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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN FORDYCE,

Defendant and Appellant.

A131896

(Solano County  
Super. Ct. No. FCR259498)

Defendant Steven Fordyce appeals following revocation of probation and imposition of a prison sentence. Defendant contends that he received ineffective assistance of counsel because counsel failed to object when the sentencing court mistakenly used the facts of a dismissed charge in selecting a prison term. (*People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*)). We conclude that there was no misuse of facts during sentencing and affirm the judgment.

**I. FACTS**

According to the probation officer’s report and other documents in the record, defendant’s wife told the police that defendant was having an Internet relationship with a woman in which defendant had graphic discussions of sexual fantasies involving underage girls (including his niece) and sent a nude photograph of his young children taking a bath. A search of defendant’s computer found images and videos of children engaging in sexual activities and numerous stories written by defendant about his fantasies of engaging in sexual activities with children. When questioned by the police,

defendant admitted a twenty-year “addiction” to pornography but denied an interest in child pornography. Defendant told the police that the child pornography on his computer was downloaded unintentionally, while downloading adult pornography, and that he viewed the child pornography solely out of curiosity and meant to delete it. Defendant dismissed the sexual fantasies he wrote about as fictional stories meant to entice his woman correspondent to continue the “ ‘on-line affair.’ ”

Defendant was charged with possessing child pornography (Pen. Code, § 311.11, subd. (a)), and with possessing child pornography with the intention of distributing it for commercial consideration (Pen. Code, § 311.2, subd. (b)). Pursuant to a negotiated disposition, defendant entered a no contest plea to the simple possession charge. (Pen. Code, § 311.11, subd. (a).) In exchange for his plea, the charge of commercial distribution was dismissed outright, and defendant was granted probation. (Pen. Code, § 311.2, subd. (b).) Probation was conditioned upon, among other things, serving time in county jail; not possessing pornographic material; and not possessing any devices that can access the Internet.

Defendant violated the terms of his probation in January 2011, shortly after his release from county jail. Defendant was released from jail on January 6, 2011. On January 26, 2011, a probation compliance check of defendant’s home found defendant with an Internet device that he had been using to stream pornographic videos. Defendant admitted that he violated probation by having Internet devices and by accessing pornographic material on the Internet. In admitting his probation violation, defendant stated that he understood that the court could sentence him to a maximum term of three years in prison. In April 2011, the court sentenced defendant to two years in prison, the midterm. Defendant appeals the sentence.

## II. DISCUSSION

Defendant contends that he received ineffective assistance of counsel because counsel failed to object when the sentencing court mistakenly used the facts of a dismissed charge in weighing mitigating and aggravating circumstances during selection

of the prison term. (*Harvey, supra*, 25 Cal.3d at p. 758.) The People deny trial court error and ineffective assistance of counsel but also claim, as a preliminary matter, that the appeal should be dismissed because defendant waived his right to appeal. The People are mistaken concerning defendant's right to appeal.

Defendant did enter a general waiver of his appeal rights on his negotiated no contest plea and his admitted probation violation. However, a general waiver does not bar a challenge to sentencing rulings occurring subsequent to the plea that are not integral to the terms of the plea agreement. (*People v. Panizzon* (1996) 13 Cal.4th 68, 85-86; *In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1156-1160; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1661-1662.) Defendant's plea agreement and admission to a probation violation did not specify the sentence to be imposed, and only advised defendant of the maximum possible term. The court's choice of a prison term was a matter left to future resolution and thus falls outside the scope of defendant's waiver of appeal rights.

The People are correct, however, in denying that there was any trial court error or ineffective assistance of counsel at sentencing. At the sentencing hearing, the court first found defendant unsuitable for a further grant of probation and then turned to the question of the appropriate prison term. The court remarked: "I'm going to order the defendant sentenced to the Department of Corrections for the recommended term of two years. This is the midterm. I don't think there [are] either aggravating or mitigating circumstances that outweigh the others in this. I mean, the only mitigating circumstance really, is the defendant has no prior criminal history, but the circumstances of this offense is aggravated. [¶] When he entered his plea, I think the other charge [Penal Code section 311.2, subdivision (b), commercial distribution of child pornography] was dismissed with a Harvey waiver, and this behavior that he involves himself in is not only damaging to the defendant, but it could be dangerous to the community, as well. [¶] So I'm going to order the defendant—I agree with probation's recommendation, there [are] neither aggravating nor mitigating circumstances which outweigh the other. The sentence will be the midterm of two years."

Defendant notes that the court was mistaken in thinking there was a *Harvey* waiver at the time of the plea bargain. But the mistake is immaterial. Pursuant to *Harvey, supra*, 25 Cal.3d at p. 758, a sentencing court “cannot use the facts of a dismissed charge to impose ‘adverse sentencing consequences’ unless the defendant consents *or* a transactional relationship exists between the admitted charge and the dismissed charge.” (*People v. Martin* (2010) 51 Cal.4th 75, 77, italics added.) Implicit in a plea bargain “is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*Harvey, supra*, at p. 758.) Although a sentencing court may not consider facts underlying the dismissed count for purposes of aggravating a defendant’s sentence where those facts pertain *solely* to the dismissed count, a court may consider facts *common* to both counts. (*Ibid.*; see *People v. Beagle* (2004) 125 Cal.App.4th 415, 421-422 [collecting cases].) The charged offenses here were transactionally related and arose out of the same core facts: defendant’s Internet activities in collecting and exchanging child pornography. Defendant concedes as much on appeal.

However, defendant argues that the court’s reference to a *Harvey* waiver implies that the court used facts of the dismissed count beyond those transactionally related to the facts of the admitted charge, specifically, that the court must have “assumed that facts existed that were supportive of the additional elements” of a commercial distribution of pornography. We disagree. The court’s brief reference to defendant’s behavior that “is not only damaging to the defendant, but it could be dangerous to the community, as well” does not demonstrate the misuse of any facts pertaining *solely* to the dismissed charge. The reference is reasonably understood to apply to facts transactionally related to defendant’s possession of child pornography which, in this case, included possessing depictions of sexually explicit sex acts, writing graphic descriptions of sexual fantasies involving at least one child (his eight-year-old niece) to whom he had access, and disseminating a nude photograph of his own young children. There was no *Harvey* error, and thus no ineffective assistance of counsel in failing to object to the alleged error.

### III. DISPOSITION

The judgment is affirmed.

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Sepulveda, J.\*

We concur:

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Ruvolo, P. J.

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Rivera, J.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.