years to life, Nardoni raised no issues. Appellant's appellate counsel here, in her opening brief, failed to identify any specific sentencing issue appellant might have raised at the resentencing hearing. In order to help determine whether appellant might have had a colorable claim(s) of sentencing error concerning which he might have wished to

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[7] Former section 667.61, subdivision (g), applicable at the time of appellant's 1997 offenses (counts 2 through 4), required one, but only one, sentence pursuant to the One Strike law for offenses committed against a single victim during a single occasion. However, that subdivision also stated, "Terms for other offenses committed during a single occasion shall be imposed *as authorized under any other law*, including Section 667.6, if applicable." (Italics added.) As to counts 2 through 4, it appears the trial court imposed on count 2, as the one sentence pursuant to the One Strike law, a prison sentence of 25 years to life (tripled pursuant to the Three Strikes law), and imposed on each of counts 3 and 4, a prison sentence of 25 years to life as a term "authorized under any other law," i.e., the Three Strikes law, since appellant had suffered two prior strikes. (§§ 667, subd. (e)(2)(A)(ii), 1170.12, subd. (c)(2)(A)(ii).)

[8] We assume appellant's right to counsel issue is preserved for appellate review notwithstanding the fact appellant did not raise it below.

consult with his counsel at the resentencing hearing, we asked for supplemental briefing on various resentencing issues. We have received the parties' responses and we discuss the pertinent issues below.

The parties in their supplemental letter briefs concede that during the resentencing hearing, the trial court erroneously concluded *Machado II itself mandated* sentences on counts 3 and 4 that were *consecutive* to each other and to count 2. We accept the parties' concession.

The parties concede in their supplemental letter briefs that during the resentencing hearing, the trial court erroneously relied on section 1170.12, subdivision (a)(6), a mandatory consecutive sentencing provision of the Three Strikes law, to impose sentences on counts 3 and 4 which were consecutive to each other and to the sentence on count 2. However, the offenses at issue in counts 2 through 4 were committed on the "same occasion" for purposes of section 1170.12, subdivision (a)(6), because there was a close temporal and spatial proximity between the acts underlying those counts (*People v. Jeffries* (2000) 83 Cal.App.4th 15, 25-27 (*Jeffries*); therefore, subdivision (a)(6) was inapplicable to those counts. We accept the parties' concession.

The parties concede in their supplemental letter briefs that former section 667.6, subdivision (d) did not mandate sentences on counts 3 and 4 which were consecutive to each other and to the sentence on count 2. Both parties concede the issue on the ground former section 288, subdivision (b), the offense of which appellant was convicted in counts 3 and 4, was not an offense listed in former section 667.6, subdivision (d).

However, in 1997, when appellant committed the violations of former section 288, subdivision (b)(1), at issue in counts 3 and 4, former section 667.6, subdivision (d), expressly listed, and applied to, a violation of former section 288, subdivision (b). Curiously, both parties in their supplemental letter briefs quote versions of former section 667.6, subdivision (d) that expressly list a violation of former section 288, subdivision (b) as a qualifying offense. We do not accept the parties' concession.

Instead, whether former section 667.6, subdivision (d) applies in *this* case depends upon whether, as between counts 2 and 3, and as between counts 3 and 4, appellant had a "reasonable opportunity to reflect upon his . . . actions and nevertheless resumed sexually assaultive behavior." (Former § 667.6, subd. (d).) If a trial court concludes a finding is appropriate that a reasonable opportunity to reflect existed, the court "must clearly explain its reasoning based upon a dispassionate review of the facts." (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071 (*Irvin*)). The court "must give a factual explanation supporting its finding of 'separate occasions' for each count sentenced under that subdivision. An overall statement of the court's general impression of the evidence is insufficient." (*Id.* at p. 1072.) The trial court did not discuss whether former section 667.6, subdivision (d), applied in this case, and did not give a factual explanation supporting a finding of separate occasions as to counts 2 through 4, apparently because the court thought *Machado II* itself, and section 1170.12, subdivision (a)(6), each mandated consecutive sentences as to counts 3 and 4. As discussed below, we will remand the matter to permit the court to consider this issue.

The parties concede in their supplemental letter briefs that during the resentencing hearing, the trial court erroneously failed to decide whether, in the exercise of its discretion, to impose sentences on counts 3 and 4 that were concurrent or consecutive to each other and to appellant's sentence on count 2. We accept the concession. (Cf. *People v. Lawrence* (2000) 24 Cal.4th 219, 233; *Jeffries, supra*, 83 Cal.App.4th at pp. 25-27; former §§ 667.6, subd. (c), 1170.1, subd. (a).)[9]

In sum, there is no need to reach appellant's claim that the trial court violated his right to counsel. Following supplemental briefing, we conclude the trial court erred by concluding *Machado II* itself, and section 1170.12, subdivision (a)(6), each mandated sentences on counts 3 and 4 that were consecutive to each other and to count 2, and erred

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[9] We express no opinion as to how, following remand, the trial court should exercise any such discretion, but we note the trial court on December 18, 2008, articulated numerous aggravating factors. (See fn. 4, *ante*.)

by failing to decide whether, in the exercise of the court's discretion, to impose such sentences pursuant to former section 667.6, subdivision (c) or former section 1170.1, subdivision (a) (assuming former section 667.6, subdivision (d) did not mandate consecutive sentences).

