

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ETAN FISHER,

Defendant and Appellant.

G046459

(Super. Ct. No. 07HF2332)

ORDER MODIFYING OPINION;  
NO CHANGE IN JUDGMENT

The opinion filed on July 3, 2013, is hereby modified as follows:

1. On page 6 of the opinion, delete the second full sentence in the first paragraph and insert the following sentence: “The total sentence imposed is still less than the sentence Fisher agreed to, and the sentence previously imposed by Judge Fitzgerald, twice. (*People v. Vera* (2004) 122 Cal.App.4th 970, 983 [criminal defendant who receives benefit of bargain cannot renegotiate that bargain on appeal].)”

This modification does not change the judgment.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

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(Super. Ct. No. 07HF2332)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge (retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to Cal. Const. Art. VI, § 6), and Vicki Hix, Temporary Judge (pursuant to Cal. Const. Art. IV, § 21). Affirmed as modified.

Sylvia Whatley Beckham, 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, Melissa Mandel and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Paul Etan Fisher is currently serving a nine-year state prison sentence after pleading guilty to various sex crimes, and after twice admitting he violated the terms of his probation. Fisher contends the trial court erred in sentencing. We correct a minor error in the abstract of judgment, and affirm the judgment in all other respects.

### FACTS<sup>1</sup>

In August 2007, Newport Beach police responded to a hotel regarding a report of a missing 15-year-old girl. While an officer talked to the girl's mother in the lobby, the mother learned the girl had returned to their room. The officer and the mother went to the room and found the girl. The officer described the girl as appearing "a little hung over" in that she smelled of alcohol, and had bloodshot eyes and "disheveled" hair.

The girl initially said she spent the night on "some lady's couch." But she later admitted she spent the night in a man's room. The girl explained she had been very intoxicated and could not remember everything about the previous night, but she did recall waking up during the night and finding herself and the man naked and in bed. He repeatedly kissed her, orally copulated her, digitally penetrated her vagina, and had intercourse with her. She never had sex before and had not wanted to have sex with this stranger, but claimed to be "so drunk . . . she was unable to push [him] off of her."

During a search with the girl in tow, officers knocked on Fisher's hotel room door. Fisher answered and the girl identified him as the man who assaulted her. Fisher told the officers the girl had knocked on his door around 3:00 a.m. She was very intoxicated, had trouble standing, and had urinated in her clothing. Fisher said he invited the girl into his room because he did not want her to be arrested. He denied having any sexual contact with her. He did buy breakfast that included four bloody Marys.

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<sup>1</sup> The statement of facts is taken from the preliminary hearing transcript.

## PROCEDURAL BACKGROUND

An information charged Fisher with rape by intoxication (Pen. Code, § 261, subd. (a)(3); count 1),<sup>2</sup> oral copulation by intoxication (§ 288a, subd. (i); count 2), lewd act with a child 15 years old or older and 10 years younger than himself (§ 288, subd. (c)(1); count 3), and unlawful intercourse with a minor (§ 261.5, subd. (d); count 4). Fisher eventually pleaded guilty to all of the charged offenses.

As agreed in the *Tahl* form (*In re Tahl* (1969) 1 Cal.3d 122), and in what is sometimes euphemistically referred to as a “deal with the devil,” the trial court, Judge Fitzgerald, first sentenced Fisher to a total prison term of 11 years, 8 months, consisting of the upper term of eight years on count 1, plus one-third of the midterm consecutive sentences of two years on count 2,<sup>3</sup> eight months on count 3, and one year on count 4. Judge Fitzgerald then immediately recalled and suspended execution of that sentence and placed Fisher on five years formal probation on various terms, including one year in the county jail.

In November 2010, Fisher admitted violating the terms of his probation. Judge Fitzgerald again sentenced Fisher to a total prison term of 11 years, 8 months on the same terms as before, again immediately recalled and suspended execution of that sentence, and placed Fisher back on formal probation, with certain modifications, including no alcohol consumption and an additional year in the county jail.

In November 2011, Fisher again admitted violating his probation. After a lengthy sentencing hearing and after carefully considering the evidence and arguments of

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<sup>2</sup> All further statutory references are to the Penal Code.

