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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.

CARLOS ARTURO HERNANDEZ,

Defendant and Appellant.

In re CARLOS ARTURO HERNANDEZ

on Habeas Corpus.

G048869

(Super. Ct. No. 07CF2844)

O P I N I O N

G049881

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Reversed and remanded with directions.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition granted.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Karl T. Terp and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant contends he received ineffective assistance of counsel when he was resentenced because his new counsel did not remind the court of a finding it made during his previous sentencing, or request the court to order his term on count two to run concurrently instead of consecutively. We determine there was no ineffective assistance of counsel.

Because of the court's previous finding with regard to count two, we conditionally reverse his sentence for the court to explain its reasons for abandoning that previous finding.

## I

### FACTS

Defendant Carlos Arturo Hernandez returns to this court once again. Previously, after affirming his convictions and finding sentencing errors, we remanded his case to the superior court in a nonpublished opinion. (*People v. Hernandez* (Feb. 26, 2013, G046096).)

In our previous opinion we state defendant was charged with “a forcible lewd act on a child under 14 ([Pen. Code,] § 288, subd. (b)(1); count one), sodomy of a child under 14 ([Pen. Code,] § 286, subd. (c)(1); count two), oral copulation on a child under 14 ([Pen. Code,] § 288a, subd. (c)(1); count three), three counts of lewd act on a child under 14 ([Pen. Code,] § 288, subd. (a); counts four, five, and six),<sup>1</sup> distribution of pornography to a minor ([Pen. Code,] § 288.2, subd. (a); count seven), and furnishing marijuana to a minor (Health & Saf. Code, § 11361, subd. (a); count 8). The information further alleged counts one through six involved more than one victim ([Pen. Code,] § 667.61, subd. (c)(1)), and defendant engaged in substantial sexual conduct in committing the offense alleged in count one. ([Pen. Code,] § 1203.066, subd. (a)(8).)” (*People v. Hernandez, supra*, G046096.)

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<sup>1</sup> These counts alleged three different victims.

We further stated in the previous opinion the “jury found defendant guilty on all counts, found defendant engaged in substantial sexual conduct in the commission of the offense charged in count one, and found defendant committed a lewd offense on more than one child under 14. [¶] The trial court sentenced defendant to an indeterminate term of 60 years to life and a consecutive determinate term of five years eight months.” (*People v. Hernandez, supra*, G046096.)

Upon remand, the trial court resentenced defendant to state prison for an indeterminate term of 45 years to life and a determinate term of 10 years four months. Count two was selected as the principal determinate term, and defendant was sentenced to six years on that count. The other determinate terms were ordered to run consecutively, two years on count three, eight months on count seven and one year eight months on count eight. On counts one, four, five and six, indeterminate terms were ordered. Count one was selected as the principal term and count four was ordered to run concurrently. Counts five and six were ordered to be served consecutively.

A declaration of defendant’s trial counsel is attached to his petition for habeas corpus. It states counsel represented him at the 2013 sentencing hearing, but not at the 2011 sentencing hearing.

## II

### DISCUSSION

#### *Ineffective Assistance of Counsel*

As a preface to defendant’s argument, we note that at the 2011 sentencing hearing, the court asked the parties to address the appropriateness of imposing a concurrent sentence for count two, and the court, agreeing with defense counsel’s argument stated: “With respect to count 2, I’m not persuaded that there was sufficient separation of the two criminal acts occurring at the same time in the same place as to the same victim to demonstrate sufficiently for this court to impose a consecutive term that the defendant had time to reflect. I do believe that it was continuous conduct. And,

therefore, I will impose on count 2 a sentence of 15 years-to-life in prison to run concurrent to the sentence in count 1.”

Defendant now argues his trial counsel rendered him ineffective assistance, explaining: “Defense counsel did not make an objection to the court’s selection of Count 2 as the principal determinate term, and no statement is set forth in the record to explain why the court did not impose a concurrent sentence for Count 2 as it had previously done.”

Defendant concedes a defendant who does not object at sentencing when the trial court fails to give a statement of reasons forfeits the issue for appeal. Instead of arguing the issue was preserved for appeal, defendant contends his lawyer was ineffective for failing to preserve it.

With regard to prejudice resulting from trial counsel’s performance, defendant states in his brief: “[Defendant] contends he has met his burden to show he was prejudiced by counsel’s deficient performance because the reasons the court had originally given for imposing a concurrent term for Count 2 showed the court did not believe a consecutive sentence was warranted based on the facts. And had the court been asked to impose a concurrent term while being reminded of its reasons for doing so the first time, it likely would have done so again.”

A successful claim of ineffective assistance of counsel must demonstrate counsel’s performance was deficient for falling below an objective standard of reasonableness under prevailing professional norms, and that counsel’s deficient representation prejudiced him. (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) Further, “[a] court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.]” (*Id.* at p. 541.) Defendant has not made such a showing here.

The trial court was free to impose any lawful sentence and was not limited to its determinations during the initial sentencing. (*People v. Serrato* (1973) 9 Cal.3d

753, 764-765, overruled on another ground in *People v. Fosselman* (1983) 33 Cal.3d 572, 853, fn.1.) Defendant has not demonstrated the court's recent sentence is unauthorized under the law.

It does appear, however, there might have been a change in the evaluation of the evidence by the court. A trial judge may reevaluate evidence and come to a different conclusion than previously reached. (*Nacht v. Nacht* (1959) 167 Cal.App.2d 254, 264-265.)

On remand, the court conferred with counsel about the sentence in chambers as evidenced in the court reporter's transcript which shows the court related a discussion about sentencing with counsel that occurred in chambers. With regard to that discussion, the court stated: "And I believe you both [agreed] with that; is that right?" Both counsel said they agreed. Once in open court, defense counsel had no argument, but from the circumstances it appears argument was made in chambers. Defense counsel's declaration states: "Prior to resentencing, in chambers and off the record, I asked the court to run all of the counts concurrently. The court denied my request."

Under the circumstances we find in this record, we cannot conclude defense counsel was ineffective during defendant's sentencing hearing.

### *Court's Reasons Required*

This court is faced with a situation where the trial judge either reevaluated the evidence and had a change of mind with regard to count two, forgot what occurred two years earlier or something else. We are unable to determine from the record why the court's specific finding of continuous conduct was ignored when the court resentenced defendant in 2013.

California Rules of Court, rule 4.406 lists certain circumstances when the court is required to give its reasons for imposing a particular sentence and states:

“Sentence choices that generally require a statement of a reason include: [¶] (5) Imposing consecutive sentences.” (Cal. Rules of Court, rule 4.406(b)(5).)

It could very well be the court reevaluated the evidence and changed its mind, which the court had a right to do. But defendant argues he was entitled to the court’s previous favorable evaluation, and his concern is reasonable. We realize this issue has not been preserved for appeal, but under the particular circumstances here, and in the interest of justice, having previously affirmed his convictions, we conditionally reverse his sentence and remand to the trial court for the court to explain whether it reevaluated the evidence or simply forgot its previous finding or something else.

On the next remand, the court shall either resentence defendant in accordance with its previous finding or state its reasons for not applying its previous finding. If the court has reevaluated the evidence and changed its mind about the previous finding, the court shall so state and then reinstate the judgment as of that date.

### III

#### DISPOSITION

The judgment is conditionally reversed and remanded to the trial court with directions, and the petition for writ of habeas corpus is conditionally granted.

MOORE, J.

WE CONCUR:

O’LEARY, P. J.

BEDSWORTH, J.