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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DELACRUZ APODACAS,

Defendant and Appellant.

H024797

(Santa Clara County
Super. Ct. No. CC120278)

Defendant Joseph DeLaCruz Apodaca was found guilty at a court trial for failing to register as a sex offender within five days of his birthday. He was sentenced to 32 months in state prison. He appeals contending the court erred in finding that he willfully failed to register and in abusing its discretion by failing to strike the Three Strikes prior.

FACTS

About 11:00 a.m. on July 30, 2001, San Jose Police Officers Jaime Jimenez and Paul Guerra saw defendant in his wheelchair in the parking lot of a Super Mercado at Willow and Almaden Streets. They recognized defendant from a two-minute contact two days earlier, spoke to him, and discovered that defendant had a misdemeanor warrant outstanding and told defendant how to take care of it. Jimenez then drove away. Defendant had been cooperative at all times. As Jimenez was driving away, he received information that there was a possible parole violation and outstanding felony warrant for defendant's failure to report within 24 hours to his assigned parole officer. Jimenez

returned to defendant in the parking lot, obtained his social security number and confirmed an identifying scar. He arrested defendant. After the arrest, defendant stopped answering questions or responding to the officer.

Parole agent Dane Segall testified that when she learned of defendant's arrest she went to the jail to serve a felony warrant she caused to be issued because defendant had failed to report within 24 hours of being released from county jail custody. On April 3, 2001, the Board of Prison Term had suspended defendant's parole effective January 30, 2001. When Segall arrived, defendant was refusing to speak to a nurse or cooperate with the booking process, although defendant asked to speak to Segall. Nevertheless, Segall announced that she was leaving. Defendant made eye contact with her and again stated that he wished to speak to her. Segall told defendant he had failed to take advantage of earlier opportunities to speak and left the jail. Segall testified she assumed defendant had received instructions from the Department of Corrections to report to his parole agent.

As shown by defendant's registration records kept by the San Jose Police Department, defendant had registered 12 to 14 times. His most recent Penal Code section 290¹ registration was dated April 5, 2000. On April 5, defendant had changed from resident to transient status. He was provided with a form meant for registrants who have trouble reading. It notified defendant of the duty to register and the various rules and provided lines for the registrant's initials by each item. The April 5 form did not show that defendant requested help completing it.

A review of defendant's past completed forms showed that occasionally defendant requested and received assistance in completing the forms. On four to five occasions defendant completed registration updates. The records showed that defendant had registered as a transient two or three times. On March 24, 2000, defendant reported a change of address within the jurisdiction because he had just been released from a county

¹ Further statutory references are to the Penal Code unless otherwise stated.

jail commitment. Previously defendant registered as a transient on May 27, 1999, and he received a sex offender registration receipt on June 4, 1999.

On October 14, 1998, a registration form was completed with assistance and reported a different address from the one reported on a July 2, 1998 form. The first registration was on March 10, 1998. A check of the Violent Crime Information Network database showed that defendant had not registered with any other police agency since his April 5, 2000, registration with the San Jose Police Department.

There was also a notification form dated February 20, 2001, three days before defendant's birthday, which was provided by the Santa Clara County Adult Probation Department. It did not indicate whether it had been filled out when defendant was in custody after violating his probation or if it had been filled out after he had been released. It was not a registration but it notified that he had a duty to register when he was released from jail.

Dr. Michael Echols, an expert in assessing cognitive function, testified that on August 12, 1999, he administered a neurobehavioral cognitive status examination to defendant for county jail administration purposes. Echols found that defendant had "mild to moderate attention deficit impairment of short term memory." Echols scored defendant's verbal IQ at 73, his performance IQ at 79, and full scale IQ at 74. Echols believed that defendant was functioning at a "borderline intellectual" level.

