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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER AIBOR JESCHKE, Defendant and Appellant.	2d Crim. No. B235707 (Super. Ct. No. 1256120) (Santa Barbara County)

Peter Aibor Jeschke appeals from postjudgment orders (1) revoking his probation; (2) putting into effect a previously imposed, suspended sentence to state prison; and (3) requiring him to register for life as a sex offender pursuant to Penal Code section 290.[1] Appellant was subject to discretionary, not mandatory, sex offender registration.

Appellant contends that (1) the trial court abused its discretion in refusing to reinstate his probation; (2) the lifetime registration requirement was unauthorized because it was not part of the suspended sentence that the trial court ordered into effect upon the revocation of probation; (3) he was entitled to a jury trial of the facts underlying the lifetime registration requirement; and (4) the trial court erroneously calculated his credits for presentence confinement. The first and third contentions are without merit. The second contention would have been meritorious, but appellant forfeited the issue by acquiescing in the trial

[1] Unless otherwise stated, all statutory references are to the Penal Code.

court's unauthorized procedure. The fourth contention has merit and we modify the judgment to award appellant the correct amount of presentence confinement credit. As so modified, we affirm.

Factual and Procedural Background

Appellant was convicted by a jury of misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (b)); furnishing marijuana to a minor 14 years of age or older (*Id.*, § 11361, subd. (a)); sexual penetration of a person under the age of 18 years (§ 289, subd. (h)); three counts of oral copulation of a person under the age of 18 years (§ 288a, subd. (b)(1)); and two counts of unlawful sexual intercourse. (§ 261.5, subd. (c).) In December 2009 the trial court sentenced appellant to prison for seven years, eight months, but suspended execution of the sentence and placed him on probation for five years. One of the conditions of probation was that he serve 365 days in the county jail. Appellant was awarded credit for time served of 339 days. Another condition of probation was that he register as a sex offender during the five-year probationary period.

We affirmed the judgment in an unpublished opinion. (*People v. Jeschke*, May 16, 2011, 2d Crim. No. B222221.) As stated at pages 2-3 of that opinion, the facts underlying appellant's convictions are as follows:

"Appellant was the assistant coach of a high school girls' tennis team. Z.M, who was on the tennis team, met appellant when she was 15 years old. In addition to being Z.M.'s school coach, appellant gave Z.M. private tennis lessons paid for by her parents. Z.M. 'considered [appellant] to be a role model.'

"In November 2007 when Z.M. was 16 years old, appellant removed her clothes, put his finger inside her vagina, and orally copulated her. Appellant, who was 34 years old, committed the sexual acts inside his car. Appellant warned Z.M. not to tell anyone.

"About a week later, appellant furnished marijuana to Z.M., which she smoked. Later that same day, appellant removed Z.M.'s clothes, orally copulated her, and 'made [Z.M.] rub his penis' with her hand until he ejaculated. Appellant warned Z.M. not to tell anyone.

"The day before Thanksgiving in November 2007, appellant furnished marijuana to Z.M., which she smoked. Appellant and Z.M. then went into a Jacuzzi. Appellant orally copulated Z.M. and put his penis inside her vagina. Z.M. said to appellant, 'Are you sure we should do this?' She asked whether he had a condom. Appellant replied, 'It's all right, it's okay.' Appellant warned Z.M. not to tell anyone. He said that if she told other people, 'his life would be ruined and he'd lose his job.'

"The day after Thanksgiving, appellant furnished the drug Ecstasy to Z.M. After Z.M. ingested the drug, appellant had sexual intercourse with her. He did not use a condom.

"During a search of appellant's bathroom, the police found a pornographic magazine entitled, 'Barely Legal.' The magazine contained photographs 'of naked girls in sexual positions. The girls had bodies that caused them to appear to be very young, age range 14 to 16.' "

On May 27, 2011, following an evidentiary hearing, the trial court found that appellant had violated the terms of his probation because (1) without the approval of his probation officer, he had entered into a romantic relationship with a woman who had a child under the age of 18 years; (2) "in terms of the [sex offender] registration requirements," he had failed to report that his girlfriend's home was "his second and arguably primary residence, as he was sleeping there most nights"; (3) he had "accessed pornographic web sites" on his girlfriend's computer; (4) he had used alcohol and marijuana; and (5) in an attempt to "subvert the [drug] testing process of the probation department," he had "engaged in flushing" his body with fluids prior to testing.

