Filed 9/16/14 P. v. Levy CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP JAY LEVY, Defendant and Appellant.	G048541 (Super. Ct. No. C-72625) ORDER MODIFYING OPINION; DENYING REQUEST FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on August 27, 2014, be modified as follows:

1. On page 2 the third sentence beginning, "Twenty-three years before the amendment . . ." is modified to read, "Six years before the amendment . . . ."

2. On page 2 the third sentence beginning, "In 2012 and 2013, he unsuccessfully sought . . ." is modified to read, "Twenty-three years after pleading guilty, he unsuccessfully sought . . . ."

This modification does not change the judgment.

The petition for rehearing is DENIED.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

THOMPSON, J.

Filed 8/27/14 P. v. Levy CA4/3 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP JAY LEVY, Defendant and Appellant.	G048541 (Super. Ct. No. C-72625) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregg L. Prickett, Judge. Reversed and remanded.

Janice R. Mazur, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kim Donohue and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

In 1989, a defendant convicted of violating Penal Code section 243.4 [sexual assault] did not have to register as a sex offender.[1] But in 1995 the Legislature amended section 290 to include sexual battery as a registrable offense. Twenty-three years before the amendment, Phillip Jay Levy pleaded guilty to one count of sexual battery. In 2012 and 2013, he unsuccessfully sought "specific performance" of the plea bargain, claiming he was promised he would not have to register as a sex offender. The trial court denied his writ of mandate and motions for relief.

In this appeal, Levy contends he was denied due process because extrinsic evidence showed the parties understood non-registration was part of the plea agreement and even if not, there was an implicit agreement he would not be required to register. The Supreme Court in *Doe v. Harris* (2013) 57 Cal.4th 64, 71 (*Doe*), recently held a plea bargain does not operate to insulate parties from future changes in the law unless "the parties . . . affirmatively agree[d] or implicitly underst[oo]d the consequences of [the] plea will remain fixed despite amendments to the relevant law. [Citations.]" The trial court made its ruling without having the benefit of the *Doe* decision. Accordingly, we reverse the order denying the motion and remand the matter to trial court to conduct an evidentiary hearing on that issue based on "an analysis of the representations made and other circumstances specific to the individual case." (*Ibid.*)

I

The facts of the underlying case are not relevant to this appeal, and therefore, we limit our summary of the facts to the procedural history. In 1989, an information alleged Levy committed two felony violations of section 288a, subdivision (b)(2) [oral copulation]. If convicted of these offenses, Levy would have been required to register as a sexual offender pursuant to section 290.

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[1] All further statutory references are to the Penal Code.

However, after negotiating a plea bargain, the information was amended to replace count 2 with a felony violation of section 243.4 [sexual battery]. The same day the information was amended, Levy pleaded guilty to count 2 and the prosecutor dismissed count 1. The court sentenced Levy to one day in jail and three years formal probation, to change to informal probation after one year.

On the plea form, Levy acknowledged "it is absolutely necessary all plea agreements, promises of particular sentences or sentence recommendations be completely disclosed to the court on this form" and that no one has "made any promises to [him] except as set out in this form . . . ." Levy initialed all the paragraphs on the plea form that applied to his case and his conviction, including his understanding the court would grant probation pursuant to certain conditions.

He did not initial the paragraphs that *did not* apply. The boxes next to all the non-applicable paragraphs contained a large letter "X." In the box next to the paragraph discussing the registration requirement pursuant to section 290 there is a "X." At the time, registration was not a requirement for sexual battery convictions.

On the form, Levy's counsel confirmed "[n]o promises of a particular sentence or sentence recommendation have been made by [him] or to [his] knowledge by the prosecuting attorney or the court which have not been fully disclosed in this form." Despite the plea form's indication that the grant of probation was one of the motivating factors for Levy's plea, it contained no direct reference to the non-registration issue. It is unclear from our record whether there exists a transcript of the actual hearing.

Levy did not register as a sex offender and completed his probation. The case was reduced to a misdemeanor pursuant to section 17, subdivision (b), and dismissed pursuant to section 1203.4, subdivision (a). Levy moved to Utah.

In 1995, the Penal Code was amended to require persons convicted of section 243.4 to register as sex offenders. (Stats. 1995, ch. 85, § 1, p. 211.) The amendment applies retroactively to "every person described in the Act, without regard to when his or her crime or crimes were committed or his or her duty to register pursuant to the Act arose, and to every offense described in the Act, regardless of when it was committed." (§ 290.023.)

In October 2012, Levy moved for "specific performance of [a] plea agreement." He submitted a declaration stating he accepted the plea bargain because he was promised he would not have to register as a sex offender. He explained that in 1989 as the underlying case progressed, "it was clear there were some major problems with the 'victim's' accusations. [¶] While I wanted to clear my name, what was of utmost concern to me was minimizing the damage to my life, including not being labeled a sex offender, of which I was in no way going to accept."

