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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL U.,

Defendant and Appellant.

D058486

(Super. Ct. No. CR115460)

APPEAL from an order of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

Penal Code section 1203.4 allows a defendant who has successfully completed probation to be relieved of his or her conviction and all disabilities associated with the conviction.¹ However, in 1997, section 1203.4 was amended with retroactive effect to exclude certain sex offenders from its provisions. Prior to the enactment of the

¹ Subsequent unspecified statutory references are to the Penal Code.

amendment, Michael U.² pleaded guilty to a sex offense, was granted probation, and was told he would be required to register as a sex offender. Several years after completing his probation, he petitioned the court for relief under section 1203.4, and the court denied his motion.

On appeal, defendant argues he was promised section 1203.4 relief as part of his plea agreement, and accordingly as a matter of constitutional due process he is entitled to this relief. He recognizes there are no express terms in his plea agreement referencing section 1203.4 relief, but asserts the promise is implied based on the implicit incorporation of then-existing law into the agreement. For reasons we shall explain, we reject this contention. Defendant also argues that extrinsic evidence shows that a section 1203.4 promise was part of his plea agreement. On the record before us, we conclude he has not made this evidentiary showing.

Finally, defendant argues he is entitled to relief because prior to his acceptance of the plea, he was not advised that the sex offender registration requirement would last a lifetime. The contention fails because defendant has not shown it is reasonably probable he would have rejected the plea agreement had he been fully advised of the consequences of his plea.

We affirm the court's order.

² Given the unique privacy interests at stake in a case involving a request to obtain relief from a conviction and associated disabilities, we grant defendant's request for protective nondisclosure of his full name.

FACTUAL AND PROCEDURAL BACKGROUND

The Plea Agreement and Surrounding Circumstances

In 1990 defendant was charged with six counts of lewd acts on a child under age 14, committed during a two-year period from 1988 to 1990. (§ 288, subd. (a).) According to the probation report, the allegations arose from claims by defendant's nine-year-old daughter that he had been molesting her for about two years. The daughter told the authorities that defendant touched her "'private spot'" with his fingers and penis; he made her rub his penis; "'slimy stuff'" came out of his penis; and on at least one occasion he put his penis inside her. When interviewed by the authorities, defendant's 14-year-old daughter disclosed that she also had been molested by defendant about five years earlier when they lived in Oregon. Defendant told the police that he never molested his daughters.

On August 8, 1990, defendant pleaded guilty to one count of lewd conduct under *People v. West*.³ In exchange, the district attorney agreed the remaining counts would be dismissed; defendant would be granted probation; and as a condition of probation he would receive a 365-day suspended sentence. The plea agreement stated the maximum sentence he could receive was eight years in prison.

At the change of plea hearing, the court advised defendant that if he received probation the probationary period could be as long as eight years. The court then asked defendant if he understood he would be required to register as a sex offender. Defendant

³ Under *People v. West* (1970) 3 Cal.3d 595, a defendant may plead guilty without personally admitting a factual basis for the plea.

responded, "I didn't know that, but —" Defense counsel apologized, stating he had forgotten to inform defendant of this consequence.⁴ The court told defendant that registration was mandatory, and defendant asked, "What does that require on my behalf?" The court responded: "That you register pursuant to Penal Code section 290 as a sex offender." Defense counsel explained that he was required "to go to the police department and register." Defendant then stated, "If I have to do it, I have to do it, Your Honor, yes."

The trial court delineated the terms of the plea agreement and asked defendant if any other promises had been made; defendant answered no. After the prosecutor summarized the factual basis for the plea, defense counsel (with defendant's concurrence) stated that defendant was not contesting the facts and he was pleading guilty under *People v. West* "on the theory he did not do this, but if he went to trial the consequences could be catastrophic."

