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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.

BRIAN LEE GRAYSON,

Defendant and Appellant.

E056723

(Super.Ct.No. SWF1200751)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,  
Judge. Affirmed with directions.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, and Barry Carlton, Deputy Attorney General,  
for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Brian Lee Grayson pleaded  
guilty to one count of committing a lewd and lascivious act on a child under age 14.

(Pen. Code, § 288, subd. (a).) He was sentenced to the low term of three years in prison

for this offense. He has filed a timely notice of appeal. We order the trial court to modify the restitution fine order and to correct the calculation of defendant's pretrial custody credits, but otherwise affirm the judgment.

### FACTS AND PROCEDURAL HISTORY

In April 2002, the Hemet Police Department opened an investigation in a child molestation case. The victim was 10 years old at the time. She related that one evening in March 2002, while they were sitting on the couch, defendant (her mother's boyfriend) leaned over and made hand motions toward her vagina. He did not touch her at that time. Later the same night, however, she was awakened from sleep when she felt something rubbing on her vagina over her clothing. She saw defendant lying next to her on the bed with his hand on her leg. She told him to leave the room, which he did. When the investigating officers attempted to investigate further, defendant and the victim's mother, together with the children, fled to another state.

In 2003, the investigating officer discovered defendant's whereabouts in Oregon. In a telephonic interview, defendant denied molesting the victim. He explained that one of the other children had wet the bed, and he moved both children to the dry area of the bed. Any touching was done inadvertently. The police referred the matter to the district attorney's office, but the prosecutor declined to file charges based on insufficient evidence.

In 2012, the Hemet Police Department received information from a social worker in Oregon. The social worker was assigned as the case worker for defendant and his children concerning domestic violence issues. Two years earlier, defendant had

confessed to another social worker that he did molest the victim; he did it to “get even” with the victim’s mother for allegedly “cheating on him” with another man. Case records from Oregon also documented a separate confession that defendant made to another social worker in 2011. Finally, a licensed psychologist also conducted an evaluation of defendant in 2010; in the course of the psychological evaluation, defendant had told the psychologist that he had molested the victim in 2002, even though he had denied the incident to police when he was questioned in 2002.

As a result of the new information obtained in 2012, the Hemet Police Department obtained an arrest warrant for defendant. Defendant was charged with one count of committing a lewd and lascivious act on a child under age 14 (Pen. Code, § 288, subd. (a), count 1), and one count of genital penetration with a foreign object on a child under age 14, and where the victim was over 10 years younger than defendant (Pen. Code, § 289, subd. (j), count 2). The complaint was filed in March 2012, and defendant was arraigned in May 2012. The court issued a protective order that defendant should have no contact with the victim.

About one week after arraignment, defendant agreed to plead guilty to count 1 of the complaint in exchange for dismissal of count 2, and he agreed to a prison term of three years. The plea agreement set forth that the offense was a strike offense, which would carry a requirement to register as a sex offender pursuant to Penal Code section 290.

Defendant requested immediate sentencing. The court denied probation and imposed the low term of three years in state prison. Defendant was given credit for 12

days of actual presentence custody, plus one additional day of custody credit pursuant to Penal Code section 2933.1, for a total of 13 days. The court imposed a restitution fine of \$240, and imposed (and suspended) a parole revocation fine in the same amount. The court ordered defendant to pay a court operations assessment fee of \$40, a conviction assessment fee of \$30, and a booking fee of \$450.34. The court reserved jurisdiction to determine the amount of victim restitution to be paid. Defendant was informed of his obligation to register as a sex offender upon his release.

About two months later, defendant filed a motion in propria persona to withdraw his guilty plea. He asserted that, one hour before his change-of-plea hearing, he had taken “some Doctor prescribed psychiatric medication for the first time,” and averred that he “now [felt] that I didn’t fully understand and was at a diminished capacity at the time of the plea agreement.” Defendant stated that he wanted to withdraw his plea also because he had discovered that the statute of limitations for the convicted offense was six years and it had expired by the time of his conviction. Defendant urged that his attorney had rendered ineffective assistance of counsel, because his attorney “did not inform me or the court of the (6) six year statute of limitations, nor prevent[] me from entering into the plea agreement when he knew I was distraught and not in my right mind.”

