Filed 1/20/26 P. v. Hishmeh CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH MICHAEL HISHMEH, Defendant and Appellant.	G063858 (Super. Ct. No. 15WF0292) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Larry Yellin, Judge. Affirmed as modified.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Mestman and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Joseph Michael Hishmeh sexually abused a two-year-old girl. He made photographs and videos of the abuse, which he traded with people over the Internet to acquire more child pornography. A jury convicted him of two counts of sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b))[1], and five counts of lewd conduct on a child under the age of 14 (§ 288, subd. (a)). In a prior appeal, Hishmeh obtained reversal of his convictions on the sexual penetration counts. A new trial was held on these two counts, and a jury again found him guilty. Hishmeh was sentenced to two consecutive terms of 15 years to life in prison for the sexual penetration counts and a determinate sentence of 14 years for the lewd conduct counts. The latter sentence had been imposed in the first trial.

In this appeal, Hishmeh argues that his sentence of two consecutive terms of 15 years to life in prison for sexual penetration is cruel and/or unusual punishment under the federal or state constitutions. We disagree. His punishment is proportionate to his criminal conduct.

However, we agree with Hishmeh and the Attorney General that Hishmeh's 14-year sentence for the lewd conduct counts must be clarified. In his first trial, the trial court stated this 14-year sentence would run concurrently to his 30-year-to-life sentence for the sexual penetration counts. However, the court's sentence following the second trial is ambiguous as to whether this 14-year sentence runs concurrently or consecutively. The lower court could not impose a greater sentence on Hishmeh after retrial. (*People v. Torres* (2005) 127 Cal.App.4th 1391, 1403.) Thus, we modify Hishmeh's 14-year determinate sentence so that it runs concurrently to his indeterminate sentence for the sexual penetration counts.

---

[1] All undesignated statutory references are to the Penal Code.

FACTS AND PROCEDURAL HISTORY

A. Initial Trial and Appeal

The following facts are taken from our prior opinion in this matter, *People v. Hishmeh* (2020) 52 Cal.App.5th 46 (*Hishmeh*).

"In February 2015, the Orange County Child Exploitation Task Force executed a search warrant on the house in which [Hishmeh], was living. Thousands of photographs and videos containing child pornography were seized. ([Hishmeh] was not charged in this case with possession of child pornography.)" (*Hishmeh*, *supra*, 52 Cal.App.5th at p. 48.) Some of these videos and photographs appeared to show Hishmeh sexually penetrating the victim with his finger. (*Id*. at pp. 49–50.)

"[Hishmeh] was charged in an information with two counts of using his finger to sexually penetrate the victim (a female child between two and three years of age at the time the crimes were committed) ([§ 288.7, subd. (b)]) (counts 1 and 2), and five counts of touching her in a lewd or lascivious way while photographing and/or videotaping her (*id*., § 288, subd. (a)) (counts 3 through 7). [Hishmeh's] cousin babysat the victim in the home in which [Hishmeh] was living. During the interviews in the garage and at the police station, [Hishmeh] admitted being present when photographs and videos were taken of the victim, and admitted touching the victim inappropriately, although he denied sexually penetrating her with his finger." (*Hishmeh*, *supra*, 52 Cal.App.5th at p. 49.)

"During the interviews, [Hishmeh] admitted e-mailing some of the photographs and videos [of the victim] to other people. One of the individuals to whom [Hishmeh] sent photographs of the victim e-mailed back: '[T]hose are great. Anything go inside?' [Hishmeh] replied by e-mail: 'Just the

tip of my finger. Gotta make more and will try to go inside. Do you have any other . . . pics?'" (*Hishmeh*, *supra*, 52 Cal.App.5th at p. 49.)

"Videos and photographs of the victim constituting child pornography were admitted at trial. The videos and photographs were all taken with the same device and showed the victim. Relevant to the issues in this case were two photographs 'of a prepubescent female's genital area being spread on one side by what purports to be an adult finger.'" (*Hishmeh*, *supra*, 52 Cal.App.5th at pp. 49–50.)

