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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON LAMAR BROWN,

Defendant and Appellant.

G045242

(Super. Ct. No. 06NF1301)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Patrick Marion, Judge. The judgment of conviction is affirmed but remanded for resentencing.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of nine counts of committing lewd and lascivious acts upon a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ Each offense occurred between July 1 and September 30 of 2005. The jury found true the allegations that defendant committed the offenses against more than one victim (§ 1203.066, subd. (a)(7)) and had substantial sexual conduct with them (§ 1203.066, subd. (a)(8)).

In sentencing defendant, the court erroneously applied statutory law that came into effect after he committed his crimes. As a result of this retroactive application of law, the court found defendant was statutorily ineligible for probation. This violation of ex post facto principles requires us to remand the case for resentencing.

FACTS

Between July and September of 2005, defendant lived with his sisters² when the girls were age 10 and seven. He babysat them when their mother was at work. During those months, defendant touched the girls' bottoms, had them masturbate him, touched them with his penis, and digitally penetrated one girl's anus and touched the other girl's vagina.

DISCUSSION

Defendant contends the court sentenced him under post-2005 versions of sections 667.61 and 1203.066. He concludes the court violated ex post facto principles. The Attorney General agrees.

¹ All statutory references are to the Penal Code.

² The parties' briefs state the victims are defendant's half sisters.

At the sentencing hearing on March 25, 2011, the court stated: “As far as probation eligibility, everybody agrees that he’s statutorily ineligible for probation pursuant to [section] 1203.066 [subdivisions] (a)(7) and (a)(8) and that the crimes were committed against multiple victims under 14 years of age and substantial sexual conduct was involved. Right?” The prosecutor agreed. The probation report had stated defendant was statutorily ineligible for probation under section 1203.066, subdivision (a)(7) because he committed crimes against multiple victims. Defendant’s sentencing brief had conceded that, under section 667.61, subdivision (b), defendant’s minimum sentence was 15 years to life for each count. Accordingly, the court, believing it was acting in accordance with sections 667.61 and 1203.066, sentenced defendant to 15 years to life on one count and concurrent terms of 15 years to life on the remaining eight counts.

Unfortunately, everyone was wrong. Under the versions of sections 667.61 and 1203.066 in effect in 2005 (when defendant committed the crimes), he was eligible for probation if the court made five specific findings under section 1203.066, subdivision (c), *and*, if the court found him eligible for probation he was *not* subject to a mandatory prison term of 15 years to life per offense under section 667.61, subdivision (b). In 2005, section 667.61 required a court to sentence a person convicted of a multi-victim violation of section 288, subdivision (a) to a prison term of 15 years to life, *unless the defendant qualified for probation under section 1203.066, subdivision (c)*. (Former § 667.61, subs. (b), (c)(7), & (e)(5), added by Stats. 2010, ch. 219, § 25.)³ In 2005, a person

³ Section 667.61, also known as the “One Strike” law, “provides that a defendant convicted of certain sex offenses under certain circumstances . . . shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole’ for either 15 or 25 years.” (*People v. Acosta* (2002) 29 Cal.4th 105, 109.) “The sentences prescribed by section 667.61 greatly exceed the determinate sentences previously available for violations of section 288.” (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257.) In 2005, section 667.61, subdivision (c)(7) provided that the statute applied to a “violation of subdivision (a) of Section 288, unless the defendant

qualified for probation under section 1203.066, subdivision (c), if: (1) defendant's potential disqualification under that statute was based solely on a violation of section 288 against more than one victim and with substantial sexual conduct with a victim under the age of 14; and (2) the court found that: (i) the defendant was the victim's relative or a member of the victim's household; (ii) granting probation to the defendant was in the child's best interest; (iii) rehabilitation of the defendant was feasible, the defendant was amenable, and the defendant was placed in a treatment program; (iv) the defendant was removed from the victim's household; and (v) a probation grant would not pose a threat of physical harm to the child. If a defendant qualified for probation under the 2005 version of section 1203.066, subdivision (c), the court had *discretion* not to sentence the defendant to jail or prison, and had to state the reasons for the sentence on the record.⁴

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.) "[A] law may be retrospective not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory. [Citation.]" (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1167-1168.)

Defendant "has a constitutional right to be sentenced under the terms of the laws in effect when he committed his offenses." (*People v. Hiscox, supra*, 136

qualifies for probation under subdivision (c) of Section 1203.066." Effective September 20, 2006, subdivision (c)(7) of section 667.61 was replaced by subdivision (c)(8), under which the statute applies to a "lewd or lascivious act, in violation of subdivision (a) of section 288," with no express exception. (Sen. Bill No. 1128 (2006 Reg. Sess.) § 33.)

⁴ Effective January 1, 2006, section 1203.066, subdivision (d) replaced former subdivision (c) and provided that a defendant qualifies for probation only if: (1) the factor(s) rendering him ineligible for probation under the statute have *not* been pled and proven, and (2) the court makes the five findings formerly specified in subdivision (c). (Sen. Bill No. 33 (2005 Reg. Sess.) § 5.)

Cal.App.4th 253, 261.) Because the court sentenced him pursuant to post-2005 versions of sections 667.61 and 1203.066, he must be resentenced. (*Hiscox*, at p. 262.)

DISPOSITION

The judgment of conviction is affirmed but the matter is remanded for resentencing under the law in effect at the time defendant committed his offenses.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.