Defendant was sentenced two months later, on October 16, 1990. As specified in the plea bargain, he was granted probation, with a suspended one-year jail sentence as a condition of probation. He was placed on eight years' formal probation, with sex offender registration listed as one of his probation conditions. On the date of sentencing, defendant signed a document entitled "NOTICE OF REGISTRATION REQUIREMENT," which stated that his probation would expire on October 16, 1998

⁴ The plea agreement initialed and signed by defendant included sex offender registration among the list of possible consequences of his plea, and stated the applicable consequences should be circled. However, none of the listed consequences were circled.

and that his "responsibility to register as a sex offender is a lifetime requirement." The bottom portion of the probation order includes preprinted language stating that upon successful completion of probation, a defendant shall "at any time thereafter" be permitted to withdraw his guilty plea and enter a not guilty plea, the court shall dismiss the accusation or information, and the defendant shall then be released "from all penalties and disabilities resulting from" the conviction.⁵

Eight years later, on October 15, 1998, defendant completed his probation term. In September 1998, defendant sent a letter to the El Cajon police department stating that he had successfully completed his probation, and that according to the probation order "as well as the court[] appointed attorney who represented" him, he had "now gained the right to have the court set aside the verdict of guilty [and] have the accusation and information dismissed in this case against [him] [s]o as to release . . . [him] from all the penalties and disabilities that had been placed upon [him]." In support, defendant referenced "the fine print located at the bottom of the probation order." He asked the police department to "forward this letter to those that will need it" and requested that the court dismiss the case and release him from all the penalties and disabilities. Defendant

⁵ This preprinted language stated: "You are hereby informed that: [¶] Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the Court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the Court shall set aside the verdict of guilty; and in either case the Court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."

described the burdens imposed on him due to his conviction and the sex offender registration requirement; stated he was moving with his family to Oregon; and provided a contact address and phone number in Oregon.

Development of the Registration Controversy

Six years later, by letter dated August 10, 2004, the Oregon police department notified defendant that they had recently learned about his lewd act conviction in California, and based on this conviction he was required to register as a sex offender in Oregon. In a September 3, 2004 letter to defendant, the Oregon police department noted defendant had not filed a motion in California for relief under section 1203.4 and had not obtained a certificate of rehabilitation. By letter dated September 12, 2004, defendant responded that he had delivered a request for relief from his conviction and associated disabilities to the El Cajon police department and to his probation officer when he left California; he received no communications from them; he assumed "this ordeal was finally over just like [he] was told and was written in [his] probation order"; and if he needed a certificate of rehabilitation he would obtain it. He also explained that he pleaded guilty even though he did not commit the offenses because on occasion innocent people go to jail and "[n]ot wanting to be one of those and being that [he] was offered a plea that would prevent that, one that was supposed to go away after a period of time, [he] took it."

Six years after these initial communications, by letter dated August 11, 2010, the Oregon police department notified defendant that it had determined that he was required

to register, noting again that he had not been granted section 1203.4 relief and had not obtained a certificate of rehabilitation.

Changes in the Law Concerning Section 1203.4 Relief

Section 1203.4, subdivision (a) requires the court to permit a defendant who has fulfilled the conditions of probation to obtain relief from the conviction and all disabilities accompanying the conviction. (See *People v. Arata* (2007) 151 Cal.App.4th 778, 783.) The defendant must be advised of the right to section 1203.4 relief in the probation papers; the relief may be granted at any time after termination of probation; and the defendant may apply for the relief in person, through an attorney, or through a probation officer. (§ 1203.4, subd. (a)(1).)⁶

In 1990, when defendant pleaded guilty to the section 288 lewd act offense, section 1203.4 relief was available to sex offenders. (Historical and Statutory Notes, 50D West's Ann. Pen. Code (2004 ed.) foll. § 1203.4, p. 554.) An order providing relief under section 1203.4 did not automatically remove the lifetime registration requirement required under section 290. However, under then-existing statutory provisions, after

⁶ Section 1203.4, subdivision (a)(1) states in relevant part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation . . . the defendant shall, at any time after the termination of the period of probation . . . be permitted by the court to withdraw his or her plea of guilty . . . and enter a plea of not guilty; . . . and . . . the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing."

securing the section 1203.4 order, the defendant could obtain removal of the lifetime sex offender registration by petitioning for and obtaining a certificate of rehabilitation. (§ 4852.01, subd. (c); 51C Pt. 2 West's Ann. Pen. Code (2011 ed.) § 4852.01, p. 36; former § 290.5; Historical and Statutory Notes, 48 West's Ann. Pen. Code (2008 ed.) foll. § 290.5, p. 382.)⁷

