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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALBERTO PECHCOCOM, Defendant and Appellant.	B235631 (Los Angeles County Super. Ct. No. VA109421)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Schurr, Judge. Affirmed in part, reversed in part, modified in part and remanded with directions.

Siri Shetty, 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, Lawrence M. Daniels and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Luis Alberto Pechcocom, appeals from a judgment after he pled no contest to the continuous sexual abuse of children under the age of 14, A.P. (count 1) and J.B. (count 9). (Pen. Code,[1] § 288.5, subd. (a).) As part of the plea agreement the following charges against defendant were dismissed: 4 counts of lewd and lascivious acts against A.P. (§ 288, subd. (a)); two counts of forcible rape of A.P. (§ 261, subd. (a)(2); and one count of and lewd and lascivious acts with or on a child under the age of 14, E.P. (§ 288, subd. (a).

Defendant was sentenced to a total of 32 years consisting of 16 years for each count pursuant to section 667.6, subdivision (d). Defendant was given 1,010 days of custody credits consisting of 879 of actual custody plus 131 days of conduct credits. Defendant was ordered to pay: a restitution fine of $10,000 (§ 1202.4, subd. (b)(1)), a $10,000 parole revocation fine (§ 1202.45); an $80 court security assessment fee (§ 1465.8, subd. (a)(1); a $60 criminal conviction fee (Gov. Code, § 70373, subd. (a)(1)); and a $300 sexual habitual offender fine (§ 290.3, subd. (a).)

II. FACTS

At the preliminary hearing on July 30, 2009, defendant's 11-year-old daughter, E.P., testified that she was in the second grade in 2006. Defendant was in her bedroom and touched her "private parts." Defendant touched her in the chest and below her chest in the vaginal area. E.P. told an older sister, A.P., about the incident.

J.B. is defendant's niece. She was 17 years old when she testified at the preliminary hearing. When she was about 10 or 11 years old, she visited defendant's home. Sometimes J.B. would spend the night with her cousins. Defendant would often touch her private parts at night while she was in her cousins' bedroom. At other times, he

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

would touch her while they were in the living room. Defendant touched her chest and buttocks over her clothes. The touching occurred every time she visited defendant's house until she was about 13 or 14 years old. J.B. and A.P. are best friends. Eventually, they confided to each other that defendant was touching both of them.

Defendants' daughter, A.P., was 18 years old at the time of the preliminary hearing. Defendant began touching A.P. inappropriately when she was five years old. At that time, he touched her in the vaginal area over her clothes. This occurred mostly at night while A.P.'s mother was working. Defendant would touch her about three times a week. Defendant continued to touch A.P. until she was 17 years old.

Between the time A.P. was 9 and one-half to 12 years old, the touching started to go under the clothes. Defendant would touch her in the vaginal area every day. As A.P. got older, the touching became worse. Defendant would touch her once or twice a week. Defendant would try to put his finger inside of her vagina. This happened about two or three times. Defendant would try to put his mouth on her vagina but she would move. When A.P. was 14 years old, defendant would get on top of her. Defendant, who would be naked, would hold A.P.'s hands over her head and sit on her feet. He would try to put his penis inside of her. This happened about twice a week. Defendant would put his penis inside her vagina about twice a week when she was in the tenth grade. When A.P. was in the eleventh grade, defendant stopped trying to put his penis in her but he continued to touch her. A.P. first revealed the incidents to the authorities in February 2009. A.P. and J.B. confided in one another about the incidents when they were younger.

III. DISCUSSION

We appointed counsel to represent defendant on appeal. After examination of the record, counsel filed an "Opening Brief" in which no issues were raised. Instead, counsel requested this court to independently review the entire record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. On November 22, 2011, we advised

defendant that he had 30 days within which to personally submit any contentions or arguments he wishes us to consider. No response has been received.

