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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BRUCE MICHELLE PRESLEY, Defendant and Appellant.	C054589 (Super. Ct. No. 06F02210)

APPEAL from a judgment of the Superior Court of Sacramento County, Helena R. Gweon, Judge. Affirmed as modified.

Deborah Prucha, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, Susan Rankin Bunting, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts IB and II of the Discussion.

Defendant Bruce Michelle Presley was charged with assault with intent to commit rape (count one), felony false imprisonment (count two), assault with intent to commit a sexual crime (count three), and assault likely to produce great bodily injury (count four). A jury found defendant guilty of count two as charged and found him guilty of three misdemeanor simple assaults as lesser included offenses of counts one, three, and four. Defendant received the midterm of two years in state prison for false imprisonment, with the assault sentences for counts one, three, and four to be served concurrently. The trial court also ordered defendant to register as a sex offender pursuant to Penal Code[1] section 290, subdivision (a)(2)(E) for the false imprisonment offense. The court ordered registration because it specifically found that the "uncontrovertable and credible evidence" proved that the false imprisonment was committed and motivated by sexual compulsion or for purposes of sexual gratification.

Defendant claims the sex offender registration requirement violates his Sixth Amendment rights under the federal Constitution because the facts underlying the trial court's order were not submitted to a jury or found beyond a reasonable doubt. Additionally, defendant claims the sentences on counts three and four constitute multiple punishment in violation of section 654 because the assaults were incidental to the false

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

imprisonment offense (count two). We agree only as to this latter claim.

FACTUAL AND PROCEDURAL BACKGROUND

Around 9:00 a.m. on March 9, 2006, defendant arrived at the home of Sherry W. Defendant and Sherry W. had been friends for six years and had drunk beer together at her house the day before. Sherry W. willingly admitted defendant into her home after he told her he had been partying all night. Sherry W. suggested defendant shower and then take a nap in her back room. Defendant napped for a while, awoke around 11:00 a.m., and went into the living room to join Sherry W. Shortly after 11:00 a.m., Sherry W. told defendant she was going to change the linens on her bed and she went into her bedroom. When Sherry W. turned around to leave the bedroom, defendant was standing in the doorway. Defendant pushed Sherry W. with two hands and said, "Get back in there." "I'm going to do you like your man do you." Sherry W. asked defendant what those words meant and defendant responded, "I'm going to take it." Sherry W. replied, "no, no, don't," "I'm not going to do that," walked past defendant, and went into the kitchen. Defendant went into the living room and sat down.

Around 12:00 p.m., Sherry W. went into the living room to get her cordless phone. She told defendant that she was going to call her cousin Buster. When defendant heard the name "Buster," he jumped up, grabbed Sherry W. by the neck and shirt and said, "Bitch, you are not going to call nobody. You [*sic*] not going to tell nobody what I did."

Defendant and Sherry W. struggled in the front doorway of the house. Trying to get outside, Sherry W. fell down on the front porch and kicked and scratched at defendant as he attempted to pull her back into the house. Defendant grabbed her hair, removing her artificial ponytail and a chunk of her real hair. Defendant also grabbed Sherry W.'s left breast and her T-shirt. He then tore her T-shirt off, leaving her naked from the waist up. Sherry W. then got away from defendant and ran to the nearby DMV office where she was brought inside and given clothing.

The prosecution charged defendant with one count of assault with intent to commit rape (count one) for the encounter in Sherry W.'s bedroom, and felony false imprisonment (count two), assault with intent to commit a sexual crime (count three), and assault likely to produce great bodily injury (count four) for the struggle in the front doorway. A jury found defendant guilty of count two as charged and found him guilty of three misdemeanor simple assaults as lesser included offenses for counts one, three, and four.

