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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DINO ALFRED CARDELLI , Defendant and Appellant.	A133794 (Humboldt County Super. Ct. Nos. CR1005536 & CR1100227)

Under a plea agreement, defendant Dino Alfred Cardelli pleaded guilty to two counts of sexual abuse against two of his adopted children, and to the separate offense of attempting to dissuade one of the victims from testifying. He was sentenced to 16 years in prison for the sexual offenses, and to a consecutive sentence of two years for the dissuasion offense. Defendant claims the trial court erroneously believed it lacked discretion to impose a concurrent term for dissuasion, and seeks a remand for resentencing. We agree and remand the matter for the court to exercise its discretion on that issue. In all other respects, we affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

An amended complaint filed October 13, 2010 charged defendant with one count of continuous sexual abuse with a child under 14 years of age, Jane Doe No. 1 (Pen. Code,[1] § 288.5, subd. (a); count 1); one count of a lewd and lascivious act with Jane Doe No. 1, then a child of 14 or 15 years of age (§ 288, subd. (c)(1)); count 2); two counts of

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

oral copulation of Jane Doe No. 1, then a person under 16 years of age (§ 288a, subd. (b)(2); counts 3 and 4); and three counts of a lewd or lascivious act with a different minor, Jane Doe No. 2, then a child under 14 years of age (§ 288, subd.(a); counts 5, 6, and 7) (hereafter the sexual abuse case). The complaint further alleged defendant had substantial sexual conduct with a victim under age 14 in the commission of count 1 (§ 1203.066, subd. (a)(8)) and, in connection with all counts, defendant committed the offenses on more than one victim at the same time and in the same course of conduct (§ 1203.066, subd. (a)(7)).

An information filed February 9, 2011 charged defendant with attempting to dissuade Jane Doe No. 1 from testifying (§ 136.1, subd. (a)(2)) and with 25 misdemeanor counts of disobeying a court order (§ 166, subd. (a)(4)) (hereafter the dissuasion case).

Pursuant to a plea agreement, defendant pled guilty to the continuous sexual abuse of Jane Doe No. 1, to a misdemeanor lesser included charge of annoying or molesting Jane Doe No. 2 (§ 647.6, subd. (a)(1)), and to all of the charged offenses in the dissuasion case. The remaining charges and special allegations in the sexual abuse case were dismissed with a *Harvey*[2] waiver.

Defense counsel stipulated the following prosecution evidence constituted a factual basis for his guilty pleas in the sexual abuse case: Defendant initiated a sexual relationship with his 13-year-old daughter, Jane Doe No. 1, in approximately March 2009. The relationship progressed from touching and kissing to incidents of digital penetration on at least a weekly basis beginning in July 2009. The two began having sexual intercourse in approximately October 2009. Jane Doe No. 2 would have testified that at least once between February 1, 2010 and March 31, 2010, when she was 12 years old, defendant climbed into bed with her while she was saying her prayers at night and rubbed her chest with his chest.

For purposes of defendant's plea in the dissuasion case, defense counsel stipulated the following summary of the prosecution's evidence would constitute a factual basis for

[2] *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

his plea of guilty to all counts: As a condition of his release on bail, the court barred defendant from having contact with any of the minors removed from his care. Nonetheless, investigation revealed defendant had ongoing, frequent contact with Jane Doe No. 1 using e-mail, a Facebook account opened with a false name, and a throw-away cellular phone. Defendant discussed his criminal case with Jane Doe No. 1 and the amount of prison time he was facing if convicted, while professing his love for her and assuring her they would be together someday. Jane Doe No. 1 was prepared to testify that as a result of these contacts she felt sorry for defendant, came to believe he was being unfairly treated, and felt she would not be able to testify against him. She created a falsified journal in an effort to establish defendant had not had intercourse with her until after her 14th birthday.

As the trial court was orally advising defendant of the consequences of his guilty pleas, it stated the following: "In the [dissuasion case], the standard potential prison sentences for Count One, the attempting to dissuade a witness, would be sixteen months, two years or three years; however, because of the combination of the two cases, *that would require a mandatory, full consecutive sentence of the mid-term of two years*. [¶] Do you understand that?"[3] (Italics added.) A short time later in the proceeding, the court asked the prosecutor to clarify the consequences of defendant's guilty plea to the dissuasion offense: "Now, Ms. Neel, to clarify, based on your research as to . . .

[3] Section 1170.15 provides: "Notwithstanding subdivision (a) of Section 1170.1 which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person who was about to give material information pertaining to, the first felony, or of a felony violation of Section 653f that was committed to dissuade a witness or potential witness to the first felony, the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed, and shall include the full term prescribed for any enhancements imposed for being armed with or using a dangerous or deadly weapon or a firearm, or for inflicting great bodily injury."

attempting to dissuade a witness, you believe that the sentence in prison would be two years conseq. [¶] Is that correct?" The prosecutor responded, "It is, and that was conveyed to defense counsel."

By written submission prior to defendant's sentencing hearing, the probation department recommended that "defendant . . . be sentenced to a two year full-term consecutive sentence [for dissuasion] . . . *as required pursuant to section 1170.15*." (Italics added.) At the sentencing hearing, the prosecutor advised the court, that "Penal Code 1170.15 *requires* the Court to do a consecutive term of two years." (Italics added.) Defense counsel did not at any time dispute or object to the suggestion that defendant's guilty plea to dissuasion subjected him to a *mandatory* two-year consecutive sentence. In fact, counsel apparently agreed a consecutive sentence for that offense was mandatory. He asked the court, if it would not grant probation, to impose the mitigated sentence of six years for the sexual abuse conviction and stated defendant "will be in prison for some eight years" under that scenario.

