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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
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BY PKMAM DEPUTY

KEVIN ROJANO SENTENCING ANALYSIS

Rule of Court 4.410- General objectives in Sentencing

These include: Protecting Society, Punishing the Def; Encouraging the Def to lead a law-abiding life and deter him from future offenses; Deterring others from crime by demonstrating its consequences; Preventing the Def from committing new crimes by isolating him with incarceration.

The Sentencing Judge must consider which objectives are of primary importance in the particular case, and should be guided by statutory statements of policy, the criteria in the Rules of Court, and the facts and circumstances of the case.

Sentencing is the most difficult part of a Trial Judge's job, and often involves difficult decisions that will have a lasting impact on a number of individual's lives. It is not an easy task and there are often no bright line answers to what constitutes a fair and appropriate sentence. But it is my job, and I rely on statutory policy, the criteria in the Rules of Court, and my experience to help me fashion a sentence that the Court deems is fair and appropriate given the facts and circumstances of a given case.

I. 288.7(a) Mandatory Sentencing of 25-Life and Cruel and Unusual Punishment

The Court asked afforded both Parties the opportunity to adequately respond to the issue as to whether 25-Life mandatory minimum punishment under PC 288.7(a) could constitute Cruel and Unusual Punishment when applied to the facts of this case. The Court has reviewed both parties' Briefs and cited points and authorities.

In addition, the Court has reviewed the following cases: Manduley v Superior Court 27 Cal 4th 537; People v Wingo 14 Cal 3d 169; People v. Rhodes 126 Cal. App 4th 1374; People v. Meneses 193 CalApp4th 1087; People v Dillon 34 Cal 3d 441; In

re Lynch 8 Cal. 3d 410; People v. Felix 108 Cal. App.4th 994; People v Leigh 168 Cal.App.3d 217; In re Rodriguez 14 Cal.3d 639; In re Grant 18 Cal.3d 1; People v. Schueren 10 Cal. 3d 553.

The Court has also reviewed the following documents: 14 page P+S Report of Feb. 6, 2015 by DPO Krysten Fussell; 13 page 288.1 report of Jan. 12, 2015 by Dr. Roberto Flores de Apodaca; People's Sentencing Brief of Dec. 10, 2014 by DA Whitney Bokosky; People's Supplemental Sentencing Brief of March 27, 2015 re Cruel and Unusual Punishment; Defense Sentencing Brief of April 1, 2015 re Cruel and Unusual Punishment by Attorney Erfan Puthawala; Victim Impact Statement Transcript from Feb. 6, 2015 from victim Xiomara's mother, Judith Nieto, and her husband, Luis Arevalo.

II. CONSTITUTIONAL STANDARDS FOR DETERMINING WHETHER CRUEL AND UNUSUAL PUNISHMENT IS APPLICABLE

Absent Constitutional considerations, trial courts have a duty to impose and not deviate from statutorily prescribed punishment for designated offenses. Subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.

As the People note in their Brief, there should be considerable reluctance to overturn a sentence on the grounds that it inflicts cruel or unusual punishment. The doctrine of separation of powers is firmly entrenched in California law, and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature.

It is indeed rare that Cruel and Unusual punishment is found warranted by California Sentencing Judges. This Court has never engaged in such a process in over 15 years on the Bench hearing Criminal cases, and it is of course a matter of grave importance to all parties, so this Court has given careful consideration to the positions of all parties involved.

However, there are rare circumstances in the criminal arena when Sentencing Courts have found that mandated punishment is grossly disproportionate to the Defendant's individual culpability. There is legal precedent that enables a Sentencing Court to engage in a thorough legal analysis to determine whether Cruel and Unusual Punishment might be applicable....I have engaged in such an analysis in this case---which I will now put on the record.

III. LYNCH-DILLON ANALYSIS

A tripartite test has been established to determine whether a penalty offends the prohibition against cruel or unusual punishment: 1) The nature of the offense and the offender, with particular regard to the degree of danger present to society; 2) a comparison of the mandated penalty with those imposed in the same jurisdiction for more serious crimes; 3) the mandated penalty is compared with those imposed for the same offense in other jurisdictions. In undertaking this three-part analysis, the Court must consider the totality of the circumstances surrounding the commission of the offense. Per Dillon, all 3 prongs are not necessary to be present in order to find Cruel and Unusual punishment (Footnote 38). The ultimate issue to be decided: Whether the imposition of the mandatory sentence for Defendant's crime is grossly disproportionate to his individual culpability thus amounting to cruel and unusual punishment?