The People opposed defendant’s motion to withdraw his plea, noting that the statute of limitations for the convicted offense had been changed. Whereas most felony sex offenses had formerly had a six-year statute of limitations, by legislation effective on January 1, 2006, the statute of limitations was extended: when the victim was under age 18, the offense may be prosecuted up until the victim’s 28th birthday. (Pen. Code,

§ 801.1, subd. (a).) In this case, the victim would not have her 28th birthday until 2020. The People also argued that defendant had failed to meet his burden of showing good cause to withdraw his plea on the alleged ground of mistake, ignorance, or incapacity. The proposition that defendant would have been given psychiatric medication one hour before the taking of his plea was preposterous, and not supported by any evidence: defendant provided no prescription, no doctor's report or other information, or even the name of the doctor or medication he had taken. No affidavit of counsel attesting to defendant's impairment was included in the motion papers. "It absolutely flies in the face of reason to believe the defendant was given psychiatric medication for the very first time while he was incarcerated in jail, right before coming to court." Further, defendant "has not shown any evidence that taking this medication actually resulted in a diminished capacity or sudden lack of understanding and free judgment." Defendant had failed to meet his burden of showing, by clear and convincing evidence, that his judgment was overborne.

The trial court stated that it had no jurisdiction over defendant's motion to withdraw his plea, and placed the matter off calendar. Defendant filed a notice of appeal and obtained a certificate of probable cause in July 2012.

## ANALYSIS

### I. Appellate Counsel's Brief

Defendant's appointed attorney on appeal has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], raising no specific issues, but requesting this court to review

the entire record to determine whether the record reveals any issues which would, if resolved favorably to the defendant, result in a reversal or modification of the judgment.

Counsel has identified four potentially arguable issues: (1) Whether defendant's plea was knowing, intelligent, and voluntary; (2) Whether the imposition of a \$240 restitution fine violated ex post facto prohibitions; (3) Whether the trial court correctly determined that it did not have jurisdiction to hear defendant's motion to withdraw his guilty plea; and (4) Whether the statute of limitations had expired on the charged offenses (and whether trial counsel was consequently ineffective at the plea proceeding in failing to so advise defendant).

We treat these issues seriatim:

A. Defendant's Plea Was Knowing, Voluntary, and Intelligent

Defendant signed a change-of-plea form and entered his plea in open court. Defendant was advised of his constitutional rights, and the court conducted a thorough plea inquiry. Defendant responded rationally to all inquiries. No one, neither the trial judge, nor the prosecutor, nor defense counsel, nor defendant himself, gave any indication that defendant was anything other than fully cognizant of his actions and statements in making his plea. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.)

B. The Court-imposed Minimum Restitution Fine Must Be Modified

At the time defendant committed his crime, the minimum restitution fine was \$200. At the time of his guilty plea, that amount had been amended to \$240. (Pen. Code, § 1202.4, subd. (b)(1), amended by Stats. 2011, ch. 358, § 1.) "It is well established that the imposition of restitution fines constitutes punishment, and therefore is subject to the

proscriptions of the ex post facto clause and other constitutional provisions.” (*People v. Souza* (2012) 54 Cal.4th 90, 143.) Defendant here “cannot be burdened with the increased minimum fine, which was not in effect at the time the offenses were committed.” (*People v. Saelee* (1995) 35 Cal.App.4th 27, 31.) The trial court here manifestly intended to impose the minimum restitution fine (now set at \$240). The restitution fine should be modified to \$200.

### C. The Trial Court Lacked Jurisdiction to Hear Defendant’s Motion to Withdraw His Plea

Defendant’s motion to withdraw his plea raised claims of incompetence to make a knowing or intelligent plea (attributable to “psychiatric medication”), and the passage of the statute of limitations, plus attendant ineffective assistance of counsel (IAC) claims.

The trial court declined to rule on the motion, on the ground that it lacked jurisdiction to entertain the motion. Penal Code section 1018 provides in relevant part that, “On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.”