Subsequent to defendant's guilty plea, in 1997 (effective January 1998) section 1203.4 was amended to exclude certain sex offenders, including individuals (like defendant) who were convicted of violating section 288. (§ 1203.4, subd. (b); Historical and Statutory Notes, 50D West's Ann. Pen. Code, *supra*, foll. § 1203.4, p. 554; *People v. Arata*, *supra*, 151 Cal.App.4th at p. 783; see *People v. Ansell* (2001) 25 Cal.4th 868, 877-880, & fn. 19.) The 1997 amendment applies retroactively to defendants convicted and sentenced before the amendment's effective date. (*People v. Arata*, *supra*, at pp. 784-785; see *People v. Ansell*, *supra*, at pp. 880-893.)

⁷ At the time of defendant's plea (1990), the relevant statutes provided: "Notwithstanding Section 1203.4 and except as provided in Section 290.5, a person convicted of a felony sex offense shall not be relieved from the duty to register under Section 290." (Former § 290.1.) "A person required to register under Section 290 may initiate a proceeding under . . . Section 4582.01 . . . , and upon obtaining a certificate of rehabilitation, shall be relieved of any further duty to register under Section 290." (Former § 290.5; Historical and Statutory Notes, 48 West's Ann. Pen. Code, *supra*, § 290.5, p. 382.) "Any person convicted of a felony the accusatory pleading of which has been dismissed pursuant to Section 1203.4 may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter" (Former § 4582.01, subd. (c); Historical and Statutory Notes, 51C Pt. 2 West's Ann. Pen. Code, *supra*, foll. § 4852.01, p. 37.)

Defendant's Motion for Relief Under Section 1203.4

After receiving the Oregon police department's 2010 determination that he must register as a sex offender, in August 2010 defendant wrote to the California judge who had accepted his plea and granted him probation. Defendant informed the court that a background check showed he still had a criminal record in California, and he requested the court's assistance in resolving the matter. Defendant cited the provision in the probation order stating that after fulfillment of probation his conviction should be set aside and he should be released from all penalties and disabilities. He stated he could not afford an attorney and he had been unable "to find a form that will do what was explained to [him] according to the terms of probation when [he] entered the *People v. West* guilty plea, and what was promised and agreed to as it is written."

Shortly thereafter, on October 5, 2010, defendant, now represented by counsel, filed a formal motion to enforce the "plea agreement and probation order" and to obtain relief pursuant to section 1203.4.⁸ Defendant requested that the court set aside his conviction and discharge him from all penalties and disabilities arising from his conviction. The district attorney opposed the motion, arguing a promise of section 1203.4 relief was not part of the plea bargain. Alternatively, the district attorney contended any such promise was not a material term of the agreement.

⁸ At the time of filing the section 1203.4 relief motion, defendant temporarily came to California and registered as a sex offender. His 2010 registration form states: "My responsibility to register as a sex offender in California is a lifetime requirement, unless imposed solely as a probation condition."

Denying the motion, the trial court found there was no evidence that section 1203.4 relief was discussed during the plea negotiations or that defendant relied on the anticipated relief before pleading guilty. The court noted there were no declarations from defendant or from the attorney who had represented him during the plea proceedings. Further, there were no statements in the change of plea transcript or in the plea documents showing section 1203.4 was part of the bargain.

Defendant also argued he was entitled to relief because he was not advised, prior to the acceptance of the plea agreement, that the sex offender registration requirement would last his entire life. The trial court likewise rejected this contention.

