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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERIC HASTINGS, Defendant and Appellant.	F042199 (Super. Ct. No. 11653) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Mary G. Swift and William Arzbaecher, under appointments by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock, Janet Neeley, Kelly C. Fincher and Connie A. Proctor, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRENCE OF DAWSON, J.

Appellant Eric Hasting was convicted by the court, sitting without a jury, of two counts of violating Penal Code section 290, subd. (f)(1).[1] The crimes were alleged to have occurred in January 1999 (count 1) and July 1999 (count 2). Because an allegation that appellant was a triple recidivist offender under section 667, subdivisions (b)-(i), was found true, and because the trial court declined to dismiss these priors under section 1385 to the extent the priors were appended to count 1, appellant received a "Three Strikes" sentence of 25 years to life on count I and a determinate sentence on count 2.

I.

There was sufficient evidence (*People v. Johnson* (1980) 26 Cal.3d 557, 576) to support a conclusion as to count 1 that appellant resided at the Madera motel, where he had been placed by his parole officer, from December 27, 1998, through at least January 3, 1999, when he left without notifying the Madera Police Department of his move (§ 290, subd. (f)(1); count I).[2] The motel manager testified in part that he recalled that appellant had left the motel on the "Sunday" before the manager talked to appellant's parole officer. The parole officer testified he talked to the motel manager on January 6, 1999. The Sunday before January 6, 1999, was January 3, 1999. In addition, several witnesses testified that appellant moved into their apartment in Van Nuys, California, in July 1999, and lived there for a number of succeeding months before moving with one of the witnesses to Seattle in October 1999 without notifying the Madera Police Department of the move (count II). That witness also testified that, to her knowledge, appellant had

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The dates are significant because, before January 1, 1999, section 290 required notification only when the parolee moved within California and not when the parolee moved out of California. (*People v. Franklin* (1999) 20 Cal.4th 249, 252.) After January 1, 1999, notification was and is required regardless of the parolee's destination. (Stats. 1998, ch. 930, § 1.1.)

never been to Seattle, Washington, before moving there with her, that the move was instigated by her, and that appellant did not know Seattle and had no connections there.[3]

II.

There was sufficient evidence to support a finding as to count 2 that Madera County was the law enforcement agency "with which [appellant] last registered" (§ 290, subd. (f)(1)). The prosecution's evidence established that appellant had registered in Madera County on December 29, 1998, and there was no other evidence that he registered anywhere else prior to his move from Van Nuys to Seattle in September 1999.

If appellant had registered elsewhere between January 1999 and September 1999, it was incumbent upon him to present evidence of it under the "rule of convenience." (*People v. Mower* (2002) 28 Cal.4th 457, 477 [unless it is unduly harsh or unfair to a defendant, the burden of proving an exonerating fact may be imposed on a defendant if the existence of a fact is peculiarly within the defendant's knowledge and proof of the fact's nonexistence by the prosecution would be relatively difficult or inconvenient].) Appellant knew whether and where he last registered, if not in Madera County, and it would have been a relatively simple matter for him to present proof of it at trial. On the other hand, it would have been relatively inconvenient and difficult for the People to prove that appellant did not register with any one of the hundreds, probably thousands, of other law enforcement agencies in California during the approximate nine months between December 1998 and September 1999. It is important to point out in this connection that there was no evidence appellant moved to Van Nuys directly from Madera. To the contrary, the evidence showed only that he left Madera in December 1998 or January 1999 and moved into the Van Nuys apartment in July 1999. His

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[3] Appellant's own testimony that he left the motel on December 30th and drove to Seattle did nothing more than create a conflict with the direct and circumstantial evidence introduced by the prosecution, a conflict which the trial court obviously resolved against appellant.

whereabouts during the intervening nine months were undisclosed. Indeed, had the prosecution proved that appellant had not registered with the proper Van Nuys authorities, we have little doubt he would be contending now that the People still had not proven their case because there was no prosecution evidence that appellant had not registered somewhere other than Van Nuys between January and September 1999.

