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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH KENNETH SORDEN, Defendant and Appellant.	A099674 (San Mateo County Super. Ct. No. SC-050781)

I.

INTRODUCTION

Joseph Kenneth Sorden appeals from the judgment of conviction for failing to register as a convicted sex offender within five working days of his birthday. (Pen. Code, § 290, subd. (a)(1)).[1] The court suspended the imposition of sentence and admitted appellant to supervised probation for a period of three years with conditions, including a 90-day term in county jail. We agree with appellant that genuinely forgetting to register negates the element of willfulness required in section 290, and therefore, the trial court erred in refusing to admit testimony that appellant failed to remember to register. Accordingly, we reverse the trial court's decision.

[1] All further undesignated statutory references are to the Penal Code, unless otherwise specified.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was convicted of forcible rape and rape in concert on August 24, 1983, in the San Mateo County Superior Court. As a result of this conviction, appellant is subject to lifetime registration as a sex offender pursuant to section 290.

Section 290 requires persons who have been convicted of certain crimes to register with various entities, according to specific time frames and conditions. Among other things, section 290 provides that persons who have been convicted of certain crimes must register with the chief of police in the city in which he or she resides. (§ 290, subd. (a)(1)(A).) Section 290 also requires individuals to register within five working days after coming into or changing the individual's residence within any city, county, or city and county. (*Ibid.*) Additionally, "[b]eginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subparagraph (A)." (§ 290, subd. (a)(1)(D).) A person who "willfully violates any requirement of this section . . . for the offense of failing to register under this section . . . is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years." (§ 290, subd. (g)(2)).

Prior to the year 2001, and for total period of 12 years, appellant had consistently registered each time required under the statute, including the period since his original parole date in 1995. There is no evidence that appellant had any prior registration violations. As required by section 290, appellant most recently registered using his then-new address in Pacifica in July 2001, five months before the commission of the current offense.

In December 2001, appellant failed to register within five working days of his December 6th birthday. (§ 290, subd. (a)(1)(D).) He did not remember to do so until December 22, 2001. On that morning appellant drove to the Pacifica Police Department and voluntarily registered at approximately 8:45 a.m. The attending police officer testified that he was dispatched to the station to complete a "no registration for a sex

registrant." After meeting appellant in the station lobby, the officer took appellant into the interview room to videotape the interview. The officer testified that he read appellant his Miranda rights while in the interview room. After interviewing appellant, during which appellant stated that he had forgotten to register within five working days of his December 6th birthday, appellant was arrested and booked in the Redwood City Jail.

Appellant testified that he forgot to register within the five-working day period because he was suffering from a bout of depression, and that once he realized that he had not yet registered, he immediately went to the police station to do so. Appellant's friend testified (for the purpose of sentencing) that two months before appellant was required to register, appellant went through "a real rough time." She stated that appellant's mother was diagnosed with cancer and that appellant's dog of 14 years died. Another of appellant's friends stated in a letter to the court that appellant was dealing with other issues that greatly impacted him in the months and weeks prior to the registration. This friend stated that in addition to having lost his mother and dog, appellant was battling with his son's mother to see his son and that appellant's girlfriend had just ended their relationship. During that time, appellant appeared "depressed and withdrawn" and "was really not himself." Another friend stated in a letter to the court that appellant had "lost quite a bit of weight, looked tired, and seemed depressed" in the months near his birthday. This friend also stated that "[appellant] was forgetful and stopped making plans regarding his fiancée and his Mom's illness."

Appellant waived his right to a jury trial based on an agreement that, in the event of a conviction upon trial to the court, the court would grant appellant probation with no more than 90 days of local custody, less custody credits to which appellant might be entitled.

On July 22, 2002, the trial court considered the People's motion in limine to preclude the admission of the testimony of appellant's psychologist and other witnesses as to appellant's depressed mental state during the period in which he failed to register. Appellant argued that: 1) admission of this evidence would go to show that appellant's depressed mental state affected his ability to remember to register, 2) he did in fact fail to

remember to register, and 3) his failure to register was not willful. The court granted the People's motion, reasoning that because a section 290 violation is a general intent crime, the case of *People v. Cox* precluded the use of evidence showing forgetfulness. (See *People v. Cox* (2002) 94 Cal.App.4th 1371 (*Cox*).)