DISCUSSION

On appeal, defendant argues he is entitled to relief because (1) he was promised section 1203.4 relief as part of the plea agreement, and (2) he was not advised of the lifetime duration of the registration requirement.⁹

I. Claim Based on Enforcement of the Plea Agreement

A. Principles Governing Enforcement and Interpretation of Plea Agreements

As a matter of constitutional due process, " 'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of

⁹ In the proceedings before the trial court, defendant also argued he was entitled to relief based on the advisement in the sentencing court's probation order concerning section 1203.4 relief, which he asserted was an enforceable court order. The trial court ruled the "fine print" advisement in the probation order was not a court order directing that he be provided section 1203.4 relief, but was merely a statement of then-existing law. On appeal, defendant does not reiterate his claim that the advisement in the probation order constitutes a court order that must now be enforced.

the inducement or consideration, such promise must be fulfilled.' " (*In re Moser* (1993) 6 Cal.4th 342, 355, italics omitted; *People v. Walker* (1991) 54 Cal.3d 1013, 1024.) "This does not mean that *any* deviation from the terms of the agreement is constitutionally impermissible[;] [rather,] the variance must be 'significant' in the context of the plea bargain as a whole to violate the defendant's rights." (*People v. Walker, supra*, at p. 1024.) A defendant may be entitled to specific performance of a material promise in a plea agreement even though subsequent changes in the law make the promise statutorily unauthorized. (See *People v. Arata, supra*, 151 Cal.App.4th at pp. 782, 786-788 [state required to comply with section 1203.4 promise notwithstanding subsequent amendment to statute excluding sex offender defendant from statute's coverage]; see also *Doe v. Brown* (2009) 177 Cal.App.4th 408, 414, fn. 7.)¹⁰

To determine the promises included in a plea agreement, the courts apply contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) The goal is to give effect to the mutual intention of the parties as objectively expressed in the contract. (*Ibid.*) If contractual language is clear and explicit, it governs. (*Ibid.*) However, extrinsic evidence may be considered to determine the existence of, and to resolve, ambiguities in the contract. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391; *Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 356-357.) To ascertain the parties' intent, the court considers the words used in the agreement, the surrounding circumstances under

¹⁰ In contrast, a provision in a plea bargain that violates *then-existing* law will normally not be enforced, and the defendant will instead be given the opportunity to withdraw the plea. (*People v. Renfro* (2004) 125 Cal.App.4th 223, 227-230, 233; *In re Williams* (2000) 83 Cal.App.4th 936, 943-945.)

which the parties negotiated the contract, the subject matter of the contract, and the subsequent conduct of the parties prior to the development of the controversy. (*People v. Shelton, supra*, at p. 767; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1449.) A contract may include implied terms that are necessary to effectuate the parties' mutual intentions. (*People v. Arata, supra*, 151 Cal.App.4th at p. 787; *People v. Rabanales* (2008) 168 Cal.App.4th 494, 505.)

The interpretation of a written contract is essentially a judicial function, and on appeal we independently determine the meaning of the contract if no extrinsic evidence was admitted or if the extrinsic evidence involves undisputed facts. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; *Abers v. Rounsavell, supra*, 189 Cal.App.4th at p. 357.) However, if the extrinsic evidence creates factual disputes or requires credibility resolutions, we defer to the trial court's determination of these matters if reasonably supported by the record. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507; *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 220-221.)

B. Analysis

Defendant recognizes there are no statements in either the written plea agreement or at the change of plea hearing which promise section 1203.4 relief after successful completion of probation. Nevertheless, defendant argues the promise is implied based on (1) the principle that the parties are deemed to incorporate then-existing law as a term of their agreement, and/or (2) extrinsic evidence showing the parties understood section 1203.4 relief was part of the plea agreement. In opposition, the Attorney General argues

the record does not show section 1203.4 relief was promised during the plea negotiations, and, alternatively, any section 1203.4 promise was not a significant part of the bargain because the plea allowed defendant to avoid a potential prison sentence.

As we shall explain, we reject the Attorney General's contention that a promise of section 1203.4 relief could not have been a material part of the plea bargain. However, we hold the trial court did not err in denying defendant's motion for relief. To the extent defendant's claim is based on the incorporation of a section 1203.4 term into the plea agreement by *operation of law* (but with no showing it was part of the *bargained-for* terms), the refusal to enforce the implied term upon retroactive amendment of the statute did not alone give rise to a constitutional violation. Further, on this record, there is no evidentiary showing a section 1203.4 promise was part of the plea negotiations so as to include it among the bargained-for terms.