Moreover, the error is not harmless (*People v. Watson* (1956) 46 Cal.2d 818, 836) because it appears the only provision that might have been applicable to mandate such consecutive sentences was former section 667.6, subdivision (d), and the trial court never gave a "factual explanation supporting its finding of 'separate occasions' " (*Irvin*, *supra*, 43 Cal.App.4th at p. 1072) that would have permitted application of that subdivision.

We will remand the matter for resentencing, in part so the trial court can determine whether former section 667.6, subdivision (d), applies to this case and, if not, whether former section 667.6, subdivision (c), or former section 1170.1, subdivision (a), is applicable. (See Cal. Rules of Court, rule 4.426.)[10] Finally, since we are remanding this matter, and as a matter of guidance to the trial court, there are additional issues arising from the January 27, 2011, resentencing hearing which the trial court should consider.[11]

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[10] As a matter of guidance to the trial court, even if the trial court determines former section 667.6, subdivision (d) applies to a count(s), the trial court should indicate on the record whether, assuming arguendo subdivision (d) is inapplicable, the court would exercise its discretion under former section 667.6, subdivision (c), or former section 1170.1, subdivision (a).

[11] First, after resentencing appellant to prison on January 27, 2011, the court stated, "There's no modification of his credits; that they remain the same." (*Sic*.) Based on the reporter's transcript, then, it appears the trial court did not, at the January 27, 2011, resentencing hearing, award appellant any credit for actual time served by him beyond any credit imposed at a previous sentencing hearing. The most recent previous sentencing hearing had occurred on December 18, 2008, and the court on January 27, 2011, made no reference to the date of March 11, 1999. However, the January 27, 2011, abstract of judgment states, "Court orders all credits, previously given on *03-11-99*, remain as follows" (italics added), then reflects an award of 648 days of custody credit and 97 days of conduct credit. (It appears March 11, 1999, was appellant's initial sentencing date.) When an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the actual time a defendant has already served, whether in jail or prison, and whether before or since the defendant

We express no opinion as to what, following remand, appellant's resentence, or any component thereof, should be.

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was originally committed and delivered to prison custody, and credit that time against the defendant's subsequent sentence. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 29, 37, 40-41 (*Buckhalter*); § 2900.1.) Following remand, the trial court should reconsider its credit award in light of *Buckhalter*.

Second, at the January 27, 2011, resentencing hearing, the trial court, according to the reporter's transcript of that proceeding, stated, "all of the fines and assessments previously imposed are incorporated by this reference and reimposed." This suggests a reference to fines and assessments previously imposed at the December 18, 2008, sentencing hearing. The reporter's transcript for the January 27, 2011, resentencing hearing makes no reference to the date March 11, 1999, in the context of fines or assessments. However, the January 27, 2011, abstract of judgment states, "All fines and assessments previously imposed on *03-11-99* are incorporated by this reference and reimposed." (Italics added.) A trial court must separately list, with the statutory basis, all fines, fees, and penalties imposed on each count. (*People v. Eddards* (2008) 162 Cal.App.4th 712, 717-718; *People v. High* (2004) 119 Cal.App.4th 1192, 1200-1201 (*High*)). "Although . . . a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment. [Citations.]" (*Id*. at p. 1200.) Following remand, the trial court should reconsider its recitation concerning appellant's monetary obligations in light of *Eddards* and *High*. This may also clarify other problematic aspects of the present record. For example, as discussed, the reporter's transcript of the January 27, 2011, resentencing hearing suggests the trial court reimposed on that date fines and assessments previously imposed on December 18, 2008. Those fines included a $10,000 section 1202.4, subdivision (b) restitution fine, and a $200 section 1202.45 parole revocation fine. However, section 1202.45 requires that a parole revocation fine be "in the same amount" as the section 1202.4, subdivision (b) restitution fine. Similarly, on December 18, 2008, the court imposed a *single* $20 section 1465.8 court security fee. Section 1465.8, subdivision (a)(1) calls for one fee per conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) The jury convicted appellant on *four* counts.

DISPOSITION

The judgment is affirmed, except appellant's resentence is vacated and the matter is remanded for resentencing consistent with this opinion. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.