"[Hishmeh] was convicted of two counts of sexual penetration of a child 10 years of age or younger (counts 1 and 2) and five counts of lewd acts upon a child under 14 years of age (counts 3 through 7)." (*Hishmeh*, *supra*, 52 Cal.App.5th at p. 50.) He was sentenced to two consecutive terms of 15 years to life in prison for counts 1 and 2. On the remaining counts, the court imposed a total term of 14 years to "run *fully concurrent* to the 30-year-to-life sentence" on counts 1 and 2. (Italics added.)

In his prior appeal, Hishmeh sought reversal of his convictions on counts 1 and 2 on grounds the jury instructions were erroneous. He also asserted his sentence for these counts was cruel and/or unusual punishment under the federal and state constitutions. (*Hishmeh*, *supra*, 52 Cal.App.5th at pp. 52–55.) This division agreed that the jury instructions for counts 1 and 2 contained prejudicial error and reversed these convictions. (*Id.* at p. 48.) As such, it did not address Hishmeh's constitutional arguments regarding his sentence. (*Id.* at p. 55.)

B. Retrial and Sentencing

Following retrial in 2023, Hishmeh was convicted of counts 1 and 2, and the trial court again imposed consecutive sentences of 15 years to life in prison for these convictions. The court explained that it was imposing

consecutive rather than concurrent sentences on these two counts because the aggravating factors substantially outweighed the mitigating factors. It told Hishmeh, "[t]he victim was merely two years old at the onset of the abuse. You occupied a position of leadership or dominance . . . . [¶] The manner in which the crime was carried out. . . . I do think there was a level of planning and taking advantage of the physical situation when I believe it's your cousin . . . that was the actually [*sic*] babysitter would leave the home and you would take advantage of being there for those moments . . . reassuring her that there is an adult here to take care of the child while the child was supposedly napping, and that gave you that access to the victim. And, therefore, . . . [you] took advantage of position of trust." As to mitigating factors, the trial court noted that Hishmeh was only around the age of 20 or 21 when he committed the abuse.

As to Hishmeh's total sentence, the court's pronouncement can be read as 30 years to life for counts 1 and 2 plus a *consecutive* term of 14 years for counts 3 through 7: "The Court is choosing to sentence consecutively 15-to-life, plus 15-to-life, plus the determinate sentence [of 14 years] that you are already serving which is independent. So the total sentence would be 30 years to life indeterminate, plus 14 years that's already being served." The abstract of judgment is also unclear. It has boxes marked indicating the prison terms for counts 3 to 7 are "CONCURRENT" but also "1/3 CONSECUTIVE" (except for count 3).

In this appeal, Hishmeh again claims his sentences of 15 years to life in prison for counts 1 and 2 are cruel and/or unusual punishment under the federal and state constitutions. He also contends this case must be remanded with instructions that the trial court resentence him to a *concurrent* term of 14 years for counts 3 through 7. We find Hishmeh's

sentences on counts 1 and 2 are constitutional. However, we agree his sentence on counts 3 through 7 is ambiguous and modify the judgment accordingly.

DISCUSSION

I.

CONSTITUTIONALITY OF PUNISHMENT[2]

A. Section 288.7

"'Section 288.7 was enacted as part of the Sex Offender Punishment, Control, and Containment Act of 2006 (the Act). [Citation.] . . . The primary purpose of the Act was to prevent "future victimization" of the community by sex offenders. [Citation.] Among the provisions of the Act was the creation of several new criminal offenses involving child victims'—including a 'new offense imposing an indeterminate life sentence for sexual intercourse, sodomy, oral copulation or sexual penetration of "a child 10 years of age or younger" in section 288.7.'" (*People v. Baker* (2018) 20 Cal.App.5th 711, 722.) Violations of section 288.7, subdivision (b) carry a mandatory term of 15 years to life in prison. (§ 288.7, subd. (b); *Baker*, at p. 730.)

"The act of setting prison terms for specific crimes 'involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts."' [Citation.] When considering a claim that a particular sentence amounts to cruel and unusual punishment,

---

[2] The parties dispute whether Hishmeh waived his constitutional arguments by failing to raise them during his second trial. Even if these arguments were waived, however, we would still consider their merits in assessing Hishmeh's ineffective assistance of counsel argument. (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1406 [defendant must establish prejudice to prevail on a claim of ineffective assistance of counsel].)

we give substantial deference both to the Legislature's broad authority to determine the parameters for the punishments for crimes, and to the trial court's discretion in imposing specific sentences. [Citation.] 'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.'" (*People v. Gomez* (2018) 30 Cal.App.5th 493, 499.)

