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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.

G051481

(Super. Ct. No. C72625)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Gregg L. Prickett, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton,
Deputy Attorney General, for Plaintiff and Respondent.

This is Phillip Jay Levy's second appeal from his second attempt to relieve himself of the requirement to register as a sex offender pursuant to Penal Code section 290.¹ In his first appeal, we reversed the trial court's order denying his motion for specific performance of the negotiated plea. (*People v. Levy* (Aug. 27, 2014, G048541) [nonpub. opn. mod. Sept. 11, 2014] (*Levy I*)). We remanded with instructions for the court to hold a full evidentiary hearing on the matter as described in the Supreme Court's recent decision *Doe v. Harris* (2013) 57 Cal.4th 64 (*Doe*). After holding a hearing, the court denied the motion, and Levy again appealed. Levy argues there is insufficient evidence to support the court's conclusion there was neither an explicit nor implicit understanding between the parties that he would never have to register pursuant to section 290. Finding his contention without merit, we affirm postjudgment order.

PROCEDURAL HISTORY AND FACTS

A detailed summary of the procedural history and Levy's many efforts to relieve himself of the requirement to register as a sex offender pursuant to section 290 is contained in our prior opinion and need not be repeated entirely again. (*Levy I, supra*, G048541, at pp. 2-6.) We will repeat only the facts relevant to this appeal.

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. 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. He successfully completed probation and his case was dismissed. He moved to Utah.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

At the time of the plea, a defendant convicted of violating section 243.4 [sexual battery] did not have to register as a sex offender. But in 1995, the Legislature amended section 290 to include sexual battery as a registrable offense.

In 2008, Levy learned the Utah authorities were going to charge him with failing to register. Suffice it to say, Levy made many attempts from 2008 to 2013, in Utah and in California, to challenge this requirement.

In *Levy I*, this court reviewed the trial court's denial of Levy's March 2013 motion for a judicial determination of his registration status. (*Levy I, supra*, G048541, at p. 13.) In our prior opinion, we explained that in *Doe*, the Supreme Court 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.]" (*Levy I, supra*, G048541, at p. 2.) Recognizing the trial court made its ruling without having the benefit of the recent *Doe* decision, we remanded the matter to the trial court to conduct an evidentiary hearing to determine whether the parties had affirmatively "agree[d] or implicitly underst[oo]d the consequences of [the] plea" based on "an analysis of the representations made and other circumstances specific to the individual case." (*Ibid.*)

PROCEEDINGS ON REMAND

In February 2015, the court held an evidentiary hearing on Levy's motion for specific performance of his plea agreement. The court considered testimony from both Levy and the district attorney who handled Levy's plea in 1989.

Levy testified that prior to entering his no contest plea, he discussed with his attorney whether the charge he was pleading to required registration pursuant to section 290. Levy recalled it was absolutely important to him that he plead to a charge not requiring registration. He remembered his lawyer told him the charge he was pleading to did not require registration. Levy admitted he was not told he would never have to register in the future, but "that's what I kind of understood." He explained he

never would have pled to the charge if he knew a future change in the law could have result in him being required to register pursuant to section 290.

On cross-examination, Levy testified he understood he was promised he would never have to register pursuant to section 290 even though that promise did not appear anywhere on the plea form. When shown the plea form, Levy said he did not recognize it. He remembered the plea form he was given and signed was blank. In response to questions about his signature on the plea form, Levy replied it looked like his signature, but he would not confirm it was his. With respect to a second signature on another page, Levy again said it looked like his signature but he only remembered signing his name once. He reiterated he signed the plea form when there was no other writing on it.

Levy was next questioned about the initials next to each condition and term on the plea form. Levy denied putting them there. When asked about the statement on the form, “I understand that it is absolutely necessary all plea agreements promises [of] . . . particular sentences or sentence recommendations be completely disclosed to the court on this form,” Levy said he never read the form.

Although not included on the plea form, Levy insisted he was promised he would never have to register pursuant to section 290. He could not recall the exact words of the promise but he maintained he would not have accepted the plea deal if it was not “a permanent thing.” Levy testified he never had a direct conversation with the prosecutor and all communications were through his attorney. Levy insisted he remembered his attorney clearly stated Levy would never have to register.