1. *Materiality of Section 1203.4 Promise*

The Attorney General contends a promise of section 1203.4 relief could not have been a significant part of defendant's plea bargain because the agreement afforded him the benefit of avoiding prison. We are not persuaded. Although the parties' understanding that the case did *not* warrant prison time can support a finding that section 1203.4 relief was a significant factor in the plea bargain (see, e.g., *People v. Arata, supra*, 151 Cal.App.4th at p. 788), it does not follow that the avoidance of a potential prison sentence necessarily makes a section 1203.4 promise an immaterial part of the bargain. Notably, when evaluating whether a plea bargain promise is significant for purposes of the due process right to relief in the event the promise is breached, the inquiry does *not*

turn on whether the defendant was prejudiced by the breach; i.e., whether it is reasonably probable the defendant would have rejected the plea bargain without the promise.

(*People v. Walker, supra*, 54 Cal.3d at pp. 1026, 1027, fn. 3; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1224.)¹¹ Rather, the relevant inquiry for breach of a plea agreement is whether the promise was significant in the context of the bargain as a whole; i.e., whether the "plea rests in *any significant degree* on a promise or agreement of the prosecutor, so that it can be said to *be part of the inducement or consideration*" (*Santobello v. New York* (1971) 404 U.S. 257, 262, italics added; *People v. Walker, supra*, 54 Cal.3d at p. 1024.)

Removal of a felony conviction from a person's record carries highly significant benefits, including marked enhancement of a person's employment opportunities. (See *People v. Arata, supra*, 151 Cal.App.4th at pp. 787-788.) Likewise, although a lifetime registration requirement has been deemed not to constitute a punitive sanction for ex post facto and other purposes, the courts recognize that the consequences engendered by the registration requirement are significant. (See *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197 [sex offender registration imposes substantial and onerous burdens on registrant]; *People v. Castellanos* (1999) 21 Cal.4th 785, 796; *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1482-1484.) A defendant who is told that upon successful completion

¹¹ In contrast, as we shall discuss below, when the complained-of error concerns failure to properly advise of plea consequences (rather than breach of the plea agreement), the defendant can obtain relief only upon a showing there is a reasonable probability the defendant would not have pleaded guilty if properly advised. (*People v. Walker, supra*, 54 Cal.3d at pp. 1022-1023.)

of probation, he or she may obtain relief from a felony conviction and all associated disabilities (including relief from registration upon acquisition of a rehabilitation certificate) could reasonably consider this to be a significant promise that serves as part of the inducement and consideration for the decision to accept the plea.¹²

2. *Deviation from Term Incorporated by Operation of Law*

Defendant asserts that a promise of section 1203.4 relief is impliedly part of his plea agreement based on the principle that the parties are presumed to incorporate into their contract the law in existence at the time of contracting, and they are not bound by subsequent changes in the law. Although this general principle has been applied in the civil context (*Swenson v. File* (1970) 3 Cal.3d 389, 393), it does not resolve the question of whether the implied term continues in operation when, as here, a criminal law has been retroactively changed to make the implied term unlawful.

When a defendant is promised probation, the parties can reasonably expect that he or she will be afforded all the statutorily-permitted benefits of probation, including the right to seek relief under section 1203.4 upon successful completion of probation. (See *People v. Arata, supra*, 151 Cal.App.4th at p. 787; *People v. Johnson* (1955) 134 Cal.App.2d 140, 143.) However, if section 1203.4 relief is deemed incorporated into a plea agreement based solely on the existence of the statute — but with no reference to the

¹² In *People v. Acuna* (2000) 77 Cal.App.4th 1056, 1062, the court found a promise of section 1203.4 relief was an insignificant term of the bargain because the defendant avoided a prison sentence. However, the *Acuna* court did not discuss the standard set forth in *Santobello* and *Walker*, which deems a promise significant if it was part of the inducement or consideration for the bargain.

availability of this relief during plea negotiations — the failure to abide by the term due to a retroactive change in the law does not alone give rise to a constitutional violation of the plea agreement. In this circumstance, the implied term arises by operation of law rather than from an actual manifestation of the parties' intentions. The due process right to require the state to comply with its promises is premised on the fundamental unfairness of depriving the defendant of a bargained-for term which induced the defendant to waive constitutional rights and plead guilty. (See *Santobello v. New York*, *supra*, 404 U.S. at pp. 261-262; *People v. Walker*, *supra*, 54 Cal.3d at p. 1026; *People v. Mancheno* (1982) 32 Cal.3d 855, 860, 864.) This fairness concern does not come into play when a claimed contractual term was *not* part of the bargaining process, but is now argued to be impliedly part of the plea agreement premised solely on the existence of a statute at the time of contracting. Under these circumstances, it follows that noncompliance with a statutory (but unbargained-for) term based on an amendment to the statute does not violate constitutional due process.

