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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.

D'MORIA DWAYNE CUNNINGHAM,

Defendant and Appellant.

A130105

(Contra Costa County
Super. Ct. No. 05-090126-4)

INTRODUCTION

In 2008, defendant D'Moria Dwayne Cunningham physically and sexually assaulted his former girlfriend. A jury convicted him of various assaultive and sexual crimes. The court sentenced defendant to 18 years in state prison, mostly under the statutory framework of Penal Code section 1170.1.¹ However, the court also sentenced defendant to a fully consecutive middle term of six years for one count of forcible oral copulation under the alternative sentencing scheme codified in section 667.6. Defendant's contention on appeal is that the court's imposition of a fully consecutive sentence under section 667.6 violated California law and his federal due process right to notice because the prosecution did not allege the enhanced punishment in the information. Defendant also contends a ministerial error in the court's minutes requires correction, and the Attorney General agrees. We will order correction of the minute

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

order, but we affirm the judgment because section 667.6 need not be alleged in the information.

STATEMENT OF THE CASE

A nine-count information filed in 2009 alleged that on November 26, 2008, defendant Cunningham committed four counts of forcible rape, one count each of forcible oral copulation, assault with intent to commit rape, corporal injury on a cohabitant, assault with a deadly weapon, and criminal threats against Jane Doe. (Pen. Code, §§ 261, subd. (a)(2), 288a, subd. (c)(2), 220, subd. (a), 273.5, subd. (a), 245, subd. (a)(1), 422.) In 2010, a jury found defendant guilty as charged.

On October 8, 2010, the court sentenced defendant to 18 years in state prison. Indicating that it had more than one sentencing choice, the court concluded that “the first four counts, the forcible rapes, were close enough in time that I wouldn’t separate them out.” Accordingly, the court selected the forcible rape conviction from count one as the principal term and imposed the upper term of eight years (“because of the high degree of viciousness and callousness involved”) for that count, and imposed concurrent midterm sentences of six years each for the rapes in counts two, three, and four. Alluding to the language of section 667.6, subdivision (d),² the court stated with respect to the oral copulation in count five, “I do think there is a separation there in terms of a separate occurrence and the defendant having a reasonable opportunity to reflect in his actions [¶] . . . [¶] [¶] For count five I would impose the midterm of six years as full term

² Section 667.6, subdivision (d) provides in relevant part: “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.* [¶] *In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.* Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.” (Italics added.)

consecutive sentencing.”³ For the remaining counts six, seven, eight and nine, “because these were separate acts of violence and threats in addition to the sexual assault,” the court chose consecutive sentences, “[b]ut instead of full term consecutive sentencing just normal consecutive sentencing.” Accordingly, the court imposed one-third the midterm, or 16 months, for count six; one-third the midterm, or one year each, for counts seven and eight; and one-third the midterm, or eight months, for count nine.

STATEMENT OF THE FACTS

On November 26, 2008, Jane Doe (Doe) was in bed when defendant, her ex-boyfriend, stood over her, yelling, cussing, and insulting her. He then tried to take Doe’s pants off, but she held on to them. Defendant punched Doe in the face, pulled her hair, choked her, and verbally threatened to kill her. Defendant bit her on the breast two or three times and once on the thumb. Doe was bleeding and crying and did not want to have sex with defendant, but she did not resist at this point because she did not want to die.

Defendant took off her pants and orally copulated her. He then penetrated her vagina. When she told him it was painful, he withdrew and ordered her to change positions; he then penetrated her again. Defendant had her change positions again and then repenetrated her. Finally, he ordered Doe to mount him, and he penetrated her again until he ejaculated. When defendant fell asleep Doe escaped, found a police officer and reported the assault. She was bleeding from the nose and lip, had bruises on her face, and blood on her shirt. A sexual assault nurse examined Doe and noted that her injuries included bites to her breasts, arm, thumb and shoulder, as well as bruises and abrasions on her face.

³ Section 667.6, subdivision (e) provides in relevant part: “This section shall apply to the following offenses: [¶] . . . [¶] (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c) . . . of Section 288a.”

DISCUSSION

Due Process Does Not Require That Penal Code Section 667.6 Be Plead In The Information.

In his opening brief, defendant argued that sections 1170.1, subdivision (e),⁴ 667.6, subdivision (j),⁵ the reasoning of *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*) and other cases,⁶ and the federal constitution's due process and fair notice provisions (U.S. Const., 14th Amend.), required the prosecution to plead in the information that he would be subject to sentencing under section 667.6, subdivisions (c) or (d) upon conviction. He contends the prosecution's failure to so plead violated his due process right to notice and entitles him to a reversal and remand for resentencing.