DISCUSSION

I

Defendant Fails To Establish That The Public Notification And Residency Requirements Of The Sex Offender Registration Laws Are Punishment For Purposes Of The Sixth Amendment

Defendant claims that the public notification requirement and residency restrictions imposed by the sex offender registration laws increase his punishment beyond the permissible

range. For this reason, defendant contends that the facts underlying his registration must be found by a jury as required by *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403]. In *Blakely*, the United States Supreme Court held that any fact increasing the penalty for a crime outside the standard sentencing range had to be submitted to a jury and proved beyond reasonable doubt. (*Id*. at p. 301 [159 L.Ed.2d at p. 412].) The Sixth Amendment protections discussed in *Blakely* attach only if the facts found by the judge result in an increase in defendant's punishment. (*Id*. at pp. 301, 313 [159 L.Ed.2d at pp. 412, 420].) Since the facts supporting defendant's registration were found by the judge, defendant's Sixth Amendment rights are violated unless the consequences of sex offender registration are not punishment. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455].)

In *Smith v. Doe* (2003) 538 U.S. 84 [155 L.Ed.2d 164], the United States Supreme Court set forth the framework for determining whether a statutory scheme is civil and regulatory or punitive. The court affirmed a two-prong test that first asks whether the legislative body intended a scheme to be punitive and, secondly, whether the scheme is punitive in nature or effect despite the legislative intent. (*Id*. at pp. 92-93 [155 L.Ed.2d at pp. 176-177].) To evaluate the effects of a statutory scheme, a court must consider seven factors originally developed in *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 168 [9 L.Ed.2d 644, 660-661]. These factors, which are "'neither exhaustive nor dispositive,'" determine whether a

scheme has been regarded in our history and traditions as punishment, imposes an affirmative disability or restraint, promotes the traditional aims of punishment, has a rational connection to a nonpunitive purpose, is excessive with respect to this purpose, comes into play only on a finding of scienter, and applies to behavior which is already a crime. (*Smith*, at pp. 97, 105 [155 L.Ed.2d at pp. 179-180, 185].) Applying this two-prong test and the *Mendoza-Martinez* factors, the United States Supreme Court upheld an Alaska statute mandating sex offender registration for certain convicted individuals. (*Smith v. Doe*, *supra*, 528 U.S. at pp. 89, 105 [155 L.Ed.2d at pp. 174, 185].) The court decided that the Alaska Legislature intended to create a civil regulatory scheme and the statute was not punitive in nature or effect. (*Smith*, at pp. 105-106 [155 L.Ed.2d at p. 185].)

The California Supreme Court used this same reasoning to conclude that sex offender registration was not punishment for purposes of ex post facto analysis or the prohibition against cruel and unusual punishment. (*People v. Castellanos* (1999) 21 Cal.4th 785; *In re Alva* (2004) 33 Cal.4th 254.) In *Castellanos*, the court relied primarily on legislative intent and certain *Mendoza-Martinez* factors to explain that California's sex offender registration requirement "serves an important and proper remedial purpose" and is not "so punitive in fact that it must be regarded as punishment." (*Castellanos*, at p. 796.) Similarly, in *Alva*, the court relied heavily on the analysis in *Smith* to find that sex offender registration "is not punishment,

but a legitimate, nonpunitive regulatory measure." (*In re Alva*, *supra*, 33 Cal.4th at p. 280.) Finally, in *People v. Hofsheier* (2006) 37 Cal.4th 1185, the California Supreme Court reaffirmed the role of section 290's sex offender registration requirements, proclaiming that "[t]hese provisions serve an important and vital public purpose." (*Hofsheier*, at p. 1208.) Thus, our federal and state courts have established that a requirement to register as a sex offender is not per se punishment for purposes of the federal Constitution.

Defendant correctly points out that *Castellanos* and *Alva* are not dispositive of the issues presented here. Currently, a registered sex offender's personal information -- such as name, address, criminal history, and photograph -- may be made available to the public via the Internet. (§ 290.46.) *Castellanos* and *Alva* did not address the constitutionality of this system because the defendants in those cases were not subject to the public notification requirements. In *Castellanos*, the court specifically withheld its opinion "regarding the effect, if any, application of those provisions would have upon [its] analysis." (*People v. Castellanos, supra,* 21 Cal.4th at p. 796, fn. 6.) Likewise, in *Alva*, the court noted that its disposition did not include consideration of the issue because "the public inspection and public notification provisions do not apply to [the defendant]." (*People v. Alva, supra,* 33 Cal.4th at p. 265, fn. 6.) *Hofsheier*, too, does not apply because the issue there was denial of equal protection resulting from varying application of the sex offender

