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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. WAYLAND ALLEN RUDD, Defendant and Appellant.	C087595 (Super. Ct. No. 16CF05754)

Defendant Wayland Allen Rudd pleaded no contest to one count of possession of child pornography after a prior conviction for sending or exhibiting harmful matter to a minor (count 1) and one count of possession of sadomasochistic child pornography (count 2).

On appeal, defendant contends his concurrent sentence for count 2 should have been stayed pursuant to Penal Code section 654.[1] We agree and modify the judgment accordingly.

BACKGROUND

On December 27, 2016, the Butte County District Attorney filed an information charging defendant with possession of child pornography after a prior conviction for a violation of section 288.2, subdivision (a), which required him to register as a sex offender (count 1), and possession of sadomasochistic child pornography (count 2). (§ 311.11, subds. (b), (c)(2).)

At the time defendant committed the offenses, he was on postrelease community supervision following his prior conviction. Probation officers conducted a search and found defendant in possession of one cell phone with 16 photos of child pornography and a second cell phone with 595 photos of child pornography. One of the images found on the second cell phone depicted a child experiencing pain.

On November 30, 2017, defendant pleaded no contest to both counts. The probation report noted without explanation that section 654 did not apply and no party raised the application of section 654 at sentencing. The trial court sentenced defendant to the upper term of six years in state prison on count 1, and a concurrent middle term of two years on count 2.

DISCUSSION

Defendant contends the sentence imposed for count 2 should have been stayed pursuant to section 654. He argues that both offenses are based on the possession of multiple images of children on the same cell phone, a single act resulting in violations of both subdivisions. We agree.

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[1] Further undesignated statutory references are to the Penal Code.

In relevant part, section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.*, subd. (a).) "Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences." (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

Defendant relies on *People v. Hertzig* (2007) 156 Cal.App.4th 398 and *People v. Manfredi* (2008) 169 Cal.App.4th 622 to support his claim that the possession of multiple images of child pornography are subject to a single punishment. In *Hertzig*, this court held that the defendant's possession "of multiple images on one computer" was a single violation of section 311.11, subdivision (a). (*Hertzig*, at pp. 401-402.) The *Hertzig* court analyzed other types of possession cases, including *People v. Rouser* (1997) 59 Cal.App.4th 1065, where the court held that the possession of " 'two or more discrete controlled substances (here methamphetamines and heroin) at the same location constitutes but one offense under Penal Code section 4573.6.' " (*Hertzig*, at p. 403, citing *Rouser*, at p. 1067.) The *Hertzig* court held that as in *Rouser*, the defendant "violated a provision of the Penal Code by the solitary act of possessing the proscribed property." (*Hertzig*, at p. 403; see also *People v. Toure* (2015) 232 Cal.App.4th 1096, 1105-1106 [reasoning that a defendant may be convicted under Vehicle Code section 23153, subdivisions (a) and (b) for both driving under the influence and driving with a blood-alcohol level of 0.08 percent or more but may only be sentenced under one subdivision where both charges relate to the same act of driving].)

Similarly, in *People v. Manfredi*, *supra*, 169 Cal.App.4th at pages 633-634, the court reasoned that section 311.11's criminalization of the possession of "any matter" suggested a legislative intent to proscribe a broad course of conduct involving multiple pornographic images on multiple devices. The court held that the possession of multiple images of child pornography cannot be "fragmented" so long as the images are possessed

simultaneously and are "found at the same time and in the same place." (*Manfredi*, at p. 634.)

The Attorney General argues that we should disregard the reasoning in *Hertzig* and *Manfredi* because by amending section 311.11 to include greater penalties for that particular type of child pornography, "the Legislature deemed that one who possesses sadomasochistic child pornography is more culpable than one who possesses other types of child pornography." Although this may well be true, it is also true that the Legislature left the *greatest* punishment for repeat offenders like defendant, who received the upper term of six years on count 1, whereas his upper term exposure on count 2 was five years. (See § 311.11, subds. (b), (c).) The statutory scheme here is analogous to that discussed in *People v. Toure, supra*, 232 Cal.App.4th at page 1106, where the court reasoned that both offenses under Vehicle Code section 23153, subdivisions (a) and (b), driving under the influence and driving with a blood-alcohol level of 0.08 percent or more, involve different elements of proof and while "dual convictions are both possible and proper," dual *punishments* are improper "where both charges relate to the same act of driving."

In response to *Hertzig* and *Manfredi*, the Legislature had the opportunity to amend the Penal Code to allow the possession of multiple images of child pornography or multiple types of child pornography to be fragmented into separately punishable offenses. Instead, the Legislature added higher penalty provisions for the same underlying crime of possession where certain aggravating factors are proven, including the possession of sadomasochistic material or the possession of more than 600 images. (See § 311.11, subds. (b), (c).) There is no indication that the Legislature did so in order to circumvent the application of section 654.

Defendant, as a recidivist, was subject to the highest available triad for possessing the images *in toto*, and he received the upper term of that triad on count 1. His punishment for count 2 must be stayed, as it is related to the same act of possessing multiple images for which he has already been punished.

DISPOSITION

The judgment is modified to stay sentence on count 2. The trial court is directed to prepare an amended abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Butz, Acting P. J.

/s/
Renner, J.