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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.

MICHAEL GAMEZ

Defendant and Appellant.

A134486

(Contra Costa County

Super. Ct. No. 05-110717-6)

Defendant Michael Gamez appeals from a final judgment after a no contest plea to eight counts of Penal Code section 288, subdivision (a) (performing a lewd act on a person under the age of 14 years). No finding of probable cause for the appeal was made by the trial court and no application of a finding was presented by defendant. Appellate counsel has reviewed the file in this case and determined there are no meritorious issues to raise on appeal. He has complied with the relevant case authorities. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, and filed a supplemental brief addressed below. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm the judgment.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On May 24, 2011, the district attorney filed an information charging Gamez with eight counts of lewd conduct on a minor under the age of 14, a violation of Penal Code section 288, subdivision (a). The information further alleged defendant was ineligible for probation under Penal Code section 1203.066, subdivision (a)(8) because he had

substantial sexual conduct with a minor under the age of 14. Defendant entered a not guilty plea to the information.

On October 26, 2011, defendant changed his plea to no contest for all eight of the felonies and admitted the enhancement under section 1203.066, subdivision (a)(8). He was advised the court would impose a state prison sentence of no less than three years and not more than eight years.

On January 6, 2012, the trial court imposed the aggravated term of eight years in state prison on Count One, and then imposed on Counts Two — Eight a “one-third of the midterm” (two years) running concurrent with the sentence on Count One. Additionally, the court imposed various fines and fees along with custody credits not at issue in this appeal.

The facts in this case are based on the reports of Jane Doe, who was 13 at the time of the criminal acts. She met defendant through her father while on a family vacation. By July 2010, the relationship was such that defendant, age 31, visited the minor at her home and engaged in oral sex in her bedroom. A few days later, the couple went to a restaurant and then to a park where they played Frisbee together. While in the defendant’s car, the twosome then engaged in oral sex. Later in July, at a drive-in theatre, the minor again gave oral sex to defendant. Finally, on another occasion in July 2010, he had sexual intercourse with the minor in her bedroom with defendant using a condom.

During the investigation, the investigator asked the minor the number of times defendant had performed oral sex with her. She responded the number was 15 to 20 times and she performed oral sex on defendant five times. She also indicated defendant had sought out the sexual relationship with her.

The police interviewed defendant who acknowledged he had kissed the minor on several occasions and had performed oral sex on her two times. He indicated she had performed oral sex on defendant three times. Defendant denied any sexual intercourse with Jane Doe. Defendant did write a letter of apology to the minor.

At the sentencing hearing, defense counsel sought the imposition of the mitigated term. She pointed out the defendant had no prior record and had acknowledged his wrongdoing early in the case. The trial court affirmed the lack of prior criminal conduct was a mitigating factor. However, the court believed, because of the “no contest” plea, the defendant did not enjoy early acknowledgment of guilt because he had pled “no contest” as opposed to “guilty.” Yet the trial court indicated that regardless whether a “no contest plea” is a mitigating or aggravating factor, she would not consider the nature of his plea in the sentence she imposed. This position satisfied defense counsel. The defense presented reports and evidence in mitigation of sentence. Of course, the district attorney presented the victim and her family, and argued for the aggravated sentence.

In the end, the court admitted this was not an easy sentence. She pointed out aggravating factors that included breach of a position of trust and the clear vulnerability of the victim aged 13. The impact of the crimes on Jane Doe “swayed” the court “a great deal.” The court proceeded to impose the aggravated term.

In his supplemental brief, appellant spends considerable time on the bias of the probation officer and the flaws in his report. Needless to say, the sentencing judge was quite critical of the report itself. She noted that before her legal career began, she was a probation officer assigned to Judge Arnason in Contra Costa County. She stated at sentencing “I have never seen anything quite like this, inappropriate comments in the report.” The judge found the report “very annoying” and proceeded to strike several references from the report. She also gave defense counsel opportunity to strike additional portions of the probation report, but appellant’s lawyer was satisfied with what the court had done.

Also, at sentencing, the court was quite candid regarding its sentencing considerations. She did indicate Jane Doe had substantially changed from the “child” seen in the police video tapes, taken shortly after the crimes against her occurred, to the young woman observed by the court at sentencing whose demeanor and appearance the court found shocking. While the court viewed Jane Doe’s behavior as voluntary, she was but 11 when she first met defendant; and at all times pertinent herein, defendant was the

31-year-old adult. Also, the court believed the criminal offenses here triggered an unfortunate maturing in Jane Doe that explained her current “demeanor.”

Regarding the balancing of factors in aggravation versus mitigation, the bottom line to the sentencing judge was the ongoing pattern of multiple sexual interactions between the “adult” defendant and the “young girl,” adults obviously being obligated to better understand what constitutes proper behavior. Jane Doe could well be affected for many years by this premature experience.

### **DISCUSSION**

This case involves the appellate review of the exercise of a trial court’s sentencing discretion. The aggravated term that was imposed was within the range discussed at the time the plea of no contest was entered. The court articulated her conclusions at a hearing in which each side presented their arguments for a proposed sentence and each side was fully heard by the judge. There is no evidence defendant was represented by other than able counsel. There was no finding of probable cause in the review of the sentencing proceedings.

Focusing on appellant’s supplemental brief, we conclude the challenges argued regarding the probation report and its author were fully considered by the trial court. A reading of the sentencing transcript as indicated above supports the conclusion the trial court imposed the aggravated term of eight years based on the pattern of criminal conduct and the judge’s honest assessment of the dynamics of the crimes on Jane Doe. In fact, while the court imposed an eight year sentence, she chose to not follow the demand by Jane Doe, her parents, and the deputy district attorney, that more time was proper. The sentence will not be disturbed here.

The judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.