Levy explained, "After numerous [p]re-[t]rial hearings, we discredited all of the facts of the 'victim's' accusations and it was relayed to my [a]ttorney and he informed me that the [district attorney] felt I was being 'FALSELY' accused. The [district attorney] had an issue with the 'victim's' [a]unt and [g]uardian who had been growingly [*sic*] expressing a deep hatred towards me and would not let the case go . . . as I had reported that someone in the [victim's] home was '[a]busing' him and that caused them to lose their home . . . . After much negotiation, the [district attorney] agreed to change the charge to a charge 'under the California [w]obbler [l]aws' that was not a sexual offense and (1) would block any attempt to come after me for any monetary actions, (2) would not require any registering requirements, and (3) would provide the case be reheard at a later time when it would be safe to get the case dismissed and clear my record and my name." Levy stated he accepted the plea bargain "induced by the fact that I would never have to register as a sex offender."

In his declaration, Levy stated he successfully completed one year of formal and two years of informal probation. He stated that in September 1995 he withdrew his plea and the case was dismissed. In 1996, he retired from his job and moved to Utah for treatment of a spinal injury. Levy stated he learned in January 2008 that Utah authorities were going to charge him with failing to register. He appeared in a local Utah district court and that case was dismissed.

In December 2011, Levy was again notified by Utah's authorities he needed to register based on information he was on California's list of "lifetime individuals" who needed to register. He contacted the public defender's office in California and filed the motion seeking specific performance of the 1989 plea agreement.

The district attorney opposed the motion on the grounds it was "not cognizable" because a trial court lacks jurisdiction to consider a motion when a case is final and the defendant is no longer in custody. Alternatively, the district attorney argued Levy entered the plea so he would receive the benefit of gaining unsupervised probation, serving one day in jail, avoiding civil liability, and the possibility of later having the case dismissed. The district attorney argued the plea bargain did not incorporate non-registration as an essential term.

Judge Craig E. Robison denied the motion as being substantively and procedurally defective: "It fails to clarify what parties are involved, what relief is sought, or under what authority counsel expects the court to act." The court noted Levy had not registered in Utah or California, and he failed to provide information regarding what agency in California was requiring Levy to register.

Levy next filed a petition for writ of mandate asking the court to remove his name from the sex offender tracking program or permit him to withdraw his plea of no contest. The trial court (Judge Gregg L. Prickett) denied the writ petition on the grounds

the court had no authority to grant the requested relief. The court stated an administrative agency within the executive branch is responsible for maintaining the sex offender registry and "a writ of mandate does not lie against an administrative entity for purposes of determining the validity of a conviction relied upon to impose mandatory sex offender registration." In addition, the court stated it had no authority "to issue a writ of mandate directed to itself."

In March 2013, Levy filed a motion for a judicial determination of his registration status pursuant to section 290. The district attorney filed an opposition, arguing the court lacked jurisdiction to consider the matter, and alternatively, Levy's argument lacked merit for the same reasons stated in the prior opposition. At the hearing, the parties submitted on the moving papers. The court (Judge Prickett) stated it had read the papers and denied the motion, stating, "I am not unsympathetic, but your motion is denied." The court ruled without having the benefit of the *Doe* opinion, filed two months later.

II

"""When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.""" (*People v. Segura* (2008) 44 Cal.4th 921, 930-931, original brackets.) "Thereafter, material terms of the agreement cannot be modified without the parties' consent." (*People v. Martin* (2010) 51 Cal.4th 75, 80.) "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.]'" (*People v. Shelton* (2006) 37 Cal.4th 759, 767 (*Shelton*).)

As relevant to this case, ""“all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated,”"" and “laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties.” (*Swenson v. File* (1970) 3 Cal.3d 389, 393 (*Swenson*).) Therefore, “to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent.” (*Id*. at p. 394.)

In *Doe, supra,* 57 Cal.4th 64, our Supreme Court addressed this rule from *Swenson* in the context of a plea agreement. In that case, at issue was whether “John Doe’s” plea agreement was violated by applying a retroactive amendment to California’s Sex Offender Registration Act, section 290 et seq. (*Doe, supra*, 57 Cal.4th at p. 65.) Specifically, when Doe registered as required by section 290, the statute provided his statements, photographs, and fingerprints would not be open to public inspection. “But the Legislature later adopted ‘Megan’s Law’ (§ 290.46, added by Stats. 2004, ch. 745, § 1, pp. 5798-5803), which among other things, provides a means by which the public can obtain the names, addresses, and photographs of the state’s registered sex offenders. The Legislature further specifically and expressly mandated that the public notification provisions of the law are ‘applicable to every person described in this section, without regard to when his or her crimes were committed or his or her duty to register pursuant to [s]ection 290 arose, and to every offense described in this section, regardless of when it was committed.’ (§ 290.46, subd. (m).) The Legislature accordingly made the public notification provisions retroactive and thus applicable to Doe’s conviction.” (*Doe, supra,* 57 Cal.4th at pp. 66-67.) “Doe filed a civil complaint in the United States District Court,

asserting that requiring him to comply with the amended law's public notification provisions would violate his plea agreement." (*Id.* at p. 67.)