In fact, section 667.6 does not include a subdivision (j), or, for that matter, any other provision containing a pleading and proof requirement. Defendant acknowledges as much in his reply brief.⁷ Moreover, section 1170.1, subdivision (e) does not apply to section 667.6, subdivision (c) which provides in relevant part that “[i]n lieu of the term

⁴ The version of section 1170.1, subdivision (e) in effect at the time defendant was sentenced provided: “(e) All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (Stats. 2009, ch. 171, § 5; eff. Jan. 1, 2010 to Jan. 1, 2011.)

⁵ According to defendant's opening brief, section 667.6, subdivision (j) provides that “[t]he penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (c) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact.”

⁶ (See *People v. Hernandez* (1988) 46 Cal.3d 194 (*Hernandez*), disapproved on another point in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5; *People v. Haskin* (1992) 4 Cal.App.4th 1434 (*Haskin*); and *People v. Najera* (1972) 8 Cal.3d 504 (*Najera*), disapproved on another point in *People v. Wiley* (1995) 9 Cal.4th 580, 589 & fn. 6.)

⁷ *Section 667.61, subdivision (o)* provides: “The penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact.” Prior versions of section 667.61 contained the same language in a then-extant subdivision (j). (Stats. 2006, ch. 337, § 33, eff. Sept. 20, 2006; Initiative Measure (Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006).)

provided in Section 1170.1, a full, separate, and consecutive term *may* be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion,” or subdivision (d), which 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.” (Italics added.) “Section 667.6, subdivision (d), ‘is mandatorily applicable to cases within its terms, supplanting to that extent the generally applicable consecutive sentencing scheme of section 1170.1.’ [Citation.]” (*People v. Delgado* (2010) 181 Cal.App.4th 839, 854.) Accordingly, there is no statutory basis for defendant’s argument that section 667.6 contains a pleading or proof requirement.

Nor is there a constitutional basis for implying such a requirement. Defendant cites *Mancebo* for the proposition that a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes, but *Mancebo* is distinguishable. California Rules of Court, rule 4.405(3) defines an “enhancement” as “an *additional* term of imprisonment *added to the base term*.” (Italics added.) “*Enhancements* typically focus on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies *a higher penalty than that prescribed for the offenses themselves*. That is one of the very purposes of an enhancement’s existence.” (*Hernandez, supra*, 46 Cal.3d at pp. 207–208, italics added.)

Mancebo, Hernandez, Haskin, and Najera all involved sentence enhancements as defined above (i.e., imposition of an additional term of imprisonment added to the base term) that were not alleged in the accusatory pleading. (*Mancebo, supra*, 27 Cal.4th at pp. 741–742 [§ 667.61 elevation of sentence for certain sexual offenses committed under specified aggravating circumstances from determinate term to a lengthy indeterminate term—either 15 years to life or 25 years to life, depending on the particular circumstances]; *Hernandez, supra*, 46 Cal.3d at p. 197 [§ 667.8 additional three-year enhancement for kidnapping for purpose of rape]; *Haskin, supra*, 4 Cal.App.4th at

p. 1438 [§ 667 additional five-year enhancement for prior serious felony]; *Najera, supra*, 8 Cal.3d at p. 508 [§ 12022.5 additional term for use of a firearm].)

However, by their own terms and under well-established California precedent, section 667.6, subdivisions (c) and (d) are *not* enhancement provisions; instead, they represent an alternative sentencing scheme that comes into play after conviction “for each violation of an offense specified in subdivision (e)” if the crimes involve the same victim on the same occasion (§ 667.6, subd. (c)) or if the crimes involve separate victims, or the same victim on separate occasions (§ 667.6, subd. (d)). “The Legislature enacted section 667.6 in 1979 to provide longer prison terms for certain sex offenders. (Stats.1979, ch. 944, § 10, p. 3258.) Before then, the principal provisions governing the sentencing of persons convicted of multiple felonies were sections 669 and 1170.1. Section 669 authorizes the court to decide whether sentences should run concurrently or consecutively. Subdivision (a) of section 1170.1 establishes a formula for computing the length of the aggregate term should the court impose consecutive sentences. Under that formula, the longest term for one offense, including enhancements, becomes the ‘principal term,’ and to it are added any ‘subordinate terms’ for the other offenses, limited to one-third of the middle term for each such offense. (§ 1170.1, subd. (a).) [¶] As a more severe consecutive sentencing alternative to the section 1170.1 formula, section 667.6, subdivision (c), permits the imposition of a full, separate, and consecutive term ‘for each violation of’ the enumerated sex offenses.” (*People v. Jones* (1988) 46 Cal.3d 585, 592.) Section 667.6, subdivision (d) makes such sentencing mandatory if the enumerated offenses are committed under specified circumstances. Neither subdivision (c) or (d) adds punishment to the base term for an offense. Since section 667.6 is not an “enhancement” added to a normal section 1170.1 sentence, in our view, the reasoning of *Mancebo* and like cases involving true enhancements does not apply to the alternative sentencing scheme for certain sexual offenses at issue here.