registration laws to crimes with similar elements. (*People v. Hofsheier, supra,* 37 Cal.4th at p. 1193.) Further, *Castellanos, Alva*, and *Hofsheier* were decided before the new sex offender residency requirements were enacted. Accordingly, the only law, to date, interpreting the new restrictions are those cases holding that the residency requirements are not retroactive, and that issue is not presented here. (*Doe v. Schwarzenegger* (E.D.Cal. 2007) 476 F.Supp.2d 1178; *Doe v. Schwarzenegger* (N.D.Cal., Feb. 22, 2007, No. C 06-06968 JSW) ___ F.Supp.2d ___ [Lexis 16244].) Consequently, these cases do not resolve the matters before us.

A

The Public Notification Requirement Of Sex Offender Registration Is Not Punishment

The issue of notifying the public of a sex offender's registration came before the United States Supreme Court in *Smith*. (*Smith v. Doe, supra,* 538 U.S. at p. 84 [155 L.Ed.2d at p. 164].) There, an Alaska statute allowed law enforcement to make publicly accessible via the Internet a registered sex offender's name, aliases, home address, photograph, place of employment, crime for which convicted, length and conditions of sentence, and a statement of whether the offender was in compliance with registration and could be located, as well as other information. (*Id*. at p. 91 [155 L.Ed.2d at pp. 175-176].) Having established that the legislative intent was not punitive, the court used the *Mendoza-Martinez* factors to determine whether

the statute was punitive in nature or effect. (*Smith*, at p. 97 [155 L.Ed.2d at pp. 179-180].)

Applying the *Mendoza-Martinez* factors to the sex offender registration statute, the court found that the statutory scheme served a legitimate, nonpunitive objective; did not resemble traditional forms of punishment; did not impose a physical restraint or disability; had a rational connection to a nonpunitive purpose; and was not excessive in relation to the statute's purpose. (*Smith v. Doe*, *supra,* 538 U.S. at pp. 94, 97, 99-100, 102-106 [155 L.Ed.2d at pp. 178, 180, 181, 183-185].) Although the court used these factors to determine what constitutes punishment for purposes of ex post facto analysis, the court commented that the *Mendoza-Martinez* factors "have their earlier origins in cases under the Sixth . . . Amendment[]" and "are designed to apply in various constitutional contexts." (*Smith* , at p. 97 [155 L.Ed.2d at p. 179].) Therefore, the conclusions in *Smith* would also be true for purposes of the Sixth Amendment.

The court's analysis of the Alaska statute is particularly relevant since California's public notification statutes are quite similar. Like Alaska, California permits the Department of Justice to make available to the public via the Internet a registered sex offender's name and known aliases, photograph, physical description, date of birth, criminal history, the address at which the person resides, and any other information the department deems relevant. (§ 290.46, subd. (b)(1).) Unlike Alaska, California does not publicize the name and/or

address of the sex offender's employer or the person's criminal history other than the specific crimes for which the person is required to register. (§ 290.46, subd. (a)(1).) Thus, the court's decision and analysis in *Smith* is on point with the issue here.

Defendant attempts to distinguish his case from *Smith* by emphasizing that the sex offenders in *Smith*, unlike defendant, had been convicted of a *listed sex offense* requiring *mandatory* registration without any additional finding by the court. (*Smith v. Doe, supra,* 538 U.S. at p. 91 [155 L.Ed.2d at p. 176].) Although this distinction is accurate, defendant fails to demonstrate why it is material. The punishment analysis in *Smith* did not rely on the fact that the defendants had been tried by a jury and convicted of a specified sex offense. (See *id*. at p. 92 [155 L.Ed.2d at p. 176].) Nevertheless, defendant relies on a single sentence in *Smith* that the "consequences [of Alaska's statute] flow not from the Act's registration and dissemination provisions, but from the fact of conviction." (*Id*. at p. 101 [155 L.Ed.2d at p. 182].) Defendant contends, then, that since the consequences of registration and public notification, for him, do not flow from "the fact of conviction" based on a jury's verdict but rather from a finding made by the judge alone, sex offender registration is punishment. However, defendant arrives at this conclusion by circular reasoning.

