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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEONARD OCHART, Defendant and Appellant.	A127301 (Marin County Super. Ct. No. SC060144)

I.

INTRODUCTION

Appellant Leonard Ochart (Ochart) appeals from the trial court's discretionary imposition of lifetime registration as a sex offender pursuant to Penal Code section 290.006.[1] He contends on appeal that the trial court abused its discretion in imposing the registration requirement. We disagree and affirm.

II.

PROCEDURAL BACKGROUND

In 1994, the Marin County District Attorney charged Ochart with 12 felony counts regarding his alleged sexual contacts with his minor half-sister. Ochart pleaded guilty to one count of oral copulation with a minor under section 288a, subdivision (b)(1). That one count arose out of an incident occurring on November 5, 1993, when the victim was 16 years old and Ochart was 34 years of age. The court dismissed the remaining counts,

[1] All further undesignated statutory references are to the Penal Code.

four with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. The court suspended imposition of sentence, placed Ochart on probation for five years, ordered him to serve eight months in county jail, ordered that he pay for the victim's psychotherapy, and imposed other conditions of probation.

On March 29, 2000, the court granted his petition under section 17, subdivision (b)(3) and section 1203.4, to reduce the felony conviction to a misdemeanor and to set aside his conviction. The court indicated in the order that "[r]elief under [s]ection 1203.4 does not remove the duty to register imposed upon certain sex offenders. . . ."

In February 2005, Ochart filed a petition for certificate of rehabilitation under section 4852.01 seeking relief from the section 290 registration requirement. The court denied his petition without prejudice, finding that, while Ochart had "lived an upright life pursuant to [section] 4852.5 . . . I am not convinced that he is not a continuing threat to minors" under section 4852.13. This determination was appealed, and we affirmed the trial court's ruling in our nonpublished opinion in case number A111918 (*People v. Ochart* (Sept. 22, 2006)) (*Ochart I*).

In 2006, our state Supreme Court issued its decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). The high court ruled that it was a violation of equal protection to require sex offenders convicted of oral copulation with a minor (§ 288a, subd. (b)(1)) to be subject to mandatory sex offender registration (§ 290).

Thereafter, Ochart moved the trial court to relieve him of his mandatory sex offender registration, which the trial court granted. However, at the same time, the trial court concluded that Ochart should continue sex offender registration under the *discretionary* registration law, section 290.006.[2] Ochart filed this appeal contending the

[2] Section 290.006 states: "Any person ordered by a 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."

decision to continue his registration requirement under section 290.006 was an abuse of discretion.

III.

LEGAL ANALYSIS

A. Standard of Review

First, we must decide whether Ochart's appeal from the discretionary imposition of a lifetime sex offender registration requirement can be, and should be, addressed on its merits. In *People v. Picklesimer* (2010) 48 Cal.4th 330, 335-341 (*Picklesimer*), our Supreme Court addressed the proper procedural vehicle for a defendant to raise a postjudgment challenge to a sex offender registration requirement. In that case, the defendant, who had been convicted of oral copulation with a minor under section 288a, subdivision (b)(1), filed a motion seeking to have his name removed from the sex offender registry based on the then-recent decision in *Hofsheier*.

The court in *Picklesimer* concluded that a postjudgment challenge to sex offender registration should be raised by a petition for writ of habeas corpus if the defendant is still in custody, or by a petition for writ of mandate if he has already been released. (*Picklesimer*, *supra*, 48 Cal.4th at pp. 335, 339-341.) It rejected an argument that a registration requirement could be challenged in a freestanding motion brought after the original judgment has become final: " '[T]here is no statutory authority for a trial court to entertain a postjudgment motion that is unrelated to any proceeding then pending before the court. [Citation.] Indeed, a motion is not an independent remedy. It is ancillary to an on-going action and " 'implies the pendency of a suit between the parties and is confined to incidental matters in the progress of the cause. As the rule is sometimes expressed, a motion relates to some question collateral to the main object of the action and is connected with, and dependent on, the principal remedy.' " [Citation.] In most cases, after the judgment has become final, there is nothing pending to which a motion may attach.'. . ." (*Id*. at p. 337, quoting *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 76-77 (*Lewis*).)

As in *Picklesimer*, Ochart brought a motion to vacate the *mandatory* registration requirement after the judgment in his case was final. The prosecutor opposed that motion and moved, in the alternative, for the court to impose a *discretionary* registration requirement under section 290.006.[3] As noted, the trial court granted Ochart's motion but also granted the prosecutor's alternative motion.

