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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.
JAIME FRANCO GUZMAN,
Defendant and Appellant.

A132789
(San Mateo County
Super. Ct. No. SC063118A)

On January 18, 2011, we affirmed the judgment in this sexual molestation case upholding the jury verdict finding defendant guilty of seven counts of lewd and lascivious conduct upon a child under the age of 14 years (Pen. Code,¹ § 288, subd. (a)), and five counts of sexual penetration of a child under the age of 10 years (§ 288.7, subd. (b)). (*People v. Guzman* (Jan. 18, 2011, A123734) [nonpub. opn.] (*Guzman I.*)) We concluded that the jury's findings on two additional counts of section 288.7, subdivision (b), specifically counts 23 and 26, violated the ex post facto clauses of the state and federal constitutions because it was conceivable that the jury could have convicted defendant on those counts based on acts that occurred prior to September 20, 2006, the effective date of section 288.7. (*Guzman I, supra*, A123734 at p. 13.) We determined that there was sufficient evidence to support defendant's conviction of two section 289 offenses [sexual penetration with a person who is under 14 years of age and who is more than 10 years younger than perpetrator] as lesser included offenses. (*Ibid.*)

¹ All further statutory references are to the Penal Code.

We therefore modified the judgment to reflect convictions of the lesser included offense of section 289 and remanded the matter to the trial court for resentencing. (*Ibid.*) This appeal follows our remand of the cause for resentencing.

On remand, the trial court sentenced defendant to state prison for the total indeterminate term of 45 years to life. The court imposed the midterm of six years on both counts 23 and 26, the sentences to be served concurrently to the 45 year to life term. Defendant contends that the court's sentence constitutes cruel and unusual punishment. He also argues that the matter must be remanded for a calculation of presentence credits. We conclude that defendant is entitled to presentence conduct credits and remand the matter for that purpose. In all other respects, we affirm.

DISCUSSION

Defendant contends that the 45 year to life sentence constitutes cruel and unusual punishment in violation of the federal and state constitutions. He acknowledges that this court rejected his claim in his first appeal. He raises the issue only to preserve it should he seek further review in the federal courts.

The law of the case doctrine precludes our reconsideration of the sentencing issue in this appeal. “[W]here an appellate court states a rule of law necessary to its decision, such rule ‘ ‘must be adhered to’ ’ in any ‘ ‘subsequent appeal’ ’ in the same case, even where the former decision appears to be ‘ ‘erroneous.’ ’” (*People v. Whitt* (1990) 51 Cal.3d 620, 638, quoting *People v. Shuey* (1975) 13 Cal.3d 835, 841.) “ ‘The primary purpose served by the law-of-the-case rule is one of judicial economy.’ [Citation.] It prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances. [Citation.] In criminal cases, the prosecution and defense are both bound by the rule.” (*Whitt, supra*, at p. 638.) In *Guzman I*, we rejected defendant's cruel and unusual punishment claim, holding that the sentence was not disproportionate to defendant's crimes. (*Guzman I, supra*, A123734 at pp. 14-15.) We adhere to our prior ruling in this appeal.

Defendant also contends that the matter must be remanded to calculate the custody credits he earned while he was in county jail as a result of the resentencing proceedings.

At the sentencing hearing, the court stated that the credits would be calculated by the Department of Corrections and Rehabilitation.

The Attorney General concedes the error. Upon remand for resentencing, the trial court was required to recalculate custody credits under section 2900.1.² “[W]hen a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence *all actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) We therefore remand the cause for a calculation of actual custody credits.

DISPOSITION

The matter is remanded to the trial court for a calculation of custody credits. The trial court is directed to issue an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.

² Section 2900.1 provides: “Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts.”