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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

WENDELL PASION PRIETO,

Defendant and Appellant.

A131166

(Contra Costa County
Super. Ct. No. 4-162606-8)

I. INTRODUCTION

A complaint charged appellant Wendell Pasion Prieto with one count of committing a lewd act on a child under the age of 14 (Pen. Code,¹ § 288, subd. (a)) and one count of committing oral copulation with a person under the age of 14 and 10 or more years younger than appellant (§ 288a, subd. (c)(1)). Appellant rejected an offer for a three-year prison term in exchange for a guilty plea to one of the charges. Instead, appellant pleaded no contest to both counts. The plea was “open” with possible sentences ranging from a grant of probation to eight years in prison. At the sentencing hearing, the trial court rejected appellant’s argument that he was a suitable candidate for probation, instead finding him statutorily ineligible under section 1203.066, subdivision (a)(8) and sentencing him to a six-year prison term. He appeals contending: (1) his trial counsel was ineffective for giving him inaccurate advice about his probation eligibility, misadvising him to reject the plea bargain offer, and failing to move to withdraw his

¹ All further undesignated statutory references are the Penal Code.

plea;² (2) the trial court misled him about his probation eligibility; and (3) his equal protection rights were violated by the mandatory requirement that he register as a sex offender. We affirm the judgment.

II. BACKGROUND

A. The Offenses³

Appellant fathered a child, the victim Jane Doe, when he was approximately 17 years old. Appellant was estranged from Jane since infancy and subsequently reunited with her when she was 13 years old. Soon after reuniting, appellant and Jane began spending a lot of time together and developed a close relationship, which Jane described as “boyfriend/girlfriend type” more than a “father/daughter” type. According to the probation report, “the two had texted each other and talked on the phone in a sexual manner, discussing sexual activity.”

On the day of the offenses, appellant drove Jane to a local park to play basketball. Once at the park, appellant and Jane “began ‘play wrestling’ in the front seat” of the car. Jane explained that when her cell phone dropped onto appellant’s lap, she “began rubbing [his] penis, and they both pulled down his shorts, exposing his erect penis.” Jane then “placed her mouth on the tip of [his] penis for approximately five seconds.” According to the probation report, appellant took a picture of Jane performing oral sex on him.

Jane’s mother subsequently discovered the photograph on Jane’s cell phone that showed Jane performing oral sex on appellant. When interviewed by the police, appellant admitted that Jane orally copulated him. Appellant said that “he stopped her and drove her home. He further admitted to kissing the victim in a sexual manner, and it was the worst ‘30 seconds’ of his life.”

² Appellant raises the same ineffective assistance of counsel claims in a petition for writ of habeas corpus (A133503), which is being considered concurrently with this appeal. A separate order in the habeas proceeding is being filed on the same date as the filing of this opinion.

³ Because appellant waived a preliminary hearing and entered his no contest plea based on the complaint, the facts concerning the underlying offenses are derived from the probation report and police reports.

B. Appellant's Psychological Evaluations

1. Voluntary Counseling

Following his arrest, appellant sought counseling with Caprice D. Haverty, Ph.D., a specialist in the areas of sexual abuse and molestation. At the time of sentencing, Dr. Haverty had conducted 22 sessions with appellant, and she concluded that he will likely never commit a sexually related act with a minor again. She noted that appellant did not engage in a sexual act with a minor based on predisposed tendencies or normative arousal to children. Dr. Haverty further found appellant to be mentally sound, remorseful for his actions, empathetic to Jane's situation, and a good candidate for treatment.

Dr. Haverty described appellant as a family man, with a supportive wife and employer, who matched the profile of a situational, "single incident" offender, who would be highly responsive to treatment. Dr. Haverty opined that there is "virtually no risk" that appellant would molest another family member, or any other child.