Responding to a question certified by the United States Court of Appeals for the Ninth Circuit, the *Doe* court drew a distinction between *Swenson*, which involved a change in law not intended to apply retroactively, and *People v. Gipson* (2004) 117 Cal.App.4th 1065 (*Gipson*), in which the court applied a retroactive change in recidivism sentencing notwithstanding the parties' plea agreement under prior law. (*Doe, supra*, 57 Cal.4th at pp. 69-70.) The *Doe* court reasoned that unlike the *Swenson* court, the *Gipson* court applied the following rule: "'When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . . .'" (*Doe, supra*, 57 Cal.4th at p. 70, quoting *In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 112.)

The Supreme Court in *Doe* explained the *Gipson* case recognized "that the Legislature, for the public good and in furtherance of public policy, and subject to the limitations imposed by the federal and state Constitutions, has the authority to modify or invalidate the terms of an agreement. Our explanation in *Swenson* that, as a general rule, contracts incorporate existing but not subsequent law, does not mean that the Legislature lacks authority to alter the terms of existing contracts through retroactive legislation. Nor should it be interpreted to mean that the parties, although deemed to have existing law in mind when executing their agreement, must further be deemed to be unaware their contractual obligations may be affected by later legislation made expressly retroactive to them, or that they are implicitly agreeing to avoid the effect of valid, retroactive legislation. *Gipson* explains that the parties to a plea agreement—an agreement unquestionably infused with substantial public interest and subject to the plenary control

of the state—are deemed to know and understand that the state, again subject to the limitations imposed by the federal and state Constitutions, may enact laws that will affect the consequences attending the conviction entered upon the plea." (*Doe, supra*, 57 Cal.4th at p. 70.) The Supreme Court applied the rule from *Gipson*, not *Swenson*, because the amendments to the Sex Offender Registration Act were expressly made retroactive by the Legislature. (*Ibid*.)

Relevant to this case, the Supreme Court in *Doe* also observed that "even though . . . California law does not hold that the law in effect at the time of a plea agreement binds the parties for all time, it is not impossible the parties to a particular plea bargain might affirmatively agree or implicitly understand the consequences of a plea will remain fixed despite amendments to the relevant law. [Citations.] [¶] Whether such an understanding exists presents factual issues that generally require an analysis of the representations made and other circumstances specific to the individual case." (*Doe, supra*, 57 Cal.4th at p. 71.) But a plea agreement's failure "to reference the possibility the law might change [does not] translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law." (*Id.* at pp. 73-74.)

In this case, like in *Doe*, we are considering an amendment to section 209, which the Legislature expressly provided would apply retroactively to those convicted and sentenced before its effective date. Applying the reasoning of *Doe*, Levy's plea agreement can be affected by the change in the law. The only issue left to be decided is whether the record shows the parties affirmatively agreed or implicitly understood Levy would be entitled to non-registration notwithstanding any amendment. Constitutional due process requires that "'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 the inducement or

consideration, such promise must be fulfilled.'" (*People v. Arata* (2007) 151 Cal.App.4th 778, 786.)

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." [Citations.]' [Citation.] 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.'" (*Shelton, supra*, 37 Cal.4th at p. 767.)

We review de novo a trial court's construction of a contract if no extrinsic evidence was admitted or the facts are undisputed (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866), but defer to the trial court where extrinsic evidence creates factual disputes or requires credibility resolutions if reasonably supported by the record. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507.) Here, the court did not indicate it considered the terms of the plea bargain, express or implicit, concluding only that Levy was not entitled relief. We thus remand the case to allow the court to conduct an evidentiary hearing and determine whether there was an affirmative agreement or implicit understanding between the parties that the consequences of Levy's plea would remain the same notwithstanding any amendments to the statute. (*Doe, supra*, 57 Cal.4th at p. 71.) Given this remand, we need not address Levy's additional claim the court had jurisdiction to grant the petition for a writ of mandate.

III

The order denying Levy's motion is reversed and the case is remanded for the court to conduct an evidentiary hearing to determine whether "the parties to [the] . . . plea bargain . . . affirmatively agree[d] or implicitly underst[oo]d the consequences of a plea will remain fixed despite amendments to the relevant law [citations]" based on "an analysis of the representations made and other circumstances . . . ." (*Doe, supra,* 57 Cal.4th at p. 71.)

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

THOMPSON, J.