Under *Blakely*, a fact must be found by a jury only if the factual finding increases punishment. (*Blakely v. Washington*, *supra*, 542 U.S. at p. 303 [159 L.Ed.2d at p. 413].) Defendant's

conclusion suggests that the public notification requirement of sex offender registration is punishment because the underlying facts were not found by a jury, even though a jury needs to make the finding only when the fact increases punishment.

Although here the facts supporting sex offender registration were found by a judge, the identity of the trier of fact is immaterial to the question of whether public notification is punishment. The court's stated reasons in *Smith* why public notification is not punishment do not change depending on whether the facts supporting registration are found by a judge or by a jury. Further, defendant does not explain why the conclusion offered in *Smith* -- mandated registration with public notification is not punitive in nature or effect -- is not equally applicable to individuals who are ordered to register as sex offenders based on a finding by a judge. We can see no reason for holding that registration under section 290, subdivision (a)(2)(E) is any more punitive than mandated registration for crimes committed under section 290, subdivision (a)(2)(A).

Based on the United States Supreme Court's ruling in *Smith,* we conclude that the public notification requirements of sex offender registration do not constitute punishment for purposes of the Sixth Amendment.

B

Defendant's Challenge To The Residency Restrictions Enacted Under Proposition 83 Is Deemed Forfeited Because Defendant Failed To Adequately Brief The Issue

Defendant obliquely raises an interesting question -- ignored by the People in their respondent's brief -- as to whether the residency restrictions under Proposition 83 constitute punishment. A new provision, enacted under Proposition 83, prevents any registered sex offender from living within 2,000 feet of a school or park where children frequently gather. (§ 3003.5, subd. (b).) Defendant comments, in passing, that these new requirements "border[] on banishment and outright social stigma." Unfortunately, defendant fails to follow this statement with any argument or authority as to why these consequences should be considered punishment under the applicable law. Defendant passionately asserts that registration as a sex offender, when the jury acquitted him of the sex-related crimes, is a punishment that "'significantly exceeds'" the usual sentence for a felony offense. Again, however, defendant does not offer any *legal analysis* as to why the consequences of sex offender registration are punishment. Defendant's brief does not even reference the great body of legal authority that sets forth the framework for determining whether a statutory scheme is civil or punitive. (See, e.g., *Kennedy v. Mendoza-Martinez, supra*, 372 U.S. 144 [9 L.Ed.2d 644]; *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501];

Seling v. Young (2001) 531 U.S. 250 [148 L.Ed.2d 734]; *United States v. Ward* (1980) 448 U.S. 242 [65 L.Ed.2d 742].)

Our courts make it clear that "every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.) "Beyond advising us that no reported California case has passed upon the questions presented, [defendant]'s brief is of no help to us. If [defendant's counsel] was aware of authority on the questions elsewhere, [s]he has not troubled to call it to our attention." (*Tate v. Canonica* (1960) 180 Cal.App.2d 898, 900.) "'Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.'" (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Accordingly, as to whether the residency restrictions under Proposition 83 constitute punishment and require the facts underlying sex offender registration to be found by a jury beyond reasonable doubt, defendant's argument is deemed waived.

II

The Trial Court Violated Section 654 When It Imposed Multiple Punishments For Defendant's False Imprisonment And Two Simple Assault Convictions

The trial court sentenced defendant to two years in state prison for count two, with the sentences for counts three and four to be served concurrently. The People acknowledged at

trial that all three counts related only to the struggle between defendant and Sherry W. that occurred in the front doorway of Sherry W.'s home. Defendant argues that the sentencing violated section 654 because the two assaults (counts three and four) comprised the false imprisonment offense (count two) and, therefore, he cannot be separately punished for the assaults. We agree.