On July 23, 2002, the trial court heard testimony from the investigating officer and the Pacifica Police Department custodian of records. After appellant testified, the court heard additional testimony from appellant's friends about his good character for the purpose of sentencing. The trial court found appellant guilty of a felony of failing to register under section 290, subdivision (a)(1) and suspended imposition of the sentence. The court admitted appellant to supervised probation for 3 years, with a 90-day jail term.

III.

DISCUSSION

The trial court excluded appellant's evidence after concluding it was irrelevant to an alleged violation of section 290. Generally, appellate courts review rulings by trial courts as to the admissibility of evidence for abuse of discretion. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 201; see also *People v. Rowland* (1992) 4 Cal.4th 238, 264; see also *People v. Clair* (1992) 2 Cal.4th 629, 671.) Where a decision on admissibility turns on the relevance of the evidence in question (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 201), the reviewing court must examine the underlying determination as to relevance itself. (*Ibid.*) Evidence is relevant if it has any tendency in reason to prove a disputed material fact. (Evid. Code, § 210.)

In this case, the exclusion of evidence in limine was not based merely on the application of the ordinary rules of evidence, but instead allegedly " ' "impermissibly infringe[d] on a defendant's right to present a defense.". . .' " (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; see *People v. Epinoza* (2002) 95 Cal.App.4th 1287, 1317.) Because this claim raises a question of constitutional dimension, the proper standard is whether the proported error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant claims that in order to convict under section 290, both the statute and due process require there be proof beyond a reasonable doubt that the registrant had actual knowledge and purpose in failing to register, and evidence of lack of such knowledge and purpose because of forgetfulness is relevant and admissible on this issue of fact.

The United States Supreme Court requires that a conviction based on a violation of a criminal offender registration statute include an "element of willfulness" to satisfy the due process requirement of the Fourteenth Amendment. (*Lambert v. California* (1957) 355 U.S. 225, 227-228 ["No element of willfulness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction."]) A criminal registration statute that imposes such heavy criminal sanctions requires "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply" to comport with the notions of due process. (*Id.* at p. 229.) Due process places some limits on the rule that "ignorance of the law will not excuse" because the requirement of notice is engrained in due process. (*Id.* at p. 228.) Further, the conduct of registering as a felon is an act that is "wholly passive" conduct, unlike the commission of acts or the failure to act under circumstances that should alert the doer to consequences of his deed. (*Ibid.*)

In a failure to register case brought under section 290, our Supreme Court requires proof beyond a reasonable doubt that the defendant actually knew of his duty to register. (*People v. Garcia* (2001) 25 Cal.4th 744, 752.) The court relied on the definition the Legislature provides in section 7 and held that the word "willfully" implies a "purpose or willingness" to make the omission.[2] (*Ibid.*) The court also reasoned that "one cannot purposefully fail to perform an act without knowing what act is required to be performed." (*Ibid.*) Further, the term "willfully" requires "a union of act and wrongful

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[2] Penal Code section 7, subdivision 1. provides: "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

intent, or criminal negligence." (*Id.* at p. 754, citing § 20; *People v. Vogel* (1956) 46 Cal.2d 798, 801 [holding that defendant was not guilty of bigamy because there was no union of act and wrongful intent where defendant had a bona fide and reasonable belief that facts existed that left him free to remarry.]) The court emphasized that its requirement of actual knowledge of the duty to register as an element of willfulness undoubtedly satisfies any due process requirements imposed by the United States Supreme Court in *Lambert.* (*People v. Garcia*, *supra*, 25 Cal.4th at p. 753; *Lambert v. California*, *supra*, 355 U.S. at p. 229.)