Here, defendant pleaded guilty, pursuant to a plea bargain, and requested immediate sentencing. He was thereupon sentenced to three years in state prison. Defendant did file his motion to withdraw his plea within a few weeks after pleading guilty, but the trial court declined to hear the matter, for lack of jurisdiction. Manifestly, defendant did not bring his motion to withdraw his plea before judgment. His request for

immediate sentencing meant that the judgment was entered immediately after the plea. Defendant also was denied probation; he therefore did not come within the clause permitting a motion to withdraw the plea to defendants who have been granted probation and had their sentences suspended. Thus, even though defendant brought his motion within six months of the time of judgment, he did not meet the statutory criteria to have his motion considered. The trial court properly determined that it lacked jurisdiction to entertain the motion to withdraw defendant's plea. (*People v. Wade* (1959) 53 Cal.2d 322, 339, overruled on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381.)

The proper procedure for seeking to withdraw a guilty plea after the entry of judgment is to petition for a writ of error *coram nobis* in the trial court. Denial of the writ would then be reviewable on appeal. (*People v. Lockridge* (1965) 233 Cal.App.2d 743, 745.) Even if the motion below were construed as a writ of error *coram nobis*, however, and the trial court's refusal to hear the motion treated as a denial of that petition, denial of defendant's claims was not an abuse of the trial court's discretion.

A writ of error *coram nobis* is granted only when strict requirements are met: (1) the petitioner must show that some fact existed which, without any fault on the petitioner's part, was not presented to the trial court, but which, if it had been presented, would have prevented the rendition of the judgment; (2) the petitioner must show that the newly discovered evidence does not go to the merits of the issues tried; and, (3) the petitioner must show that the facts relied upon were not known to him or her, and could not have been discovered in the exercise of due diligence, at any time substantially before the time the writ petition is filed. (*People v. Lockridge, supra*, 233 Cal.App.2d at p. 745.)

The facts on which defendant relies in his motion to withdraw the plea (treated as a petition for writ of error *coram nobis*), are that he was mentally impaired by psychiatric medication taken shortly before the plea and judgment, and the supposed expiration of the statute of limitations. Neither issue satisfies the strict requirements of the *coram nobis* writ. Defendant at all times knew what medication he had taken and how he felt or what he understood at the time of taking the plea. He at all times knew or should have known the proper statute of limitations for his offense, which was discoverable at any time.

As to the merits of the two claims, we have already (*ante*) discussed and rejected the substantive claim that defendant's plea was not voluntary, knowing, and intelligent, based on the supposed administration of psychiatric medication. There was no evidence that defendant was impaired in any way. We address and reject his substantive statute-of-limitations claim *post*, inasmuch as the statute of limitations was changed and extended by statute, well before the expiration of the former statute of limitations for defendant's offense. The failure of these claims defeats any claim that defendant's trial counsel was ineffective in failing to raise these issues below.

Procedurally, there was no error in the trial court's refusal to hear the untimely motion to withdraw defendant's plea. Substantively, the claims were without merit.

#### D. The Statute of Limitations Had Not Expired

Defendant committed the convicted offense in March 2002. At that time, the statute of limitations for violations of Penal Code sections 288, subdivision (a), and 289, subdivision (j), was six years. The maximum punishment for each of these offenses was

eight years in state prison; Penal Code section 800 provided for a six-year statute of limitations for any offense punishable by eight years or more.

In 2004, the Legislature added Penal Code section 801.1, which modified and extended the statute of limitations for certain offenses, including violations of Penal Code sections 288 and 289. The Legislature amended Penal Code section 801.1 in 2005, to provide in part that:

“(a) Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in Section . . . 288, . . . or 289, . . . that is alleged to have been committed when the victim was under the age of 18 years, may be commenced any time prior to the victim’s 28th birthday.

“(b) Notwithstanding any other limitation of time described in this chapter, if subdivision (a) does not apply, prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 290 shall be commenced within 10 years after commission of the offense.” (Stats. 2005, ch. 479, § 2.)