Section 654 bars multiple punishment for a single criminal act and for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376.) The relevant portion of the statute reads, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Traditionally, section 654 applied when a defendant committed a single act that resulted in more than one offense. (*People v. Brown* (1985) 49 Cal.2d 577, 590-591.) In *Neal v. State of California* (1960) 55 Cal.2d 11, the California Supreme Court expanded section 654's definition of "act or omission" to include a "course of conduct." (*Neal*, at p. 19.) If the alleged act is not a single, physical act, but more closely resembles a "course of conduct," a court must ascertain the defendant's intentions and objectives for each offense committed during that course of conduct to determine whether the offenses are separate and distinct from one another. (*Ibid.*)

When applying section 654, we first ask if the court imposed two punishments for one criminal act or an indivisible course of conduct with one criminal objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134-1135.) The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them. (*Ibid*.) If a trial court imposes concurrent sentences, does not stay one of the sentences pursuant to section 654, and offers no factual basis for its decision, we presume the court found that the defendant harbored a separate intent and objective for each offense. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1147.) In reviewing the propriety of the imposition of multiple punishments for separate convictions under section 654 based upon a finding that the defendant held more than one objective in committing those crimes, we evaluate whether there was substantial evidence to support that determination. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

Here, the trial court imposed concurrent sentences on defendant for the three counts and did not explain its reasons for declining to apply section 654. Accordingly, we presume the trial court found defendant had three independent objectives for committing the false imprisonment and two assaults and, thus, imposed the appropriate punishment. However, this determination is not supported by substantial evidence.

The court's implicit finding of multiple intents is in direct conflict with the court's other statements at the sentencing hearing. At sentencing, the trial court declared, "I specifically find that the crime for which [defendant] was convicted, the false imprisonment, Felony 236, was committed as a result of sexual compulsion or for purposes of sexual gratification, and . . . *all the evidence points to that, and for no other reason*." (Italics added.) In support of this statement, the court referenced the facts that "[t]he defendant grabbed [Sherry] W.'s breast area and pulled her, pulling her shirt off." Thus, the court concluded from the evidence at trial that the false imprisonment offense and defendant's acts of grabbing Sherry W.'s breast and attempting to pull her back into the house were committed for one purpose only.

Additionally, the jury verdicts on counts two, three, and four support only a finding that defendant generally intended to restrain Sherry W. by using force. Originally, the People charged defendant with felony false imprisonment, assault with intent to commit a sexual crime, and assault likely to inflict great bodily injury. The jury acquitted defendant of the two special intent assaults and convicted him of general intent misdemeanor simple assaults and the felony false imprisonment, also a general intent crime. Therefore, the jury's verdicts on these offenses reflect only a finding of defendant's general intent to restrain Sherry W. by use of force.

Nevertheless, the People argue that defendant harbored three separate intents and objectives when he restrained Sherry

W. in her front doorway. The People explain that "the trial court explicitly found that count 2, the false imprisonment charge, was 'committed as a result of sexual compulsion or for purposes of sexual gratification.'" Also, "[w]ith respect to count 3 . . . [defendant's] statement when he grabbed [Sherry W.], that she was not going to get a chance to tell Buster what he did . . . supports the inference that the court found the separate intent of preventing [Sherry W.] from reporting the prior assault." Finally, "[a]s for count 4, the assault on [Sherry W.] which included grabbing and bruising her breast, pulling out her hair, and dragging her, . . . constituted gratuitous violence beyond what was necessary to merely restrain her." The People conclude that "[i]t is reasonable to infer that, at this point, [defendant]'s intent had shifted from his initial sexual motivation for the false imprisonment and was motivated by anger and his intent to prevent Sherry [W.] from reporting his crime. This objective was independent of [defendant]'s initial objective in pulling Sherry [W.] back into the house and may be separately punished."

After reviewing the record, we cannot say there is substantial evidence to support a finding that defendant harbored three separate and independent objectives when he restrained Sherry W. in the doorway. The violence involved in the felony false imprisonment offense was the same violence underlying the charge of assault likely to produce great bodily injury and the charge of assault with intent to commit a sexual crime. If defendant's conduct is indivisible, it constitutes a

single act. (*People v. Katz* (1962) 207 Cal.App.2d 739, 757; *People v. Logan* (1953) 41 Cal.2d 279, 290.)

Because defendant's restraint of Sherry W. was a single act during which defendant committed multiple criminal violations, defendant may be punished only once for the false imprisonment offense.

DISPOSITION

The judgment is modified to stay sentence on counts three and four pursuant to section 654. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

NICHOLSON, Acting P.J.

MORRISON, J.