In response to appellant's contention that knowledge and willfulness are not proven when the evidence shows that a defendant forgot, respondent urges us to follow *Cox*, where Division One of the Fourth District Court of Appeal held that forgetting does not negate knowledge and willfulness.[3] (*Cox*, *supra*, 94 Cal.App.4th at p. 1376.) In *Cox*, the defendant argued that the trial court erroneously rejected the consideration of a legitimate defense of forgetting to register.[4] The court held that "one willfully fails to register when possessed of actual knowledge of the requirement [and] he or she forgets to do so." (*Ibid.*) The court reasoned that "[f]orgetting presupposes knowledge" and that the defendant conceded that he had actual knowledge of the registration requirement. (*Ibid*.) Further, human beings store many facts in their brains at one time and are responsible to insure that important responsibilities are met by using cues such as keeping personal calendars or tying strings around their fingers. (*Ibid.*) The court uses such analogies as a spouse forgetting a wedding anniversary and a patient forgetting a doctor's appointment to illustrate its point that "such lapses arise not from a lack of actual knowledge but a failure to respond to cues." (*Ibid*.)

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[3] This issue is now before our Supreme Court, which has granted review in two recent cases reaching different conclusions. (See *People v. Moss*, review granted Aug. 13, 2003, S117313); *People v. Barker*, review granted June 11, 2003, S115438.)

[4] Although some courts have referred to forgetting to register as a defense, it is not an affirmative defense. Rather, it goes to negate the prosecution's case of proving the element of willfulness.

We do not find this reasoning persuasive for several reasons. First, in *Garcia*, our Supreme Court concluded that in order to violate section 290 willfully a defendant must "actually *know*" of his duty to register. (*People v. Garcia*, *supra*, 25 Cal.4th at p. 752, italics added.) The present tense use of the word "know" suggests that the court requires the defendant to have *concurrent* knowledge, not simply that the defendant knew about the duty to register at some time other than during the period of default. Also, in *Garcia*, the court emphasized, " '. . . [T]he requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. . . . ". . .' In other words, there must be a union of act and wrongful intent, or criminal negligence. . . ." (*Id*. at p. 754, quoting *People v. Simon* (1995) 9 Cal.4th 493, 519 & *People v. Vogel*, *supra*, 46 Cal.2d at p. 801.) Thus, the court explicitly contemplated that knowing about the duty and act (or failure to act) must be concurrent. The *Cox* court fails to address the implication apparent in *Garcia.*

Further, the *Cox* court's reasoning also ignores the real possibility that a sex offender might forget to register for reasons beyond his control. For example, if the sex offender were to become temporarily or permanently mentally incompetent or is rendered comatose by accident or illness, he would not be able to respond to "cues," no matter how many strings he tied around his finger. Further, it defies logic to state that the failure to remember an anniversary is the moral equivalent to the *willful* refusal to recognize such an important event.

The *Cox* rationale also effectively eliminates the term "willfully" from the statute's requirements by making willfully failing to register indistinguishable from inadvertently failing to register. The legislative history confirms that the Legislature did not intend to make *all* failures to register felonies. Rather, the Legislature deliberately inserted a requirement that the failure to act be willful for it to be punishable as a felony. (See § 290, subd. (a)(1).) For example, prior to 1979, former section 290 provided that persons who violated any section of the statute were guilty of a misdemeanor. (Stats.

1974, ch. 1124, § 1, p. 2562.) Then, in 1979, the Legislature added to subdivision (f), mandating a minimum 90-day period of confinement for those who had committed designated sex crimes and "willfully" failed to register as required by the statute. (Stats. 1979, ch. 944, § 8, p. 3256.) Currently, subdivision (g)(1) provides that a person who originally received a misdemeanor conviction or juvenile adjudication and "willfully" violates any requirement of the section is guilty of a misdemeanor. Subdivision (a)(1), applicable to the case at bar, which requires an individual who has a felony conviction or juvenile adjudication to register, also requires the element of willfulness to convict the individual of failing to register.

On the other hand, willfulness is not required for persons subject to registration "who fail[] to provide proof of residence" under subdivision (g)(7). Those individuals are guilty only of a misdemeanor punishable by imprisonment of no more than six months local custody. Similarly, under subdivision (g)(5), a person adjudicated a sexually violent predator under section 6600 of the Welfare and Institutions Code "and who fails to verify his or her registration every 90 days as required" shall be punished for a term of no more than one year in prison.

