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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

BARRY MARLON SUMMERS,

Defendant and Appellant.

E053155

(Super.Ct.No. FSB029047)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

In 2002, defendant Barry Marlon Summers was found guilty on three counts of committing a lewd or lascivious act on a child under 14 years. (Pen. Code, § 288, subd. (a).)

On count 1, pursuant to the “one strike” law (Pen. Code, § 667.61), defendant was sentenced to an indeterminate term of 15 years to life. On count 3, he was sentenced to eight years (the upper term). On count 2, he was sentenced to two years (one-third the midterm). Thus, the total sentence was 25 years to life. In calculating defendant’s presentence conduct credits, the trial court applied the 15 percent limitation of Penal Code section 2933.1.

Defendant appealed. In 2004, we affirmed the judgment. (*People v. Summers* (Feb. 4, 2004, E032940) [nonpub. opn.].)

In January 2011, the prosecution and defendant stipulated to reduce the sentence on count 3 to six years (the midterm), based on *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856]. Thus, the total sentence became 23 years to life.

In March 2011, defendant filed a motion to “correct” the sentence. In it, he argued, among other things, that the trial court had violated ex post facto principles by applying Penal Code section 2933.1 to offenses committed before its enactment. The trial court denied the motion without a hearing. Defendant appealed.

Defendant's sole appellate contention is that the trial court erred by applying Penal Code section 2933.1 to all three counts, because two of the counts were committed before Penal Code section 2933.1 went into effect. We disagree. Hence, we will affirm.

## I

### FORFEITURE

Preliminarily, the People contend defendant forfeited his present contention by failing to raise it in his previous appeal.

“[O]rdinarily, no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment. [Citation.]” (*People v. Totari* (2002) 28 Cal.4th 876, 882.) This rule has been applied not only to a motion to vacate a judgment of conviction, but also to “any postjudgment attack upon the conviction or sentence.” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981.) “In such a situation appeal from the judgment is an adequate remedy; allowance of an appeal from the order denying the motion to vacate would virtually give defendant two appeals from the same ruling and, since there is no time limit[] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment. [Citation.] The considerations are the same whether the matters sought to be presented by motion to vacate actually were presented to the trial court prior to judgment of conviction, or whether such matters should have been but were not so presented.’ [Citation.] In other words, ‘an order ordinarily is not appealable when the appeal would merely bypass or

duplicate appeal from the judgment itself.’ [Citation.]” (*People v. Totari, supra*, at p. 882.)

However, “[a]n exception to the general rule of nonappealability of a postjudgment order of denial occurs when the final judgment at issue is void. [Citation.]” (*People v. Totari, supra*, 28 Cal.4th at p. 885, italics omitted.) “A sentence not authorized by law is subject to correction whenever the error comes to the attention of the trial court or a reviewing court. [Citations.] In such a case, the sentence, or at least its unlawful part, is void. [Citations.]” (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 434 [Fourth Dist., Div. Two].)

Here, defendant is claiming that the sentence was unauthorized. This claim has not been forfeited.

## II

### DISCUSSION

#### A. *Statutory Construction.*

Defendant argues that Penal Code section 2933.1, by its terms, does not apply to count 2 or count 3.

Penal Code section 2933.1, subdivision (a) applies to “any person who is convicted of a [violent] felony. . . .” A lewd act on a child is a violent felony. (Pen. Code, § 667.5, subd. (c)(6).)

Penal Code section 2933.1, subdivision (c) then provides that presentence conduct credit “shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).”

Penal Code section 2933.1, however, expressly applies only “to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative.” (Pen. Code, § 2933.1, subd. (d).) It became operative on September 21, 1994. (Stats. 1994, ch. 713, § 2, p. 3448.)

In this case, as the People concede, “count 1 is the only count which definitively occurred after . . . September 21, 1994.” The evidence established only that count 2 occurred sometime between December 1993 and December 1995 and count 3 occurred sometime between May 1994 and May 1996. (*People v. Summers, supra*, E032940, slip opn. at p. 3.) Thus, Penal Code section 2933.1 applied only to count 1.