The addition of Penal Code section 801.1 in 2004, and the amendment in 2005, both long preceded the expiration of the standard six-year statute of limitations formerly applicable to the charged violations. “Although the six-year period of limitations was applicable when the offenses were committed, the extension of the limitations period . . . governs the present case without violation of the prohibition against ex post facto laws. ‘The critical question for purposes of ex post facto analysis’ is whether the provisions of the [extended] statute of limitations ‘became effective as to the charged offenses before expiration of the standard limitations period.’ [Citation.] While a ‘law enacted after

expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution,’ ‘“where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws.” ’ [Citations.] As a result of the sequence of revisions in the law, the six-year statute of limitations in section 800 had not expired when the [extended] statute of limitations became effective . . . , and was continuously in effect thereafter. [Citation.] Thus, the prosecution of defendant for the [charged] offenses . . . ‘was never time-barred, so constitutional *ex post facto* clause protection against prosecution with a statute of limitations enacted *after* a previous statute of limitations period expired is inapplicable. [Citations.] Here, the Legislature did not revive an expired statute of limitations period but simply extended one *before* expiration. That is constitutionally permissible.’ [Citation.]” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1272-1273.)

The extended statute of limitations in Penal Code section 801.1, subdivision (a), was the applicable provision in this case. The crimes were committed when the victim was under the age of 18, and the prosecution was commenced in 2012, before the victim’s 28th birthday. Defendant’s claim that the prosecution was barred by the statute of limitations is without merit.

## II. Defendant's Supplemental Brief

After appointed appellate defense counsel filed a brief asserting no arguable issues, we offered defendant the opportunity to file a personal supplemental brief, which he has done. We turn now to the issues defendant has raised.

Defendant urges that the conviction was improper because the statute of limitations should have been six years. We have addressed that issue, *ante*. The statute extending the statute of limitations for the charged crimes was amended well before the expiration of the six-year former statute of limitations.

Defendant contends that he did not receive all the presentence custody credits to which he was entitled. The trial court gave defendant credit for local time in California (12 days), and attendant conduct credit (1 day), for a total of 13 days. However, the court failed to give credit for time that defendant was incarcerated in Oregon before he was extradited to California. Appellate defense counsel has filed in this court an informational copy of a motion filed in the trial court below to correct the calculation of defendant's pretrial credits. The motion notes that defendant was arrested in Oregon on April 21, 2012, and extradited to California on May 4, 2012. The motion asks the trial court to award defendant a total of 28 days of presentence custody credit, consisting of 25 actual custody days, plus 3 days of conduct credit pursuant to Penal Code section 2933.1. Counsel argues in the motion below that a defendant is entitled to custody credit for time spent in jail in a foreign jurisdiction when that custody time is attributable to the charges on which the defendant is ultimately convicted. (See *In re Watson* (1977) 19 Cal.3d 646, 651-652.)

The trial court may correct the credits, even though the matter is pending on appeal, but for the sake of completeness, we direct the trial court to recalculate defendant's pretrial custody credits, to include the time defendant was incarcerated in Oregon awaiting extradition and trial for the current offense.

Finally, defendant objects to the characterization of the offense as a "violent crime." Defendant states that, "my crime was not a physically committed crime when done thus it should not be violent." Defendant evidently refers to the designation of his convicted offense as a "violent felony" for purposes of restricting his ability to earn conduct credits against his sentence. (Pen. Code, §§ 667.5, 2933.1.) The minute order of the change-of-plea hearing states: "Credit for time served of 12 days actual served plus 1 days pursuant to 2933.1 PC for a total of 13 days. (Violent Felony)."

Penal Code section 2933.1 provides that, "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." Penal Code section 667.5, subdivision (c), in turn, provides that, "(c) For the purpose of this section, 'violent felony' shall mean any of the following: [¶] . . . [¶] (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288. [¶] . . . [¶] (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289." Both charged offenses, one of which was the offense to which defendant pleaded guilty, are statutorily defined as "violent felonies" for purposes of Penal Code sections 667.5, and 2933.1. Even if defendant's crime was arguably not "violent" in the conventional or colloquial sense, it is

statutorily specifically so defined for purposes of restricting the rate at which he may earn conduct credits.

DISPOSITION

We direct the trial court to modify the restitution fine to the amount of \$200, pursuant to *People v. Souza* (2012) 54 Cal.4th 90, 143 and *People v. Saelee* (1995) 35 Cal.App.4th 27, 31. We further direct the court to recalculate defendant's presentence custody credits, taking into account the time that defendant was incarcerated on the convicted charge in Oregon, as well as his presentence custody time in California. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we have examined the record and find no other arguable issues. With the exception of the modification of the restitution fine and the recalculation of presentence custody credits, the judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.