Dr. Haverty noted that appellant had been a victim of sexual abuse as a child for a number of years; a babysitter and his older sister molested him at the ages of 10 and 13, respectively. Appellant never received treatment for the abuse, never told anyone about it, and never came to terms with it. Dr. Haverty opined that it would be beneficial to appellant if he were permitted to go back to work and continue with his treatment.

2. Section 288.1 Exam

Court-appointed psychologist Jules Burstein, Ph.D., conducted a psychological evaluation of appellant, consisting of interviews with appellant and his common law wife, A.V., as well as reviewing the police reports and letters from Dr. Haverty. Dr. Burstein, like Dr. Haverty, opined that it was highly unlikely that appellant would ever molest again. Dr. Burstein concluded that appellant's behavior was attributable to his sexual victimization as a child, coupled with the fact that Jane initiated the sexual contact, the end result being that appellant allowed his cognitive reasoning to be overcome by opportunistic sexual feelings.

Dr. Burstein opined that appellant was an "ideal candidate for probation," as he had been in treatment for eight months, and was strongly and sincerely motivated to

avoid relapse and to repair the damage he has done to his personal relationships. Dr. Burstein recommended that appellant remain in treatment for as long as Dr. Haverty deemed appropriate.

III. DISCUSSION

A. Ineffective Assistance of Counsel

Appellant contends that he received ineffective assistance of counsel during plea negotiations. He argues that the public defender's incorrect advice during these negotiations caused him to reject a three-year sentence offer in hopes of getting probation in a case in which—unbeknownst to appellant—he was statutorily ineligible for probation.

A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*); *People v. Maury* (2003) 30 Cal.4th 342, 389, cert. den. *sub nom. Maury v. California* (2004) 540 U.S. 1117; see U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) The right to effective assistance of counsel includes the right to be informed of the consequences of refusing a proffered plea bargain. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933-934, 936 (*Alvernaz*.) To establish a claim of incompetence of counsel, a defendant must demonstrate both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland, supra*, 466 U.S. at pp. 686-688, 694-695; *People v. Maury, supra*, 30 Cal.4th at p. 389; see *People v. Benavides* (2005) 35 Cal.4th 69, 92-93; *Alvernaz*, 2 Cal.4th at pp. 936-937.) It is the defendant's burden on appeal to establish both deficiency and prejudice. (*People v. Williams* (1988) 44 Cal.3d 883, 937.) In demonstrating prejudice, the defendant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*Ibid.*) Where, as here, a claim of ineffective assistance of counsel is raised on direct appeal, the facts supporting both deficiency and prejudice must appear in the appellate record. (*People v. Gray* (2005) 37 Cal.4th 168, 207.)

“[N]ormally a claim of ineffective assistance of counsel is appropriately raised in a petition for writ of habeas corpus (see, e.g., *People v. Mendoza Tello* [(1997)] 15 Cal.4th 264[, 266-267]), where relevant facts and circumstances not reflected in the record on appeal, such as counsel’s reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the two-pronged inquiry of whether counsel’s ‘representation fell below an objective standard of reasonableness,’ and whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 111.) Reviewing courts are not to become engaged “ ‘in the perilous process of second-guessing.’ [Citation.]” (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

Even assuming for the sake of argument that defense counsel’s assessment of appellant’s probation eligibility was incorrect, the appellate record discloses no basis for concluding that “ ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Snow, supra*, 30 Cal.4th at p. 111.) In order to prevail on a claim of ineffective assistance of counsel based upon counsel’s failure adequately to convey a settlement offer to a defendant, “[i]n addition to proving that he or she would have accepted the plea bargain, a defendant also must establish the probability that it would have been approved by the trial court. Such a requirement is *indispensable* to a showing of prejudice” (*Alvernaz, supra*, 2 Cal.4th at pp. 940-941, italics added.)