Although a direct appeal of the trial court's order is inappropriate under *Picklesimer* and *Lewis*, the decision recognizes that a motion to vacate a sex offender registration requirement may be treated as a writ petition when the record is adequate to do so. (*Picklesimer*, *supra*, 48 Cal.4th at pp. 335, 341.) As we discuss below, in this case the record is adequate to allow us to consider the appeal as a writ petition. Therefore, we address the trial court's ruling on the merits.

Turning to the applicable legal standard, we note that to require discretionary registration under section 290.006, "the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*Hofsheier*, *supra*, 37 Cal.4th at p. 1197.)

In applying the abuse of discretion standard, "[b]road deference must be shown to the trial judge. The reviewing court should interfere only ' "if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he [or she] did." [Citations.]' [Citation.]" (*In re*

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[3] Ochart's original motion sought to have the court delete his mandatory lifetime sex offender registration under authority of *Hofsheier*. Apparently, once counsel became aware that the prosecutor alternatively was seeking to impose a discretionary registration requirement under section 290.006, on November 10, 2009, Ochart also filed a supplemental motion opposing the imposition of a registration requirement under section 290.006.

Robert L. (1993) 21 Cal.App.4th 1057, 1067, superseded by statute on another ground, as stated in *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) In other words, the trial court's ruling must be affirmed unless it is "arbitrary, capricious or patently absurd." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

B. The Facts Presented In Connection With the Prosecution's Motion to Have a Lifetime Registration Requirement Imposed Under Section 290.006, and the Lower Court's Ruling

As noted earlier, Ochart was originally charged with 12 felony counts of sexual misconduct: 10 counts of lewd conduct upon a child (§ 288, subd. (c)), and 2 counts of oral copulation with a person under the age of 18 (§ 288a, subd. (b)(1)). Ochart pleaded guilty to a single count of oral copulation with a minor under section 288a, subdivision (b)(1). That count arose from an incident that occurred on November 5, 1993, when the victim was 16 years old and Ochart was 34. The court dismissed the remaining counts, four with a waiver pursuant to *People v. Harvey*, *supra*, 25 Cal.3d 754.

In considering the motion from which this appeal arose, the court had before it the probation department's November 10, 1994 presentence report and recommendation, which the department prepared in advance of Ochart's sentencing under his plea agreement. According to that report, which was alluded to by the court and counsel during the December 18, 2009 hearing on the motion, Ochart sexually molested his half-sister over the course of a year and a half beginning when she was 15 years old. When the victim was about 13 years old, her father and family sent her from another state to live with Ochart, his wife, and their daughter, who was slightly younger than the victim. At that time, Ochart was about 34 years old and was on active duty with the United States Navy in Florida and California. The reason the victim's father sent her to live with Ochart was because he wanted to offer her a better life than the one she had where she had been living, where she had been sexually assaulted, and where there was a significant amount of violence on the streets.

In November 1993, the Ocharts observed behavior on the part of the victim which indicated that she might need counseling. She was advised to speak to the minister of

their church. On November 11, 1993, she told a church representative that her half-brother had been molesting her for the past three years. Ochart's wife was then informed, and she confronted her husband, who initially denied everything, but finally confessed to some molestation. The church representative said Ochart admitted that he had fondled the victim and videotaped her private parts. Later, Ochart's wife had informed the authorities that Ochart had confessed to her. When confronted with that information, he stated that his wife had been lying.

The victim informed the authorities that since she had moved in with the Ochart family, there had been occasional "sexual games" and other incidents of touching between her and Ochart, but that there had never been "penetration." She informed authorities that Ochart had videotaped her private parts and that there had been oral sex.

According to the report, the victim confirmed that at age 13 she had started living with the Ocharts and had remained with them for about three years. She stated that the first incident with Ochart occurred in Florida when she was asleep or pretending to be asleep, and the defendant would touch her in various private places. She also stated that they played games such as double dare and strip poker. She denied that there had ever been any sexual intercourse. She stated that he tried, but she refused. She also stated the "most done" between them was oral sex performed on Ochart three or four times. When asked how she felt about Ochart, she stated that she wanted him to serve time and receive counseling. She stated what he did was wrong and he was still denying it. She confirmed that she had been sexually molested three times between the ages of 9 and 12 by three other male adults prior to moving in with Ochart and his family.

The probation report included Ochart's statement concerning the November 5, 1993 incident. Ochart said that on that date he arrived home from work at 2:00 a.m. Everyone in the house was sleeping except the victim, who was waiting up to watch a movie with him. According to Ochart, the victim began massaging him while they were watching the movie. They ended up fondling and having oral sex. Ochart said the reason this happened was because he gave in to his own desires and weaknesses. He said that the victim was almost 17 and he was 34 and her guardian, and should have known better.

The report stated that Ochart told the probation officer that he took full responsibility for his conduct because there was no excuse for giving in to his own passion and lust.

