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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

DRACO JOHN FLAMA,

Defendant and Appellant.

C067481

(Super. Ct. No. CM03391)

Pursuant to a plea bargain, defendant Draco John Flama pled no contest to oral copulation with a person under 18 years of age (Pen. Code, § 288a, subd. (b)(1) -- count 3) in exchange for the dismissal of charges of unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (c) -- count 1), sodomy of a person under 18 (Pen. Code, § 286, subd. (b)(1) -- count 2), and

sexual penetration with a foreign object upon a person under 18 (Pen. Code, § 289, subd. (h) -- count 4).¹

Defendant's ensuing appeal is subject to the principles of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106, 110. In accordance with *Kelly*, we will provide a summary of the offenses and the proceedings in the trial court.

Defendant was sentenced to state prison for three years. The court imposed restitution fines of \$600 in accordance with Penal Code sections 1202.4 and 1202.45, a criminal conviction assessment of \$30 (Gov. Code, § 70373), a court security fee of \$40 (Pen. Code, § 1465.8), and ordered defendant to register as a sex offender under Penal Code section 290. The court credited defendant with 78 days of actual custody and 78 days for conduct, for a total presentence custody credit of 156 days.

FACTUAL BASIS FOR PLEA

Between October 1 and 8, 2010, defendant had a 17-year-old girl stay with him for a week. During that time, she engaged in an act of oral copulation with him on school grounds, "among other things." The incident was witnessed by a third party.

DISCUSSION

Defendant appealed and we appointed counsel to represent him. Counsel filed an opening brief that sets forth the facts of the case and asks us to review the record and determine

¹ Defendant entered a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, with respect to the three dismissed counts.

whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief, and defendant has done so.

In defendant's supplemental brief, he takes issue with statements made by the prosecutor and the probation officer that were used by the court in exercising its discretion to order sex offender registration. (See *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1192-1193 [sex offender registration for violation of Penal Code section 288a, subd. (b)(1) is discretionary, not mandatory].)

Defendant cites the following statements made by the prosecutor: (1) "He is a self[-]described deviant, is a sadistic slave master. He's created this persona for himself of Draco Flama, uses the Internet to befriend under age females." (2) "I believe that the Court's intended ruling of an upper term in state prison is not only appropriate, it is necessary in order to protect society from this sexual predator." The probation officer, in her report, stated, "The defendant spent almost two years grooming the victim to prepare her for a sexual relationship."

According to defendant, the above statements were made "with no supporting evidence, whatsoever." To the contrary, we conclude substantial evidence exists in support of the above facts and inferences to be drawn therefrom.

According to the probation report, the victim told the investigating officer "she had carried on a two-year Internet

relationship with the defendant, beginning when she was age 15." When she was 16 and he was 34, they began talking about meeting face to face. They met when she took a bus to Chico. During their relationship, "they engaged in sexual intercourse four to five times, she orally copulated him two to three times, he sodomized her twice, and he digitally penetrated her vagina once."

Defendant told the probation officer that he is "involved in sadomasochism," and that his lifestyle includes "slave/master" relationships. Defendant admitted having been arrested in Kansas for a sexual relationship with a 17-year-old female who was also into "sadomasochism" and "slave/master" relationships. According to the arresting officer's report, defendant was currently on probation in Kansas for two misdemeanor counts of "sexual battery" and "criminal restraint." An arrest warrant had been issued for defendant because he had left the jurisdiction without permission and had failed to register as a sex offender.

The foregoing statements amply support the findings that defendant was grooming the victim for a future sexual encounter, that he was a sexual predator, and that sex registration was necessary for the protection of society. Consequently, we reject defendant's contentions.

However, our review of the record does disclose an error. The court credited defendant with 78 days for actual confinement and 78 days for conduct credit. Because defendant is required to register as a sex offender, he is not entitled to the one-

for-one credits set forth in the amendments to Penal Code, former sections 4019 and 2933. (Stats. 2010, ch. 426 (eff. Sept. 28, 2010).) Instead, his presentence conduct credit is controlled by the formula set forth in *People v. Smith* (1989) 211 Cal.App.3d 523, 527 -- actual days divided by four, any remainder truncated, and the quotient multiplied by two. Thus, defendant was eligible for only 38 days of conduct credit, for a total presentence custody of 116 days.

DISPOSITION

The matter is remanded to the Butte County Superior Court with directions to prepare an amended abstract of judgment reflecting the foregoing changes in presentence custody credit, and to forward a certified copy of the amended abstract of judgment to the Director of the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.