Here, the record is silent regarding whether the plea would have been approved by the trial court. “In exercising their discretion to approve or reject proposed plea bargains, trial courts are charged with the protection and promotion of the public’s interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes. [Citation.] For that reason, a trial court’s approval of a proposed plea bargain must represent an informed decision in furtherance of the interests of society [citation]; as recognized by both the Legislature and the judiciary, the trial court may not arbitrarily abdicate that responsibility. . . . [¶] Thus, although it may well be that in our frequently overcrowded courts, judicial rejection of plea bargains is the

exception rather than the general rule, we may not simply presume . . . that the trial court automatically would have approved a plea bargain negotiated by the prosecutor and the defense.” (*Alvernaz, supra*, 2 Cal.4th at p. 941, italics & fn. omitted.) Accordingly, we cannot, on this record, presume to know whether the trial court would have approved the prosecution’s offer. (*Id.* at pp. 940-941.)

For these reasons, we conclude appellant’s ineffective assistance claims fail on direct appeal and they are properly considered in a habeas corpus proceeding. (*People v. Diaz* (1992) 3 Cal.4th 495, 566; *People v. Cummings* (1993) 4 Cal.4th 1233, 1342.)

B. Admonishment by Trial Court

Appellant further complains that he was affirmatively misled by the court about his eligibility for probation. In support of this assertion, he states that during the plea colloquy the court led him to believe that he *could receive* probation by informing him that “sentence could range from I guess essentially credit for any time that you have already served all the way through and up to eight years in state prison.” He further asserts the court misled him into thinking that probation was an option when it ordered the section 288.1 evaluation.

According to appellant, he “rejected a low-term offer of three years from the prosecution and elected to plead open to the court in order to secure the possibility of a grant of probation.” Appellant asserts that the trial court committed reversible error and that we should reverse and remand to allow him to withdraw his plea. However, once appellant knew probation was not an option, neither he nor his counsel moved to withdraw his plea prior to the entry of judgment. (See § 1018.) Under well-established principles of appellate review, this claim of error is forfeited due to appellant’s failure to raise it below. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590.) To the extent appellant asserts that defense counsel rendered ineffective assistance of counsel by not moving to withdraw his plea, this claim, like his other ineffective assistance claim, is more appropriately addressed in the related habeas proceedings, as the record discloses no basis for defense counsel’s failure to move to withdraw appellant’s plea or if such a

motion would have been granted upon a showing of good cause. (*People v. Snow, supra*, 30 Cal.4th at p. 111.)

C. Mandatory Sex Offender Registration

Appellant is required under section 290 to register as a sex offender because he was convicted of violating section 288, subdivision (a) (lewd acts on a child under 14 years old) and section 288a, subdivision (c)(1) (oral copulation on person under 14 years old and more than 10 years younger). (See § 290, subds. (b)-(c).)

Appellant contends that he was denied equal protection of the laws under the federal and state Constitutions because sex offender registration is mandatory for his convictions, whereas it is discretionary for a section 261.5 conviction (unlawful intercourse with a minor). Appellant complains that persons convicted of committing section 288, subdivision (a) and section 288a, subdivision(c)(1) offenses are similarly situated to those who commit a section 261.5 offense, yet they are treated differently. We disagree.

“The United States and California Constitutions entitle all persons to equal protection of the laws. [Citations.] This guarantee means ‘that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances.’ [Citation.] A litigant challenging a statute on equal protection grounds bears the threshold burden of showing ‘that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’ [Citation.] Even if the challenger can show that the classification differently affects similarly situated groups, ‘[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest,’ the classification is upheld unless it bears no rational relationship to a legitimate state purpose. [Citation.]” (*People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1372, italics omitted (*Ranscht*).)

Section 288, subdivision (a) makes it a crime to commit a lewd act on a child under the age of 14. It is a specific intent offense and it requires that the defendant have “ ‘the specific intent of arousing, appealing to, or gratifying the lust of the child or the

accused.’ [Citation.]” (*People v. Warner* (2006) 39 Cal.4th 548, 557, italics omitted.) Unlawful intercourse under section 261.5, by contrast, simply makes it a crime to engage in sexual intercourse with a minor. It is a general intent offense. (*Ranscht, supra*, 173 Cal.App.4th at p. 1373.) Despite appellant’s contentions to the contrary, those who commit the specific intent crime of committing a lewd act with a child under the age of 14 are not “similarly situated” to those who commit the general intent offense of having unlawful intercourse with a minor.

