Filed 11/3/10 P. v. Oaks CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. ORVILLE DUANE OAKS, Defendant and Respondent.	G043261 (Super. Ct. No. 09SF0249) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Derek Guy Johnson, Judge. Reversed.

Tony Rackauckas, District Attorney, Anna Chinowth, Deputy District Attorney for Plaintiff and Appellant.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

* * *

The Orange County District Attorney (D.A.) appeals from an order relieving defendant of his requirement to register as a sex offender under Penal Code section 290.[1] Defendant argues that the order is not appealable. We disagree, and further find that the court erred by relieving defendant of his mandatory statutory duty to register as a sex offender. We therefore reverse and remand for further proceedings.

I

FACTS

In 1998, defendant pleaded guilty to misdemeanor annoying or molesting children (§ 647.6, subd. (a)(1)) and loitering (§ 647, subd. (e)) in case No. 97SF1092. He was placed on probation for five years, and in the years following, admitted to a number of probation violations and served jail time as a result. In 2006, the case was closed.

In March 2009, the D.A. filed a felony complaint against defendant, alleging that he had failed to register as a sex offender as required by sections 290.011, subdivision (d) and 290.018, subdivision (b). Defendant ultimately pled guilty, sentence was suspended and defendant was placed on probation for three years. He was also ordered to serve 90 days in jail. Over the D.A.'s objection, the court ruled that defendant would not be required to register on the underlying case No. 97SF1092, pursuant to section 290. The court also revoked and terminated defendant's probation on his prior failure to register convictions, case Nos. 07SF1031 and 08SF0212.

The court explained that defendant's obligation to register arose from "a misdemeanor conviction of some time ago," and that defendant, who was nearly 81 at the time of the hearing, was "physically feeble," and homeless, and that he had, for the most part, historically complied with the registration requirements.

The D.A. now appeals from the court's order relieving defendant of the requirement to register as a sex offender pursuant to section 290.

[1] Subsequent statutory references are to the Penal Code.

II

DISCUSSION

Appealability

"The prosecution in a criminal case has no right to appeal except as provided by statute. [Citation.] 'The Legislature has determined that except under certain limited circumstances the People shall have no right of appeal in criminal cases. [Citations.] . . . [¶] The restriction on the People's right to appeal . . . is a substantive limitation on review of trial court determinations in criminal trials.' [Citation.] 'Appellate review at the request of the People necessarily imposes substantial burdens on an accused, and the extent to which such burdens should be imposed to review claimed errors involves a delicate balancing of the competing considerations of preventing harassment of the accused as against correcting possible errors.' [Citation.] Courts must respect the limits on review imposed by the Legislature 'although the People may thereby suffer a wrong without a remedy.' [Citation.]" (*People v. Williams* (2005) 35 Cal.4th 817, 822-823.)

Thus, an appeal by the People is permitted only where permitted by statute, specifically, section 1238. (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 108.) Defendant contends that the court's order is not subject to appeal, arguing that it is an "appeal from an order granting probation," under section 1238, subdivision (d), which can only be reviewed by a writ proceeding. The D.A. asserts that it is not appealing the order granting probation, but only a term of the probation. The D.A. argues the term, removing the requirement to register under section 290, is therefore appealable under section 1238, subdivision (a)(5), which permits the appeal from an order made after judgment "affecting the substantial rights of the people." Alternatively, the D.A. argues that removing the registration requirement is an unlawful sentence and therefore appealable pursuant to section 1238, subdivision (a)(10).

We agree with the D.A. that the order is appealable as an unlawful sentence. An unlawful sentence is one which is "not authorized by law" (§ 1238, subd. (a)(10)), as opposed to an exercise of judicial discretion with which the People disagree. Courts have found, for example, that a purportedly unlawful ruling that a prior conviction was not a strike was appealable. (*People v. Trujillo* (2006) 40 Cal.4th 165, 173.) The instant case is similar – the D.A. is not challenging an exercise of the trial court's discretion, but arguing that removing mandatory sex offender registration as a probation term is flatly in contravention of the relevant statute. Further, appellate review in this case does not threaten defendant's probation or invoke other unfair consequences. We therefore agree with the D.A. that the order is appealable.

Mandatory Registration

Other than arguing the order was not appealable, defendant does not attempt to persuade us that the court's decision to remove the registration requirement was lawful. Defendant's restraint is commendable, as indeed, the court's decision cannot be squared with the statute. "Section 290 'applies automatically to the enumerated offenses, and imposes on each person convicted a lifelong obligation to register.' [Citations.]" (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) Defendant was convicted of violating section 647.6, which is an enumerated offense under section 290. The trial court, therefore, simply did not have the authority to relieve defendant of the registration requirement, and the order must be reversed.

The trial court's concerns about how defendant's age, health and homelessness might have led to his violations of the registration statute are logical lines of inquiry. But we believe that had the Legislature intended to create an exception to the registration requirement based on these factors, or provide for judicial discretion in such a situation, such an intent would be present in the statute. Because it is not, we must apply the statute as currently enacted.

III

DISPOSITION

The court's order is reversed, and the case is remanded for further proceedings.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.