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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE MONROE LEEKINS,

Defendant and Appellant.

2d Crim. No. B229367  
(Super. Ct. No. 1183232)  
(Santa Barbara County)

Tyrone Monroe Leekins appeals from a discretionary order imposing lifetime sex offender registration. (Pen. Code, § 290.006.)<sup>1</sup> Appellant contends that the statutory standard for discretionary registration, a finding that the offense was committed "as a result of sexual compulsion or for purposes of sexual gratification" (*ibid.*), is unconstitutionally vague and overbroad, unless it is interpreted to require that the offender was motivated by the victim's youth, that there was no substantial evidence that he was motivated by the victim's youth, and that the statute violates due process because it does not require proof by clear and convincing evidence. We do not reach the first constitutional claim because there is substantial evidence that appellant was motivated by the victim's youth. We reject the due process claim and we affirm.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

## FACTUAL AND PROCEDURAL HISTORY

In April 2006, appellant had a sexual encounter with a minor who was 16 years old. At the time, appellant was 22 years old and was on misdemeanor probation for unlawful sexual intercourse with another minor.

Appellant was charged with one count of voluntary<sup>2</sup> oral copulation with a person under 18 (§ 288a, subd. (b)(1)), one count of sexual penetration with a foreign object (§ 289, subd. (h)) and one count of unlawful sexual intercourse with a minor (§ 261.5, subd. (a)). He pled no contest to oral copulation, and the court granted the prosecutor's motion to dismiss the remaining counts. The court sentenced appellant to five years of supervised probation on terms and conditions which included sex offender treatment and restrictions on contact with minors and computer use. Notwithstanding *People v. Hofsheier* (2006) 37 Cal.4th 1185, and without objection, the trial court imposed mandatory lifetime registration as a sex offender. (§§ 290 & 288a, subd. (b)(1).)

In March 2008, appellant was disqualified from his sex offender treatment program. The counselor who discharged him reported that he "maintain[ed] that his victims were not victims and that it was consensual sex, although they were underage. He [had] an entitled attitude."<sup>3</sup> In November 2008, the trial court found appellant in violation of his probation because he did not comply with the computer-use restriction. The court revoked and reinstated his probation, and sentenced him to 30 days in jail for the violation, to commence March 1, 2009, or an alternative work program.

In May 2009, appellant filed a motion requesting relief from the mandatory sex offender registration requirement on the ground that it violated equal protection,

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<sup>2</sup> We use the term "voluntary" in its special and restricted sense to indicate both that the minor victim willingly participated in the act and that there were no statutory aggravating circumstances such as duress or intoxication. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 341.)

<sup>3</sup> The report from the counselor was not included in the record. We rely on the accuracy of a quotation in the prosecutor's opposition to petition for writ of mandate.

citing *Hofsheier*. In July, he asked to withdraw the motion without prejudice, and the court did not hear the motion.<sup>4</sup>

Also in July 2009, the court found appellant in violation of his probation because he was in the company of a 17-year-old female, failed to report to his probation officer, and failed to complete his sex offender treatment program. The court revoked and reinstated his probation, and ordered him to serve 180 days in jail for the violation.

In September 2009, while in jail, appellant again violated his probation by maintaining contact with a 17-year-old female through letters in which he described their sexual relationship, expressed his desire to engage in sexual intercourse with her, and referred to himself as "Big Daddy." The probation department concluded that appellant was a "'predator who will continue to take advantage of young girls despite having participated in two separate courses of sex offender treatment.'"<sup>5</sup> The court revoked and terminated his probation, vacated the 180-day sentence, and sentenced him to 16 months in state prison. As a result of his re-incarceration, appellant was discharged from his treatment program for failure to attend. His counselor reported that, before discharge, appellant had "worked successfully" in eight of nine treatment modules, had attended 75 percent of scheduled treatment sessions, and his participation was average.

After his release from prison, appellant filed a petition for writ of mandate in the trial court in which he renewed his request for *Hofsheier* relief. The prosecutor conceded that appellant was entitled to relief from mandatory registration, but asked the court to exercise its discretion pursuant to section 290.006 to impose lifetime registration based upon a judicial finding that the offense was a result of sexual compulsion or sexual gratification and that appellant was likely to reoffend. Appellant opposed discretionary registration. He argued that his victims were willing participants, that teen sex is not

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<sup>4</sup> A noncustodial defendant may only seek relief from mandatory registration on equal protection grounds by petition for writ of mandate to the trial court. (*People v. Picklesimer, supra*, 48 Cal.4th at p. 339.)

<sup>5</sup> The probation report was not included in the record. We rely on the accuracy of a quotation in the prosecutor's opposition to petition for writ of mandate.

uncommon, that he had completed eight of nine treatment modules, that he had assisted law enforcement in a home invasion and robbery case, and that a kindergarten teacher attested to his good character.

The court conducted a hearing on the petition, at which appellant's counsel argued that section 290.006 does not apply to him because he is not a child molester or rapist, but is someone who "has had access to young women who were only too willing to engage in a sexual relationship with him." Counsel argued that registration would render appellant, who was in his 20's, unemployable and would make it difficult for him to live anywhere. Appellant's counsel conceded that the court could consider a subsequent violation of section 289, subdivision (h), sexual penetration with person under 18.

The trial court imposed discretionary registration after finding that appellant acted with a "sexual compulsion" within the meaning of section 290.006 at the time of the offense. The court explained, "I think when you're on probation or at the time you commit this offense you continue to target women, young girls that the state has specifically tried to protect, and you can't -- you can't get your behavior modified by the actions of the Court, that sounds like a compulsion to me."