At that level, an individual would have "some difficulty in their day-to-day life understanding . . . what they read, . . . developing a plan, that sort of thing." Echols found a "severe impairment of delayed recall." Echols stated that while defendant suffered from some level of cognitive impairment, he was not developmentally disabled. Defendant had impairment of delayed recall, which equated to a high level of forgetting. Echols concluded that defendant was not mildly mentally retarded but that he suffered severe memory and cognitive impairment with capacity to briefly hold information. In his written report made at the time of testing, Echols noted defendant used a notebook to

remind himself of fundamental tasks. Echols had no personal knowledge of how defendant actually functioned in the community, nor did he have personal knowledge about defendant's understanding of sex offender registration laws.

Defendant was found guilty of failing to register within five working days of his birthday (§ 290, subd. (g)(2)), with a prior section 290 conviction. The court found true an 18-year-old prior "Three Strikes" conviction for assault with intent to commit rape, and a prior prison term. The court struck the prior and sentenced defendant to double the mitigated term totaling 32 months. The court refused to strike the Three Strikes prior. This appeal ensued.

ISSUES ON APPEAL

Defendant contends the court erred in finding he willfully failed to register and that it abused its discretion by failing to strike the 18-year-old prior felony conviction.

ACTUAL KNOWLEDGE

Defendant contends that the prosecution did not establish beyond a reasonable doubt that he willfully failed to register with actual knowledge of his duty to register. Defendant reasons that a willful act is one that is purposeful or intentional. Although defendant knew that he had a duty to register, his mental impairment caused him to forget. Therefore, he did not purposefully or intentionally fail to register. Defendant asserts that evidence of a mental disease or defect as it affects the ability to remember is relevant to a defendant's actual knowledge of his duty to register. Defendant takes issue with *People v. Cox* (2002) 94 Cal.App.4th 1371, 1376 which held that forgetting to register is not a defense to a section 290 violation because "[f]orgetting presupposes knowledge." The *Cox* court reasoned that once someone admits he forgot to register, it means he had actual knowledge of the duty to register. Actual knowledge in this context equates to the willful failure to register whether or not a sex offender forgets the duty. (*Ibid.*) Defendant argues that the defense that a defendant forgot should be therefore admissible on the issue of whether a failure to register was willful.

“ ‘ “[T]he power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict if possible.” ’ [Citation.]” (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

A violation of section 290 requires a showing that the defendant actually knew of the registration requirement. (*People v. Garcia* (2001) 25 Cal.4th 744, 752.) “[A] sex offender is guilty of a felony only if he ‘willfully violates’ the registration or notification provisions of section 290. [Citation.] The word ‘willfully’ implies a ‘purpose or willingness’ to make the omission. (§ 7.) Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed. As stated in *People v. Honig* (1996) 48 Cal.App.4th 289, 334, ‘the term “willfully” . . . imports a requirement that “the person knows what he is doing.” [Citation.] Consistent with that requirement, and in appropriate cases, knowledge has been held to be a concomitant of willfulness. [Fn. omitted.]’ [¶] . . . Although notice alone does not satisfy the willfulness requirement, a jury may infer from proof of notice that the defendant did have actual knowledge, which *would* satisfy the requirement. [¶] . . . [¶] . . . By making actual knowledge of the duty to register an element of a section 290 violation, we undoubtedly meet any due process limitations imposed by *Lambert* [*v. California* (1957) 355 U.S. 225, 229-230 (actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under a registration ordinance can stand)].” (*Id.* at pp. 752-753.)

In the instant case, there is substantial evidence that defendant had actual knowledge of his duty to register. Defendant registered as a sex offender on numerous occasions over the course of years. He registered not only for an annual update, but also when he moved from one address to another and when he became transient. As for the

willfulness of the act, “ ‘[t]he word “willfully” when applied to the intent with which an act is done or omitted means with a purpose or willingness . . . to make the omission in question. The word “willfully” does not require any intent to violate the law’ (CALJIC No. 1.20.) Thus this instruction correctly requires a showing of purpose or willingness to act, or (as in this case) fail to act.” (*People v. Garcia, supra*, 25 Cal.4th at pp. 753-754.)

