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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS CRUZ,

Defendant and Appellant.

H037223

(Santa Clara County  
Super. Ct. No. C1198471)

Defendant Carlos Cruz was convicted by negotiated plea of a single count of second degree robbery in violation of Penal Code sections 211-212, subdivision (c).<sup>1</sup> He also admitted that he had suffered two prior prison commitments within the meaning of section 667.5, subdivision (b). There was no discussion in connection with his change of plea about a requirement that he register as a gang member under section 186.30, subdivision (b)(3)—the discretionary provision for gang registration when the court finds that an unspecified crime is gang related. And defendant was not advised either that gang registration was a potential consequence of his plea or of his right to withdraw his plea under section 1192.5 if the court’s sentence departed from the bargain. The subsequent probation report recommended gang registration based on the facts of the crime.

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

At sentencing, the court imposed a two-year prison sentence, which was consistent with the plea bargain. But the court also exercised its discretion to order, over defendant's objection, that he register as a gang member. The court further ordered defendant to have no contact with his robbery victim. We conclude that the discretionary gang registration requirement violated the terms of defendant's plea bargain. We further conclude, as respondent concedes, that the court lacked authority to enter the no-contact order. We accordingly reverse and remand, with directions, for the purpose of allowing the trial court to consider whether discretionary gang registration is to be imposed in this case as a term outside of the negotiated bargain and, if so, to allow defendant the opportunity to withdraw his plea.

#### STATEMENT OF THE CASE

##### I. *Factual Background*<sup>2</sup>

On or about January 26, 2011, defendant took a cell phone and "ear phones" from the victim while she was on or near public transportation. According to the victim, "she was in fear for her life based on defendant's posture, comments regarding gangs, and threat of a weapon," a knife. After defendant's arrest, she was "pleased with the outcome and the quick response of law enforcement." Although she is still sometimes afraid of using public transportation as a result of the crime, she did not ultimately suffer any financial loss.

##### II. *Procedural Background*

Cruz was charged by complaint filed January 28, 2011, with one count of second degree robbery in violation of sections 211-212, subdivision (c), a felony. The complaint further alleged that he had served two prior prison terms within the meaning of section 667.5, subdivision (b), for convictions of auto theft and unlawful sex with a minor.

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<sup>2</sup> The underlying facts of the crime are described only briefly and incompletely in the waived referral report and the complaint. But a full description of the facts is not necessary to resolve the legal issues on appeal.

On June 13, 2011, Cruz pleaded guilty to the charge and admitted the enhancement allegations on the condition that he receive a sentence of two years in prison, “top/bottom,” with credits from the date of his arrest. Before his plea, the court advised Cruz of some of its direct consequences, which included that the offense was a strike, that he would be placed on parole after being released from prison, that he would suffer a lifetime ban on the ownership of firearms or ammunition, and that there would be immigration consequences if he were not a United States citizen. He waived his rights and confirmed that no other promises were made to him in exchange for his guilty plea, which was given freely and voluntarily. The court did not advise defendant in connection with his plea that one of its possible consequences was that he would be required to register as a gang member under section 186.30. Nor did the court advise that defendant could withdraw his plea if the later sentence departed from the plea bargain.

Defendant waived a full probation report. Based on the indications from the victim that the crime was gang related and defendant’s threatened use of a knife, the subsequent waived referral report recommended that gang registration be ordered under section 186.30. The waived referral report also relayed the victim’s request for a no-contact order.

On July 26, 2011, the court sentenced Cruz to the mitigated term of two years in prison and struck the additional punishment for the prison priors under section 1385 in the interests of justice, consistently with the plea bargain. Over defendant’s objection that gang registration was not part of the negotiated plea bargain, the court determined the offense to be gang-related and ordered defendant to register as a gang member under section 186.30. The court stated its view that this term does not necessarily have to be included within a plea bargain and could be imposed notwithstanding the bargain “if the evidence supports the nexus” between the crime and gang affiliation. The court further observed that defendant is “a gang member. He’s a validated barrio horseshoe member,”

thus additionally justifying the gang registration requirement, in the court's view. The court also ordered defendant to have "no contact with [the] victim [or her] family," per her request.

Cruz timely appealed from the judgment of conviction, challenging the sentence or matters occurring after the plea but not affecting its validity. (Cal. Rules of Court, rule 8.304(b).)

## DISCUSSION

### I. *The Gang-Registration Requirement Violated the Plea Bargain*

The legal issue we confront here is this: When a defendant agrees to a plea bargain by which he pleads guilty to an offense not specifically included in the gang registration statute (§ 186.30, subd. (b)(3)), and the registration is not included in the bargain, may the sentencing court subsequently require the defendant to register based on the facts underlying the offense? Relying principally on *People v. Olea* (1997) 59 Cal.App.4th 1289, 1292 (*Olea*), which was decided in the context of the arguably analogous sex offender registration statute, Cruz contends that the court may not do so without violating the plea bargain and that we should accordingly strike the gang registration requirement or, alternatively, allow him the opportunity to withdraw his plea. Respondent, on the other hand, first contends that the issue is not cognizable on appeal for defendant's failure to have obtained a certificate of probable cause and, on the merits, that the gang-registration requirement does not violate the plea bargain in any event.

