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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DOUGLAS GONSALEZ GARCIA,

Defendant and Appellant.

H037456

(Monterey County

Super. Ct. No. SS110184)

In re DOUGLAS GONSALEZ GARCIA,

on Habeas Corpus.

H038718

Pursuant to a plea agreement, defendant Douglas Gonzalez Garcia pleaded no contest to one count of sexual penetration of a person under 18 by a foreign object (Pen. Code, § 289, subd. (h)),¹ one count of oral copulation of a person under 18 (§ 288a, subd. (b)(1)) and one misdemeanor count of dissuading a witness (§ 136.1, subd. (b)(1)). In exchange, Garcia was to receive a top sentence of felony probation with the court to determine at sentencing whether the admitted sexual offenses would remain felonies or be reduced to misdemeanors. The court was also to determine in its discretion under section 290.006 whether or not to require Garcia to register as a sex offender.

¹ Further unspecified statutory references are to the Penal Code.

Garcia was sentenced to three years' felony probation and ordered to register as a sex offender. On appeal, he contends the trial court abused its discretion in requiring him to register as a sex offender and denied him the benefit of his plea agreement by failing to specify whether the offenses to which he pleaded no contest remained felonies or were reduced to misdemeanors.

Garcia also filed a separate petition for writ of habeas corpus in which he contends his trial counsel was ineffective for failing to obtain an expert psychological opinion on his propensity to commit forcible sex crimes in the future.

Because the trial court failed to state either the reasons for its finding that the crime was committed for purposes of sexual gratification or the reasons for requiring lifetime registration as a sex offender, we shall reverse and remand for resentencing. Consequently, Garcia's petition for writ of habeas corpus is moot and shall be dismissed as such.

I. FACTUAL AND PROCEDURAL BACKGROUND²

The victim³ and Garcia first met on August 8, 2010, when mutual friends introduced them at Garcia's 19th birthday party. Between August 8, 2010, and October 12, 2010, Garcia and the victim had a series of sexual encounters.

A few days after their initial meeting, Garcia called the victim on her cell phone, and the two engaged in flirtatious conversation. One Saturday in late August, the victim, accompanied by a female friend, arranged to meet Garcia at a 7-Eleven in Seaside. The victim and Garcia spoke briefly, and the victim left with her friends.

The victim and some other girls were all staying overnight at a friend's house, and the other girls decided to sneak out and see their boyfriends. At first the victim did not

² As Garcia pleaded no contest, we derive the facts from the probation report, the testimony offered at the preliminary hearing and other documents in the record on appeal.

³ Because the victim was a minor (age 17) at the time the offenses took place, we will refer to her only as the "victim" herein.

want to go as she did not have a boyfriend, but her friends suggested she call Garcia. She did so, and asked him to meet her at a local store. Her friends dropped her off at the store, and Garcia picked her up and drove her to his house, where he lived with his mother. The two went into Garcia's room and began kissing and fondling one another.

At one point, Garcia asked the victim to take her pants off. She refused. Garcia and the victim continued kissing, and as Garcia began to unbutton her pants, the victim agreed to remove them. Garcia then used his fingers to penetrate the victim's vagina. The victim told him, "stop" and "cool it." Garcia stopped, and later drove the victim back to her friend's house. The two spoke on the telephone multiple times after the incident, but never made firm plans to spend more time together.

On October 11, 2010, Garcia called the victim and asked her to come over to his house, but she refused. The following afternoon, however, the victim invited Garcia to join her and several other friends at a beach in Seaside. The victim's friends decided to leave when none of their boyfriends showed up, but they promised to return for her shortly. The victim and Garcia remained on the beach and she asked why he had been mean to her on the phone earlier. After he apologized and admitted he was "lit," he asked her to be his girlfriend and she agreed.

Garcia's mother picked up the victim and Garcia and drove them back to her house, but then left. No other family members were home. The victim and Garcia went to his room, where they engaged in some play wrestling. At one point, Garcia pinned her down and said something like, "See, I'm stronger than you" or "I'm bigger than you." Garcia then asked her to orally copulate him. She said she did not want to, but Garcia coaxed her, saying, "Just touch it." Garcia asked her to try oral copulation and told her if she did not like it, he would not force her. Eventually, the victim agreed to try, but then said she would not do it. Garcia became upset and exclaimed, "Are you serious?" The victim then gave in to Garcia's request. Garcia had his hand on her head and "kind of forced her onto his penis," which made her gag. She said she did not want to continue,

and Garcia again said, "Are you serious?" He asked her to try one more time, and she did, but stopped shortly thereafter. The victim said Garcia kept his hands behind her head, and she felt she could not pull away at first. Shortly thereafter, the victim's friend called and arranged to pick the victim up at a nearby convenience store.