After cross-examination concluded, the trial court asked Levy a few questions. Levy indicated that when the plea was taken the judge did not hold up the plea agreement and ask him if his lawyer had a chance to go over the provisions of the plea with him. Nor did the judge ask Levy if the signature on the document was his. Levy did remember the trial judge asked him about the rights he was giving up.

The prosecution called Assistant District Attorney Mark Rosenberg. Rosenberg testified as to his recollection of this particular plea and his custom and practice in 1989 when entering into a plea agreement. Rosenberg had no independent recollection of Levy's plea other than a legal issue relating to venue. He said the signature above the "district attorney" line was his.

Rosenberg testified it was his custom and practice to include all the conditions of a plea on the form and he did not make promises to defendants that were not written on the plea form. Rosenberg did not recall promising a defendant that he or she would never have to register, pursuant to section 290, if the law changed after the plea agreement.

On cross-examination, Rosenberg agreed there was an "X" next to the following condition: "I understand that I will be required to register as a sex offender pursuant to section 290" In response to a question from the court, Rosenberg testified he would never have signed a blank plea form.

After considering counsels' arguments, the trial court denied the motion. On the record it stated, "Court cannot find that there was [an] affirmative agreement of any kind, and I do not find that there [was an] implicit understanding by the parties."

DISCUSSION

Our Supreme Court in *Doe, supra*, 57 Cal.4th at page 71, determined California law does not hold the law in effect at the time of a plea agreement binds the parties for all time, but it is not impossible that 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. 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. (*Ibid.*) For this reason, we remanded the matter to the trial court to determine the factual issues.

The parties dispute the standard of review. Levy maintains the trial court's "construction of a contract" is reviewed de novo "if no extrinsic evidence was admitted or the facts are undisputed." However, he also recognizes "a reviewing court will defer to the trial court where extrinsic evidence creates factual disputes or requires credibility resolutions if reasonably supported by the record." (Citing *People v. Paredes* (2008) 160 Cal.App.4th 496, 507.) Nevertheless, Levy argues the de novo standard applies in this case because the plain language of the plea agreement is unambiguous and certainly establishes the parties agreed he would never have to register as a sex offender. We disagree.

We conclude the agreement is ambiguous about the issue now in dispute. There is nothing in the plain language that qualifies as conclusive proof of an implicit agreement or negotiated term regarding future registration. Although an "X" appears next to the registration condition, there was nothing on the plea form affirmatively stating the parties were agreeing registration was precluded if the law changed in the future. And the "X" becomes less persuasive to Levy's argument when we consider his testimony the form was blank when he signed it. Because the trial court in this case was asked to resolve a factual issue when ruling on the motion, the appropriate standard of review is the substantial evidence test.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . We do not reweigh evidence or reevaluate a witness's credibility.' [Citations.] 'Resolution of conflicts and

inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]”
(*People v. Brown* (2014) 59 Cal.4th 86, 105-106.)

We conclude the record clearly establishes substantial evidence supporting the court’s conclusion there was no affirmative agreement or implicit understanding that should the law change in the future, Levy would not be required to register pursuant to section 290. The court heard testimony from Levy and Rosenberg. Levy was uncertain about many of the details surrounding the plea. Rosenberg’s testimony was far more certain. For example, contrary to Levy’s equivocation about the signature bearing his name, without hesitation Rosenberg identified the signature on the plea form was his.

Although Rosenberg had no independent recollection of Levy’s plea, he was clear he did not make promises to defendants that were not written on the plea form, nor would he ever sign a blank plea form. And he specifically testified he has never promised a defendant that he or she would never have to register pursuant to section 290, even if the law changed after the plea agreement.

Levy’s explanation was less definite. He indicated he did not recognize the plea form and indicated he never read it. Levy testified he was never asked at the time of the plea if his lawyer had a chance to go over its provisions. He could not offer any clarification as to why the alleged promise did not appear despite the statement on the form that all promises had to be disclosed. Levy admitted he was never specifically told he would not have to register pursuant to section 290 in the future, but rather this was his understanding of the plea agreement. And he could not recall the exact words he relied on to conclude there was such a promise. It was reasonable for the court to conclude Rosenberg’s testimony was more credible and of solid value.

DISPOSITION

The postjudgment order is affirmed.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.