Appellant submitted a sentencing brief requesting that the court reinstate probation based on his "Going Forward Plan" instead of revoking probation and sentencing him to prison. Pursuant to the plan, appellant would be required to serve a six-month jail term. After release from jail, he would "reside full-time at a sober living home for men . . . for the duration of his probation." This facility would regularly test him for drugs. Appellant would "wear an ankle bracelet that has a GPS [global positioning system] installed and which constantly monitors his BAC [blood-alcohol concentration]." (CT 239, lines 26-27) He would attend weekly meetings of Sex Addicts Anonymous and would be "forbidden

from having any social or professional contact whatsoever with any person under the age of eighteen years."

Decision to Reinstate Probation

Appellant contends that the trial court abused its discretion by not to reinstating probation based on the Going Forward Plan. We review the court's decision for abuse of discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.) "A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (***Id.***, at pp. 909-910.)

The trial court did not exceed the bounds of reason in refusing to reinstate probation. It is reasonable to infer that appellant deliberately concealed from the probation officer that, in violation of his probation, he was living with a woman who had a child under the age of 18 years. The relationship began in October 2010 and ended in January 2011. At the end of November 2010, appellant started "staying" at his girlfriend's house "[u]p to five days a week." Appellant admitted to the probation officer that he knew his girlfriend had a 17-year-old daughter.[2] Despite the probation conditions prohibiting the use of alcohol and drugs, appellant was a regular user of both. Appellant's girlfriend testified that she and appellant had smoked marijuana three or four times a week during November and December 2010. On 10 to 15 occasions, appellant appeared to be "stoned" on marijuana. Appellant told his girlfriend that he had received the marijuana in exchange for giving tennis lessons. The girlfriend further testified that appellant drank alcohol two or three times a week.

Appellant's viewing of pornography on his girlfriend's computer was of particular concern. One of the conditions of his probation was that he "use only his own computer" and "not access pornography." On his girlfriend's computer, appellant accessed web sites that "fell into . . . the teen pornography category." These web sites displayed photographs of "[t]eenage females who . . . appeared to have less developed physiques." One of the websites purportedly showed a "[s]choolgirl" having sexual relations. The probation officer stated: "[Appellant's] . . . inability to adequately manage his impulse control and [his]

[2] The 17-year-old daughter lived with her father. Appellant's girlfriend testified that appellant was with the daughter on only one occasion: Christmas Eve in 2010.

access[ing] a web site consistent with the age and setting of the victim[] in the case he is on probation for are of alarming concern." [¶] . . . "[I]it is this officer's opinion that [appellant] is at great risk of victimizing another female. He is not amenable to probation and the suspended prison sentence is deserved to be imposed."

Appellant argues that the trial court's "comments . . . fail to reflect consideration of a reinstatement of probation on the strict plan proposed in counsel's sentencing brief." We disagree. At the time of sentencing, the court declared that it had "reviewed" the parties' "sentencing briefs."

The trial court's "determination that a prison term was required . . . is one which any other judicial officer might well have made under the same circumstances . . . . In the absence of any showing that the court's decision was arbitrary or capricious, we will uphold it on appeal." (*People v. Downey*, *supra*, 82 Cal.App.4th at p. 910.)

Sex Offender Registration

Pursuant to section 290.006, the court had discretion whether to require appellant to register under the Sex Offender Registration Act (§§ 290–290.023).[3] (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1206–1207; *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1371, 1375.) As a condition of probation (condition number 26), the trial court originally ordered appellant to register as a sex offender pursuant to section 290. "By its terms, section 290 imposes a registration requirement on the individual 'for the rest of his or her life . . . .' (§ 290, subd. (a)(1)(A) [now subd. (b)].)" (*People v. King* (2007) 151 Cal.App.4th 1304, 1308.) When the court placed appellant on probation, it permitted him to file a motion to limit registration to the five-year probationary period.

Appellant filed the motion approximately six weeks later. The court granted the motion. The court declared: "I am going to modify Term and Condition Number 26, and as

[3] Section 290.006 provides: "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."

opposed to registration pursuant to Penal Code Section 290, I'm going to require that [appellant] register with a local law enforcement agency as a sex offender during the period of probation." The court's written order states that appellant's "sex offender registration is specifically not imposed pursuant to the provisions of P.C. § 290, et seq."

When the trial court revoked appellant's probation and sentenced him to prison, it ordered him to register as a sex offender for life pursuant to section 290. Appellant contends that this order was unauthorized because it increased the previously imposed sentence, the execution of which had been suspended.

