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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR OLANJIMENEZ,

Defendant and Appellant.

H036904

(Santa Clara County
Super. Ct. No. CC965254)

I. INTRODUCTION

After a jury trial, defendant Julio Cesar Olanjimenez was found guilty of threatening to commit a crime resulting in death or great bodily injury (Pen. Code, § 422),¹ assault with a deadly weapon (§ 245, subd. (a)(1)), and stalking (§ 646.9, subd. (a)). The trial court declared a mistrial as to the six remaining counts (3 counts of forcible rape (§ 261, subd. (a)(2)), 2 counts of threatening to commit a crime resulting in death or great bodily injury (§ 422), and 1 count of assault with a deadly weapon (§ 245, subd. (a)(1)) because the jury was unable to reach a verdict on those counts.

The prosecutor subsequently advised the trial court that the parties had agreed to a sentence bargain in which the six remaining counts would be dismissed in exchange for defendant agreeing to (1) a sentence in the range of three years four months to four years four months on the convicted counts; and (2) lifetime registration as a convicted sex offender. When the trial court questioned defendant as to his understanding of the

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

registration requirement, defendant stated that he did “not accept that” and would “appeal the case.” Defendant then responded, “Yes,” to the court’s query, “[D]o you accept that you’re going to have to register if you lose your appeal?”

At the sentencing hearing, defense counsel confirmed the prosecutor’s representation that defendant had agreed to sex offender registration under section 290 as part of the sentence bargain. The trial court imposed a sentence of four years four months and ordered defendant to register pursuant to section 290.

On appeal, defendant contends that the requirement of sex offender registration under section 290 should be stricken from his sentence because he never agreed to it on the record. Defendant also contends that there was an insufficient factual basis for the discretionary imposition of the registration requirement under section 290.006. For reasons that we will explain, we will reverse the judgment and remand the matter for resentencing.

II. FACTUAL BACKGROUND

Our very brief summary of the factual background is taken from the reporter’s transcripts of the jury trial held in November and December 2010.

At the time of the crimes, victim E. was employed at a nightclub where defendant was one of her co-workers. The owners of the nightclub also owned a liquor store and the apartments above the liquor store, where E. and defendant both lived. Defendant’s apartment was across the hall from E.’s apartment.

E. considered defendant to be a friend. They would go out to eat and shop together, and sometimes defendant would cook dinner for E. However, E. did not have any romantic interest in defendant and became concerned when he began to give her presents.

One day, after leaving work at 2:00 a.m., E. fell asleep in defendant’s apartment after eating dinner with him in the early morning hours. Nothing unusual happened on that occasion. The next time E. was in defendant’s apartment late at night, defendant did

not let her leave and threatened her with a gun. He then pushed her onto the bed and told her not to scream or he would kill her. After pulling E.'s clothing down to her knees, defendant put his penis inside her. When defendant finished having sexual intercourse with E., he told her not to say anything or he would kill her.

A second rape occurred a few days later. Defendant knocked on E.'s apartment door and when she opened it, he grabbed her, pulled her out, and took her to his apartment. Defendant told E. that if she screamed he would kill anyone who came to the door. He then pushed E. onto the bed and had sexual intercourse with her.

About three days later, defendant again knocked on E.'s apartment door, grabbed her and pulled her into his apartment. He also continued to threaten to kill her and to kill her mother, a neighbor, and their employers. Because she was afraid, E. did not resist when defendant removed her clothes and had sexual intercourse with her. Afterwards, E. fell asleep in defendant's bed. When she woke up, defendant threatened her again but she was able to leave. E. did not tell anyone about what had happened. She continued to live in the apartment across the hall from defendant's apartment and to work with him.

About a week after the third rape, another incident involving defendant occurred. While E. was sleeping in her bed, defendant entered her apartment, got on top of her, put a gun to her head, and started to choke her. When E. went limp, defendant stopped choking her and they both fell asleep in the bed.

A few days after the choking incident, defendant came into the nightclub where E. was working. She sold him three beers and two tequilas, then refused to sell him more alcohol because he had to go to work. Defendant became upset and threw things at her, including money, a napkin holder, and a salt shaker. He also squeezed a tequila glass so hard that he broke it and cut his hand. At that point, one of their employers arrived, had an argument with defendant, and fired him.

