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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH FREDERICK NEHLS,

Defendant and Appellant.

H037256

(Santa Cruz County  
Super. Ct. No. F20897)

A person convicted of specified sex offenses is required under the Sex Offender Registration Act (Act) to register as a sex offender for the remainder of his or her life while residing in California pursuant to Penal Code section 290, subdivision (b).<sup>1</sup> In addition, the court in its discretion may require sex offender registration for anyone convicted of any offense not specified in section 290, subdivision (c), if the court specifically finds that the offense was committed “as a result of sexual compulsion or for purposes of sexual gratification” and states on the record its “reasons for its findings and the reasons for requiring registration.” (§ 290.006.)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

Defendant Joseph Frederick Nehls pleaded no contest to five counts of unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)). The court suspended imposition of sentence and granted formal five-years' probation. At the time it granted probation, the court ordered that defendant register as a sex offender "for the period of probation . . . pursuant to [section] 290 of the Penal Code."

Defendant challenges the probation order insofar as it compelled him to register as a sex offender. He argues that the offenses of which he was convicted are not subject to mandatory registration under section 290, subdivision (b). He asserts further that the court neither made the specific findings nor stated its reasons for its findings and for requiring registration as required for a discretionary order under section 290.006.

We conclude that the order was an invalid discretionary order which did not comply with the requirements of section 290.006. Accordingly, we will strike the registration requirement and otherwise affirm the probation order.

#### FACTS<sup>2</sup>

Defendant was an assistant coach of the Santa Cruz Junior Composite Bike Team. Jane Doe joined the team when she was 15. In a later interview with a police officer in March 2011 (when she was 18), she indicated that she had had a sexual relationship with defendant over an approximate four-month period when she was 16 years old. Defendant was approximately 43 years old at the time. Jane Doe reported to the officer that her relationship with defendant had "turned sexual because she was exploring her sexuality" and that "the relationship ended because she got tired of trying to hide everything and lying." When the officer spoke with

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<sup>2</sup> Our summary of facts is taken from the memorandum prepared by the probation officer.

her shortly after the first interview and requested that she make a pretext telephone call to defendant, “Jane Doe respectfully told the officer that she did not want to pursue the case and did not want to have any further involvement. If subpoenaed, however, she would come to Court and cooperate. She told the officer she did not wish to speak with him any further and the interview was ended.”

### PROCEDURAL BACKGROUND

Defendant was charged by felony complaint filed May 11, 2011, with five counts of unlawful sexual intercourse with a minor more than three years younger than defendant (§ 261.5, subd. (c)). It was further alleged in the complaint that the offenses “were committed for sexual gratification and that the defendant should be compelled to register per Penal Code Section 290.006 as a sex offender.”

Defendant pleaded no contest to all counts alleged, based upon the understanding that he would receive probation and a maximum one-year jail term. At the time of the change of plea, defendant was advised that it was possible that the court at the sentencing hearing would order defendant to register as a sex offender under section 290.

At an August 2011 hearing, the court suspended the imposition of sentence and imposed formal probation for a term of five years. Citing section 290, the court ordered defendant to register as a sex offender during the term of his probation.<sup>3</sup> Defendant filed a timely notice of appeal based on the sentence or other matters occurring after the plea not affecting the validity of the plea.

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<sup>3</sup> The clerk’s minutes do not reflect that the duration of the reporting obligation is limited to five years. Rather, the minutes state: “Register with local law enforcement pursuant to the provisions of 290 PC.” The written order signed by the court similarly reflects a registration requirement pursuant to section 290 without indicating that such obligation is limited to the term of probation. Where there is a conflict between the clerk’s minutes and the oral pronouncement of the court, the latter controls. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

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## DISCUSSION

### I. *Order Requiring Sex Offender Registration*

#### A. *Background and Contentions*

The court considered the testimony, declarations, and written statements of several witnesses concerning whether defendant should be ordered to register as a sex offender.<sup>4</sup> It also received a written report of a psychiatrist who interviewed defendant and presented conclusions regarding his psychological condition. A sentencing memorandum was also submitted on behalf of defendant arguing, among other things, that this was not an appropriate case to order registration under section 290.006. And the court considered arguments from the People and defendant concerning registration. In the court's announcement of its decision to require registration, the court and counsel had the following exchange: “[The Court:] And at this point, based upon my belief and appropriateness for the period of probation you will register pursuant to [section] 290 of the Penal Code. [¶ Deputy District Attorney:] I'm not sure that the Court can order that. That's been a recent issue and a [recent] change that . . . during the probationary period, once a 290, always a 290. I don't think you can do it just during the probationary period anymore. [¶ Defendant's Attorney:] Well, we've litigated that issue. [¶ The Court:] I think I have—well— [¶ Deputy District Attorney:] I'm concerned. [¶ The Court:] Okay. I will make that order and if, in fact, I'm wrong, then

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<sup>4</sup> The probation officer's summary sentencing report noted that the court had indicated when defendant entered his no contest plea that it would be considering whether to require defendant to register as a sex offender under section 290. The probation officer, however, made no recommendation on this issue.

somebody will tell me. And we'll figure out how to deal with probation. But at this point I'll make it at least for that period of time.”