"Unlike the situation in which sentencing itself has been deferred, where [as here] a sentence has actually been imposed but its execution suspended, 'The revocation of the suspension of execution of the judgment brings the former judgment into full force and effect . . . .' [Citations.]" (*People v. Howard* (1997) 16 Cal.4th 1081, 1087.) Therefore, "[o]n revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect [citations] . . . ." (***Id.***, at p. 1088.) "[T]he court has no authority, on revoking probation, to impose a lesser sentence . . . ." (***Id.***, at p. 1095.)

Generally speaking, the court also has no authority to impose a greater sentence. This principle was recognized in *People v. Ramirez* (2008) 159 Cal.App.4th 1412. There, the trial court imposed a four-year prison sentence but suspended its execution pending a period of probation. After the defendant was rearrested for a probation violation, the court reinstated probation but increased the suspended prison term to five years. Citing *People v. Howard, supra,* 16 Cal.4th 1081, the appellate court concluded that the trial court lacked authority to increase the four-year suspended sentence. (***Id.***, at pp. 1424-1425.)

Thus, when appellant's probation was revoked, the court's power was limited to ordering into effect the "exact sentence" the execution of which had previously been suspended. (*People v. Howard, supra,* 16 Cal.4th at p. 1088.) Although the requirement of sex offender registration " 'is not considered a form of punishment' " (*People v. Picklesimer* (2010) 48 Cal.4th 330, 343-344), it is considered to be a part of a defendant's sentence. (See *People v. Garcia* (2006) 147 Cal.App.4th 913, 916 ["under the statutory scheme of section

290, the imposition of a registration requirement as *part of a defendant's sentence* can be mandatory or discretionary depending on the crime committed" (italics added)]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1059 ["Noting defendant's objection, the court nonetheless imposed the sex offender registration requirement *as part of defendant's sentence*" (italics added)]; *People v. King* (1993) 16 Cal.App.4th 567, 570 ["On appeal, [defendant] challenges that *part of this sentence* which requires him to register as a sex offender pursuant to section 290" (italics added)].) Since appellant's suspended sentence did not require lifetime sex offender registration pursuant to section 290, the court lacked authority to require registration upon revocation of probation.[4] "[D]efendants may challenge an unauthorized sentence on appeal even if they failed to object below . . . ." (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

The People argue that, upon revocation of probation, the section 290 lifetime registration requirement was authorized because "the record clearly reflects that the trial court's original sentence included" such a requirement. But the section 290 registration requirement was not included in the original sentence, the execution of which had been suspended. Instead, it was imposed as a condition of probation (condition number 26). In any event, the court's modification of that condition nullified *ab initio* the original requirement that appellant register pursuant to section 290.

People v. Young (1995) 38 Cal.App.4th 560, is distinguishable. There,"[t]he question presented [was] whether a trial court has jurisdiction after revoking probation to modify a judgment to add an order of direct victim restitution where victim restitution was not a part of the initial . . . sentence, [execution of which was suspended,] but rather was a condition of probation." (***Id***., at p. 564) The defendant contended that "upon the revocation of his probation the court could only order service of the previously imposed sentence . . . ." (***Ibid***.) The appellate court concluded that, in these circumstances, the trial court has the

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[4] The trial court would not have lacked such authority if sex offender registration had been mandatory instead of discretionary. Where registration is mandatory, the "obligation [to register] is a separate consequence of [the defendant's] conviction *automatically* imposed as a matter of law." (*People v. Picklesimer, supra*, 48 Cal.4th at p. 338, italics added.)

authority to require restitution upon a revocation of probation. The court reasoned that the absence of such authority "would run contrary to the intent of the people expressed in article I, section 28, subdivision (b) of the California Constitution, which created a victim's right to receive restitution from the criminals who harmed the victim. [Citation.]" (***Id.***, at pp. 566-567.) Here, in contrast, no constitutional right is at issue.

People v. Allexy (2012) 204 Cal.App.4th 1358, supports the theory that imposition of the section 290 lifetime registration requirement was unauthorized.[5] In *Allexy* the appellate court "explain[ed] the procedure a trial court must follow [where, as here,] it chooses to impose sex offender registration on a defendant whose crime does not *require* registration." (***Id.***, at p. 1360.) The trial court in *Allexy* sentenced the defendant to prison for four years, suspended execution of the sentence, and placed her on probation. The court told the defendant that, if she violated probation, it would order her to register as a sex offender. The defendant accepted this arrangement. The defendant subsequently violated probation. The trial court revoked probation, ordered into execution the previously imposed four-year prison sentence, and ordered the defendant to register as a sex offender.