The record in the instant case establishes that the evidence is sufficient to support the trial court’s finding that defendant willfully failed to act. Defendant had actual knowledge of the registration requirement. Although he had memory deficits, he carried out his duty to register on many previous occasions. From the fact that defendant used a notebook to remind himself of “fundamental tasks,” he recognized he had difficulties with his memory. Consequently, his failure to register cannot be excused because he “forgot” despite his actual knowledge of the registration requirement. Whether defendant “forgot” because of a mental impairment that he attempted to accommodate by use of a notebook or whether he forgot because of “a failure to respond to cues” (*People v. Cox, supra*, 94 Cal.App.4th at p. 1376), is immaterial. “Because the Legislature believed it is essential the authorities know at all times the whereabouts of those who have been convicted of committing sex offenses, it has created a demanding and rigorous registration scheme. [Citation.] [¶] . . . [¶] . . . In the face of such rigorous notification and registration requirements, it is unreasonable to believe that in this context the Legislature intended that a mere lapse of memory would excuse a failure to register. There are simply some things that cannot be forgotten. To allow forgetfulness to excuse a failure to register, would serve, in this context, as an incentive not to remember.” (*Id.* at pp. 1376-1377.) While evidence of a mental deficit as it affects the ability to remember is relevant to a defendant’s actual knowledge of his duty to register, in this case the evidence is overwhelming that defendant had actual knowledge. As stated *ante*, defendant knew of and acted in conformity with the registration requirement on previous

occasions and he took reasonable steps to accommodate his deficit by the use of a notebook. Thus although there was evidence of defendant's impaired memory, there was substantial evidence of defendant's actual knowledge of the registration requirement from which the willfulness element of the crime could be inferred. The court did not err.

REFUSAL TO STRIKE THE PRIOR

Next, defendant contends the court abused its discretion in refusing to strike his prior felony conviction. Defendant argues that he merely committed a technical violation of section 290 without an intent to deceive or evade law enforcement. He took no action to hide himself from law enforcement, had engaged in registration in the past, and had not committed any crimes of violence in the last 19 years. Defendant argued his mental and physical condition and his lack of a violent criminal history indicate he was not at risk of reoffending, and he was not a threat to the community at large. Defendant was diagnosed with a mental illness, was in a wheelchair, had suffered a number of head injuries, was an alcoholic and was homeless. For these reasons the court should have stricken the 18-year-old prior conviction.

The trial court denied the motion stating that “defendant on two prior occasions has been granted what is commonly called a *Romero*^[2] motion. In both those instances the Court has given the defendant the benefit of the doubt and the Court has in each of those cases stricken the prior conviction and granted probation . . . and the defendant did not do well on probation. [¶] This is the third time where the defendant is asking that the court . . . strike the prior conviction and grant probation. I think in light of the track record that would be inappropriate in this case.”

The standard for striking a prior conviction under the Three Strikes law requires both the trial and the reviewing courts to “consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Appellate review is limited to abuse of discretion. (*People v. Benevides* (1998) 64 Cal.App.4th 728, 735.) “[J]udicial discretion is . . . ‘the sound judgment of the court, to be exercised according to the rules of law.’ [Citation.] . . . [T]he term judicial discretion ‘implies absence of arbitrary determination, capricious disposition or whimsical thinking.’ [Citation.] Moreover, discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]” (*People v. Gimenez* (1975) 14 Cal.3d 68, 72.) Where the record shows that the trial court balanced the relevant facts and reached an impartial decision in conformity with the rule of law, a reviewing court will affirm the trial court's ruling, even if the reviewing court might have ruled differently in the first instance. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

In our case, the court considered the defense sentencing memorandum that argued for striking the prior and in favor of probation and the prosecutor's memo in opposition. The court considered the probation report which provided defendant's criminal record including his previous failures to register as a sex offender for which, he was first placed on probation and served four months in the county jail and later granted probation and required to serve 12 months in jail and pay a fine. The court also considered the fact that in two previous cases the prior felony convictions were stricken but defendant failed to reform. Finally, the probation department considered defendant an inappropriate candidate for probation since he did not perform satisfactorily on previous grants of probation or on parole.

The trial court was made aware of all relevant factors. That the trial court determined that a 32-month state prison term was more appropriate than probation and a third county jail sentence for a registration violation was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.