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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JENNIFER PEARL CARTER,

Defendant and Appellant.

C069709

(Super. Ct. No.  
CRF113618)

Defendant Jennifer Pearl Carter pleaded no contest to embezzlement from an elder. The trial court sentenced her to one year in prison consecutive to a two-year prison term she was already serving on a prior conviction.

Defendant contends (1) the trial court should have committed her to county jail under the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, ch. 15), and (2) the failure to commit her to jail violated her right to equal protection.

We conclude (1) defendant was already sentenced to prison on a prior conviction constituting the principal offense, and thus she must also serve her subordinate term for embezzlement in prison, even though the offense would otherwise qualify for a jail commitment under the Realignment Act; and (2) this court recently rejected equal protection contentions in *People v. Lynch* (Sept. 13, 2012, C068476) \_\_\_\_ Cal.App.4th \_\_\_\_ [2012 Cal.App. Lexis 975], and that decision resolves defendant's contentions here.

We will affirm the judgment.

#### BACKGROUND

Defendant used her grandmother's ATM card and personal identification number to make ten unauthorized withdrawals totaling \$420. She subsequently pleaded no contest to embezzlement from an elder. (Pen. Code, § 368, subd. (d)).<sup>1</sup>

At the time of her plea defendant was already serving a two-year prison sentence in case No. 11-1444 for felony theft or unauthorized use of a vehicle, along with a concurrent two-year prison term in case No. 10-2558 for possession of a controlled substance.

The plea agreement in this case included a stipulated sentence of one year, to run consecutively to the two-year term in case No. 11-1444. But the prosecutor informed the trial court that the parties could not agree whether defendant would

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

be committed to prison, or whether she would be committed to jail pursuant to the Realignment Act.

The probation report recommended that the trial court sentence defendant to prison. The report said defendant was not entitled to commitment in jail for the embezzlement offense because she was already serving a prison term.

Nonetheless, at the sentencing hearing, defense counsel and the prosecutor agreed that defendant should be committed to jail under the Realignment Act because she was being resentenced on the prior conviction. The trial court disagreed and sentenced her to an aggregate term of three years in prison, consisting of two years for theft or unauthorized use of a vehicle in case No. 11-1444, and a consecutive one year (one-third the middle term) for the embezzlement offense in this case.

#### DISCUSSION

##### I

Defendant contends the trial court should have sentenced her to two years in jail in case No. 11-1444 and a consecutive one year in jail in this case, because (a) the trial court resentenced her in case No. 11-1444 after the effective date of the Realignment Act, and (b) the effective date of the Realignment Act should be retroactive under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). Defendant is incorrect on both points.

##### A

With certain exceptions, felons sentenced under the Realignment Act are committed to jail rather than prison, may have a concluding portion of their sentence suspended in lieu of

probation, and are not subject to parole. (§§ 3000 et. seq., 1170, subds (h)(1)-(3), (5).) But prison sentences are imposed for felons who have current or prior serious or violent felony convictions, who are required to register as sex offenders, or who have sustained a section 186.11 aggravated white collar crime enhancement. (§ 1170, subd. (h)(3).) Defendant's offenses in this case and in case Nos. 11-1444 and 10-2558 are not among the crimes exempted from a jail commitment under the Realignment Act.

The Realignment Act sentencing scheme applies to defendants sentenced on or after October 1, 2011. (§ 1170, subd. (h)(6).) Defendant argues that although her original sentence in case No. 11-1444 was imposed before the effective date of the Realignment Act, the trial court resentenced her in case No. 11-1444 after the effective date, and hence she should have been committed to jail.

The trial court, however, did not modify the sentence in case No. 11-1444. As a general rule, a sentence lawfully imposed may not be modified once a defendant is committed and execution of sentence has begun. (*People v. Bozeman* (1984) 152 Cal.App.3d 504, 507.) Nonetheless, when a subsequent consecutive term is added to a prior term, the terms must be combined into an "aggregate term of imprisonment." (§ 1170.1, subd. (a); Cal. Rules of Court, rule 4.452(1).) The trial court must recalculate the subordinate term under the one-third rule (§ 1170.1, subd. (a)) by reducing the terms for both the conviction and any specified enhancements applicable to the

subordinate term. "While imposing the current, consecutive sentence, the second court is empowered to modify a sentence previously imposed by a different court and make it subordinate to the later-imposed term." (*People v. Baker* (2002) 144 Cal.App.4th 1320, 1329.)

A trial court can modify a previously executed sentence, but only if that sentence is designated as a subordinate term to the sentence for the new crime. Here, however, the trial court designated the new conviction for embezzlement as subordinate to defendant's prior sentence for vehicle theft. As a result, defendant was sentenced to prison in case No. 11-1444 before the effective date of the Realignment Act, and the trial court in this case did not modify that sentence.

Under these circumstances, the aggregate prison sentence was authorized by section 1170.1, subdivision (a), which states: "Whenever a court imposes a term of imprisonment in the state prison, whether the term is a principal or subordinate term, the aggregate term shall be served in the state prison, regardless as to whether or not one of the terms specifies imprisonment in the county jail pursuant to subdivision (h) of Section 1170."

Because defendant was sentenced to prison in case No. 11-1444 for the principal offense, she must also serve her subordinate term for embezzlement in prison, even though the offense would otherwise qualify for a jail commitment under the Realignment Act.

B

Defendant next argues that the Realignment Act jail provisions should apply to her retroactively pursuant to *Estrada, supra*, 63 Cal.2d 740. *Estrada* held that an amendment to a statute lessening the punishment for a crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.) Defendant claims that because the Realignment Act lessens punishment for her offenses, it should be construed to apply retroactively to her sentence in case No. 11-1444.

The *Estrada* rule is limited to cases where the Legislature has not indicated whether a change in the law reducing punishment is to be applied retroactively. "The rule in *Estrada*, of course, is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of an express saving clause or its equivalent." [Citation.]" (*People v. Floyd* (2003) 31 Cal.4th 179, 185; italics omitted.) Here, however, the Legislature expressly limited application of the Realignment Act to sentences taking place on or after October 1, 2011. Because defendant was sentenced before that date in case No. 11-1444, the Realignment Act does not apply to defendant's sentence in that case.

II

Defendant alternatively contends that prospective application of the Realignment Act sentencing provisions violates her equal protection rights. Although in part I she argued that *Estrada* retroactivity applies because the

Realignment Act reduces punishment, her alternative argument in part II is that the holding in *In re Kapperman* (1974) 11 Cal.3d 542 applies because the Realignment Act does *not* reduce punishment.

This court recently rejected such equal protection contentions in *People v. Lynch* (Sept. 13, 2012, C068476) \_\_\_ Cal.App.4th \_\_\_ [2012 Cal.App. Lexis 975]. The decision in that case resolves defendant's contentions here.

DISPOSITION

The judgment is affirmed.

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MAURO, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.