#### DISCUSSION

Sex offender registration is mandatory for certain offenses enumerated in section 290, subdivision (c). It is discretionary for any other offense, upon a judicial finding that "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." (§ 290.006.) After *Hofsheier*, the trial court retains its discretion to impose registration upon a defendant convicted of voluntary oral copulation with a 16- or 17-year-old pursuant to section 290.006. ( *People v. Picklesimer*, *supra*, 48 Cal.4th at p. 335.)

The trial court determines whether the offense was a result of "sexual compulsion or for purposes of sexual gratification" (§ 290.006) based on a preponderance of the evidence. (Evid. Code, § 115.) The court may consider all relevant information available to it. (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 79.) The court must state its reasons for requiring registration on the record. (§ 290.006.) The court must

find that the offender is likely to reoffend. (*Lewis*, at p. 78.) "Since the purpose of sex offender registration is to keep track of persons likely to reoffend, one of the 'reasons for requiring registration' under section 290.006 must be that the defendant is likely to commit similar offenses -- offenses like those listed in section 290--in the future." (*Ibid.*)

The decision to impose registration pursuant to section 290.006 lies within the trial court's discretion. "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

### *"Sexual Compulsion"*

Federal due process requires that a criminal enactment give fair warning of what conduct is prohibited. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) It also requires that statutes aim specifically at evils within the area of state control and not sweep into their ambit activities that ordinarily constitute protected conduct. (*Thornhill v. Alabama* (1940) 310 U.S. 88, 97.) Appellant contends that the term "sexual compulsion" is unconstitutionally vague and overbroad as used in section 290.006, because it encompasses sexual encounters with minors that result from a general sexual compulsion, rather than a sexual compulsion for minors, and may also infringe upon sexual encounters with lawful partners that result from a general sexual compulsion. He argues that, to render section 290.006 constitutional, the term "sexual compulsion" should be narrowly construed to mean that the underage status of the victim was a significant motivating factor in the commission of the offense. He argues further that there was no evidence that he was motivated by the victim's youth, and the registration order is therefore invalid.

Even if we were to accept appellant's narrow construction of the term "sexual compulsion," which we do not, his continuing pattern of initiating "voluntary" sexual encounters with 16- and 17-year-old minors demonstrates that he is motivated by their youth and is likely to commit similar offenses against young females in the future. His own counsel acknowledged appellant's attraction to underage females in a trial court

brief when he asked rhetorically, "Is Mr. Leekins' attraction to underage women the kind of behavior that should be met with a mandatory life registration as a sex offender?"

Appellant is not like the offender in *Lewis v. Superior Court*, *supra*, 169 Cal.App.4th 70, whose registration an appellate court reversed for lack of any evidence that he was likely to reoffend. In *Lewis*, the offender committed oral copulation once with a 17-year-old and had not committed a similar offense in the 20 years that followed. Appellant, on the other hand, has a pattern of reoffending at the earliest opportunity, even while on supervised probation and undergoing sex offender treatment. The trial court did not abuse its discretion when it required registration.

#### *Due Process and The Standard of Proof*

We reject appellant's contention that section 290.006 violates federal due process because it does not require a finding based on clear and convincing evidence.

Under California statute, the standard of proof is by a preponderance of the evidence unless otherwise provided by law. (Evid. Code, § 115.) The federal and state constitutions require due process before the government may deprive an individual of his or her liberty or property interests, and the standard of proof is a component of due process. (*People v. Jason K.* (2010) 188 Cal.App.4th 1545, 1556.) The preponderance of the evidence standard of proof is properly applied in civil proceedings (*ibid.*), and for criminal sentencing decisions where the defendant has already been proven guilty beyond a reasonable doubt. (*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 92, fn. 8) Although sex offender registration arises from a criminal conviction, it is a component of a non-punitive regulatory scheme, "intended to assist law enforcement to maintain surveillance of recidivist sex offenders." (*In re Alva* (2004) 33 Cal.4th 254, 279, 287.) Accordingly, there is no constitutional right to a jury on the question of whether a defendant acted under a sexual compulsion or for purposes of sexual gratification. That question need not be decided beyond a reasonable doubt, and "there is no constitutional bar to having a judge exercise his or her discretion [under section 290.006] to determine whether [an offender] should . . . be subject to registration." (*People v. Picklesimer*, *supra*, 48 Cal.4th at p. 344.)

Appellant argues that the question should nevertheless be decided by clear and convincing evidence because the Ninth Circuit applies the clear and convincing standard for sentence enhancement decisions if the enhancement will disproportionately impact the overall sentence. (*U.S. v. Pineda-Doval* (9th Cir. 2010) 614 F.3d 1019, 1041; *U.S. v. Staten* (9th Cir. 2006) 466 F.3d 708, 720.) He argues sex offender registration may also be more onerous than punishment for the underlying offense. But the Ninth Circuit decisions do not apply because registration does not impact the sentence. Sex offender registration is not considered a punishment under the state or federal Constitutions. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1197.) This is true whether the registration is a mandatory consequence of conviction pursuant to section 290 or a discretionary consequence of a judicial finding pursuant to section 290.006. (*People v. Presley* (2007) 156 Cal.App.4th 1027, 1035.) We decline to impose a heightened standard of proof.

#### DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.\*

We concur:

GILBERT, P.J.

YEGAN, J.

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\* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Edward H. Bullard, Judge  
Superior Court County of Santa Barbara

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