This examination of the legislative history of section 290 reveals that the Legislature did indeed intend to distinguish between those individuals who have "willfully" failed to act and those who have done so inadvertently. (See Assem. Bill Nos. 3513 and 1211 (1993-1994 Reg. Sess.) §§ 865, 864.)[5] Thus, rejecting evidence of forgetfulness reduces the proof needed to prove the felony form of violation to that indistinguishable from the misdemeanor form. The legislative history betrays the *Cox* rationale, by confirming that our lawmakers intended to raise the level of proof to prove the more severe type of violation. This is not merely a formalistic distinction—it can

[5] The proposed 1994 bill, Assembly Bill No. 3513, was amended in the Senate and, as adopted, increased the penalties for violations, but retained the element of willfulness in section 290.

have serious consequences, as it is well known that the felony form of section 290 is being prosecuted in some instances as a third strike.[6]

In light of the foregoing statutory interpretation, case law, and legislative history, we conclude that appellant's proffered evidence relating to his argument that he did not "willfully" fail to register because he forgot to do so was materially relevant to his case. Thus, the trial court abused its discretion in its decision to exclude the evidence.

As to prejudice, the evidence appellant proffered to negate the willfulness element of the crime was substantial, if not compelling. Appellant's expert testimony, his friends' testimony, and his own, showed appellant's state of mind for the short period of time during which he failed to register, and thus, was very relevant to showing that he failed to do so "willfully." For example, appellant's expert, Dr. Weiner, "would have testified that in December of 2001, appellant was suffering from a clinical depression, not within his control, which affected his memory." Appellant testified that he was depressed during and around the time that he had forgotten to register. Several of appellant's friends wrote letters to the court about their proposed testimony and testified for purposes of sentencing that appellant was going through a "tough time" and was the not the type of person who would have purposely failed to register, but rather likely forgot to do so. These facts combined with the facts that appellant had a history of consistently registering on time, he missed his registration deadline by nine days, and that he voluntarily went to register as soon as he remembered, emphasize the import of this evidence as a whole to a fair assessment of the charged violation.

Therefore, the trial court's exclusion of the evidence was prejudicial, as the trial court's error was not harmless beyond a reasonable doubt under the *Chapman* standard. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)[7]

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[6] Sections 667, subdivision (e)(1); 1170.12, subdivision (c)(1); see *People v. Cluff* (2001) 87 Cal.App.4th 991.)

[7] In our view, reversal would be required even if the lower (i.e., more prejudice needed to reverse), substantial likelihood test were applicable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Lastly, we note that respondent also argues in a conclusory fashion that requiring the admission of evidence relevant to prove appellant's forgetfulness would "unnecessarily frustrate" prosecution of section 290 violations.[8] However, we find that, much like other disputed factual issues in criminal cases, the trier of fact is quite able to determine the validity of appellant's claim that he honestly forgot to re-register. As with critical elements contained in other criminal statutes, the prosecution has the burden to prove a willfulness to violate the law existed at the time of the violation. If facts exist that negate this critical element, the trier of fact is assuredly competent to consider and weigh those facts, just as it does in deciding whether the prosecution's burden of proof has been met as to any other element of a charged crime.[9]

IV.

DISPOSITION

The judgment is reversed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.

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[8] Respondent offers no explanation of how the admission of evidence of forgetfulness would frustrate prosecutions under section 290. We decline to guess how this might be so.

[9] Parenthetically, we reject respondent's argument that appellant may only present evidence of mental disease, defect or disorder when the evidence is relevant to "the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a).) Because section 290 is a general intent crime, it is argued, evidence of mental disease, mental defect, or mental disorder is irrelevant under section 28. This contention lacks merit because appellant was not attempting to negate that he had the mental capacity to form the requisite intent. Rather, appellant offered the testimony of his witnesses and doctor to establish that he did not *form* the requisite intent because he forgot to register on time, despite his admitted mental *capacity* to willfully fail to register.