The appellate court concluded that that the trial court had followed the wrong procedure: "Section 290.006 allows a court to impose registration '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 . . . .' (Italics added.) The plain language of the statute requires the court to decide whether to impose sex offender registration either at the time of conviction or at the time of sentencing. It does not allow the court to sentence defendant and then defer the registration decision. If a trial court wants to use the specter of sex offender registration as a basis for encouraging a defendant to comply with the terms of probation, there is a way to do so without violating section 290.006. A trial court may suspend imposition of sentence and place a defendant on probation (see § 1203.1, subd. (a)), thereby leaving any decision to impose sex offender registration to the time defendant is sentenced. [¶] Here, the procedure the trial court followed was wrong. It failed to decide at

[5] At our request, the parties submitted supplemental letter briefs discussing the impact of *Allexy* on the instant case. *Allexy* was decided after appellant had filed his reply brief.

the time it *imposed* sentence whether defendant would have to register. Rather, it bifurcated the procedure by imposing sentence (instead of suspending imposition of sentence) and deferring a decision about whether defendant had to register. There was no statutory basis for the court's bifurcated procedure." (*People v. Allexy*, *supra*, 204 Cal.App.4th at p. 1363.)

In the instant case, the trial court followed a similar bifurcated procedure. It imposed sentence, suspended its execution, and required as a condition of probation that appellant register as a sex offender during the five-year probationary period. More than a year later when probation was revoked, it ordered appellant to register for life as a sex offender pursuant to section 290. As in *Allexy*, "[t]here was no statutory basis for the court's bifurcated procedure." (*People v. Allexy*, *supra*, 204 Cal.App.4th at p. 727.)

In *Allexy* the appellate court concluded that "any argument regarding the error in the court's bifurcated proceeding would have been either forfeited or invited, given that trial counsel did not object and indeed acquiesced to the court's procedure in return for giving his client the chance of escaping the registration requirement by complying with her probationary terms." (*People v. Allexy*, *supra*, 204 Cal.App.4th at p. 1363, fn. omitted.) Thus, "[t]he court's procedural error does not require reversal . . . ." (***Id***., at p. 1360.) At the time of sentencing, the trial court in *Allexy* declared: "I want it understood that any judge who hear[s] the case would be able to make the order [for sex offender registration] in the event that your client failed to comply with probation conditions." (***Id***., at p. 1363, fn. 4.)

Here, as in *Allexy*, trial counsel also "acquiesced to the court's procedure in return for giving his client the chance of escaping the [lifetime section 290] registration requirement by complying with [his] probationary terms." (*People v. Allexy*, *supra*, 204 Cal.App.4th at p. 1363.) We do not fault counsel for doing so. This was a means to an end which inured to his client 's substantial benefit. That appellant did not honor the terms of probation is not the fault of counsel. In his January 2010 reply to the People's opposition to appellant's request for modification of the section 290 registration requirement, counsel stated: "[I]n the event [appellant] violates any of the sex offender registration requirements during his 5 year probationary term, this Court can, at that point, choose to require [appellant] to register as a

sex offender pursuant to P.C. § 290 for the rest of his life."[6] When the trial court revoked appellant's probation, it found that he had violated the registration requirements because he had failed to report that his girlfriend's home was "his second and arguably primary residence, as he was sleeping there most nights."[7] In view of counsel's statement in the January 2010 reply and the trial court's finding that appellant had violated sex offender registration requirements, appellant has forfeited the argument that the trial court lacked authority to require section 290 lifetime registration upon the revocation of probation. (***Ibid***.) Trial counsel made it clear that, in these circumstances, the court would have authority to order appellant to register as a sex offender pursuant to section 290.

Appellant argues: "The issue cannot be deemed forfeited because the court never indicated, and thus, appellant was never placed on notice, that [the court could require him to register for life as a sex offender] if, in fact, appellant ever violated the terms and conditions of probation. An on-the-record discussion, as appears in *Allexy* . . . , did not occur in this case so as to provide appellant with any type of due process notice." But an on-the-record discussion in appellant's presence was not required. "[C]ounsel is captain of the ship. . . . 'When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of "fundamental" personal rights to *counsel's* complete control of defense strategies and tactics.' [Citations.] It is for the defendant to decide such fundamental matters as whether to plead guilty [citation], whether to waive the right to trial by jury [citation], whether to waive the right to

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[6] At our request, the parties submitted supplemental letter briefs on whether counsel's statement constitutes a forfeiture of the registration issue.