Nevertheless, appellant, relying on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), insists that he is similarly situated with other child sex offenders. In *Hofsheier*, the Supreme Court held that persons convicted of voluntary oral copulation with 16- or 17-year-old minors and those convicted of voluntary sexual intercourse with minors of the same age were similarly situated for purposes of mandatory sex offender registration under section 290 where the only difference between the two offenses was the nature of the sexual act. (*Hofsheier, supra*, 37 Cal.4th at pp. 1200, 1206-1207.) But subsequent decisions have refused to extend *Hofsheier*’s rationale in cases where the defendants were not similarly situated with another group of convicted persons who receive different treatment under the sex offender registration statute. (See *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114 [lewd and lascivious acts on victim age 14 or 15 and 10 or more years younger than defendant in violation of § 288, subd. (c)(1)]; *People v. Anderson* (2008) 168 Cal.App.4th 135, 142 [same]; *People v. Manchel* (2008) 163 Cal.App.4th 1108, 1114, disapproved on another point in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338-339, fn. 4 [oral copulation of victim age 15 and defendant over age of 21 in violation of § 288a, subd. (b)(1)].)

The court in *People v. Alvarado* (2010) 187 Cal.App.4th 72 faced the same argument that appellant makes here. The *Alvarado* court rejected it flatly, stating “there is no equal protection violation in imposing mandatory registration for defendant’s attempted section 288(a) conviction. Defendant fails to establish any similar crime in which mandatory registration is not required. Defendant has not shown that the state has adopted a classification that affects two or more similarly situated groups in an unequal

manner. [Citation.] A section 261.5 offense does not require the victim to be under the age of 14 and concerns the general intent offense of committing unlawful sexual intercourse.” (*Id.* at p. 79.)

Similarly, in *People v. Singh* (2011) 198 Cal.App.4th 364 (*Singh*), the defendant was caught in a sting operation and was convicted of attempting to commit a section 288, subdivision (a) offense. (*Id.* at p. 367.) On appeal he argued the court violated his equal protection rights when it required him to register as a sex offender. (*Id.* at p. 369.) The *Singh* court disagreed, “Singh has not met his threshold burden of showing ‘ “that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.” ’ [Citation.] Despite his contentions, Singh is not similarly situated to offenders convicted under section 261.5, 288a[, subd.] (b)(1) or 289[, subd.] (h) because those provisions are not limited to children under the age of 14 and are general intent offenses. Accordingly, Singh’s equal protection argument fails.” (*Id.* at p. 371.)

Likewise, in *People v. Kennedy* (2009) 180 Cal.App.4th 403 (*Kennedy*), the defendant contended that “his mandatory registration as a sex offender violates the equal protection provisions of the federal and state Constitutions because felons convicted of attempted distribution of harmful matter to a minor (§§ 664, 288.2, subd. (b)) are subject to mandatory sex offender registration while those convicted of unlawful sexual intercourse with a minor (§ 261.5) are not.” (*Kennedy, supra*, 180 Cal.App.4th at p. 408.) The *Kennedy* court found that, “[c]ontrary to [the] defendant’s claim, had [the] defendant actually engaged in either unlawful, nonforcible sexual intercourse, or unlawful, nonforcible oral copulation with the alleged victim, who he thought was 13 years old, he would have been subject to prosecution under section 288, subdivision (a), for the commission or attempted commission of a lewd act on a minor under 14, a crime for which sex offender registration is mandatory. [Citations.] The fact that defendant—had he had sexual intercourse with a 13-year-old victim—could have been charged under section 261.5, subdivision (d), an offense that is not subject to mandatory registration under section 290, rather than section 288, subdivision (a), does not suggest that mandatory registration based on defendant’s conviction under section 288.2 constituted a

violation of equal protection. [Citation.] [¶] [The d]efendant has not shown ‘ “ ‘that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’ [Citations.]” [Citation.]’ [Citations.] Since [the] defendant has not proven a violation of equal protection, we reject his claim that mandatory registration as a consequence of his section 288.2, subdivision (b) felony conviction is unconstitutional.” (*Id.* at pp. 410-411, italics & fn. omitted.)