We do not view the burden on appellant in this respect to be any different than the burden imposed upon a defendant to prove possession of a driver's license if it would establish a complete defense to the charge of driving without a license. (See *In re Shawnn F.* (1995) 34 Cal.App.4th 184, 197.) Had appellant demonstrated that he had registered elsewhere between January 1999 and September 1999, he would have presented a complete defense to the crime charged in count 2 without also having to prove that he had notified that agency of his move to Seattle, because the information alleged specifically that the crime took place in Madera County. (See 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Jurisdiction and Venue, § 47, p. 137 [conviction cannot stand if evidence does not support proper venue, which must be alleged and proven by the prosecution].)

None of appellant's objections to the application of the rule of convenience are persuasive. First, it is beside the point whether application of the rule would create a presumption that appellant did not register in Van Nuys. The question raised by count 2 was not where appellant in fact failed to last register but instead where appellant in fact last registered. Proof, by tangible evidence or intellectual presumption, that he did not last register in Van Nuys would have been irrelevant, because he could not have committed the crime charged in count 2 by failing to notify an agency with which he did not last register. Second, for the same reason, whether or not his failure to notify Madera County of the move to Seattle constituted inadmissible propensity evidence that he also did not notify the Van Nuys authorities would have been irrelevant to the issues raised by count 2 because count 2 alleged a violation in Madera County not in Van Nuys. Third,

application of the rule of convenience does not rewrite the statute any more than does application of the rule of convenience rewrite the statute prohibiting driving an automobile without a valid driver's license (Veh. Code, § 12500). (See *In re Shawnn F., supra,* 34 Cal.App.4th at pp. 196-197.) The rule is procedural only, and simply identifies the party with the duty to produce evidence on a certain issue; the rule has nothing to do with the substantive elements of the particular crime charged. (*People v. Mower, supra,* 28 Cal.4th at pp. 477-478.)

III.

The trial court did not err in imposing separate punishments for both counts because appellant's failure to comply with section 290, subdivision (f)(1) when he left the motel in January 1999 (count 1) and when he left Van Nuys in July 1999 (count 2) were separate crimes. (See *People v. Davis* (2002) 102 Cal.App.4th 377, 380-381.)

Subdivision (f)(1) of section 290 mandates that every person with a registration requirement who changes his or her residence must, within five days, notify the law enforcement agency with which he or she last registered of the person's new residence address. The registration and notification requirements of section 290 insure generally that the responsible law enforcement agency in the jurisdiction where the person currently resides knows of the person's presence so that the agency may keep the person under surveillance. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Subdivision (f)(1) of the statute insures specifically that the person's change of residence will be communicated to the California Department of Justice and to the law enforcement agency in the new jurisdiction. (§ 290, subd. (f)(1).) These statutory purposes would be utterly frustrated if the continuing nature (see *Wright v. Superior Court, supra,* 15 Cal.4th at p. 525) of a violation of subdivision (f)(1) were deemed to subsume into a single violation all subsequent violations of the same or a different duty imposed by the statute. Once a person failed to perform one requirement he or she would have no reason or incentive to perform any other regardless of the number of times the person changed

residences, with the result that all interested law enforcement agencies would be in the dark about the person's location at any particular time.

Alternatively, appellant argues that the imposition of punishment for both counts violated section 654. However, in this case, appellant's two failures, several months apart, to notify the "enforcement agency . . . with which he . . . last registered" (the Madera Police Department) could legitimately have supported a conclusion by the trial court that each violation had an independent objective (*People v. Osband* (1996) 13 Cal.4th 622, 730) -- in January 1999 to escape from the surveillance of the Madera Police Department and in July 1999 to avoid criminal prosecution for having illegally escaped from that initial surveillance.

III.

We have held that, absent a mistake by the trial court about the nature or extent of its discretion, there is "no [appellate] review available to" a defendant of a trial court's decision not to exercise its power under section 1385 to dismiss a prior serious felony conviction. (*People v. Benevides* (1998) 64 Cal.App.4th 728, 734-735.) Though we acknowledge that the decision has not been uniformly followed in other appellate districts, we stand by it in the absence of a disapproval by the Supreme Court, and we decline to revisit the issue here. Here, the trial court was well aware of the nature and extent of its section 1385 discretion. We therefore do not address appellant's contention that the trial court abused that discretion by failing to dismiss all of the "strike" prior convictions (§ 667, subds. (b)-(i)) found true by the court.