Hishmeh appears to argue that section 288.7, subdivision (b)'s mandatory sentence of 15 years to life in prison is cruel and/or unusual punishment as applied to him. In particular, he relies on evidence showing (1) he was 21 years of age when the crime was committed, (2) he was held back in school and has an IQ score in the 19th percentile, (3) his parents had a history of domestic violence, incarceration, and drug abuse, (4) he has no criminal record, and (5) the victim was unaware of the sexual abuse due to her young age.

B. The United States Constitution

"The Eighth Amendment of the United States '"prohibits the infliction of 'cruel *and* unusual' punishment."'" (*People v. Christensen* (2025) 113 Cal.App.5th 187, 195.) It '"prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.' [Citation.] But '[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.'" (*Ewing v. California* (2003) 538 U.S. 11, 21.) '"[C]ourts should be reluctant to review legislatively mandated terms of imprisonment."' (*Id*. at pp. 21–22.)

This division has rejected similar arguments to the one Hishmeh makes here. Like Hishmeh, the defendant in *People v. Gomez, supra,* 30 Cal.App.5th at p. 498, was convicted of one count of sexual penetration of a child 10 years of age or younger under section 288.7, subdivision (b). He also

argued his sentence of 15 years to life was cruel and unusual punishment under the federal constitution. (*Id*. at p. 499.)

This division held his sentence was constitutional under the Eighth Amendment. It explained, "The federal Constitution prohibits imposition of punishment that is 'cruel and unusual.' [Citations.] The United States Supreme Court has concluded that neither a 25-year-to-life sentence for stealing three golf clubs nor a 50-years-to-life sentence for stealing videotapes valued at $153 constitutes cruel and unusual punishment. ([Citing] *Ewing v. California* [,*supra,*] 538 U.S. [at pp.] 30–31; *Lockyer v. Andrade* (2003) 538 U.S. 63, 77].) In the present case, by contrast, defendant committed acts of sexual molestation against a very young child—with whom he had the equivalent of a parent/child relationship—to satisfy his own sexual desires. Given the United States Supreme Court precedent and the nature of defendant's crimes, we conclude the sentence imposed did not constitute cruel and unusual punishment under the Eighth Amendment." (*People v. Gomez*, *supra*, 30 Cal.App.5th at pp. 499–500.)

Here, Hishmeh sexually molested a two-year-old child. He took pictures and videos of this sexual abuse and shared them with people over the Internet. Hishmeh was also in position of trust, acting as the de facto caretaker for the victim while his cousin was gone. Thus, as in *People v. Gomez, supra,* 30 Cal.App.5th 493, Hishmeh's punishment is not "'grossly disproportionate to the severity of the crime.'" (*Ewing v. California*, *supra*, 538 U.S. at p. 21.) Nor do any of the factors Hishmeh cites change our conclusion.

While Hishmeh claims the victim's young age made her unaware of the abuse, this factor does not favor him. The victim's young age increased her vulnerability. She was too young to resist Hishmeh or tell anyone what

he had done. Further, "California courts have long recognized 'a strong public policy to protect children of tender years.' [Citation.] 'Along a spectrum ranging from murder, mayhem, and torture on one end to petty theft on the other, "lewd conduct on a child may not be the most grave of all offenses, but its seriousness is considerable."'" (*People v. Wilson* (2020) 56 Cal.App.5th 128, 169.)

As to Hishmeh's age, we recognize he was 21 years old at the time of the crime and that evidence indicates the human brain "'continues to develop into a person's mid-20s." (See *People v. Acosta* (2021) 60 Cal.App.5th 769, 779.) But the trial court considered his age and found it was outweighed by the aggravating circumstances. We see no error in this analysis. The victim was extremely vulnerable given her young age, and Hishmeh abused a position of trust. Further, Hishmeh's actions did not involve a single moment of poor judgment that could be blamed on youth. Rather, his crimes fit within an egregious course of conduct. We can infer that Hishmeh traded child pornography since police seized thousands of photographs and videos during his arrest and the communications in the record showing he exchanged materials with others. To facilitate his trade of child pornography, Hishmeh sexually abused the victim and exchanged videos and photograph of the abuse with others.