Later the same night, the victim was again staying over at the home of a female friend with some other girls who invited their boyfriends over. The victim called Garcia and invited him to come over. Garcia arrived about 10:00 or 11:00 p.m. The other people either left the house or went into other rooms, leaving the victim and Garcia alone in the living room. The victim showed Garcia her promise ring, explaining that she wore it as an emblem of her commitment to not engage in premarital sex. Garcia laughed and said she was "crazy." She said if he wanted to have sex with her, he would have to marry her. He responded that they "better have sex" as he was sleeping over, but then said he was kidding.

The two began to make out and Garcia asked the victim to go with him into the bathroom. She accompanied him to the bathroom, where Garcia asked her to orally copulate him again. When she said she did not want to, Garcia said she had to because "you're my girlfriend" and cajoled her to "just do it for one second." The victim agreed and, as she began, Garcia again placed his hands behind her head, causing his penis to go deeper into her mouth. She gagged and stopped, spitting. She then followed Garcia back to the living room.

When they returned to the living room, they began kissing again. At some point, the victim got a text message from another boy, which made Garcia upset. He took her phone and asked her why she was talking to other boys if he was her boyfriend. He put his hands around the victim's neck and said, "I should just choke you right now." Although he did not apply any force and did not actually choke her, the victim was frightened.

Shortly thereafter, the two lay down on the floor to sleep. Garcia apologized, and asked the victim to kiss him. After she did so, Garcia, who had taken off his pants before lying down, asked her to get on top of him, saying he “wouldn’t do anything.” She told Garcia that she did not want to have sex with him, but agreed to lie on top of him. She did not think Garcia would try to have sex with her since he did not have a condom. The victim was wearing a dress, and Garcia began manipulating her underwear, pulling them aside. He eventually took her panties off and penetrated the victim’s vagina with his penis. The victim was surprised and said, “Wait, wait, wait,” and asked if he had really put his penis inside of her. The victim got up, and told Garcia that she was very uncomfortable and that he was hurting her. Garcia told the victim “bend over for a second.” She was afraid of making Garcia angrier because he had yelled at her and called her names throughout the night,⁴ so she did as he told her. Garcia penetrated her from behind and moved his penis in and out of her vagina. After a short period of time, less than five minutes, Garcia stopped, pulled his penis out and the victim felt something wet dripping from her vagina.

Garcia asked the victim to get him a towel. She walked to the bathroom and saw she was bleeding. She began crying, but wiped her tears and brought a towel to Garcia in the living room. Garcia asked if she was crying and when she said she was, told her that was stupid since they did nothing wrong. The victim told Garcia that what they did was wrong and Garcia told her she “better not tell no fucking [*sic*] body.” He said “nobody needs to know what happened right now.”⁵

⁴ At some point that evening, prior to Garcia penetrating her, he grabbed her and told her “shut the fuck up.”

⁵ A couple of days after the incident, the victim called Garcia, telling him she no longer wanted to talk to him and felt terrible. Garcia called and texted her, and when the victim called him back, he asked why she was acting like this with the guy she “lost her virginity to.” He promised to leave her alone if she promised not to tell anyone that he had taken Ecstasy on the night of October 12.

The victim and Garcia lay down on the floor to go to sleep. In the morning, the victim gathered her things, but did not speak to Garcia. As he was leaving, he asked her if she would give him a hug goodbye. She did so, and left with her friend. Her friend asked if she was okay, and the victim said she was fine. She did not tell her friend what happened the night before.

That same day, the victim's mother took her for a previously scheduled physical exam. The doctor noticed blood and protein in the victim's urine sample and told the victim's mother. The victim's mother guessed that the victim had become sexually active, and, in order to get the victim to reveal her activities, the victim's mother lied to her and told her that she (the victim) was pregnant. The victim eventually admitted that she had sex with Garcia.

About a week later, the victim's mother took her to the police station to report the incidents. In her interview with detectives, the victim initially maintained that the conduct was consensual. At a subsequent interview conducted at the Child Advocacy Center, however, the victim told the interviewer that she was fearful of Garcia and that she had felt threatened and coerced.

Garcia was subsequently charged by information with one count of sexual penetration with a foreign object on a person under 18 years of age (§ 289, subd. (h), count 1); one count of forcible rape (§ 261, subd. (a)(2), count 2); two counts of oral copulation of a person under 18 years of age (§ 288a, subd. (b)(1), counts 3 & 4); and one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1), count 5).