We first address respondent's claim that the appeal should be dismissed because defendant did not obtain a certificate of probable cause. The argument rests on respondent's misconception that defendant's challenge on appeal is to the court's failure to advise him as to the gang-registration consequences of his plea, which would be an attack on the validity of the plea and which would therefore require a certificate of probable cause under section 1237.5 and rule 8.304 of the California Rules of Court.

(*People v. Panizzon* (1996) 13 Cal.4th 68, 76; *People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) Instead, defendant here contends that the post guilty-plea gang-registration requirement exceeded the terms of his plea bargain, which he seeks to enforce. This is a matter that occurred after the plea, that does not go to its validity, and that was imposed as part of subsequent sentencing.

“In any given case, there may be a violation of the advisement requirement, of the plea bargain, or of both. Although these possible violations are related, they must be analyzed separately, for the nature of the rights involved and the consequences of a violation differ substantially.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1020 (*Walker*); see also *People v. McClellan* (1993) 6 Cal.4th 367, 375 (*McClellan*); *In re Moser* (1993) 6 Cal.4th 342, 350-351.) Where, as here, the claim is that a breach of the plea bargain occurred after the plea and as part of sentencing, the claim does not require a certificate of probable cause in order to appeal. (§ 1237, subd. (a); Cal. Rules of Court, rule 8.304(b)(4)(B); *People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *People v. Rabanales* (2008) 168 Cal.App.4th 494, 499-501.) Defendant’s claim that gang registration violated his plea bargain is accordingly appealable under section 1237, subdivision (a) and rule 8.304(b)(3)(B) of the California Rules of Court without a certificate of probable cause. We therefore proceed to the merits.

Interpretation of a plea agreement is guided by contract principles; a court looks to the language and circumstances of the agreement to ascertain the parties’ intent and with a view to carrying out their reasonable expectations. (*People v. Nguyen* (1993) 13 Cal.App.4th 114, 120.) The question is: “[T]o what did the parties expressly or by reasonable implication agree?” (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.)

“When a guilty 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. The punishment may not significantly

exceed that which the parties agreed upon.” (*Walker, supra*, 54 Cal.3d at p. 1024.) Moreover, a “violation of a plea bargain is not subject to harmless error analysis. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer. ‘Because a court can only speculate why a defendant would negotiate for a particular term of a bargain, implementation should not be contingent on others’ assessment of the value of the term to the defendant.’ ” (*Id. at p. 1026*)

In several cases, courts have considered whether a plea bargain was violated when some type of consequence not mentioned during plea negotiations was imposed on the defendant. It is not necessary that the added consequence be technically punitive in order to be subject to the strictures of a plea bargain. (*Walker, supra*, 54 Cal.3d at p. 1024 [discussing restitution fines as part of a plea bargain].) If the consequence to the defendant is sufficiently severe, then it is considered “punishment” for purposes of considering whether the plea bargain has been breached by its imposition. (*Ibid.*) The key inquiry in evaluating whether an omitted consequence was part of a plea bargain is whether the defendant could reasonably have believed the consequence was foreclosed by the plea agreement. (*McClellan, supra*, 6 Cal.4th at p. 380; *Olea, supra* 59 Cal.App.4th at p. 1297.)

For example, the Supreme Court has concluded that the imposition of a restitution fine, which is a negotiable term, can violate a plea bargain under circumstances in which a defendant “reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.” (*McClellan, supra*, 6 Cal.4th at p. 380, citing *Walker, supra*, 54 Cal.3d 1013.) In contrast, the court has held that the imposition of a consequence that is mandated by statute and is thus “an inherent incident of defendant’s decision to plead guilty to that offense” does not violate a plea bargain, as long as the defendant was not misled to believe the requirement would be eliminated. (*McClellan,*

*supra*, 6 Cal.4th at p. 380 [discussing mandatory sex registration requirement].) But where registration as a sex offender is not mandatory because of the specific crime of which the defendant was convicted and is instead discretionary based on the trial court's determination that the offenses were committed "as a result of sexual compulsion or for purposes of sexual gratification" (§ 290, subd. (a)(2)(E)), this added term can violate a plea bargain. (*Olea, supra*, 59 Cal.App.4th at pp. 1296-1298; see also *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197-1198 [distinction between mandatory and discretionary sex registration].) In other words, under *Olea*, because sex registration was not an automatic consequence of the defendant's burglary convictions, it could not be required of him without violating the terms of his plea bargain. (*Olea, supra*, 59 Cal.App.4th at pp. 1296-1298.)

That said, the Supreme Court has recognized that not every deviation from the terms of the agreement is impermissible. To constitute a violation of the plea bargain, the "variance must be 'significant' in the context of the plea bargain as a whole to violate the defendant's rights. A punishment or related condition that is insignificant relative to the whole, such as a standard condition of probation, may be imposed whether or not it was part of the express negotiations." (*Walker, supra*, 54 Cal.3d at p. 1024.) Courts look to the totality of the circumstances to decide whether the defendant reasonably expected not to have the consequence imposed or whether the consequence was significant to the plea bargain as a whole. (See, e.g., *People v. Lopez* (1998) 66 Cal.App.4th 615, 636-637; *People v. Collins* (2003) 111 Cal.App.4th 726, 732-733.)