<sup>3</sup> The minutes erroneously describe the sentence on count 2 as a full consecutive midterm of two years. The midterm is actually six years. (§ 288a, subd. (i).)

counsel, Commissioner Hix, sentenced Fisher to a total prison term of nine years, consisting of the midterm of six years on count 1, plus a full consecutive low term of three years on count 2, and a concurrent term of one year on count 3. Commissioner Hix also stayed punishment on count 4 pursuant to section 654.<sup>4</sup> This is the sentence from which Fisher has now appealed.

## DISCUSSION

Fisher asserts two sentencing errors. First, he claims the trial court relied on improper aggravating circumstances to impose the midterm of six years on count 1. Second, he argues the trial court created an unauthorized sentence by relying on section 667.6, subdivision (d) to impose a full low term consecutive sentence of three years on count 2. In essence, Fisher claims Commissioner Hix erred by imposing a nine-year sentence instead of the agreed upon 11 years, 8 months sentence twice imposed and recalled by Judge Fitzgerald.

As a threshold matter, the Attorney General asserts Fisher expressly waived his right to appeal in the plea agreement,<sup>5</sup> impliedly waived his right to appeal by failing to object to the court's sentencing choices at the sentencing hearing (*People v. Scott* (1994) 9 Cal.4th 331, 356) and, in any event, his appeal is barred because he failed to obtain a certificate of probable cause (§ 1237.5 and Cal. Rules of Court, rule 8.304(b)). The Attorney General is probably correct on some or all of these points. Nevertheless,

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<sup>4</sup> The abstract of judgment makes no mention of count 4 or the court's imposition of a stay on punishment for this count. For this reason, the abstract of judgment must be corrected to reflect the conviction and the court's sentencing decision on count 4.

<sup>5</sup> Paragraph 14 of the *Tahl* form states in relevant part, "I waive and give up my right to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement."

we exercise our discretion to consider the matter on the merits, if for no other reason than to forestall any potential ineffective assistance of counsel claim.

With respect to count 1, Fisher complains the court erroneously made dual use of the victim's intoxication, when considering her *level of intoxication* as a basis for finding her particularly vulnerable, an aggravating factor under California Rules of Court, rule 4.421. Fisher may be correct. Intoxication is an element of the crime of rape by intoxication. But the court also cited the victim's age, an alternative basis for finding the victim particularly vulnerable. Fisher responds the victim's age was already accounted for in the sentence imposed on count 3 for committing a lewd and lascivious act on a child. However, as the Attorney General points out, age is not an element of rape by intoxication, and a single aggravating factor is sufficient to support a sentencing choice. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Besides, even if there were dual use error – so what? The result was a six-year term rather than the agreed upon eight-year term on count 1. In other words, Fisher ended up with a more favorable sentence, not a less favorable sentence. Thus, he cannot now complain. (*People v. Hester* (2000) 22 Cal.4th 290, 295 [defendants who have received the benefit of their bargain should not be allowed to “trifle with . . . courts”].)

With respect to count 2, Fisher complains the trial court erroneously imposed the full term consecutive sentence pursuant to section 667.6, subdivision (d). But that sentence was discretionary under section 667.6, subdivision (c), which states in pertinent part, “In lieu of the term provided in Section 1170.1 [i.e., one-third of the midterm], a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) [including rape by intoxication] if the crimes involve the same victim on the same occasion.” Finally, the trial court also identified other aggravating factors, any one of which supports the full term consecutive sentence on count 2. Hence, there was no error.

Furthermore, even if the full term consecutive sentence was an error, again Fisher cannot now complain. That is exactly the sentence Fisher agreed to, and exactly the sentence previously imposed by Judge Fitzgerald, twice. (*People v. Vera* (2004) 122 Cal.App.4th 970, 983 [criminal defendant who receives benefit of bargain cannot renegotiate that bargain on appeal].)

In sum, Fisher made an agreement with the trial court (a chance at probation in exchange for a guilty plea), and he received the benefit of that agreement. Under these circumstances, any trial court would have been justified, or perhaps even required, to impose the 11 year, 8 month sentence. (§ 1203.2, subd. (c); *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088.) Fisher cannot avoid the more lenient sentence imposed which was well within the trial court's broad sentencing discretion.

#### DISPOSITION

The clerk of the superior court is directed to correct the abstract of judgment to reflect the conviction and the court's sentencing decision on count 4 (§ 261.5, subd. (d)), and send a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.