IV.

The sentence imposed upon appellant was not cruel or unusual under the federal Constitution or the state Constitution. (*Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63; *In re Lynch* (1972) 8 Cal.3d 410.)

V.

Appellant submitted, without assistance of counsel, a separate "Supplemental Brief" in which he argued that (1) his trial counsel was ineffective in connection with the request to dismiss all the strike prior convictions because counsel neglected to object to or correct certain inaccurate information in a "parole violation report" apparently considered by the trial court at sentencing; and (2) the trial court abused its discretion in denying the dismissal request because it was based upon the allegedly inaccurate information.[4]

These questions are not before us because, as we have already held, appellant has no right to appellate review of the trial court's decision not to dismiss any of the strike priors appended to count 1. (*People v. Benevides, supra,* 64 Cal.App.4th at pp. 734-735.)

DISPOSITION

The judgment is affirmed.

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Dibiaso, Acting P.J.

I CONCUR:

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Vartabedian, J.

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[4] We disregard the fact that appellant's supplemental brief is unauthorized and should not be considered. (*People v. Merkouris* (1956) 46 Cal.2d 540, 554-555 [the attorney of record has the exclusive right to appear for his or her client and neither the party himself or herself nor another attorney should be recognized by the court in the conduct or disposition of the case].)

DAWSON, J.

I concur in the result in this matter, but differ with the majority's view that appellant is not entitled to appellate review of the trial court's decision not to grant his *Romero*[1] motion. Other districts have disagreed with that view (see, e.g., *People v. Romero* (2002) 99 Cal.App.4th 1418, 1434; *People v. Zichwic* (2001) 94 Cal.App.4th 944, 961; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998; *People v. Myers* (1999) 69 Cal.App.4th 305, 309), and I find myself in agreement with them. I refrain from writing at length because the issue is currently before, and will be decided by, the California Supreme Court. (*People v. Carmony*, review granted May 21, 2003, S115090.)

I concur in the result because I find nothing in the record from which to conclude that the trial court abused its discretion in denying appellant's *Romero* motion. Appellant's prior offenses were horrendous. Though he has already been punished for those offenses, the nature of the offenses imposes upon him the additional requirement that he cooperate in society's effort to help and to protect victims like his. This he has not only failed to do but has deliberately and prolongedly refused to do. The crimes here are not de minimis. Neither is this a *Burgos*[2] situation. Though the prior offenses were committed against a single victim, they had separate objectives.

On the other hand, appellant's prior offenses—attempted murder, rape and oral copulation by force, with findings that he used a firearm and inflicted great bodily injury during the commission of those crimes—were committed when he was just 17 years old, and there is reason to think that a combination of drugs and alcohol played some part in their commission. Though appellant repeatedly violated the terms of his parole after his first release from prison, and committed the first of the current offenses within weeks of

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[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[2] *People v. Burgos* (2004) 117 Cal.App. 4th 1209.

his second release, he did manage to live free of any new arrests during the two years between that second release and his apprehension. He apparently was working and productive during that time. It is not within the purview of this court's review of the trial court's action, however, to determine how this court, or any of its members, would have judged these factors. The question is abuse of discretion, and none is shown.

As noted in the majority opinion, appellant contends by way of a supplemental brief prepared without his attorney's assistance that (1) his trial counsel was ineffective in connection with the *Romero* motion because counsel neglected to object to or correct inaccurate information contained in a parole violation report, and (2) the trial court abused its discretion in connection with the *Romero* motion because it considered the same allegedly inaccurate information. The majority does not decide this issue, based on its view that appellate review of the denial of the *Romero* motion is not available. As I do not join in that view, I have considered appellant's point and reject it. The record of the hearing on appellant's *Romero* motion shows that the trial court considered information indicating that appellant had absconded from parole before, not that he had previously violated Penal Code section 290.

As to the Penal Code section 654 issue, I note that the two moves in question occurred several months apart. Temporal proximity, or the lack of it, is an appropriate factor to consider when applying section 654. (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11; *In re William S.* (1989) 208 Cal.App.3d 313, 317.)

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DAWSON, J.