In addition, the charges themselves put defendant on notice that if he were convicted of them he could be punished under section 667.6’s alternative sentencing scheme for such offenses. As the Court of Appeal explained in *People v. Stought* (1981)

115 Cal.App.3d 740 (*Stought*), “[a] ‘full, separate and consecutive’ term is an option available to the trial court when a sex crime enumerated in subdivisions (c) and (d) has been committed. There is nothing to plead and prove as an additional ingredient of such an offense.” (*Stought, supra*, at p. 742.) This observation is true even if the court must make a separate occasions finding for subdivision (d) to apply in a given case. Because “[a] trial court *may* impose a full consecutive term for a second sexual assault offense, even if both offenses were committed during a single transaction” under subdivision (c), the court’s finding under subdivision (d) does no more than make the imposition of fully consecutive sentences mandatory rather than discretionary. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1231 (*Groves*)). “The mandatory imposition of this maximum possible sentence does not constitute an increase in the maximum possible sentence” as an enhancement does. (*Ibid.*) Moreover, the probation report and the prosecutor’s sentencing memorandum put defendant on notice that fully consecutive terms under section 667.6 would be under consideration at sentencing. Thus, defendant cannot complain of actual lack of notice.

Finally, defendant does not cite any case holding the failure to plead the potential application of section 667.6, subdivisions (c) or (d) in the information violates a defendant’s due process rights. Indeed, the United States Supreme Court’s decision in *Oregon v. Ice* (2009) 555 U.S. 160 suggests the opposite. In that case, the court rejected the contention that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny apply to the sentencing court’s decision to impose consecutive sentences. (See also *Groves, supra*, 107 Cal.App.4th at pp. 1231–1232; *People v. Black* (2005) 35 Cal.4th 1238, 1263, fn. 18, overruled on other grounds in *Cunningham v. California* (2007) 549 U.S. 270.) In other words, if there is no constitutional basis for requiring that traditional sentencing considerations be proven to a jury, there cannot be any constitutional basis for requiring that they be pleaded in the charging document. Furthermore, as discussed above, the due process cases defendant does cite are factually inapposite because they relate to the failure to allege true enhancements that impose additional terms. Based on these authorities, we conclude the sentencing judge did not violate defendant’s due process

rights by imposing a full, consecutive, midterm sentence for count five under section 667.6.

The Minute Order Requires Correction.

The typed minute order for October 8, 2010 states that defendant was sentenced to “1/3 Middle Term—1 year 4 months consecutive” for counts seven, eight, and nine. Defendant contends, and the Attorney General agrees, that the court’s minutes do not reflect the court’s oral pronouncement of the sentences for those counts. Our independent review of the record confirms the court’s typed minutes are also at odds with the court’s handwritten minute order and the abstract of judgment, both of which correctly reflect the court’s oral pronouncement. Accordingly, we will order the court’s typed minute order be corrected to reflect that the court sentenced defendant to one-third the midterm of one year consecutive for count seven (§ 273.5, subd. (a)), one-third the midterm of one year for count eight (§ 245, subd. (a)(1)), and one-third the midterm of eight months for count nine (§ 422).

DISPOSITION

The trial court is directed to correct its typewritten minutes for October 8, 2010 to reflect the court’s oral pronouncement of sentence as follows: one-third the midterm of one year consecutive for count seven (§ 273.5, subd. (a)), one-third the midterm of one year consecutive for count eight (§ 245, subd. (a)(1)), and one-third the midterm of eight months consecutive for count nine (§ 422). As modified, the judgment is affirmed.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.