Under *People v. Ramos* (1996) 50 Cal.App.4th 810, however, this required the trial court to limit defendant’s credits on count 2 and count 3. *Ramos* held that, where a defendant is convicted of both a violent and a nonviolent offense, Penal Code section 2933.1 limits the defendant’s credits on both. It reasoned that the language of Penal Code section 2933.1, subdivision (a) “limits to 15 percent the maximum number of conduct credits available to ‘any person who is convicted of a [violent] felony offense listed in [Penal Code] Section 667.5.’ That is, by its terms, [Penal Code] section 2933.1 applies to the offender not to the offense and so limits a violent felon’s conduct credits irrespective of whether or not all his or her offenses come within [Penal Code] section 667.5. The

Legislature could have confined the 15 percent rule to the defendant’s violent felonies if that had been its intention. [Citation.]” (*Ramos*, at p. 817; see also *In re Reeves* (2005) 35 Cal.4th 765, 775-776.)

Admittedly, Penal Code section 2933.1, subdivision (d) specifically excludes certain offenses, not certain offenders. Nevertheless, under the literal language of the statute, count 1 is an “offense[] listed in subdivision (a).” (Pen. Code, § 2933.1, subd. (d).) Moreover, it is an “offense[] . . . committed on or after the date on which [Penal Code section 2933.1] bec[a]me[] operative.” Thus, defendant is a “person specified in subdivision (a).” (Pen. Code, § 2933.1, subd. (c).) It follows that *he* cannot earn *any* presentence conduct credit in excess of the 15 percent limit — even on count 2 or count 3.

B. *Ex Post Facto Analysis.*

Defendant argues that this result violates the federal and state constitutional prohibitions on ex post facto laws.

“[A]n impermissible ex post facto law is one which ““makes more burdensome the punishment for a crime, after its commission.”” [Citation.]” (*In re E.J.* (2010) 47 Cal.4th 1258, 1279.)

*Weaver v. Graham* (1981) 450 U.S. 24 [67 L.Ed.2d 17, 101 S.Ct. 960] applied ex post facto principles to credits. There, after the defendant had been convicted and sentenced, a statutory amendment was adopted reducing the rate at which postsentence conduct credit could be earned. (*Id.* at pp. 25-27.) The United States Supreme Court held that the amendment, as applied to the defendant, was unconstitutionally ex post facto.

(*Id.* at p. 35.) It explained that “two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations.]” (*Id.* at p. 29, fns. omitted.) The state argued that the amendment was not retrospective because it applied only after its effective date. (*Id.* at p. 31.) The Supreme Court disagreed: “For prisoners who committed crimes before its enactment, [the amendment] substantially alters the consequences attached to a crime already completed, and therefore changes ‘the quantum of punishment.’ [Citation.]” (*Id.* at p. 33.)

In *In re Ramirez* (1985) 39 Cal.3d 931, however, the California Supreme Court distinguished *Weaver*. There, after the defendant had committed his crime, been convicted, and been sentenced, a statutory amendment increased the range of types of bad conduct that would result in a loss of postsentence conduct credit; it also increased the amount of credit lost. (*Ramirez*, at p. 933.)

Our high court held that the amendment was not retrospective. (*In re Ramirez*, *supra*, 39 Cal.3d at pp. 936-937.) It explained: “It is true that the . . . amendments apply to petitioner only because he is a prisoner and that he is a prisoner only because of an act committed before the . . . amendments. Nonetheless, the increased sanctions are imposed solely because of petitioner’s prison misconduct occurring after the . . . amendments became effective. In other words, the . . . amendments apply only to events occurring *after* their enactment. . . . Accordingly, the . . . amendments, which change the sanctions

for that misconduct, do not relate to petitioner’s original crime and are not retrospective under *Weaver*.” (*Ibid.*)

“In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party’s liability for, an event, transaction, or conduct that was *completed* before the law’s effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute’s effective date. [Citations.] A law is not retroactive “merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.” [Citation.]’ [Citation.]” (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1273-1274.)

Here, the “last act or event” is count 1 — defendant’s commission of a violent felony after September 21, 1994. As in *Ramirez*, the result is an increase in the punishment for an earlier offense. Nevertheless, because the increase in punishment is triggered by the defendant’s voluntary commission of an additional offense following the effective date of the amendment, the amendment is not unconstitutionally *ex post facto*. (See also *John L. v. Superior Court* (2004) 33 Cal.4th 158, 174-176 [amendment changing evidentiary standards and burden of proof in juvenile probation violation proceedings is not retrospective because it is triggered by new misconduct].)

### III

#### DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

McKINSTER  
Acting P.J.

MILLER  
J.