Although discretionary sex registration—the subject of *Olea*—is for life (§ 290, subd. (a)(1)(A)) whereas the discretionary gang registration requirement of section 186.30, subdivision (b)(3) at issue here is for five years, and gang registration

does not technically constitute punishment<sup>3</sup> (*People v. Bailey* (2002) 101 Cal.App.4th 238, 244), we nevertheless conclude that the term is significant in terms of evaluating its importance in a plea bargain. While defendant was advised about other consequences of his plea—the requirements to provide fingerprints, palm prints, and biological samples for DNA testing as well the payment of a restitution fund fine, potential punitive impacts on later charged crimes, and parole and immigration consequences—he was not advised about gang registration or of his right to withdraw his plea if the sentence exceeded the bargain. We say this not to characterize his contention as one of advisement failure but rather to illustrate that based on the other advisements given, defendant could reasonably have expected to receive a similar advisement regarding gang registration if that was not to be omitted from the sentence he was bargaining for. This expectation is further evidenced by Cruz’s objection at sentencing to the waived referral report’s recommendation concerning gang registration and his clear objection to the imposition of this requirement as exceeding the terms of his plea bargain. In addition, the crime for which Cruz was charged did not require gang registration and the allegations of the complaint did not alert him that this was a possible consequence of a conviction. As was the case in *Olea*, the registration requirement was discretionary because the trial court had to consider the facts underlying the offense. As such, the requirement was a permissible subject of negotiation. Therefore, because defendant was not advised of the registration requirement—a significant term—when he entered the plea, the court’s later imposition of it violated the plea bargain.

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<sup>3</sup> Under section 186.32, “registration entails an appearance at the police or sheriff’s department, a written statement containing information required by the law enforcement agency, and submission of fingerprints and a photograph. In addition, any change in residence address must be reported within 10 days to the appropriate agency. (§ 186.32.)” (*People v. Bailey, supra*, 101 Cal.App.4th at p. 244 [concluding that burden imposed by gang registration is no more onerous than necessary to achieve statutory purpose of protecting the public from gang-related violent crime].)

Having found a violation of the plea bargain, there is still the question of the proper remedy. Cruz contends that because gang registration was not mandatory, we should specifically enforce the plea bargain by striking this requirement. He alternatively argues that the matter should be remanded to afford him the opportunity to withdraw his plea.

California courts “ ‘generally disfavor the remedy of specific performance of a failed plea bargain when “specifically enforcing the bargain [will limit] the judge’s sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing.” [Citation.] [¶] Specific enforcement of a failed plea bargain is not a remedy required by the federal Constitution. [Citation.]’ [Citations.]” (*Olea, supra*, 59 Cal.App.4th at p. 1298.) Here, as in *Olea*, the sentencing court found registration warranted in light of the factual details of the crime. This determination was within the court’s discretion but the court here still imposed the gang registration requirement on the expressed mistaken understanding that even though registration was discretionary and not mandatory, it was nevertheless not a negotiable matter in the plea bargain and therefore did not violate the bargain. The error thus was the imposition of the registration requirement without affording defendant the opportunity 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.]” (*Olea, supra*, at p. 1299.) We will accordingly remand for further proceedings, as specified in our disposition.

## II. *The No-Contact Order Was Unauthorized*

Cruz contends that the no-contact order was error as the court lacked the authority under which to issue it. (*People v. Ponce* (2009) 173 Cal.App.4th 378, 382-385 [section 136.2 protective order unauthorized where order extended beyond pendency of criminal proceedings]; *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 961, 965 [same];

*People v. Stone* (2004) 123 Cal.App.4th 153, 159 [protective orders that are not probation conditions cannot exceed pendency of criminal proceeding]; *People v. Selga* (2008) 162 Cal.App.4th 113, 118-120.) He further contends that even though he did not object to the order below, as an unauthorized sentence the error can be corrected on appeal without an objection, citing *People v. Scott* (1994) 9 Cal.4th 331, 354. Respondent, for its part, concedes that the order was unauthorized and agrees that it should be stricken. Our independent research confirms this conclusion. We will accordingly strike the no-contact order.

#### DISPOSITION

The judgment is reversed and the case is remanded to the trial court for resentencing. If the superior court determines in its discretion to impose the requirement of gang registration under section 186.30, subdivision (b)(3) as a term in excess of the existing plea bargain, then the court is directed to offer defendant the opportunity to withdraw his plea or to accept the registration requirement as a new term of the plea agreement, with further proceedings to follow accordingly through the point of entry of a new judgment. In such case, the new judgment shall exclude any order directing defendant to have no contact with the victim or her family. If, alternatively, the court declines to impose the discretionary gang registration requirement, then the

court is directed to reinstate the sentence and judgment, with the exception of the gang registration requirement and the no-contact order.

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Duffy, J.\*

WE CONCUR:

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Rushing, P.J.

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Premo, J.

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\* 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.