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OPINION	:	No. 79-1205
	:	
of	:	<u>March 14, 1980</u>
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SUBJECT: COMPUTATION OF “MAXIMUM TERM OF COMMITMENT”—
The maximum term of commitment within the meaning of Welfare and Institutions Code section 6316.1 and Penal Code section 1026.5 with respect to misdemeanors is computed by adding the maximum jail term for each such misdemeanor to any maximum term of commitment for felonies as computed under those sections provided that the resulting maximum term of commitment may not exceed that which would result if the same misdemeanor offenses had been punished as felonies.

The Board of Prison Terms has requested an opinion on questions which we have rephrased as follows:

1. How is the “maximum term of commitment” within the meaning of Welfare and Institutions Code section 6316.1 computed with respect to misdemeanor terms in the case of a person found to be a mentally disordered sex offender who has committed several offenses, one or more of which are misdemeanors?

2. How is the “maximum term of commitment” within the meaning of Penal Code section 1026.5 computed with respect to misdemeanor terms in the case of a person

found not guilty by reason of insanity with respect to the commission of several offenses, one or more of which are misdemeanors?

CONCLUSION

The maximum term of commitment within meaning of Welfare and Institutions Code section 6316.1 and Penal Code section 1026.5 with respect to misdemeanors is computed by adding the maximum jail term for each such misdemeanor to any maximum term of commitment for felonies as computed under those sections provided that the resulting maximum term of commitment may not exceed that which would result if the same misdemeanor offenses had been punished as felonies. For the purpose of determining such limit on the maximum term of commitment, those misdemeanor offenses which do not have alternative felony terms prescribed by law should be treated as if they had been a felony with punishment as prescribed by Penal Code section 18.

ANALYSIS

The Board of Prison Terms (formerly the Community Release Board) is charged with the responsibility of determining the “maximum term of commitment” within the meaning of Welfare and Institutions Code section 6316.1¹ of a person found to be a mentally disordered sex offender (MDSO) (§ 6300 *et seq.*) and the “maximum term of commitment” within the meaning of Penal Code section 1026.5 for a person found to be not guilty of a crime by reason of insanity. (Pen. Code, § 1026 *et seq.*)

A recent decision of the State Supreme Court, *In re Eric J.* (1979) 25 Cal. 3d 522, considered the “maximum term of imprisonment” as defined in section 726 which may be imposed on a minor by a juvenile court pursuant to section 602 where one of the several underlying offenses is a misdemeanor. Because of the similarity of the provisions of section 726 to the provisions of section 6316.1 and Penal Code section 1026.5, a question has arisen as to the interpretation of section 6316.1 and Penal Code section 1026.5 with regard to underlying misdemeanor offenses.

We first examine section 6316.1 in this regard. That section provides:

“(a) In the case of any person found to be a mentally disordered sex offender who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in Section 6316.2. *For the purposes of this*

¹ Hereafter all unidentified section references will be to the Welfare and Institutions Code.

section, 'maximum term of commitment' shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the defendant was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5 of the Penal Code and disregarding any credits which could have been earned under Sections 2930 to 2932, inclusive, of the Penal Code.

“(b) In the case of a person found to be a mentally disordered sex offender who committed a felony prior to July 1, 1977, who could have been sentenced under Section 1168 or 1170 of the Penal Code if the offense were committed after July 1, 1977, the Community Release Board shall determine the maximum term of commitment which could have been imposed under subdivision (a), and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in Section 6316.2.

“In fixing a term under this section, the board shall utilize the upper term of imprisonment which could have been imposed for the offense or offenses of which the defendant was convicted, increased by any additional terms which could have been imposed based on matters which were found to be true in the committing court. However, if at least two of the members of the board after reviewing the person’s file determine that a longer term should be imposed for the reasons specified in Section 1170.2 of the Penal Code, a longer term may be imposed following the procedures and guidelines set forth in Section 1170.2 of the Penal Code, except that any hearings deemed necessary by the board shall be held before April 1, 1978. Within 90 days of July 1, 1977, or of the date the person is received by the State Department of Health, whichever is later, the Community Release Board shall provide each person committed pursuant to Section 6316 with the determination of his maximum term of commitment or shall notify such person that he will be scheduled for a hearing to determine his term.