After losing his job, defendant continued to live in the apartment across the hall from E.'s apartment. E. went to the Christmas party given by her employers with

defendant because he told her he was going to kill her and then if she refused. After the party ended, E. returned to her apartment with one of her female co-workers who had been drinking and could not drive. While they were sleeping, defendant banged on E.'s apartment door but a neighbor was able to calm him down.

Two days after Christmas, the final incident occurred when E. returned to her apartment at about 2:15 a.m. after getting off work. When she unlocked her door, defendant pushed her into the apartment and told her he wanted to talk to her. After telling E. that he loved her and that if she was not going to be for him, she was not going to be for anybody, he slapped her hard enough to cause her to fall on the bed. E. got up and told him she was going to call the police. Defendant slapped her again and picked up a knife that E. used for slicing bread. When E. walked towards the door, defendant grabbed the doorknob, put the knife to her side, and told her he was going to kill her. To save her life, E. held onto defendant's shoulders and told him that she loved him. Defendant immediately pulled away and threw the knife on the ground. E. was then able to escape from defendant and get into her car. As she was driving, she called 911. When she saw that police had arrived, she returned to her apartment.

III. PROCEDURAL BACKGROUND

A. The Pleadings

The complaint filed in December 2009 charged defendant with forcible rape (§ 261, subd. (a)(2); count 1), three counts of threatening to commit a crime resulting in death or great bodily injury (§ 422; counts 2-4), assault with a firearm (§ 245, subd. (a)(2); count 5), and stalking (§ 646.9, subd. (a); count 6). After a preliminary hearing, defendant was held to answer on all charges.

The information filed in September 2010 charged defendant with three counts of forcible rape (§ 261, subd. (a)(2); counts 1-3), three counts of threatening to commit a crime resulting in death or great bodily injury (§ 422; counts 4-6), assault with a firearm (§ 245, subd. (a)(2); count 7), assault with a deadly weapon (§ 245, subd. (a)(1); count 8),

and stalking (§ 646.9, subd. (a); count 9). As to count 2, the information further alleged that defendant had kidnapped the rape victim within the meaning of sections 667.61, subdivisions (a), (b), (d), and (e).

B. Jury Trial

The matter proceeded to a jury trial in November 2010. During the course of the trial, a first amended information was filed. As amended, count 7 specified that the charge of assault with a deadly weapon involved a knife. Count 8 was amended to clarify the charge of assault with a firearm.

The jury returned a verdict of guilty on count 6 (threatening to commit a crime resulting in death or great bodily injury; § 422), count 7 (assault with a firearm; § 245, subd. (a)(2)), and count 9 (stalking; § 646.9, subd. (a)). The jury was unable to reach a verdict on counts 1, 2, 3, 4, 5 and 8 and the trial court declared a mistrial as to those counts.

C. Settlement Negotiations

On March 9, 2011, defendant declined the prosecutor's settlement offer and the case was returned to standby on the master calendar. On March 15, 2011, the date set for retrial on counts 1, 2, 3, 4, 5 and 8, the prosecutor advised the court that an agreement had been reached, as follows: "I believe the agreement is the People will move to submit for dismissal the remaining counts that are charged on the information of which the defendant was not convicted. The defendant agrees that he will be required to register as a convicted sex offender for the rest of his life, and he will be sentenced . . . anywhere from three years, four months, to four years, four months, on the counts [on] which he was convicted. That sentencing will take place before . . . the trial judge." Defense counsel confirmed that was also her understanding of the agreement.

During the proceedings held on March 15, 2011, the following colloquy between the trial court and defendant occurred regarding the requirement of lifetime registration as a convicted sex offender pursuant to section 290:

“THE COURT: Now, sir, I want to make sure that you understand this, that under the terms of this agreement you’re going to be required to register as a sex offender for the rest of your life. That means if you move, you have to register. You also have to reregister even if you stay in the same location. [¶] Mr. [Prosecutor], is it one year? Is it a yearly registration requirement?

“[THE PROSECUTOR]: Every year on his birthday.

“THE COURT: So every year, sir, on your birthday. Even if you remain in the same home for the rest of your life, every year on your birthday you’ll have to go to the—is it the police department?