Pursuant to a plea bargain, after the district attorney orally amended the complaint to reduce count 5 to a misdemeanor, Garcia pleaded no contest to counts 1, 3 and 5 (as amended). In exchange for the plea, the trial court was to sentence Garcia to no more than felony probation, with a jail sentence of up to one year, after first deciding: (1) whether counts 1 and 3 would remain as felonies or be reduced to misdemeanors; and (2) whether Garcia was to be ordered to register as a sex offender pursuant to section 290.

Garcia's counsel submitted that the preliminary hearing transcript provided a factual basis for the plea. A probation report was subsequently prepared.

Prior to sentencing, Garcia's counsel filed a motion objecting to the factual summary set forth in the probation report, arguing that the trial court should consider the testimony at the preliminary hearing as the factual basis for sentencing purposes.

At sentencing, the trial court suspended imposition of sentence, placed Garcia on formal probation for three years on condition he serve 240 days in county jail. Prior to ordering Garcia to register as a sex offender, the court remarked as follows: "The Court has read and considered the letters submitted by the teachers as well as the record of the defendant's grades at Monterey High School. . . . While [defense counsel] correctly points out that the Court does frequently come across cases where young adults are engaging in their first sexual experiences, none of them that this Court has seen has been the same as this one. This case is different. And the reason this case is different is because the defendant--while there may have been invitations by [the victim] in this matter to get together and do things together with her and clearly she was interested in being with the defendant at different times, the situation was not one that stayed pleasant or stayed appropriate. There were actions on the defendant's part that were beyond coercive and were threatening, and that is not appropriate. It doesn't matter how young you are or how close in age she is to you. It's not appropriate at this age, and it's not appropriate as you get older. And as you get older, it would be a worse crime, because as everyone has heard, no is no. [¶] I find that some of the comments of the probation officer were particularly appropriate where he says that the defendant took advantage of the victim's naiveté, her inexperience, her fear of him. And the other concern is that the defendant has shown no remorse in this matter. It's very disturbing. [¶] I'm going to follow the recommendation of the probation officer [to impose a registration requirement]." At the close of the hearing and following a reminder from the prosecutor,

the trial court made an express finding that the crime was committed for purposes of sexual gratification.

II. DISCUSSION

A. Sex offender registration under section 290

Sex offender registration is mandatory for persons convicted of certain offenses which are listed in section 290, subdivision (c). (§ 290, subd. (b).) In addition, section 290.006 grants a trial court the discretion to require sex offender registration for persons not convicted of an offense enumerated in section 290, subdivision (c). According to section 290.006: “Any person ordered by any court to register pursuant to the 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.”

A court’s decision to impose registration pursuant to section 290.006 is reviewed for abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) Under that standard, “[b]road deference must be shown to the trial judge.” (*Ibid.*) The trial court’s ruling should not be disturbed “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

However, when imposing a discretionary registration requirement 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 lifetime 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 court discretion to weigh the reasons for and against registration in each particular case.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197 (*Hofsheier*), italics added.)

In this case, the trial court failed to engage in this two-step process. It made a finding, albeit only after being reminded by the prosecutor that it must make such a finding, that the offenses were committed for purposes of sexual gratification. It also stated why it believed Garcia’s case was “different” than others involving two “young adults⁶ . . . engaging in their first sexual experiences,” citing Garcia’s actions “that were beyond coercive[,] were threatening, and . . . [in]appropriate.” The court expressed concern that Garcia “took advantage of the victim’s naiveté, her inexperience, her fear of him[, and] . . . has shown no remorse in this matter.” When making these statements however, the trial court failed to indicate whether these were the reasons supporting its conclusion that the offenses were committed for purposes of sexual gratification or whether these were reasons lifetime registration was required. Consequently, the order requiring Garcia to register must be reversed and the matter remanded to the trial court for resentencing.

B. The trial court may rely on all relevant information in deciding whether to order registration under section 290.006

We now turn to whether or not the trial court was permitted to rely on information contained in the probation report in deciding whether to require Garcia to register pursuant to section 290.006. It was. Even though Garcia stipulated that the transcript of the preliminary hearing provided the factual basis for his plea, “[i]n order to make a discretionary determination as to whether or not to require registration [under section 290.006], the trial court logically should be able to consider all relevant information

⁶ Technically, one young adult (Garcia) and one minor (the 17 year-old victim) on the cusp of adulthood.

modern-day scarlet letter,⁷ the bearer’s name, photograph, date of birth, address and other personal information available to all on the Internet. (§ 290.46.)⁸ A registered sex offender “may be at risk of losing employment, and may have difficulty finding a place to live.” (*Hofsheier, supra*, at p. 1197.)