Before imposing sentence, the court framed the question of the suitable prison sentence to be "quite frankly, whether it should be middle term [for the sexual offenses], 12 years, plus two years, or the upper term, 16 years, plus two years. . . . So [a] term of 14 years or 18 years." The trial court proceeded to sentence defendant to the upper term of 16 years in state prison for the continuous sexual abuse offense and, "pursuant to" section 1170.15, to a consecutive sentence of two years for the dissuasion offense.

II. DISCUSSION

Defendant contends a remand for resentencing is necessary because the trial court failed to recognize its discretion to sentence him concurrently for his dissuasion offense notwithstanding section 1170.15.

A. *Standard of Review*

"Discretion is compatible only with decisions 'controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice . . . .' " (*People v. Bolton* (1979) 23 Cal.3d 208, 216.) Thus, "all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies

appropriate to the particular matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195.)

The court cannot properly exercise its discretion if it does not fully understand the scope of this discretion. "Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228; see also *People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

If, however, though it misunderstood its discretion, the court nonetheless made some indication its ruling would not change even if it possessed said discretion, a remand is unnecessary. "If the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required." (*People v. Sanders* (1997) 52 Cal.App.4th 175, 178, disapproved on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11; see also *People v. Coelho* (2001) 89 Cal.App.4th 861, 888–890 (*Coelho*.) If, for instance, the court articulated *why* a consecutive term was appropriate, this explanation would demonstrate the sentencing decision the court would have made had it known the full extent of its discretion. This is in keeping with the fact that "[t]he statutes and sentencing rules generally require the court to state 'reasons' for its discretionary choices on the record at the time of sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 349; see also Cal. Rules of Court, rule 4.425.)

B. *Analysis*

As an initial matter, the People maintain defendant's claim is waived on appeal because he failed to raise it at the sentencing hearing. Exercising our discretion to do so, we reach the merits of defendant's claim notwithstanding his failure to timely raise it. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively." (*People v. Bradford* (1976) 17 Cal.3d 8, 20; *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) This discretion stems from section 669, subdivision (a), which states: "When any person is convicted of two or more crimes, . . . 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." (*Rodriguez*, at p. 1262 [absent an express statutory provision to the contrary, § 669 provides that a trial court shall impose either concurrent or consecutive terms for multiple convictions].) Some Penal Code provisions do identify circumstances in which a court *must* impose either a concurrent or a consecutive sentence for an offense (see §§ 654, 667.61, subd. (i) for example), but section 1170.15 is not one of them. The People make no claim to the contrary.

The court's statement here, in reliance on section 1170.15, that the crime of dissuading the victim "would require a mandatory, full consecutive sentence of the mid-term of two years" was simply incorrect. Contrary to what both trial counsel and the court believed at the time of sentencing, section 1170.15 imposes no such requirement. It simply establishes a rule to be applied for determining the length of the subordinate consecutive sentence the court must impose for dissuasion if (1) the dissuasion was directed against a witness or victim of another felony for which the defendant is being sentenced, *and* (2) the court has chosen to exercise its discretion pursuant to section 669 to impose a consecutive sentence for the dissuasion offense. Thus, section 1170.15 only comes into play *after* the court has decided to sentence a defendant to a consecutive term. The record clearly demonstrates the trial court misunderstood this when it imposed a two-year consecutive sentence on defendant without articulating any valid reason for making the sentence consecutive. (See Cal. Rules of Court, rules 4.406(b)(5) [specifying the imposition of a consecutive sentence as one of "the sentence choices that generally require a statement of a reason"] & 4.425 [stating criteria to be used in deciding to impose consecutive rather than concurrent sentences].)

The People argue a remand in this case is unnecessary, citing *Coelho*. The defendant in *Coelho* was found guilty of 10 counts of lewd and lascivious conduct with a minor under the age of 14. (*Coelho, supra*, 89 Cal.App.4th at p. 865.) The trial court erroneously believed all of the consecutive sentences were mandatory and imposed ten 25-year-to-life terms. (*Ibid*.) The appellate court declined to remand the case for resentencing, finding a remand would be "an idle and unnecessary, if not pointless, judicial exercise," because "[t]he trial court has twice imposed 10 consecutive sentences and indicated that it would impose them even if some were not mandatory." (*Id.* at p. 889.) Here, in contrast to *Coelho*, the trial court made no statement indicating it would have sentenced defendant consecutively for attempting to dissuade the victim even if it believed such a sentence was not mandatory. We are not permitted to speculate how the court might have resolved an issue it did not believe it needed to address.

People v. Gamble (2008) 164 Cal.App.4th 891 offers a more relevant precedent. In *Gamble*, "the trial court was laboring under the mistaken belief that it was required to impose a consecutive term for defendant's escape offense." (*Id.* at p. 901.) Because "[t]he record . . . [did] not disclose whether the trial court would have exercised its discretion to impose a concurrent term if it had known that it had such discretion," the *Gamble* court remanded the matter for resentencing. (*Ibid.*; see also *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [where the sentencing court was unaware of the full scope of its sentencing discretion, a remand is required unless the court "clearly indicated" it would have imposed the same sentence had it been aware of the discretionary choices available].)

The record shows the court did not understand its sentencing discretion with respect to the dissuasion offense, and fails to clearly demonstrate how the court would have sentenced defendant if it had not been misinformed. Resentencing on that offense is therefore required. On remand, the trial court should exercise its discretion and sentence defendant either concurrently or consecutively for the dissuasion offense and state reasons for imposing a consecutive sentence, if that is its choice.

III. DISPOSITION

Defendant's two-year consecutive sentence for dissuasion of a witness is vacated and the matter is remanded to the trial court to exercise its discretion whether to impose a consecutive or concurrent sentence for that offense. In all other respects, the judgment is affirmed.

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Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Dondero, J.