“Within 20 days following the determination of the maximum term of commitment, the board shall provide the person committed, the prosecuting attorney, the committing court, and the State Department of Health with a written statement setting forth the maximum term of commitment, the calculations, the statements, the recommendations, and any other materials considered in determining the maximum term.

“(c) In the case of a person found to be a mentally disordered sex offender who committed a misdemeanor, whether before or after July 1, 1977, the maximum term of commitment shall be the longest term of county jail confinement which could have been imposed for the offense or offenses of which the defendant was convicted, and the person may not be kept in actual custody longer than this maximum term. The provisions of this subdivision shall be applied retroactively.

“(d) Nothing in this section limits the power of the State Department of Health or of the committing court to release the person, conditionally or otherwise, for any period of time allowed by any other provision of law.”
(Emphasis added.)

With respect to misdemeanors, the language of section 6316.1 initially appears to be unambiguous. The maximum term would be “longest term of county jail confinement which could have been imposed for the offense or offenses of which the defendant was convicted” But what is the longest term in the case of a person who is convicted of more than one misdemeanor or of a felony and one or more misdemeanors? In the case of multiple felony convictions, Penal Code section 1170.1 provides a formula to determine the aggregate term. Although the basic formula has various limits and exceptions, it establishes a “principal term,” which is the longest term imposed for any of the offenses, to which is added one or more “subordinate terms,” which are one-third the middle term specified for the other (“consecutive”) offenses. Except for certain violent felonies specified in Penal Code section 667.5, subdivision (c), the total of subordinate terms for consecutive offenses may not exceed five years. (Pen. Code, § 1170.1, subd. (a).) Additionally, subject to certain specified exceptions, subdivision (c) of Penal Code section 1170.1 limits the maximum term of imprisonment at twice the base term specified in Penal Code section 1170, subdivision (b).

On its face section 1170.1 is not applicable to misdemeanors. Penal Code section 669 provides that a court may order the sentences on multiple convictions to run concurrently or consecutively. The Supreme Court in *People v. Carr* (1936) 6 Cal. 2d 227 held that Penal Code section 669 permitted a court to impose consecutive one year maximum jail terms for multiple misdemeanor convictions. (See Pen. Code, § 19a.) Accordingly, it appears that section 6316.1, subdivision (c) provides that the maximum length of each misdemeanor term is to be aggregated without limit to compute the “maximum term of commitment,” despite the fact that under subdivision (a) of the same section multiple felony terms are computed on the basis of the Penal Code section 1170.1 formula.

To accept this construction without limitation would lead to absurd and clearly unintended results in some cases. Take for example the case of an MDSO who has an underlying conviction on seven counts of unlawful intercourse, in violation of Penal Code section 261.5 which is punishable as either a felony (sixteen months, two years in state prison) or a misdemeanor (not more than one year in county jail depending upon the recommendation of the jury. (See Pen. Code, §§ 18, 264.) Under the above interpretation of section 6316.1, if the MDSO were convicted of seven misdemeanor counts, his maximum term of commitment would be seven years (one year for each offense). However, if he were convicted of seven felony counts, his maximum term of commitment would be six years.²

The basic problem with the above interpretation of section 6316.1 is that it requires every misdemeanor term to be counted at its maximum, which in some cases would be longer than a consecutive (i.e., “subordinate”) felony term. This problem of the computation of consecutive misdemeanor terms was considered with respect to the provisions of section 726 by the Supreme Court in its re Eric J., *supra*, 25 Cal. 3d 522. Section 726 provides in pertinent part:

“”

“In any case in which the minor is removed from the physical custody of his parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. “As used in this section and in Section 731, ‘maximum term of imprisonment’ means the longest of the three time periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code or to consider time for good behavior or participation pursuant to Sections 2930, 2931, and 2932 of the Penal Code, plus enhancements which must be proven if pled.

“If the court elects to aggregate the period of physical confinement on multiple counts, or multiple petitions, including previously sustained

² The computation under section 6316.1, subdivision (a) and the formula of Penal Code section 1170.1 would be as follows: Three years (the upper base term) for the principal term, plus eight months for each of the subordinate terms up to the limit of twice the base term (three years) for a total of six years.

petitions adjudging the minor a ward within Section 602, the ‘maximum term of imprisonment’ shall be specified in accordance with subdivision (a) of Section 1170.1 of the Penal Code.