Next, while Hishmeh cites his low IQ and turbulent family history, he has not shown that his sexual abuse of the victim can be "'explained in part by his limited intelligence'" or his family history. (See *People v. Baker*, *supra*, 20 Cal.App.5th at p. 726.) Nor can we reasonably infer some link between this evidence and Hishmeh's crime. Indeed, a psychological assessment in the record found that Hishmeh "presented himself without any indications of behavioral, emotional or cognitive

dysfunction. . . . There was no evidence of a thought disorder." In short, Hishmeh has not shown that either his intelligence level or family history had any effect on his conduct.

Finally, while Hishmeh's lack of a criminal record is a factor that is "'favorable to him, [it does] not outweigh the other factors.'" (*People v. Wilson* (2020) 56 Cal.App.5th 128, 169.) Though Hishmeh had no criminal history, he was heavily engaged in illicit conduct. As discussed above, he photographed and videotaped his sexual abuse of the victim to facilitate the trade of child pornography.

C. The California Constitution

"Unlike the Eighth Amendment that "'prohibits the infliction of 'cruel *and* unusual' punishment. [Citation.] Article I, section 17 of the California Constitution prohibits infliction of '[c]ruel *or* unusual' punishment. . . . The distinction in wording is 'purposeful and substantive rather than merely semantic. [Citations.]' [Citation.] As a result, we construe the state constitutional provision 'separately from its counterpart in the federal Constitution.'"'" (*Christensen*, *supra*, 113 Cal.App.5th at pp. 197–198.)

"'[U]nder the California Constitution, a punishment is cruel or unusual "if . . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."' [Citation.] '[E]ven if sentenced to a life-maximum term, no prisoner can be held for a period grossly disproportionate to his or her individual culpability for the commitment offense. Such excessive confinement, we have held, violates the cruel or unusual punishment clause [citation] of the California Constitution.'" (*Christensen*, *supra*, 113 Cal.App.5th at p. 198.)

"Three criteria are used to assess disproportionality: '(1) the nature of the offense and offender, with emphasis on his danger to society;

(2) the penalty imposed compared with the penalties for more serious crimes in California; and (3) the punishment for the same offense in other jurisdictions.' [Citation.] 'The importance of each of these prongs depends upon the facts of each specific case. [Citation.] Indeed, we may base our decision on the first prong alone.'" (*Christensen*, *supra*, 113 Cal.App.5th at p. 198.) After considering each of these factors, we find Hishmeh's sentence is not disproportionate to his crime.

As to the first factor, for the reasons discussed above, we find no disproportionality based on the nature of Hishmeh and the offense. While we could end our analysis here (*Christensen*, *supra*, 113 Cal.App.5th at p. 198), we also find that neither the second nor third factors favor Hishmeh.

For the second factor, we are not persuaded by Hishmeh's argument comparing his sentence to the sentences imposed for "more serious" crimes in California. This division rejected a similar argument in *People v. Gomez, supra,* 30 Cal.App.5th 493. It explained, "[n]o disproportionality is demonstrated . . . by comparing defendant's punishment to punishments for other crimes in this state . . . . Defendant notes that the 15-year-to-life sentence for violation of section 288.7, subdivision (b) is equal to that imposed for second degree murder, and is greater than the sentences imposed for first degree robbery, forcible rape, or forcible sodomy. It is well within the prerogative of the Legislature to determine that sex offenses against young children are deserving of longer sentences than sex offenses against adults or nonsex offenses. "'Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual.'"" (*People v. Gomez*, *supra*, 30 Cal.App.5th at p. 502.)

Finally, Hishmeh compares his sentences on counts 1 and 2 to the sentences for similar crimes in other states. He claims that New York punishes similar crimes with a sentence of five to 25 years in prison with no potential life sentence. (Citing N.Y. Pen. Law, §§ 70.02(1)(a) & (3)(a), 130.50(3).) Likewise, he asserts Oregon punishes similar crimes with a maximum possible sentence of 20 years. (Citing Or. Rev. Stat., §§ 161.605, 163.411.)

