

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEE MARTINEZ,

Defendant and Appellant.

C055549

(Sup.Ct.No. SF084548A)

***Order Modifying Opinion
No change in judgment***

APPEAL from a judgment of the Superior Court of San Joaquin County, William J. Murray, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Christina Hitomi, Deputy Attorneys General, for Plaintiff and Respondent.

THE COURT:

It is ordered that the opinion filed herein on September 23, 2008, be modified in the following manner:

1. On page 8, delete the last two sentences of the first full paragraph and replace them with the following sentences:

The trial court sentenced defendant to a life term on each count and ordered these life sentences to run

consecutively. It gave as reasons for the sentencing choices that the offenses occurred on separate occasions.¹

2. On page 9, line 2, delete the word "consecutive" and replace it with the words "two life" so that line reads:
two life sentences.

3. On page 9, line 3, insert the word "life" between the words "consecutive terms" so that line reads:

Defendant contends imposition of consecutive life terms based on

4. Delete the language on page 11 in its entirety and replace it with the following language:

Here, the trial court's finding of separate occasions supported both imposing indeterminate terms under section 667.61 and running those terms consecutively. *Black II, supra*, 41 Cal.4th 799 did not address whether *Apprendi* and *Blakely* apply to a trial court's determination of whether multiple sex offenses occurred on a single occasion for purposes of section 667.61(g). We find, however, that *Black II's* analysis with regard to consecutive sentences applies here as well.

In *Black II*, the court emphasized that *Apprendi* and *Blakely* protect a defendant's historical right to a jury trial on all elements of the crime. (*Black II, supra*, 41 Cal.4th at p. 821.) There is no right to a jury trial on factual determinations that do not serve as the "functional equivalent" of an element of a crime. (*Ibid.*) Here, the jury made the factual findings necessary to support imposition of a life sentence under section 667.61; the jury found defendant inflicted torture and great

¹ The amended complaint alleged both offenses were committed "on or about June 15, 2002 to June 18, 2002." The trial court struggled with whether there were separate occasions, eventually finding the two crimes "took place in different parts of the house at different times . . . they involve two acts of dominance and control, and frankly, humiliation over the victim." In an unpublished portion of *Martinez*, we found substantial evidence supported the trial court's finding.

bodily injury and personally used a deadly weapon. (§ 667.61, subds. (d)(3), (e)(3) & (4).) The court's finding that multiple life sentences may be imposed because the sexual assaults occurred on separate occasions is similar to the factors a court may consider in deciding whether to impose consecutive sentences where a defendant has been convicted of multiple felony offenses. The result in each case is the same: to sentence defendant fully for each crime based on the elements found by the jury. Consequently, we conclude the trial court's decision to impose multiple sentences under section 667.61(g) did not violate defendant's constitutional rights.

Nor does the decision to run the indeterminate sentences consecutively raise constitutional problems. First, as explained above, the decision to run sentences consecutively is not the functional equivalent of an element of the crime and so does not trigger the right to a jury trial. Further, defendant could have been sentenced to consecutive sentences without the separate occasion finding. While the factual determination of separate occasions made defendant eligible for mandatory consecutive sentences under section 667.6, subdivision (d), the court could have imposed consecutive sentences without a separate occasion finding under subdivision (c) of section 667.6. As *Black II* makes clear, judicial factfinding in sentencing "*is only unconstitutional when that fact raises the sentence beyond the sentence that could have been lawfully imposed by reference to facts found by the jury or admitted by the defendant.*" [Citation.] The issue to be determined in each case is whether the trial court's factfinding increased the sentence that otherwise *could* have been imposed, not whether it raised the sentence above that which otherwise *would* have been imposed." (*Black II, supra*, 41 cal.4th at p. 815, original italics, fn. omitted.)

This modification does not change the judgment.

FOR THE COURT:

MORRISON, Acting P.J.

HULL, J.

BUTZ, J.