Consistent with the decisions reached in *Alvarado*, *Singh*, and *Kennedy*, we conclude that one who commits a violation of section 288, subdivision (a) is not similarly situated to one who violates section 261.5.⁴ There is no equal protection violation.

None of the arguments advanced by appellant compel a contrary conclusion. The offense appellant committed, section 288, subdivision (a) and the offense he has identified for comparison purposes, section 261.5, both concern sexual conduct with minors. However, the fact that appellant—had he had sexual intercourse with 13-year-old Jane—*could have* been charged under section 261.5, subdivision (d), an offense that is not subject to mandatory registration under section 290, rather than section 288, subdivision (a), does not suggest that mandatory registration based on appellant’s conviction under section 288, subdivision (a) constituted a violation of equal protection. (See *Kennedy*, *supra*, 180 Cal.App.4th at pp. 410-411.)

Next, appellant argues the fact that a section 288, subdivision (a) offense is a specific intent offense committed against a child under the age of 14, while a section 261.5 offense is a general intent offense that is committed against a minor is not significant for equal protection purposes. As discussed, however, case law is to the contrary. (*Alvarado*, *supra*, 187 Cal.App.4th at p. 79; *Singh*, *supra*, 198 Cal.App.4th at p. 371.)

⁴ Because we conclude appellant has not shown he was subject to unequal classification with any similarly situated groups, we do not address his additional argument that there is no rational basis to differentiate between persons convicted of violating section 261.5 and those convicted of violating section 288, subdivision (a).

Appellant unpersuasively argues that *Alvarado* was wrongly decided. According to appellant, the *Alvarado* court incorrectly limited *Hofsheier* to specific age categories, adding that the “age threshold is not a relevant distinction between” section 288, subdivision (a) or section 288a, subdivision (c)(1) and section 261.5. We see no reason to reject the approach of the courts that have concluded that defendants convicted of lewd and lascivious acts with a child under the age of 14 are not similarly situated with defendants convicted of other sexual offenses against minors that do not specify age requirements.

In a related argument, appellant argues that “the relevant comparison group is with persons convicted of having voluntary sexual contact of any kind (i.e., ‘lewd and lascivious conduct’) with a 13-year-old and those convicted of having voluntary sexual intercourse with a 13-year-old.” According to appellant the proper focus of an equal protection analysis is on the fact that both statutes can be applied to “those who commit sexual offenses with 13 year olds but are simply punished under different statutes.” We reject this argument because it is contrary to well-settled California law. The courts of this state have ruled that to establish an equal protection violation, a defendant must show that the state has adopted a classification scheme that affects two or more similarly situated groups in an unequal manner. (*People v. McKee* (2010) 47 Cal.4th 1172, 1202; *Hofsheier, supra*, 37 Cal.4th at p. 1199; *In re Eric J.* (1979) 25 Cal.3d 522, 531; *People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.) Thus, the relevant comparison is the classification scheme the state has adopted and whether it treats similarly situated groups in an equal manner, not whether under specific factual scenarios, the results might be disparate. Appellant’s argument to the contrary is unavailing.

Because appellant violated section 288, subdivision (a), the court properly ordered him to register as a sex offender. Appellant’s equal protection rights were not violated.⁵

⁵ Having reached this conclusion, we need not determine whether appellant could also be subject to registration based on his conviction of violating section 288a, subdivision (c)(1).

IV. DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

SEPULVEDA, J.

RIVERA, J.