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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ARMANDO PICENO,

Defendant and Appellant.

B236495

(Los Angeles County
Super. Ct. No. GA070345)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Affirmed.

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

No appearance for Plaintiff and Respondent.

A jury found appellant, Jesus Armando Piceno (Piceno), guilty of committing a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1))¹ (count 1), committing a lewd act upon a child (§ 288, subd. (a)) (count 4), and, on three separate occasions, committing oral copulation and/or sexual penetration with a child under the age of 10 years (§ 288.7, subd. (b)) (counts 7, 8 and 10). The trial court sentenced Piceno to full, separate, consecutive terms of 15 years to life for each count alleging oral copulation and/or sexual penetration and consecutive terms of two years in prison for each count alleging the commission of a lewd act upon a child. Piceno appealed and, in an opinion for which the remittitur issued on July 1, 2011, this court affirmed the judgment of conviction but vacated Piceno's sentence and remanded the matter to permit the trial court to resentence him in accordance with the filed opinion (*People v. Piceno* (Feb. 28, 2011, B214346) [nonpub. opn.]).

At proceedings held on August 26, 2011, the trial court resentenced Piceno to consecutive terms of six years in prison for his convictions of committing a lewd act upon a child (counts 1 and 4), consecutive terms of 15 years to life for his convictions of the oral copulation and/or sexual penetration of a child (counts 7 and 8) and a concurrent term of 15 years to life for his third conviction of the oral copulation and/or sexual penetration of a child (count 10). In total, the trial court sentenced Piceno to 12 plus 30 years to life in prison. On October 4, 2011, Piceno filed a timely notice of appeal from the resentencing. We affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

The facts are not in dispute. Piceno, a relative of the victim, nine-year-old Armando G., would visit the house where Armando G. lived to play with Armando and the other children there. Beginning in approximately August 2006, Piceno began sexually abusing Armando G. While holding Armando G. down, Piceno orally copulated and sodomized him. During at least one incident, Piceno grabbed Armando G.'s hands and forced Armando G. to touch his, Piceno's, penis. On some occasions, Piceno showed to Armando G. pornographic magazines and, on at least one occasion, Piceno attempted to force Armando G. to orally copulate him. The abuse ended in the summer of 2007. Although Piceno had told Armando G. not to tell anyone about it, in July 2007 Armando G. told his mother that Piceno had been sexually molesting him. The following morning, Armando G.'s father telephoned the police.

2. Procedural history.

a. Piceno's convictions.

On November 26, 2008, a jury found Piceno guilty of five counts. The jury found that Piceno committed a forcible lewd act upon a child in violation of section 288, subdivision (b)(1) (count 1), committed a lewd act upon a child in violation of section 288, subdivision (a) (count 4), and, on three occasions, committed the oral copulation and/or sexual penetration of a child 10 years old or younger in violation of section 288.7, subdivision (b) (counts 7, 8 and 10).

b. *The original sentencing proceeding.*

At the original sentencing proceedings, the trial court imposed a term of 15 years to life for each of Piceno's convictions of the oral copulation and/or sexual penetration of a child 10 years of age or younger (counts 7, 8 and 10), then ran the terms consecutively pursuant to section 667.6, subdivision (d).² For his convictions of committing a lewd and forcible lewd act upon a child (counts 1 and 4), the trial court imposed one-third the mid-term, or two years as to each count. The court commented: "These are lewd acts. The same rule regarding consecutive sentences would apparently govern. So the indicated sentence [is 45] years to life, plus four years. These will be consecutive terms under the circumstances."

By imposing determinate terms for counts 1 and 4 in conjunction with the indeterminate terms imposed for counts 7, 8 and 10, the trial court erred by "fail[ing] to sentence [Piceno] for crimes punishable by imposition of determinate terms separately from the crimes punishable by imposition of an indeterminate term. Specifically, the court erroneously applied the principal term/subordinate term methodology set forth in section 1170.1 to all of the offenses." (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) This, it could not do. Offenses for which indeterminate sentences of life imprisonment or death can be imposed are not subject to section 1170.1. Accordingly,

² Subdivision (d) of section 667.6 provides: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." Subdivision (e) includes, among other offenses, a "[l]ewd or lascivious act, in violation of subdivision (b) of Section 288" and the "[c]ontinuous sexual abuse of a child, in violation of Section 288.5." It does not, however, include a violation of section 288.7.

there are no principal and subordinate terms to be selected for those crimes. (*Neely*, at p. 798.) The court should have simply imposed the statutory term of imprisonment for the crimes with indeterminate sentences. Once it had determined what sentences it was going to impose for the indeterminate term offenses and the determinate term offenses, it should have combined the two to reach an aggregate total sentence. Nothing in the sentencing for the determinate term crimes should have been affected by the sentences imposed for the indeterminate term crimes. (*Ibid.*) Moreover, because it was imposing sentences for both crimes with indeterminate terms and those with determinate terms, the court should have selected a base term from one of the sentences imposed as a determinate term. (*Ibid.*)

In view of these errors, this court affirmed the judgment of conviction, but vacated the sentence and remanded the matter to the trial court to permit it to resentence Piceno.

c. Resentencing on remand.