“If the charged offense is a misdemeanor or a felony not included within the scope of Section 1170 of the Penal Code, the ‘maximum term of imprisonment’ is the longest term of imprisonment prescribed by law.”

The court in *In re Eric J.*, *supra*, 25 Cal. 3d at pp. 536–538 stated the issue and its holding as follows:

“Under section 726, if the juvenile court chooses to ‘sentence’ consecutively on multiple counts or multiple petitions, the maximum term must be specified in accordance with the formula set forth in subdivision (a) of Penal Code section 1170.1, i.e., the sum of the ‘principal term’ (the longest term imposed for any of the offenses) and ‘subordinate terms’ (one-third of the middle term imposed for each other offense). [Fn. omitted.]

“Appellant contends the maximum term specified here was erroneously computed. As stated, the maximum term was determined to be three and one-half years-three years for the burglary and six months for the misdemeanor contempt. In other words, the ‘aggregate maximum term’ was computed here by adding the maximum terms prescribed by law for both the burglary (the principal term) and the misdemeanor contempt (the subordinate term). Appellant contends the court should have imposed only one-third of the maximum of the subordinate offense, i.e., two months. The People respond that Penal Code section 1170.1, subdivision (a), by its terms applies only to consecutive terms imposed for felony offenses and that the juvenile court should therefore aggregate any subordinate misdemeanor term by imposing the maximum term prescribed by law, as it did here.

“‘[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences the former construction will be adopted.’ (*Clements v. T. R. Bechtel Co.* (1945) 43 Cal. 2d 227, 233 [273 P.2d 5].)

“The interpretation of section 726 urged by the People would lead to the following result: A minor committed for the period of the maximum term for a principal felony offense, and to one-third of the middle term of a ‘sixteen months, two years, three years’ subordinate felony offense, could be

confined for an aggregate maximum period four months shorter than a minor committed for the same principal offense but with a subordinate misdemeanor offense having a one-year maximum term. This anomaly does not appear to have been within the contemplation of the Legislature.

“Although the Legislature clearly indicated its intent that the aggregation provisions of Penal Code section 1170.1, which limit consecutive terms to one-third of the middle determinate term, apply only in imposing sentence for felonies, we are not persuaded that the Legislature intended that this distinction apply in determining the maximum period of confinement for minors committed by the juvenile court. The limitation of section 1170.1 reflects a legislative recognition that misdemeanor terms, unless imposed concurrently with a felony term, are served in local detention facilities and are not part of a continuous period of imprisonment under the supervision of the same correctional officials. The judge who orders that a misdemeanor term be served consecutively to a previously imposed felony term thus retains discretion as to the length of the misdemeanor term and the power to maintain supervision over the defendant through probation by suspension of execution of the term for an appropriate period. The latter option would in many cases be foreclosed were the term limited to one-third of the maximum term since no realistic sanction for violation of probation would be available.

“It is apparent that the considerations leading to the limitation on physical confinement of minors differ markedly from those involved in adult sentencing. The physical confinement to which Welfare and Institutions Code section 726 refers is typically a commitment for a single continuous period of custody under the supervision of a single agency with a unitary rehabilitation plan. By directing in section 726 that the juvenile court measure the maximum period of confinement for ‘multiple counts’ in accordance with subdivision (a) of Penal Code section 1170.1, without restricting the application of the consecutive term provisions of that subdivision of felony counts, the Legislature recognized the different circumstances of juvenile and adult commitments, and indicated its intent that the aggregation provisions of section 1170.1 be applied whether the offenses committed by the minor are felonies or misdemeanors.”

As can be seen, the court held that in computing the “aggregate maximum term” of a felony and a misdemeanor under section 726, a consecutive misdemeanor term should be reduced to one-third its maximum in accordance with the consecutive sentence provisions of Penal Code section 1170.1, subdivision (a) despite the fact that section 1170.1 applies

only to felonies. The rationale of the court was that while the Legislature intended misdemeanors to be treated differently than felonies for purposes of consecutive sentencing with regard to adults, it did not intend this distinction to apply to minors committed by the juvenile court “for a single continuous period of custody under the supervision of a single agency with a unitary rehabilitation plan.”