In this case, the only information before the trial court addressing the likelihood that Garcia would commit sexual offenses in the future is one paragraph in the probation report noting that Garcia received a score of three on the Static-99R, “which places him in the Low-Moderate Risk Category[] for being charged or convicted of another sexual offense, if he is released on probation.” The trial court did not mention this when it recited its reasons why Garcia’s offenses were “different.” It did not expressly discuss the likelihood that Garcia would commit similar offenses in the future as a basis for its decision to require registration. Given that one of the principal reasons for requiring sex offender registration is so that law enforcement can more easily keep track of those deemed likely to reoffend, it seems logical to require the trial court to address that factor in stating the basis for its decision and we direct that it do so at the resentencing hearing.

⁷ Hawthorne, *The Scarlet Letter* (1850; reprinted 1929 by Houghton Mifflin). Acknowledging the burden imposed by registration does not imply disapproval of its requirement in all cases. We simply wish to emphasize that care must be taken in determining who is to be subjected to that burden.

⁸ Section 290.46 requires the Department of Justice to maintain a Web site that includes information on persons convicted of specified sex offenses, such as the offender’s name, address, aliases, photograph, physical description, date of birth, criminal history and other information the Department deems relevant. (§ 290.46, subds. (a)(1), (b)(1), (c)(1), (d)(1).)

D. The trial court impliedly deemed the “wobblers” as felonies⁹

The plea agreement provided that Garcia, in exchange for his plea of no contest to counts 1, 3 and 5, would be sentenced to felony probation with no more than one year in jail. Garcia’s counsel stated the relevant portion of the agreement as follows: “[I]t will be felony probation as a top. And the Court would at the time of sentencing decide whether it’s felony--whether they will remain as felonies or reduce them to misdemeanors, the ones that can be.” Because the parties did not agree to a specified term, the trial court retained its discretionary power to reduce the felony offenses, i.e., counts 1 and 3, to misdemeanors. At the sentencing hearing, the prosecutor argued that the offenses should be punished as felonies. Garcia’s counsel argued that the offenses should be treated as misdemeanors instead. After hearing counsels’ arguments, the statements by the victim’s parents and reviewing the documents before it, including the probation report, the court suspended sentence for three years, imposed formal probation and ordered him to serve 240 days in county jail with total credits of eight days.

“[A] sentencing court is not required to provide reasons for sentence choices made when the defendant, as part of a negotiated plea, pleads to an offense and states on the record his understanding of the court’s power to sentence him to a term of at least the length imposed.” (*People v. Stewart* (2001) 89 Cal.App.4th 1209, 1215, disapproved on other grounds in *People v. Buttram* (2003) 30 Cal.4th 773, 777.) Garcia’s plea agreement did not provide that the court was to make an express statement on the subject. The court was only obligated to decide whether to reduce the charges to misdemeanors or keep them as felonies, and because it imposed a sentence at the top of the agreed-upon range, the court implicitly decided Garcia’s offenses should be punished as felonies. The parties

⁹ Because we think it is clear that the court exercised its discretion and did not reduce the charged offenses to misdemeanors, we do not reach the People’s procedural argument that Garcia has forfeited this argument by failing to object at the time of his sentencing.

argued this very question at the sentencing hearing, so it cannot be said that the court was unaware of its discretion in this matter. It obviously decided that Garcia's conduct merited punishment as felonies rather than misdemeanors. Its decision on this issue is made clear by the sentence imposed and there was no violation of the plea agreement simply because it failed to express the obvious.

Because Garcia was sentenced to a term within the bounds contemplated by the plea bargain, the court adhered to the terms of the plea. Garcia is not entitled to relief on this claim.

E. The petition for writ of habeas corpus is moot

Garcia's petition for writ of habeas corpus argues that his trial counsel provided ineffective assistance by failing to have him evaluated, prior to his sentencing hearing, by a mental health expert regarding the question of his likelihood to commit similar sex offenses in the future. In support of that petition, he has attached a favorable psychological evaluation report dated July 31, 2012, prepared by Ricardo Winkel, Ph.D., a licensed psychologist. Because we have concluded the trial court abused its discretion in ordering Garcia to register as a sex offender under section 290.006 and are remanding the matter for resentencing on that issue, the petition for writ of habeas corpus is moot. Garcia may seek to introduce the July 31, 2012 psychological evaluation at his resentencing for the trial court's consideration.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for the limited purpose of resentencing with respect to the order requiring Garcia to register as a sex offender.

The petition for writ of habeas corpus is denied as moot.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.