Ochart's motion to be relieved of his lifetime sex offender registration requirement was supported by much of the same materials relied on in making his previous motion for a certificate of rehabilitation in 2005 in Contra Costa County Superior Court. This material included the May 2, 2005 report of psychologist Jules Burstein. We discussed both Dr. Burstein's report and the other documents submitted by Ochart in *Ochart I*, in which we affirmed the denial of his motion for a certificate of rehabilitation. That exposition was as follows:

"Dr. Burstein interviewed Ochart, administered two psychological tests, and reviewed documents including the probation report, the Contra Costa District Attorney's investigation report, the petition and Ochart's statement in support of the petition, certain of his naval records, his resume, and letters sent to the court by Ochart's wife and daughter. Dr. Burstein's report indicates that, prior to his conviction, Ochart was in the U.S. Navy for 16 years, and received excellent evaluations. Ochart told him that his half-sister was sent to live with his family because she was 'proving to be an unmanageable teenager.' His half-sister idealized Ochart, and '[h]e enjoyed the attention.' He reported a 'progressively more serious blurring of boundaries' over the course of several months. He also informed Dr. Burstein that, though he recoiled from what he was doing, the victim begged him not to stop the sexual contact.

"Dr. Burstein noted that, during the 10-year period leading up to filing his petition, Ochart had rebuilt his life. He had reconciled with his wife, gone to college and obtained two degrees, pursued a successful new career after being discharged from the Navy following his conviction, and participated in volunteer activities. Based on the results of his psychological testing, Dr. Burstein opined that Ochart was 'not a pedophile,' but had engaged in incestuous acts. He testified that the rate of reoffense for individuals who are pedophiles is 20 to 50 percent, while the rate of reoffense of those who commit incest is two to three percent. Therefore, he concluded that 'the likelihood of [Ochart] ever committing another sex offense is as close to zero as one could imagine.'

"Ochart also submitted letters of reference in support of his petition from family friends, his wife and daughter, and coworkers. With the exception of his wife and daughter, the authors of the letters were not told why he sought them, and Ochart 'was directed to tell [his references] that he needed the letter for personal reasons, and under no circumstances was he to risk his job, by disclosing his prior conviction or the application. . . .' None of the letters submitted by Ochart address the question of whether he presents a continuing threat to minors of committing any offenses specified in section 290." (*Ochart I, supra*, at pp. 3-4.)

A hearing on the motions was held on December 18, 2009. After the court indicated its intention to delete the mandatory registration requirement based on *Hofsheier*, Ochart's counsel asked the court for its thinking in connection with the alternative request to impose a discretionary registration requirement "so I can address that."

The court began by noting it was a "struggle." On one hand, the court was impressed by how well Ochart had done since the time of his conviction. However, on the other hand, the court was "appall[ed]" by the factual recitation contained in the prosecutor's "declaration,"[4] concerning the manner in which Ochart took advantage of "an extremely vulnerable child who was previously violated." The court observed that it had a tendency to believe Ochart's exemplary record since his conviction was related to the registration requirement, which "prevented people from putting Mr. Ochart in a position of trust with other children and prevented him from being in a position where he might do this again." In light of the seriousness of the conduct leading to the charges against him, the court felt that it was fair to require Ochart to continue to register.

In setting forth the bases for the court's concern that Ochart still posed a potential threat to minors, the court returned to the facts underlying the charges, including that the abuse was long term, involving a child who had been placed in his trust and care, and

[4] Actually, the prosecutor, Yvette Martinez, did not submit a declaration, but the factual summary in her opposition memorandum appears to summarize much of the information contained in the probation report.

who had been sexually abused in the past. The court observed that this was not a situation where two teens or young adults were engaged in sexual activity during a dating relationship, but one where the facts suggest uncontrollable sexual behavior by Ochart. While the court commended Ochart for the good life he had led in the 15 years since his conviction, that good conduct was not sufficient to overcome the "profound reasons to require registration," including that the crime was committed to satisfy lustful desires and for sexual gratification. The facts that were particularly important to the court's conclusion that Ochart should be required to register were the almost a 20-year difference in age between Ochart and the victim, the sexual abuse occurred over a long period of time, it was concealed by Ochart from family members, it included his videotaping of the young girl's private parts, and that some of the molestations occurred while she slept.

