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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROOSEVELT TOUSSAIN,

Defendant and Appellant.

B232803

(Los Angeles County  
Super. Ct. No. BA372747)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Monica Bachner, Judge. Reversed.

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Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Roosevelt Toussain appeals from the judgment entered after he pleaded no contest to failing to update his address with law enforcement as a mandated sex offender registrant and admitted that he had one prior serious or violent felony conviction that qualified as a strike under the “Three Strikes” law. Toussain obtained a certificate of probable cause from the trial court to raise on appeal the issue whether he was required to register as a sex offender in California based on the crime he previously had committed in Washington. We conclude that Toussain was not a mandated sex offender registrant in California and thus reverse the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. *The Information***

An information, dated August 12, 2010, charged Toussain with two counts of failing to file a change of address under Penal Code section 290.013, subdivision (b), as a mandated sex offender registrant. The information specially alleged that Toussain had two prior serious or violent felony convictions that qualified as strikes under the Three Strikes law: (1) a 2005 conviction in California for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)); and (2) a 1986 conviction in Washington for rape in the third degree (Revised Code of Washington (RCW), § 9A.44.060). The information also specially alleged that Toussain had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

### **2. *The Motion to Set Aside the Information and the Trial Court’s Denial***

After pleading not guilty to the charges, Toussain filed, first in pro. per. and then as represented by counsel, motions to set aside the information under Penal Code section 995. Toussain argued that, although he had registered as a sex offender in California, he was not required to do so based on his third degree rape conviction in Washington and that he thus could not be prosecuted for failing to file a change of address. The trial court denied both Toussain’s in pro. per. motion and the motion filed after counsel was appointed for him, concluding that the third degree rape conviction in

Washington rendered Toussain a mandated sex offender registrant in California and that, as a result, the People could prosecute him as charged in the information for failing to file a change of address.

3. *Toussain's No Contest Plea, His Notice of Appeal and the Issuance of a Certificate of Probable Cause*

After denial of his Penal Code section 995 motions, Toussain withdrew his not guilty plea and pleaded no contest to one count of failing to file a change of address as a mandated sex offender registrant in violation of Penal Code section 290.013, subdivision (b). He also admitted that he had a prior serious or violent felony conviction for assault with a deadly weapon that qualified as a strike within the meaning of the Three Strikes law. The trial court sentenced Toussain to a state prison term of 32 months, consisting of the low term of 16 months for the violation of Penal Code section 290.013, subdivision (b), doubled pursuant to the Three Strikes law. It dismissed the remaining count and other special allegations. Toussain filed an application for a certificate of probable cause, which the trial court granted. Toussain then filed a notice of appeal.

### **DISCUSSION**

Toussain contends that he was not required to register as a sex offender because the crime of rape in the third degree that he committed in Washington does not qualify as a registerable offense in California. According to Toussain, because he was not required to register as a sex offender in California, the People could not prosecute him for failing to file a change of address. We agree.

In California, a person who has been convicted of any offense listed in Penal Code section 290, which includes rape under Penal Code section 261, subdivision (a), is subject to mandatory lifetime sex offender registration. (Pen. Code, § 290, subs. (b) & (c).) A mandated sex offender registrant must file a change of address when he or she moves within or outside the state. (*Id.* at § 290.013, subs. (a) & (b).)

Penal Code section 290.005 governs whether a person with an out-of-state conviction must register as a sex offender in California. Former subdivision (a) of that provision, in effect as of the time of Toussain's alleged failure to file a change of address and his conviction and sentence, provided that "any person who . . . is hereafter convicted in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as one or more of the offenses described in subdivision (c), of Section 290 . . ." shall register as a sex offender in California. (Former Pen. Code, § 290.005, subd. (a).) To determine if an out-of-state offense is one that would have been punishable as a crime requiring mandatory registration in California, the "out-of-state offense (for which the foreign jurisdiction has not required sex offender registration) [must] be equivalent to the statutorily defined elements of the registerable California crime . . . ." (*In re Rodden* (2010) 186 Cal.App.4th 24, 36.) Under former Penal Code section 290.005, subdivision (a), "the least adjudicated elements of the out-of-state crime for which the conviction was secured must meet the definition of a section 290 offense without resort to an examination of the facts underlying the conviction." (*Ibid.*)