In this case, after conducting a Dillon analysis: is the mandatory sentence of 25-Life for Mr. Rojano's crime grossly disproportionate to his individual culpability thus amounting to cruel and unusual punishment?

As stated in Leigh, "we believe the Trial Judge is uniquely suited to do the kind of balancing of factors to determine whether the prohibition against Cruel and Unusual Punishment applies. It is the trial judge who has the first hand opportunity to analyze the panoply of factors that must be considered in determining the offender's state of mind, personal characteristics, and the degree of danger the offender poses to society."

For reasons the Court is about to state—this Court has conducted a Dillon analysis and has determined that 25-Life sentence for Mr. Rojano’s crime is grossly disproportionate to his individual culpability, thus the Constitution’s prohibition against Cruel and Unusual punishment compels reduction of his sentence. In making this decision, this Court is particularly focused on the first prong of Dillon: The nature of the Offense and the nature of Mr. Rojano.

FIRST PRONG OF DILLON ANALYSIS (NATURE OF OFFENSE)

The Court agrees with the People’s position that there is no question the nature of the offense in the abstract is such that it poses a significant degree of danger to both vulnerable children and society in general. Sodomy of a 3 year old child is a horrific crime, and imposition of harsh punishment will ordinarily not give rise to constitutional concerns.

However, in looking at the facts of Mr. Rojano’s case, the manner in which this offense was committed is not typical of a predatory, violent brutal sodomy of a child case:

Mr. Rojano did not seek out or stalk his sister. He was playing video games and she wandered into the garage. He inexplicably became sexually aroused but did not appear to consciously intend to harm Xiomara when he sexually assaulted her; As noted by defense, in an instant, he reacted to a sexual urge and stopped almost immediately after he put his penis in Xiomara’s anus.

Within seconds of commencing his offense, he realized the wrongfulness of his act and stopped without ejaculating.

Although serious and despicable, this does not compare to a situation where a pedophilic child predator preys on an innocent child. There was no violence or callous disregard for Xiomara’s well-being.

NATURE OF THE OFFENDER

Mr. Rojano's individual and personal characteristics also suggest a lessened potential risk to public safety:

Defendant was 19 years old; Defendant had no prior criminal history; Defendant did not consciously intend to harm his sister and almost immediately regretted his actions;

Mr. Rojano has shown extreme remorse for his actions and has been willing to accept the consequences;

Mr. Rojano was born into and raised in a dysfunctional familial environment;

Per Dr. Apodaca's 288.1 report: Mr. Rojano was found to have experienced a great deal of family disruption and abuse, making him an insecure, socially withdrawn, timid, and extremely immature young man with limited self-esteem.

Per Dr. Apodaca's findings: Def.'s criminal actions were more compensatory rather than predatory. Testing reveals a very low risk for recidivism, which further evidences this Court's belief that Mr. Rojano does not pose a danger to society.

Per the Probation and Sentencing Report, Def. scored extremely low on the Static-99R test, indicating a Low Risk of being a Sexual Offense re-offender.

Per Dr. Apodaca: Mr. Rojano is not a sexual predator and is not a pedophile, nor a sexual deviant. As the defense has noted, he is a confused young man who acted inappropriately in an instant with immensely damaging ramifications for the victim Xiomara, his family, and himself.

As a result, a mandatory term of 25 years to Life in state prison for Mr. Rojano's offense is grossly disproportionate to his individual culpability, and thus would amount to cruel and unusual punishment in this Court's eyes.

SECOND PRONG OF DILLON ANALYSIS

In looking at a comparison of challenged Penalty with punishments imposed in California for more serious offenses, most involve murder or death: The 25-life sentence is as severe as if the Def. had been convicted of 1st degree premeditated murder. The sentence is as severe as if Def. had Committed an Assault on a Child Under 8 which resulted in Death (PC 273ab(a). The sentence is harsher than that of 2nd degree murder (15-Life); Attempted Premeditated Murder (Life with Parole Elig. After 7 years); Attempted Murder (5-7-9); Forcible Rape (3-6-8); and Manslaughter (3-6-11);

The Court certainly recognizes that Sodomy of a Child Under 10 certainly warrants a harsh punishment of 25-Life when viewed in the Abstract. However, when the Court analyzes the nature of the offense in this case, and the nature of Mr. Rojano, it is clear to this Court that this case is an exception to the abstract.