We hold that any implied promise of section 1203.4 relief — supported merely by the existence of the statute at the time defendant was afforded probation — did not give

rise to a constitutional due process violation when the relief was denied due to the subsequent statutory amendment making it unavailable to defendant.¹³

3. *Record Does Not Establish Section 1203.4 Relief
Was Referenced During Plea Negotiations*

To support his claim that he was promised section 1203.4 relief, defendant also relies on extrinsic evidence regarding matters *subsequent* to the plea agreement. He cites the provision in the probation order advising him of section 1203.4 relief, and statements he made in various letters he sent to the authorities concerning his requests for relief. However, these documents do not shed any light on the question of whether defendant was told *at the time he agreed to the plea bargain* that he was entitled to section 1203.4 relief.

The probation order containing the section 1203.4 advisement was entered at sentencing, which was two months after the plea agreement was reached and accepted by the court. The probation order contains no information about what occurred during the plea negotiations; thus, the order does not reflect that section 1203.4 relief was discussed at the time defendant entered his plea. Apart from the preprinted language in the probation order, there is nothing in the record suggesting that section 1203.4 relief was

¹³ We note the California Supreme Court has two cases pending before it which concern the impact of postplea changes in the law on plea agreements. (*Doe v. Harris*, S191948 [issue certified for resolution by California Supreme Court at request of federal court]; see *Doe v. Harris* (9th Cir. 2011) 640 F.3d 972, 973-977; *People v. Jerry Z.* (2011) 201 Cal.App.4th 296, review granted Jan. 11, 2012, S199289.) Unless and until our high court directs otherwise, we find no constitutional due process violation based merely on noncompliance with the law in effect at the time of the plea agreement due to a retroactive change in the law.

otherwise mentioned even at sentencing. The probation order alone provides no basis to infer that section 1203.4 relief was contemplated at the time of the plea agreement several months earlier.

Further, defendant's statement in the letter to the El Cajon police at the completion of his probation term, suggesting that his attorney had told him about the section 1203.4 relief, does not state *when* this advisement was made.¹⁴ The advisement could have been made during the plea negotiations, thereby supporting an inference that it was a factor inducing defendant to agree to the bargain. However, in the absence of sworn declarations or testimony attesting to this fact (plus a finding by the court that the attestations are credible), it is just as likely that the advisement was made sometime after the plea and that it played no part in defendant's decision to agree to the plea. Indeed, the fact that defendant's trial counsel admittedly forgot to advise him of the sex offender registration requirement until the trial court raised the issue at the change of plea hearing, raises the reasonable inference that his counsel did not inform him of the section 1203.4 relief statute during the plea negotiations.

Similarly, defendant's statements in his September 2004 letter to the Oregon police (i.e., he thought this ordeal was over "just like [he] was told and was written in [his] probation order" and he agreed to a guilty plea that "was supposed to go away after a period of time") do not indicate whether he was provided information about section

¹⁴ Defendant stated in this letter that according to the probation order and "the court[] appointed attorney who represented" him, he was entitled to be free of his conviction and associated disabilities.

1203.4 relief during the plea negotiations, as opposed to after he had already agreed to and entered his plea. Moreover, the letter to the Oregon authorities was written *after* the registration controversy developed, and thus it is not extrinsic evidence relevant to the parties' intent *at the time of contracting*. (See *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 296-297.)

We note that the August 2010 letter that defendant wrote to the judge who accepted his plea could suggest he was told about section 1203.4 relief at the time of the plea bargain. In this letter, defendant states he was unable to find a form relevant to the relief "that will do what was *explained to me* according to the terms of probation *when I entered the . . . guilty plea*, and what *was promised and agreed to* as it is written."