“[THE PROSECUTOR]: Police department in the jurisdiction he lives in.

“THE COURT: So it’s going to be in the police department in the city where you live. For instance, if you live in San Jose, you register with the San Jose Police Department. If you live in Santa Clara, you go to the Santa Clara Police Department. If you live in an unincorporated area of the county, you would go to the sheriff’s department to register on your birthday each and every year for the rest of your life. Do you understand this, sir?

“THE DEFENDANT: *I do not accept that. I will appeal the case.*

“THE COURT: Well, I understand that you’re going to appeal the case. But do you understand that if you lose the appeal you’re going to have to register as I’ve just noted?

“THE DEFENDANT: Okay. Are you saying on my birthday?

“THE COURT: Yes.

“THE DEFENDANT: Okay.

“THE COURT: Or before your birthday if you move. Suppose you have a birthday, I’ll just call it June 1st. Okay? Just as an example. Then you move on June 30th to a different address. Even if it’s in the same city, you have to reregister. Do you understand that, sir?

“THE DEFENDANT: Yes.

“THE COURT: All right. And do you agree to that?

“THE DEFENDANT: *I’m going to appeal that. I don’t want to accept that in court.*

“THE COURT: I understand that, but do you accept that you’re going to have to register if you lose your appeal?

“THE DEFENDANT: *Yes.*” (Italics added.)

D. Sentencing

The sentencing hearing was held on April 22, 2011. At that time, the trial court inquired regarding the “procedural posture” of the case. The prosecutor advised the court that the jury had found defendant guilty on three counts and deadlocked on the remaining counts, which had been set for trial. The prosecutor continued, “At that proceeding the People made an offer to the defendant that, if he agreed to a sentence of three years, four months minimum, with four years, four months top, and also agreed to register as a convicted sex offender for the rest of his life pursuant to [section] 290, that we would then submit for dismissal those outstanding counts that the jury were deadlocked on in the previous trial. [¶] He agreed to that. And for some reason it appears that agreement was not communicated in the court file. But that’s what I recall, and I think [defense] counsel agrees with that as well, your Honor.” Defense counsel responded, “That’s correct.”

The trial court then added the following language to the probation report’s recommendations: “ ‘The defendant be ordered to register pursuant to Section 290 of the Penal Code and to comply with Section 290.85 of the Penal Code.’ ” At that point, the district attorney stated, “And if I may add, your Honor, [the court] conducted a lengthy voir dire with the defendant about that provision as well as the plea, and he agreed to it on the record.” Defense counsel then stated, “That’s correct.”

At the conclusion of the sentencing hearing, the trial court denied probation and imposed a total term of four years four months. The court also ordered defendant “to register pursuant to [section] 290 and to comply with [section] 290.85.” Counts 1, 2, 3, 4, 5 and 8 were dismissed.

Defendant filed a timely notice of appeal from the judgment on April 22, 2011, the day of the sentencing hearing.

IV. DISCUSSION

On appeal, defendant contends that the requirement of sex offender registration pursuant to section 290 must be stricken from his sentence, for two reasons: (1) he did not agree to the registration requirement on the record and, in fact, refused to accept the terms of the agreement; and (2) there was an insufficient factual basis for discretionary imposition of the section 290 registration requirement and the trial court did not make the findings required under section 290.006.

Although the People acknowledge that “[i]nitially, [defendant] did not accept the agreement to register,” they argue that the judgment should be affirmed because defendant “[f]inally . . . unequivocally agreed that if he lost his appeal he would have to register as a sex offender.” The People also emphasize that defense counsel expressly agreed with the prosecutor’s representations at the sentencing hearing that defendant had agreed to register as a sex offender as part of the sentence bargain. Alternatively, the People suggest that if this court concludes that defendant did not agree to register as a sex offender, “the appropriate remedy is to remand the matter and place the parties in the same position as they were before the bargain.” The People also argue that although the trial court did not order discretionary registration under section 290.006, the record would support the requisite findings that defendant committed the offenses for sexual gratification and there was a substantial risk that he would reoffend.

We will begin our analysis with a brief overview of sexual offender registration under sections 290 and 290.006.