Neither of these examples is persuasive. New York Penal Code section 130.50 was repealed effective September 1, 2024 by New York Assembly Bill No. 3340 (2023–2024 Reg. Sess.) (enacted Jan. 30, 2024). Thus, it is unclear how New York currently punishes similar crimes.[3] Hishmeh is also mistaken about Oregon, which imposes a comparable sentence to California. Oregon imposes a mandatory *minimum* sentence of 25 years in prison for sexual penetration of a victim under 12 years of age.[4] (*State v. Kropf* (Or.Ct.App. 2025) 339 Or. App. 245, 257.) Oregon courts have found that this 25-year mandatory minimum sentence is constitutional under the United States and Oregon constitutions. (*Ibid*; *State v. Alwinger* (Or.Ct.App. 2009) 231 Or. App. 11, 13.)

Moreover, "California and Oregon are not outliers." (*People v. Baker*, *supra*, 20 Cal.App.5th at p. 731.) *Baker* explained that several other

---

[3] Hishmeh filed his opening brief on September 16, 2024.

[4] Oregon Revised Statutes section 163.411(1)(b) states that "a person commits the crime of unlawful sexual penetration in the first degree if the person penetrates the vagina, anus or penis of another with any object" and "[t]he victim is under 12 years of age." Oregon Revised Statutes section 137.700(2)(b)(F) then specifies that the mandatory minimum sentence for "unlawful sexual penetration in the first degree, as defined in ORS 163.411(1)(b)" is "300 months," i.e., 25 years.

states impose punishments ranging from 10 years to life to 35 years to life in prison for similar crimes. (*Ibid*.) "Many of these statutes were passed in the wake of a prominent sex offense case in Florida and modeled after that state's Jessica Lunsford Act (Jessica's Law). In California, voters approved Jessica's Law by ballot initiative (Prop. 83) just months after the Legislature enacted section 288.7 as part of the Sex Offender Punishment, Control, and Containment Act of 2006." (*Ibid*.) Though California's punishment for sexual punishment of "a child under 10 is no doubt severe, it is not so disproportionate to the punishment imposed in other states to render [Hishmeh's] sentence constitutionally suspect." (*Ibid*.)

D. Remaining Arguments

Hishmeh briefly argues that we should reduce his sentences on counts 1 and 2 to lesser included offenses or that we order his two 15-year-to-life sentences for these counts to be served concurrently rather than consecutively. We reject these arguments for the reasons above.

II.

THE DETERMINATE SENTENCE

Hishmeh contends we must remand this matter so the trial court can impose a new sentence specifying that his 14-year determinate sentence for counts 3 to 7 runs concurrently to his sentences for counts 1 and 2. The Attorney General agrees. While we agree Hishmeh's sentence for counts 3 through 7 is ambiguous, we modify the judgment rather than remanding the matter for resentencing.

"If a defendant successfully challenges his conviction and obtains a new trial, the due process and double jeopardy clauses of the California Constitution prohibit the imposition of a greater sentence following retrial." (*People v. Torres*, *supra*, 127 Cal.App.4th at p. 1403.) In the initial trial, the

trial court sentenced Hishmeh to 30 years to life in prison for counts 1 and 2 and imposed a *concurrent* 14-year sentence for counts 3 through 7. To the extent the lower court imposed a 14-year *consecutive* sentence on counts 3 through 7 after retrial, this was error. (*Ibid*.) Thus, we modify Hishmeh's 14-year determinate sentence so that is runs concurrently to his indeterminate sentence of 30 years to life in prison for counts 1 and 2. (See, e.g., *People v. Thompson* (1998) 61 Cal.App.4th 1269, 1275–1276 [modifying sentence after trial court imposed a more severe penalty after the second trial].)

DISPOSITION

We affirm the trial court's sentence imposing two consecutive terms of 15 years to life in prison for counts 1 and 2. The judgment is modified so that Hishmeh's determinate 14-year sentence for counts 3 through 7 runs concurrently to his sentence of 30 years to life in prison for counts 1 and 2.

MOORE, ACTING P. J.

WE CONCUR:

DELANEY, J.

GOODING, J.