Defendant contends that the court erred in ordering him to register as a sex offender. He argues that the order is invalid because the court did not make the findings required under section 290.006 when the court makes a discretionary order requiring a defendant to register as a sex offender. Defendant asserts further that the court, in purporting to order sex offender registration for the term of probation, exceeded its authority. He contends: “The only type of sex offender registration in California is the lifetime registration set forth in section 290. Section 290 has no provisions for temporary registration or for registration limited to the period of probation.”

The Attorney General does not dispute that the court failed to make the requisite findings in support of a discretionary order for lifetime registration under section 290.006. Rather, she asserts that “[t]he trial court properly imposed a registration requirement as a condition of probation.” The Attorney General argues further that defendant forfeited any challenge to this probation condition and, in any event, the condition was reasonable and properly imposed by the court in the exercise of its discretion.

B. *Propriety of Registration Order*

Lifetime sex offender registration under section 290, subdivision (b) is mandatory where a person is convicted of one or more sex crimes enumerated in subdivision (c) of that statute.<sup>5</sup> It is undisputed here that the crime of which

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<sup>5</sup> “Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, . . . , shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State

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defendant was convicted—violation of section 261.5 (five separate offenses)—is not one specified in subdivision (c) of section 290 for which registration is mandatory. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1195 (*Hofsheier*).

But section 290.006 provides that a court in its discretion may order a defendant to register as a sex offender throughout the course of his or her life while residing in California. Section 290.006 states: “Any person ordered by any court to register pursuant to the [Sex Offender Registration] Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, 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. The court shall state on the record the reasons for its findings and the reasons for requiring registration.”<sup>6</sup> As explained by the high court, in making a discretionary registration order under section 290.006, “the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring life-time registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial

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University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act.” (§ 290, subd. (b).)

<sup>6</sup> The discretionary registration provisions were previously contained in former section 290, subdivision (a)(2)(E). It was renumbered as section 290.006 without substantive change. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76, fn. 4.)

court discretion to weigh the reasons for and against registration in each particular case.” (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) And discretionary registration under section 290.006 may be imposed in connection with convictions of any offense not specified under section 290, subdivision (d), regardless of whether the crime is a sex offense. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 345; see also *People v. Garcia* (2006) 147 Cal.App.4th 913, 916, disapproved on other grounds in *Picklesimer*, at p. 338, fn. 4 [discretionary registration for first degree burglary conviction].)

In this instance, the court did not make the requisite finding under section 290.006 that the offenses were committed “as a result of sexual compulsion or for purposes of sexual gratification.” Nor did it state the reasons for such findings or for ordering registration, as required by section 290.006. One of the purposes for the statute’s mandate that the court state its compulsion/gratification finding and specify its reasons for that finding and for ordering registration is to assist review of such decision. Without that finding and reasons, the appellate court is seriously disadvantaged in determining whether the court properly exercised its discretion in requiring registration under section 290.006. (Cf. *People v. Bonnetta* (2009) 46 Cal.4th 143, 152 [explaining requirement of section 1385 that court explain reasons for dismissal as providing assurance that court has not abused its discretion].) The discretionary order requiring sex offender registration is therefore invalid. (*Hofsheier, supra*, 37 Cal.4th at p. 1197; see also *People v. Allexy* (2012) 204 Cal.App.4th 1358, 1363 [specified procedure of imposing discretionary sex offender registration under section 290.006 at time of conviction or sentencing must be followed].)

The Attorney General’s effort to legitimize the order by couching it as a probation condition not subject to the Act is unavailing. The clear contemplation of the parties at the time of the sentencing hearing was that they were arguing in

favor of, and against, the court imposing discretionary registration under section 290.006. For instance, defendant noted in his sentencing memorandum that one of the issues before the court was “whether defendant should be required to register as a sex offender under Penal Code section 290.006.” He observed further in the memorandum that the imposition of discretionary registration was subject to the two-step process as delineated in section 290.006 and as explained in *Hofsheier, supra*, 37 Cal.4th at page 1196. Further, neither the People nor defense counsel addressed at the sentencing hearing the possibility of registration as a probation condition outside of the section 290 lifetime registration scheme. Moreover, the court, in its order, specifically ordered defendant to “register pursuant to [section] 290 of the Penal Code.” Thus, the order was clearly a discretionary order requiring registration pursuant to the Act, and the Attorney General’s attempt to justify the registration order as a non-section 290 probation order fails.<sup>7</sup>

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<sup>7</sup> The Attorney General argues that an order requiring temporary sex offender registration as a term of probation which is specifically made outside of the requirements of the Act is valid. We find no reported decisions specifically authorizing such a probation order. Although the Attorney General cites *People v. King* (2007) 151 Cal.App.4th 1304, we believe that any reading of that case as supporting temporary sex offender registration as a probation condition is dictum. Moreover, given the lifetime nature of registration as mandated by section 290, subdivision (b), and because we question whether the state’s tracking system for sex offender registrants can accommodate temporary registration (see <http://meganslaw.ca.gov/sexreg.htm> [describing Department of Justice’s Sex Offender Tracking Program and the “lifetime sex offender registration requirement” of California statute]), we doubt that temporary sex offender registration may be ordered as a term of probation under the present statutory scheme. But because we conclude that the court erred by making a discretionary order for sex offender registration without compliance with section 290.006, we need not decide the interesting, albeit thorny, question raised by the parties, as to the validity of a temporary registration order as a term of probation.

DISPOSITION

The portion of the probation order that requires defendant to register as a sex offender pursuant to section 290 is ordered stricken. As modified, the probation order is affirmed.

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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.