A. Sexual Offender Registration

Under section 290, a defendant convicted of certain sex offenses must register for life as a sex offender. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 78.)

“ “ “The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]’ ” ’ [Citations.]” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1196 (*Hofsheier*).)

Additionally, “[i]n recent years, section 290 registration has acquired a second purpose: to notify members of the public of the existence and location of sex offenders so they can take protective measures. [Citation.]” (*Ibid.*)

“Although sex offender registration is not considered a form of punishment under the state or federal Constitution ([citations]), it imposes a ‘substantial’ and ‘onerous’ burden [Citations].” (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) Persons required to register under section 290 have a lifetime obligation to register annually with local law enforcement authorities and upon any change of residence (§ 290, subd. (b)) and willful failure to comply may be punishable as a felony (§ 290.018, subd. (b)). Additionally, “[w]hen it becomes publicly known that a person is a registered sex offender, the person may be at risk of losing employment, and may have difficulty finding a place to live. [Citations.]” (*Hofsheier, supra*, at p. 1197.)

Since neither the prosecution nor the trial court may alter the statutory mandate that persons convicted of certain offenses are required to register as a sex offender pursuant to section 290, in those cases registration under section 290 is not a permissible subject of plea agreement negotiations. (*People v. McClellan* (1993) 6 Cal.4th 367, 380 (*McClellan*); *Hofsheier, supra*, 37 Cal.4th at pp. 1197-1198.)

Where, as here, the defendant is convicted of an offense not enumerated in section 290, the trial court has the discretion to order sex offender registration “if the court finds at the time of conviction or sentencing that the person committed the offense as a result

of sexual compulsion or for purposes of sexual gratification.” (§ 290.006.) If the court orders registration under section 290.006, it must “state on the record the reasons for its findings and the reasons for requiring registration.” (§ 290.006.)

“The statutory scheme thus creates two categories of crimes: those listed in section 290, subdivision (c) (to which a registration requirement attaches automatically) and all others (for which registration is contingent on the trial court making specific additional findings under § 290.006).” (*People v. Picklesimer* (2010) 48 Cal.4th 330, 345.) Discretionary registration under section 290.006 is a permissible subject of sentence negotiations. (See *Hofsheier, supra*, 37 Cal.4th at p. 1198 [defendant may stipulate in plea bargain that trial court will not order discretionary registration].)

B. Analysis

The parties have not addressed the standard of review that this court should apply in evaluating defendant’s claim that the section 290 registration requirement must be stricken from his sentence because he did not consent to it as a term of the sentence bargain. However, we find guidance in the decisions concerning plea agreements.

“Because a ‘negotiated plea agreement is a form of contract,’ it is interpreted according to general contract principles. [Citations.] Acceptance of the agreement binds the courts and the parties to the agreement. [Citations.] ‘ “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.” ’ [Citations.]” (*People v. Segura* (2008) 44 Cal.4th 921, 930-931.) We believe that the same contract principles apply in the present case, since the sentence bargain at issue is similar to a plea bargain in that it is an agreement made in exchange for specified benefits (here, the dismissal of counts that were set for retrial).

In *People v. Shelton* (2006) 37 Cal.4th 759 (*Shelton*), the California Supreme Court discussed the application of contract principles to plea bargains. “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. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) 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. [Citations.]’ [Citations.]” (*Shelton, supra*, at p. 767.)

It is also a general principle, as this court has stated, that “ ‘[t]he failure to reach a meeting of the minds on all material points prevents the formation of a contract *even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract.*’ [Citation.]” (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 215 (*Bustamante*)). In the context of a plea bargain, “ ‘[i]t is well settled that a plea bargain is a tripartite agreement which requires the consent of the defendant, the People and the court.’ [Citations.]” (*In re Kenneth H.* (2000) 80 Cal.App.4th 143, 148 (*Kenneth H.*)).

Guided by *Shelton*, we will apply the standards of review generally applicable to the interpretation of contracts. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507.) “ ‘[T]he “interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.” ’ [Citations.] ‘In contrast, “[i]f the parol evidence is in conflict, requiring the resolution of credibility issues, we would be guided by the substantial evidence test. [Citation.]” [Citation.] However, extrinsic

evidence is not admissible to ascribe a meaning to an agreement to which it is not reasonably susceptible. [Citation.]’ [Citation.]” (*Ibid.*)

In the present case, we have carefully reviewed the record pertaining to the parties’ sentence bargain. We find that the record is not sufficient to support a finding that defendant consented to lifetime sex offender registration under section 290 as part of the sentence bargain.