We requested the parties to brief issue of penalties and surcharge arising from the $300 sex offense fine imposed pursuant to section 290.3, subdivision (a). Defendant argues the ex post facto clauses of the federal and state Constitutions require the base fine to be $200 under versions of Penal Code section 290.3, subdivision (a) which were in existence prior to September 20, 2006. (Stats. 2006, ch. 69, § 27, eff. July 12, 2006; Stats. 1995, ch. 91, § 121; *People v. Voit* (2011) 200 Cal.App.4th 1353, 1372; *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.) We agree. Count 1, alleged the sexual abuse of one child took place from on or between January 1, 2001, and June 5, 2003. Count 9 alleged continuous sexual abuse of a second child from on or between May 3, 2003, and May 2, 2006. Thus, only a $200, not a $300 section 290.3, subdivision (a) sex offender fine should be imposed.

In addition, defendant argues ex post facto principles prohibit imposition of penalties which took effect after he committed the offenses. (See *People v. Voit*, *supra*, 200 Cal.App.4th at pp. 1374-1375; *People v. Batman* (2008) 159 Cal.App.4th 587, 591.) Defendant cites as examples of this: Government Code sections 76000.5 (Stats. 2006, ch. 841, § 1, eff. Jan. 1, 2007); 76104.6 (Initiative Measure, Prop. 69, § IV.1, approved Nov. 2, 2004, eff. Nov. 3, 2004); and 76104.7 (Stats. 2006, ch. 69, §18, eff. July 12, 2006.) Defendant is correct that the penalties under Government Code sections 76000.5 and 76104.7 cannot be imposed on defendant under ex post facto laws. (*People v. Voit*, *supra*, 200 Cal.App.4th at p. 1374; *People v. Valenzuela*, *supra*, 172 Cal.App.4th at p. 1248.) However, we agree with the Attorney General that defendant is subject to the deoxyribonucleic acid penalty under Government Code section 76104.6. This is because Government Code section 76104.6 was effective November 3, 2004. And, defendant pled guilty to continuous sexual abuse of two children in the time period from January 1, 2001, through May 2, 2006.

The $200 sex offense fine is subject to the following penalties and assessments: a $200 state penalty (§ 1464, subd. (a)(1)); a $140 county penalty (Gov.Code, § 76000,

subd. (a)(1)); a $40 state surcharge (§ 1465.7, subd. (a)); a $20 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1); and a $60 state court construction penalty (Gov.Code, § 70372, subd. (a)(1).) (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528–1530; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254.) The total fine is $660. However, the $200 sex offense fine has an ability to pay provision. Therefore, the fine must be reversed for the trial court to determine whether the defendant has the ability to pay a fine totaling $660. (See *People v. Castellanos*, *supra*, 175 Cal.App.4th at pp. 1528-1530; *People v. McCoy*, *supra*, 156 Cal.App.4th at pp. 1254-1257; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456-457.) After the ability to pay determination is made, the trial court is free to reimpose the fine.

We also requested the parties to address the issue of whether defendant is entitled to two additional days of presentence credit. Defendant received 1,010 days of presentence credit consisting of 879 days of actual custody credit and 131 days of conduct credit. The probation report states defendant was arrested on February 13, 2009. Defendant was sentenced on July 12, 2011. Because defendant is entitled to credit for the date of his arrest, there are a total of 880 days between his arrest date and the sentence date. (*People v. Smith* (1989) 211 Cal.App.3d 523, 526-527.) Pursuant to Penal Code section 2933.1, subdivision (b), conduct credit is awarded at the rate of 15 percent, which is 132 days. The total amount of custody credit is 1,012 days. The judgment must be modified to reflect 880 days of presentence custody plus 132 days of conduct credit for a total of 1,012 days.

IV. DISPOSITION

The judgment is reversed insofar as it imposed a $300 Penal Code section 290.3, subdivision (a) sex offense fine. Upon remittitur issuance, the trial court is to consider whether defendant has the ability to pay a $200 sex offense fine plus the applicable penalties and surcharge. The judgment is modified to reflect credit for 880 days of presentence credit rather than 879 days, plus 132 days of conduct credit for a total presentence credit of 1,012 days. After the trial court's decision as to the $200 sex offense fine, the superior court clerk is to prepare a correct amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.