C. Discussion

There was no abuse of discretion in the court's ruling. As required by law, the court found that the offense was committed "as a result of sexual compulsion or for purposes of sexual gratification," and it stated reasons for requiring Ochart's lifetime registration as a sex offender. (*Hofsheier*, *supra*, 37 Cal.4th at p. 1197.) The first required factual finding, that the offense was engaged in for sexual gratification, was clearly admitted by Ochart. (*Ibid*.) Additionally, the reasons for requiring continuing registration were set forth on the record. We agree with the trial court's conclusion that the age difference between Ochart and the victim was a significant factor for the court to consider. The offense to which he pled guilty certainly was not the result of a teenage dating dalliance. Indeed, at age 34 when he molested the victim, Ochart had a daughter who was only one year younger than the victim. The fact that he was the victim's guardian, and therefore held a position of trust, was also important to the court's decision. Further, the court concluded that the repugnance of the sexual acts themselves, and the number of years over which they took place, were factors weighing in favor of continuing registration. Lastly, the court's observation that Ochart's 15-year record of good conduct may have resulted from the fact that he was required to register during those years is not an unfounded inference to draw under the circumstances.

It also was not an abuse of discretion for the court to impliedly reject Dr. Burstein's opinion that "the likelihood of [Ochart] ever committing another sexual offense is as close to zero as one could imagine." As stated in *In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345, superseded on another ground by *In re Marriage of Burgess* (1996) 13 Cal.4th 25, as stated in *In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 140, fn. 3: "A trial court is not required to accept even unanimous expert opinion at face value. (E.g., *People v. Samuel* (1981) 29 Cal.3d 489, 498 . . . .) As long as the decision to reject such testimony is not 'arbitrary,' the trial court may reject the conclusion of an expert. (1 Witkin, Cal. Evidence (3d ed.1986) § 524, pp. 494-495.)"

There were a number of possible reasons explaining why the trial court could properly reject Dr. Burstein's expert opinion that Ochart was not a threat to minors. The trial court was entitled to consider the fact that Dr. Burstein was called upon by Ochart to offer an opinion on his behalf, and therefore, the possibility that his opinion was not impartial.[5] Under this circumstance, the court could reasonably have rejected Dr. Burstein's testimony for bias. (See *People v. Bolden* (2002) 29 Cal.4th 515, 552 ["information that a party retained an expert is relevant to the possible bias of that expert"].)

Moreover, some of the facts relayed to Dr. Burstein by Ochart conflicted with the evidence before the court. For example, Ochart told Dr. Burstein that the victim was sent to live with his family because she had become an "unmanageable" teenager. In contrast, the probation report indicates that Ochart knew that the victim had been sexually assaulted, and that this was one of the reasons she had been sent to live with his family.

The probation report also stated the victim was sent to live with Ochart by her father and family who stated that they had the desire to offer the victim a better life than she had where she was living, where she had been sexually assaulted three times. Therefore, in his statements to Dr. Burstein, Ochart omitted the significant fact that one

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[5] The court indicated it was familiar with Dr. Burstein, without further elaboration.

of the reasons the victim was sent to live with him was that she had been sexually molested, not that she had become "unmanageable." The trial court could infer from this discrepancy that Ochart continued to minimize and rationalize his actions and their seriousness, and could reach a conclusion contrary to that of Dr. Burstein.

As he did below, Ochart places great reliance in his appellate brief on *Lewis, supra*, 169 Cal.App.4th 70. However, *Lewis* does not compel reversal here, as it is factually distinguishable in several important ways. The factual similarity between *Lewis* and this case appears to begin and end with the fact that the request to delete the registration requirement was made years after the commission of the underlying offense of oral copulation (§ 288a, subd. (b)(1))—15 years here, and 20 years in *Lewis*. (*Id.* at p. 73.) However, in *Lewis* the age difference between the defendant and the victim was five years (22 and 17 years old, respectively),[6] the acts of oral copulation occurred following a holiday party over the course of one night, and the defendant did not know the victim's age. (*Id*. at pp. 73-74.) The court concluded that there was no factual basis for a finding of discretionary registration under section 290.006. (*Id.* at p. 79.)

Unlike the facts in *Lewis*, here there were facts found by the lower court to warrant the exercise of discretion in ordering Ochart to register under section 290.006. The age difference between Ochart and the victim was 18 years, a fact known to Ochart. He also understood that she had been placed in his care, and that she was particularly vulnerable because she had been subjected to repeated acts of molestation by three different men before she came to live with he and his family. Lastly, but equally as important, the sexual activity between Ochart and the victim did not take place during a brief encounter after a party, but extended over years during which Ochart first concealed, then later denied, the misconduct. Given these important differences, *Lewis* is not controlling here. While we may, or may not, have reached the same conclusion as did the trial court given

[6] The victim testified that her regular boyfriend was the same age as Lewis. (*Id.* at p. 74.)

the facts of this case, applying the deferential abuse of discretion standard on appeal compels that the lower court's decision be affirmed.

IV.

DISPOSITION

The trial court's order requiring Ochart to register as a sex offender for life under section 290.006 is affirmed.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

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RIVERA, J.