In considering whether the rationale of the above quoted portion of *In re Eric J.* would apply to a construction of section 6316.1, it must be noted that there is a significant difference between the wording of section 726 and section 6316.1. The particular paragraph of section 726 which deals with aggregating terms does not expressly limit its applicability to felonies, it merely provides:

“If the court elects to aggregate the period of physical confinement on multiple *counts*, or multiple *petitions*, including previously sustained petitions adjudging the minor a ward within Section 602, the ‘maximum term of imprisonment’ shall be specified *in accordance* with subdivision (a) of Section 1170.1 of the Penal Code. (Emphasis added.)

In contrast subdivision (a) of section 6316.1 prescribes how the maximum term of commitment for consecutive felonies is to be computed and subdivision (c) prescribes how the maximum term of commitment for consecutive misdemeanors is to be computed. The procedure expressly provided for aggregating consecutive misdemeanors precludes adopting the felony aggregating formula for misdemeanors under section 6316.1 on the basis of any assumptions of legislative intent as in *In re Eric J.* Accordingly, we conclude that the rationale of *In re Eric J.* provides no assistance in the interpretation of section 6316.1.

There still remains the issue of whether there is any constitutional limit on the consecutive terms which a court could impose for multiple convictions where one or more of the offenses are misdemeanors. The principle of equal protection of laws guaranteed by both the state and federal Constitutions requires that persons similarly situated must receive like treatment under the law. (*In re Moye*, 22 Cal. 3d 457, 465–466; *People v. Olivas* (1976) 17 Cal. 3d 236.) In *People v. Olivas*, *supra*, the court struck down a provision in the Welfare and Institutions Code which authorized the Youth Authority to maintain control over convicted misdemeanants committed to its care as youthful offenders for a period in excess of the maximum jail term permitted by statute for the offense or offenses committed. The court found the right to liberty to be a fundamental interest and that the state failed to establish a compelling interest justifying a statutory distinction which would permit a youthful offender to be subject to a longer period of confinement than a regular adult offender.

In the case of an MDSO, we have seen that if section 6316.1 were construed literally without regard to constitutional limitations, in some cases an MDSO with underlying misdemeanor convictions would be subject to a longer maximum term of commitment than that to which he would have been subject had the crimes of which he was convicted been felonies. That interpretation clearly would violate the principle of equal protection of laws.

However, that interpretation is not required. A statute is presumed constitutional and must be interpreted in harmony with constitutional requirements. (*California Housing Finance Agency v. Elliott* (1976) 17 Cal. 3d 575, 594.) Section 6316.1, subdivision (c) limits the maximum term of commitment for multiple misdemeanors to the maximum “which could have been imposed” by the court. Although the court in *In re Eric J.* stated that the one-third formula of Penal Code section 1170.1 was not applicable to misdemeanor sentences, and that courts have a certain amount of discretion with regard to choosing the length of a misdemeanor term up to the statutory maximum, it did not suggest that a court could constitutionally aggregate misdemeanor terms so that a defendant would receive a longer period of incarceration than had the crimes of which he was convicted been felonies. We also note that the court in *In re Eric J.* pointed out that an adult who received a misdemeanor sentence consecutive to a felony sentence would not be subject to a continuous period of confinement under the supervision of the same correctional agency. In the case of an MDSO commitment, the defendant is subject to a continuous period of confinement at a state hospital or other mental health facility irrespective of whether the underlying convictions are for felonies or misdemeanors. (See §§ 6316, 6325.1.) We conclude that the principle of equal protection of laws would preclude a court from sentencing a defendant to a continuous period of confinement in county jail on the basis of consecutive misdemeanor counts for a term longer than he would have received had the crimes of which he was convicted been felonies. The phrase, “which could be imposed,” in section 6316.1 incorporates the same principle of equal protection into the computation of the maximum term of commitment by the Board.