3RD PRONG OF DILLON ANALYSIS (OTHER JURISDICTIONS)

The Court appreciates the People's extensive research on this issue. Ms. Bokosky provided the Court with similar sentencing schemes for all 50 states for similar crimes—and the Court acknowledges this involved a lot of work and the Court is appreciative.

However, this Court is not focusing too much on this prong of the Dillon analysis mainly because this prong generally focuses on the crime of Sodomy of a Child in the abstract. While it certainly is a factor to be considered, as the Court mentioned earlier, it has given the major consideration to the first prong, which encompasses the nature of the circumstances surrounding this offense, and the nature of the circumstances surrounding Mr. Rojano.

Footnote 38 in Dillon: "A court balancing the multiple Lynch factors for determining whether a particular punishment constitutes cruel and unusual punishment need not engage in an assessment of punishments for the same

offense across multiple jurisdictions; we neither held nor implied that a punishment cannot be ruled constitutionally excessive unless it is disproportionate in all three respects....”

VICTIM IMPACT STATEMENT AND OTHER FACTORS

As indicated, the Court heard and is relying on the courageous victim impact statement given by Mr. Arevalo and Ms. Nieto. The victim Xiomara is not forgotten by the Court—Mr. Rojano will be punished severely for his actions on Xiomara. However, Xiomara testified in this Courtroom, and appears to be a happy, healthy child. It is hard to gauge how this crime might affect her mental state in the future, but she did not suffer serious violent physical injuries, and by all accounts she appears to be headed for a normal life.....It is the Court’s hope that she has fully recovered from this incident.

Mr. Rojano’s parents and step-parents have expressed forgiveness, and that is necessary for all healing to begin. They have expressed a desire for Def. to be released and given Probation. That is not going to happen. The Def. needs to be punished severely for his conduct, however, the Court is mindful of the Family’s position and their Victim Impact statements.

The Court has seen how Mr. Rojano has conducted himself in Court, and read all of the materials—and the Court is convinced that Mr. Rojano is extremely remorseful for his crimes, and is sincere in his remorse.

SENTENCE FOR MR. ROJANO COMMENSURATE WITH HIS CRIME

As a result of the aforementioned Dillon analysis, the Court has found that the statutorily prescribed punishment of 25-Life for the 288.7(a) crime is grossly disproportionate to Mr. Rojano’s individual culpability, thus that is violates the US

Constitution and the State of California's Constitutional prohibition against Cruel and Unusual Punishment.

Accordingly, the Court makes a finding that the prescribed punishment of 25-Life for Count 1 is Unconstitutional.

SENTENCING OPTIONS

As stated, the Court is entrusted with arriving at a sentence deemed commensurate with Mr. Rojano's individual culpability. That is not an easy task, given the severity of the crime, and the fact that there are both determinate and indeterminate options.

However, this Court looks at related sexual conduct crimes and their respective punishments to determine what sentence may be deemed commensurate with Mr. Rojano's individual culpability—given the Sentencing objectives and the criteria of the Cal. Rules of Court.

Penal Code Section 286(c)—Sodomy of a Child under the Age of 14 and more than 10 years younger than the perpetrator provides for a determinate sentencing range of 3-6-8 years. This Crime is related to PC 288.7(a), and its sentencing range is commensurate with Def's individual culpability.

People v Schueren 10 Cal. 3d 553 appears to allow a trial court to adopt and impose the sentence prescribed for a related offense in order to ensure punishment for an offense of which a defendant stands convicted of which is commensurate to the defendant's individual culpability.

The Court has given careful consideration to all of the Parties' positions in this case. The Court has read voluminous documentation and cases concerning its Sentencing decision.

Based on the totality of the circumstances, and in consideration of the Court's Sentencing duties, especially the protection of the public, the Court believes that

a determinate sentence of 10 years in State Prison (to be served at 85%) is an appropriate and fair sentence which is commensurate to Mr. Rojano's individual culpability in this case.

This 10 year sentence is arrived at based on the 8 year aggravated term under PC 286(c), and a consecutive 2 year term on Count 2 (PC 288(a)).....ROC 4.425 analysis (The crimes and their objectives were predominantly independent of each other).