As the People have conceded, the record reflects that during the proceedings held on March 15, 2011, when the prosecutor presented the sentence bargain to the trial court and the court initially questioned defendant about his understanding of the requirement of lifetime sex offender registration, defendant did not consent to that part of the bargain. He stated, “*I do not accept that. I will appeal the case.*” (Italics added.) After the court further explained the registration requirement and then asked defendant, “And do you agree to that?”, defendant responded, “*I’m going to appeal that. I don’t want to accept that in court.*” (Italics added.) It is undisputed that at this point in the proceedings, defendant had not consented to the registration requirement as part of the sentence bargain.

The People contend, however, that defendant unequivocally consented upon further inquiry by the trial court. The court continued to question defendant after defendant stated, “*I’m going to appeal that. I don’t want to accept that in court.*” (Italics added.) In response to defendant’s statement, the court said, “I understand that, but do you accept that you’re going to have to register if you lose your appeal?” Defendant answered, “*Yes.*” (Italics added.) According to defendant, this exchange with the court and their previous exchanges were ambiguous as to their respective understanding of what matters defendant intended to challenge on appeal—the jury verdicts or the imposition of the registration requirement.

We find that the record does not demonstrate that defendant clearly and unambiguously consented to the onerous burden of lifetime registration as a sex offender

under section 290 as part of the sentence bargain. During the proceedings of March 15, 2011, no exchange occurred in which defendant was clearly asked whether, as part of the sentence bargain, he consented to lifetime registration as a sex offender and defendant responded with an unqualified “Yes.” Absent such express consent, there was no meeting of the minds as to the registration requirement and the sentence bargain did not become an enforceable contract. (*Bustamante, supra*, 141 Cal.App.4th at p. 215; *Kenneth H., supra*, 80 Cal.App.4th at p. 148.)

Having determined, on the basis of the record before us, that the sentence bargain is unenforceable because the record does not reflect that defendant clearly and unambiguously consented to sex offender registration as part of the sentence bargain, we need not consider defendant’s alternate argument that there was an insufficient factual basis for the discretionary imposition of the registration requirement under section 290.006.

We next consider the appropriate remedy. In that regard, the decision in *People v. Olea* (1997) 59 Cal.App.4th 1289 (*Olea*) is instructive. There, the defendant entered into a plea bargain in which he pleaded guilty to an offense for which sex offender registration under section 290 was not mandatory. When the plea bargain was placed on the record, no mention was made of sex offender registration. (*Id.* at pp. 1293-1294.) At the sentencing hearing, the trial court found that the offense was sexually motivated and, over defense counsel’s objection, ordered defendant to register as a sex offender pursuant to former section 290, subdivision (a)(2)(E) (now section 290.006). (*Id.* at pp. 1294-1295.)

On appeal, the defendant in *Olea* argued that the registration requirement must be stricken because it exceeded the terms of the plea bargain. (*Olea, supra*, 59 Cal.App.4th at p. 1295.) The *Olea* court found that imposition of the registration requirement violated the plea bargain, but determined that striking the requirement was not the appropriate remedy: “The court’s determination that appellant should have to register as a sex

offender was eminently within its discretion; its error was in imposing the requirement without offering appellant a chance to withdraw his plea, as mandated by section 1192.5. In such a case, ‘ . . . the proper remedy is to return the proceedings to the point at which the court erred and reroute them to the appropriate track.’ [Citation.]” (*Id.* at p. 1299.) The appellate court therefore reversed the judgment and remanded the matter for resentencing. (*Ibid.*)

We determine that a similar disposition is appropriate in the present case. We will reverse the judgment, remand the matter for resentencing, and direct the trial court to reinstate the dismissed counts 1, 2, 3, 4, 5, and 8.

V. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing. The trial court is directed to reinstate the dismissed counts 1, 2, 3, 4, 5, and 8 and to proceed accordingly.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.