After *In re Rodden*, the Legislature modified Penal Code section 290.005, subdivision (a), to allow consideration of the facts underlying the conviction to determine if the out-of-state offense is one that California would consider a registerable offense. (Stats. 2011, ch. 362 (S.B. 622, § 1, eff. Jan. 1, 2012).) The subdivision now mandates registration for "any person who . . . is hereafter convicted in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, based on the elements of the convicted offense or facts admitted by the person or found true by the trier of fact . . . , would have been punishable as one or more of the offenses described in subdivision (c) of Section 290 . . ." Neither Toussain nor the People argue that the 2011 amendment to Penal Code section 290.005, subdivision (a), effective on January 1, 2012, is retroactive, nor do they present any facts regarding Toussain's third degree rape conviction in Washington for consideration in determining whether his offense is one for which California would require sex offender registration.

We, therefore, analyze the case under the former version of Penal Code section 290.005, subdivision (a).

In Washington, “[a] person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator: (a) Where the victim did not consent as defined in RCW [§] 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct, or (b) Where there is threat of substantial unlawful harm to property rights of the victim.” (RCW, § 9A.44.060.)<sup>1</sup> In California, “[r]ape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator,” under the circumstance, among others not relevant here, “[w]here it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily

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<sup>1</sup> In Washington, “[a] person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory: (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or (b) Kidnaps the victim; or (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or (d) Feloniously enters into the building or vehicle where the victim is situated.” (RCW, § 9A.44.040(1).) Rape in the second degree occurs “when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion; (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: (i) Has supervisory authority over the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense; (d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview or examination . . . ; (e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who: (i) Has a significant relationship with the victim; or (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.” (RCW, § 9A.44.050(1).)

injury on the person or another.” (Pen. Code, § 261, subd. (a)(2).)<sup>2</sup> Under the former version of Penal Code section 290.005, subdivision (a), where we do not look at the facts surrounding Toussain’s third degree rape conviction in Washington, the least adjudicated elements of both prongs of the Washington statute must constitute a registrable offense in California for Toussain to qualify as a mandated sex offender registrant. The least adjudicated elements of the first prong of Washington’s third degree rape statute, however, do not meet the definition of rape in California. While rape in California requires that the perpetrator accomplish sexual intercourse with the victim by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, the first prong of Washington’s third degree rape statute has no such requirement, necessitating only that the perpetrator engage in sexual intercourse with the victim, not a spouse, when the victim did not consent to the sexual intercourse and clearly expressed the lack of consent by words or conduct. (See *State v. Wright* (2009) 152 Wash.App. 64, 71-74 [limiting third degree rape to unforced, nonconsensual rape where the perpetrator’s acts are only those sufficient to achieve penetration].) Toussain, therefore, is not a mandated sex offender registrant in California based on his third degree rape conviction in Washington and could not be prosecuted for failing to file a change of address.<sup>3</sup>

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<sup>2</sup> The People maintain that third degree rape in Washington is a registrable offense in California based solely on the argument that the least adjudicated elements of the crime meet the definition of rape under Penal Code section 261, subdivision (a)(2). They do not contend that third degree rape in Washington is a registrable offense in California based on its relationship to any other qualifying crime under Penal Code section 290, nor have we discovered any such crime.

<sup>3</sup> Because both prongs of Washington’s third degree rape statute must qualify as a registrable offense in California for Toussain to be a mandated sex offender registrant, and the first prong does not so qualify, we need not address the second prong of the statute in order to reverse the judgment.

**DISPOSITION**

The judgment is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.