Piceno was resentenced on August 26, 2011. The trial court initially noted that “[t]he jury [had] returned . . . guilty verdict[s] with respect to count 1[,], alleging a violation of . . . section 288[, subdivision] (b)(1); [and] count 4, alleging a violation of . . . section 288[, subdivision] (a). . . . [G]uilty verdicts were also rendered in connection with counts 7, 8, and 10, each of which alleged a violation of . . . section 288.7[, subdivision] (b). [¶] The determinate counts, counts 1 and 4, carry with them time periods of three, six and eight [years]. And the indeterminate counts, 7, 8, and 10, carry with them indeterminate terms of 15 years to life.”

After reviewing factors in aggravation and mitigation,³ the trial court indicated that it was prepared to “go forward with the resentencing pursuant to the direction of the Court of Appeal.” With regard to count 4, which prohibits the commission of a lewd act upon a child (§ 288, subd. (a)), and count 1, which prohibits the commission of a forcible lewd act upon a child (§ 288, subd. (b)(1)), the trial court selected the mid-term, or six years, in state prison as to each count and, “pursuant to . . . section 667.6[, subdivisions] (d) and (e),” the court indicated that it was required to impose those terms in full and consecutively. The court continued: “So the sentence with respect to count 1 is six years. The sentence with respect to count 4 is six years consecutive. [Section] 288[, subdivision] (b) is enumerated in . . . section 667.6[, subdivision] (e)[⁴] and, therefore, pursuant to . . . section 667.6[, subdivision] (d),[⁵] it’s required that those two determinate terms be imposed consecutively.”

³ As factors in aggravation, the trial court noted that the conduct here was “cruel and callous,” that there was “a violent sexual assault or assaults on a child under 10 years of age[.]” that the nine-year-old victim was vulnerable, that Piceno had “threatened” the victim, that the nature of the conduct was planned and of a “predatory nature,” that Piceno had taken “advantage of the trust and confidence vested in an older family member,” and that Piceno “poses a serious danger to society.” In mitigation, the court indicated that Piceno had no prior criminal record and that he had been 17 years old at the time he committed the offenses.

⁴ Subdivision (e)(5) provides that Section 667.6 applies to “[l]ewd or lascivious act[s], in violation of subdivision (b) of Section 288.”

⁵ Section 667.6, subdivision (d) provides: “A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions.”

The trial court then imposed sentence on counts 7, 8 and 10, “each of which allege[d] a violation of . . . section 288.7[, subdivision] (b),” the oral copulation and/or sexual penetration of a child. The court noted that, according to this court’s opinion, the trial court erred when it determined that it was “required to impose those three 15-year-to-life terms consecutively.” The trial court continued: “Because [section] 288.7[, subdivision] (b) is not enumerated in . . . section 667.6[, subdivision] (e), there is no requirement pursuant to . . . section 667.6[, subdivision] (d) that . . . [the] terms be imposed consecutively. [¶] However, pursuant to . . . section 669,[⁶] the court . . . may impose those indeterminate terms consecutively [i]n the exercise of its discretion, [if] it believes that [it] is the appropriate thing to do. . . . [S]ection 669 provides in pertinent part that life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another.”

“[I]n the exercise of its discretion,” the trial court sentenced Piceno to “15 years to life in connection with count 7, consecutive [to a term of] 15 years to life in connection with count 8. That is a total of 30 years. [¶] In connection with counts 7 and 8, those two 15-year-to-life terms [were] imposed consecutively. In the exercise of its discretion

⁶ Section 669 provides in relevant part: “When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively. Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another, with any term imposed for applicable enhancements, or with any other term of imprisonment for a felony conviction.”

with respect to count 10, the court impose[d]” a term of 15 years to life, the term to run concurrently with the consecutive terms imposed for counts 7 and 8. The trial court concluded that “that [was] a total of 30 years to life in connection with counts 7, 8, and 10.”

In sum, Piceno was sentenced to a total of 12 years for his convictions of counts 1 and 4 and a consecutive term of 30 years to life for his convictions of counts 7, 8, and 10. He was awarded presentence custody credit for 1,503 days actually served and 15 percent, or 225 days, of good time/work time, for a total of 1,728 days. The trial court ordered Piceno to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a suspended \$200 parole revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)(1)) and restitution to the victim in the amount of \$10,480.

Piceno filed a timely notice of appeal on October 4, 2011.

This court ordered counsel to represent Piceno on appeal on January 4, 2012.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed February 3, 2012, the clerk of this court advised Piceno to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. On February 29, 2012, Piceno filed a “request [for an] extension of time due to the fact that [he was] in need of a new attorney.” Both his request for an extension of time and his request for a new attorney were denied that same day. No further communications from Piceno have been received.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, J.

We concur:

KLEIN, P. J.

KITCHING, J.