[7] Section 290.013, subdivision (a) provides that if a registered sex offender "changes his or her residence address," he or she "shall, in person, within five working days of the move, inform the law enforcement agency or agencies with which he or she last registered of the move." Section 290.010 provides that if a registered sex offender "has more than one residence address at which he or she regularly resides, he or she shall register in accordance with the Act in each of the jurisdictions in which he or she regularly resides, regardless of the number of days or nights spent there. If all of the addresses are within the same jurisdiction, the person shall provide the registering authority with all of the addresses where he or she regularly resides."

counsel [citation], and whether to waive the right to be free from self-incrimination [citation]. . . . [A]s to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict. [Citation.]" (*In re Horton* (1991) 54 Cal.3d 82, 95.)

Appellant contends that the trial court abused its discretion because it failed to make appropriate findings and state its reasons for ordering sex offender registration as required by section 290.066. (See fn. 3, *ante*.) This contention is forfeited because appellant failed to object on these grounds in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Bautista* (1998) 63 Cal.App.4th 865, 868-871.) "This routine defect could easily have been prevented and corrected had it been brought to the court's attention. [Citation.]" (***Id***., at p. 868.)

Jury Trial on Facts Required for Sex Offender Registration

We granted appellant's request to file a supplemental brief arguing that the facts required for sex offender registration must be found true by a jury beyond a reasonable doubt. Appellant relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*).) There, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (***Id***., 530 U.S. at p. 490.) Appellant maintains that the "imposition of sex offender registration for his offenses effectively increased the penalty beyond the statutory maximum because the Sexual Predatory Punishment and Control Act [Prop. 83 ("Jessica's Law"), approved by voters at Gen. Elec., Nov. 7, 2006] . . . contain[s] a residency restriction [§ 3003.5, subd. (b)] barring registered sex offenders from residing within 2,000 feet of a school or park where children gather." This issue is pending before the California Supreme Court in *People v. Mosley* (2010) 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965.

Based on *In re E.J.* (2010) 47 Cal.4th 1258, 1278, we conclude that the registration requirement does not trigger *Apprendi* protection because it does not constitute punishment and therefore does not "increase[] the penalty for a crime beyond the prescribed statutory

maximum." (*Apprendi*, *supra*, 530 U.S. at p. 490.) In *In re E.J.* the petitioners were registered sex offenders who had been convicted prior to the passage of Proposition 83 in 2006. They had been released on parole after its passage. Petitioners contended "that enforcement of section 3003.5(b)'s residency restrictions as to them constitutes an impermissible retroactive application of the statute . . . ." (*In re E.J.*, *supra*, 47 Cal.4th at p. 1264.) In rejecting petitioners' contention, our Supreme Court reasoned: "Although they fall under the new restrictions by virtue of their *status* as registered sex offenders who have been released on parole, they are not being 'additionally punished' for commission of the original sex offenses that gave rise to that status. Rather, petitioners are being subjected to new restrictions on where they may reside while on their *current parole*—restrictions clearly intended to operate and protect the public *in the present*, not to serve as additional punishment for past crimes." (***Id.***, at p. 1278.)

Even if *Apprendi* error had occurred, the error would have been harmless beyond a reasonable doubt. (See *Washington v. Recuenco* (2006) 548 U.S. 212, 222 [126 S.Ct. 2546, 165 L.Ed.2d 466] [*Apprendi* error not structural error requiring automatic reversal]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326 [*Apprendi* error is reversible federal constitutional error unless it was harmless beyond a reasonable doubt].) The sole factual issue for the jury would have been whether appellant had "committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.) We conclude beyond a reasonable doubt that the jury would have made the requisite factual finding.

Credit for Presentence Confinement

The trial court awarded appellant credit for 469 days of presentence confinement, consisting of 408 days of actual custody and 61 days of conduct credit. Appellant contends, and the People concede, that he is entitled to credit for 612 days, consisting of 408 days of actual custody and 204 days of conduct credit. We accept the People's concession. The trial court erroneously relied on section 2933.1, which limits conduct credit to 15 percent of the period of actual confinement if the defendant was convicted of one of the "violent felonies" listed in subdivision (c) of 667.5. None of appellant's offenses is so listed.

Disposition

The judgment is modified to award appellant credit for 612 days of presentence confinement, consisting of 408 days of actual custody and 204 days of conduct credit. In all other respects, the judgment and post-judgment orders are affirmed. The trial court shall prepare a corrected abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Frank J. Ochoa, Jr., Judge

Superior Court County of Santa Barbara

Susan Baughuess, under appointment by the Court of Appeal, for Defendant and Appellant.

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