(Italics added.) However, like the 2004 letter to the Oregon police, the letter to the judge was written subsequent to the development of the controversy and hence it is not postcontract conduct indicative of the parties' intent. Further, the letter is not akin to a sworn declaration from defendant describing what was said during the plea negotiations.

The record in this case is distinguishable from *People v. Arata, supra*, 151 Cal.App.4th 778, cited by defendant to support his claim for relief. In *Arata*, the appellate court concluded that based on the plea agreement, the sex-offender defendant was entitled to section 1203.4 relief notwithstanding the postplea change in the law making this relief statutorily unavailable to him. (*Arata, supra*, at p. 788.) In *Arata*, the defendant submitted his own declaration, plus a declaration from the attorney who represented him during the plea negotiations, attesting under penalty of perjury that he was promised he could obtain the section 1203.4 relief at the successful completion of

probation. (*Arata, supra*, at pp. 781-782.) No such evidentiary showing has been made here. (See *People v. Acuna, supra*, 77 Cal.App.4th at p. 1062 [sex-offender defendant not entitled to section 1203.4 relief absent showing that the relief was "clearly part of the parties' understanding" concerning plea agreement].)

In sum, the record before us shows that *at some point* defendant was informed of his right to section 1203.4 relief. However, the record does not show whether this avenue of relief was discussed with him prior to his agreement to plead guilty. Accordingly, the trial court did not err in finding that he failed to establish that he was promised section 1203.4 relief as part of the bargained-for terms of his plea agreement.¹⁵

II. *No Prejudice from Failure To Advise of Lifetime Duration
of Registration Requirement*

As an alternative ground to support his requested relief, defendant argues that he is entitled to relief because he was not advised prior to the entry of his plea that the duration of the sex offender registration requirement was for a lifetime. The record shows that at the change of plea hearing defendant was told about the registration requirement, but

¹⁵ Defendant's appellate counsel has requested that we take judicial notice of State Bar records indicating that the attorney who represented defendant during the plea negotiations (Raymond Caine) is on inactive status and lives in another state, with an address provided but no phone number. Appellate counsel states that she has sent a letter to Attorney Caine asking about his recollection of the case; defendant could submit a declaration attesting that "section 1203.4 relief was a significant part of the plea bargain and he would not have entered into that bargain absent the promise of that relief"; and if a declaration is required the matter should be remanded to the trial court for renewal of a section 1203.4 motion and submittal of the declaration. These are matters that must be presented to the trial court in the first instance, and they do not alter our holding that on this record the trial court did not err in denying the motion.

Given the posture of the case on appeal, we deny the request for judicial notice.

there is no mention of its lifetime duration. The lifetime duration was disclosed in the registration notification document signed by defendant, but this was not provided to him until sentencing.

The Attorney General concedes, and we agree, that defendant has shown error based on the failure to fully advise him of the consequences of his plea. (*People v. Zaidi, supra*, 147 Cal.App.4th at pp. 1481-1484.) However, unlike violations of plea agreements, to obtain relief for misadvisement on plea consequences the defendant must show prejudice. (*In re Moser, supra*, 6 Cal.4th at p. 352; *People v. Walker, supra*, 54 Cal.3d at pp. 1022-1026.) Defendant has not shown there is a reasonable probability he would not have agreed to the plea if he had been advised of the lifetime duration of the registration requirement. (See *People v. McClellan* (1993) 6 Cal.4th 367, 378.) The record shows defendant faced a lengthy prison sentence if convicted; he was motivated to reach a plea agreement to avoid the potentially "catastrophic" consequences of a trial; and the plea agreement afforded him probation with a suspended jail sentence. There is nothing in the record suggesting he would have turned down this highly favorable plea bargain if he had been told the registration requirement would last a lifetime. (See *In re Resendiz* (2001) 25 Cal.4th 230, 253-254, disapproved on another ground in *Padilla v. Kentucky* (2010) ___ U.S. ___ [130 S.Ct. 1473, 1484] [prejudice for misadvisement requires objective evidence supporting that defendant would not have pleaded guilty].)

DISPOSITION

The order is affirmed.

HALLER, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.