We conclude, therefore, that section 6316.1, when construed in light of the constitutional requirement of equal protection of laws, provides that when aggregating the terms of underlying misdemeanors to determine the maximum term of commitment, the Board must use the statutory maximum jail term for each misdemeanor offense. However, the maximum term of commitment may not exceed that which would obtain had the offenses of which the defendant was convicted been felonies. Thus, there is an upper limit on the maximum term of commitment in cases where one or more of several underlying offenses are misdemeanors. In the case of conviction for a misdemeanor where the offense has an alternate felony sentence, (see Pen. Code, § 17) an MDSO’s maximum term may not exceed the maximum term which he would have received had the crimes of which he was convicted been determined to be felonies rather than misdemeanors. In the case of misdemeanors with no alternative felony punishment, the MDSO’s maximum term may

not exceed the maximum term which he would have received had the misdemeanors of which he was convicted been punishable as felonies under Penal Code section 18, i.e., with a minimum determinate sentence of sixteen months, two years or three years.

The second question is similar to the first but concerns the “maximum term or commitment” within the meaning of Penal Code section 1026.5 in the case of a person found to be not guilty by reason of insanity with respect to several offenses, one or more of which are misdemeanors. Section 1026.5 provides in pertinent part:

“(a) (1) In the case of any person committed to a state hospital or other facility pursuant to Section 1026 or 1026.1, who committed a felony on or after July 1, 1977, the court shall state in the commitment order the maximum term of commitment, and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in this section. *For the purposes of this section, ‘maximum term of commitment’ shall mean the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits as defined by Section 2900.5, and disregarding any credits which could have been earned under Section 2930 to 2932, inclusive.*

“(2) In the case of a person committed to a state hospital or other facility pursuant to Section 1026 or 1026.1, who committed a felony prior to July 1, 1977, who could have been sentenced under Section 1168 or 1170 if the offense was committed after July 1, 1977, the Community Release Board shall determine the maximum term of commitment which could have been imposed under paragraph (1), and the person may not be kept in actual custody longer than the maximum term of commitment, except as provided in subdivision (b). The time limits of this section are not jurisdictional.

“In fixing a term under this section, the board shall utilize the upper term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted, increased by any additional terms which could have been imposed based on matters which were found to be true in the committing court. However, if least two of the members of the board after reviewing the persons file determine that a longer term should be imposed for the reasons specified in Section 1170.2, a longer term may be imposed following the procedures and guidelines set forth in Section 1170.2, except that any hearings deemed necessary by the board shall be held within 90 days of the operative date of this section. Within 90 days of the date the

person is received by the state hospital or other facility, or of the effective date of this subdivision, whichever is later, the Community Release Board shall provide each person with the determination of his maximum term of commitment or shall notify such person that he will be scheduled for a hearing to determine his term.

“Within 20 days following the determination of the maximum term of commitment the board shall provide the person, the prosecuting attorney, the committing court, and the state hospital or other facility with a written statement setting forth the maximum term of commitment, the calculations, and any materials considered in determining the maximum term.

“(3) In the case of a person committed to a state hospital or other facility pursuant to Section 1026 or 1026.1 who committed a misdemeanor, the maximum term of commitment shall be the longest term of county jail confinement which could have been imposed for the offense or offenses of which the person was found to have committed, and the person may not be kept in actual custody longer than this maximum term” (Emphasis added.)

In *In re Moye, supra*, 22 Cal. 3d 457, the Supreme Court held that persons found not guilty by reason of insanity were similarly situated to those found to be MDSO's and consequently that under the principle of equal protection of laws, they must be accorded similar treatment with regard to their “maximum term of commitment.” Penal Code section 1026.5 was enacted by Statutes of 1979, chapter 1114, section 3 as an urgency measure in apparent response to the court's decision. (See ch. 1114, § 6.)

Penal Code section 1026.5 uses language substantially identical to that of section 6316.1 with regard to the computation of the “maximum term of commitment” in both the case of underlying felonies and the case of underlying misdemeanors. Consequently, we believe that the rationale of our analysis with respect to section 6316.1 is equally applicable to this section. We conclude, therefore, that the “maximum term of commitment” for purposes of Penal Code section 1026.1 in the case of a person found not guilty by reason of insanity with respect to several offenses including one or more misdemeanors would be computed in the same manner as the maximum term of commitment under section 6316.1.
