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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER HASS,

Defendant and Appellant.

D058263

(Super. Ct. No. SCD225553)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed as modified.

Christopher Hass pled guilty to criminal threats, stalking, and harassment. At sentencing, the trial court ordered Hass to register as a sex offender under the discretionary registration statute applicable when the court finds the defendant committed an offense due to sexual compulsion or for sexual gratification. (Pen. Code,¹ § 290.006.) Based on the court's decision to impose the lifetime registration requirement, Hass is also

¹ Subsequent undesignated statutory references are to the Penal Code.

required to comply with the residency restriction applicable to sex offender registrants. (§ 3003.5, subd. (b).)

On appeal, Hass argues the residency restriction is a punitive consequence that was imposed on him in violation of his *Apprendi*² rights because it was based on court findings rather than a jury verdict or his admissions. Accordingly, he contends the sex offender registration requirement must be stricken from the judgment.

We agree that if a *lifetime* residency restriction is imposed coextensively with the lifetime registration requirement, the residency restriction is punitive so as to trigger *Apprendi* requirements. We conclude that application of a lifetime residency restriction violates Hass's *Apprendi* rights.

However, as recognized by Hass, the duty to register (distinct from the residency restriction) is *not* punitive. (*People v. Castellanos* (1999) 21 Cal.4th 785, 795-796; *People v. Presley* (2007) 156 Cal.App.4th 1027, 1033-1035.) Accordingly, there is no *Apprendi* violation concerning the registration order, and we reject Hass's request that we strike the registration requirement from the judgment. Further, our holding precluding imposition of a lifetime residency restriction does not apply to imposition of the residency restriction as a *statutory condition of parole*, which lasts *only during the parole period*. (*In re E.J.* (2010) 47 Cal.4th 1258, 1278-1280 (*E.J.*.)

² *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).

To remedy the *Apprendi* violation, we modify the judgment to include a provision stating that Hass is not subject to a lifetime residency restriction as a corollary to his lifetime duty to register. As so modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Hass was charged with 12 counts of making criminal threats and stalking and one count of misdemeanor harassment by telephone. According to the prosecution's evidence, from 2007 to 2010, Hass repeatedly sent letters and made phone calls to nine women at their place of employment in which he made demands and threatened physical violence (including sexual violence) if the women did not comply with his demands.

Hass pled guilty to nine of the counts (four counts of stalking, four counts of making criminal threats, and one count of harassment by telephone) in exchange for dismissal of the remaining counts. The court sentenced Hass to seven years eight months in prison. The court also exercised its discretion to order that Hass register as a sex offender, finding that Hass's behavior was motivated by "underlying sexual fantasies" and there was a danger of ongoing behavior as shown by the length of the incidents and the fact he had engaged in similar incidents in the past.

DISCUSSION

The lifetime sex offender registration requirement imposed under section 290 is mandatory for a defendant convicted of a statutorily-specified sex offense (§ 290, subd. (c)), and is discretionary for a defendant convicted of any other offense (§ 290.006). To impose the discretionary registration requirement, the court must find that the defendant "committed the offense as a result of sexual compulsion or for purposes of sexual

gratification." (§ 290.006.) Based on the 2006 passage of Proposition 83 (known as Jessica's Law), a residency restriction is also imposed on persons required to register as sex offenders. (See *E.J.*, *supra*, 47 Cal.4th at p. 1263.) The residency restriction statute provides: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290, to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b).) The statute also allows local governments to enact ordinances that impose additional residency restrictions on persons required to register as sex offenders. (§ 3003.5, subd. (c).) The residency restriction applies to all section 290 sex offender registrants, regardless of whether the registration requirement is mandatory or discretionary. (See § 3003.5, subd. (b).)

Under *Apprendi*, a defendant has a constitutional right to have the jury, not the trial judge, decide all facts that increase the penalty for an offense beyond the maximum punishment authorized for the offense. (*Apprendi*, *supra*, 530 U.S. at p. 490; *Blakely v. Washington* (2004) 542 U.S. 296, 301 (*Blakely*).) The *Apprendi* rule proscribes legislative schemes that in effect reclassify elements of an offense as sentencing factors to allow a judge to impose a penalty beyond the statutory maximum without a jury finding or admission by the defendant that the factors exist. (See *Blakely*, *supra*, 542 U.S. at pp. 302, fn. 6, 306-307, & fn. 11.) To trigger the *Apprendi* jury trial requirement, the consequence imposed on the defendant must (1) be punitive (*People v. Picklesimer* (2010) 48 Cal.4th 330, 344; *People v. Presley*, *supra*, 156 Cal.App.4th at pp. 1031-1032),

and (2) exceed the maximum punishment for the offense prescribed by the statute (*Cunningham v. California* (2007) 549 U.S. 270, 274-275, 289-293 (*Cunningham*)).

As we shall explain, we conclude that although the sex offender *registration requirement* is not punitive, the *residency restriction* is punitive if it attaches at sentencing as a *lifetime* corollary to the lifetime registration requirement. Further, we hold the trial court's discretionary imposition of the registration requirement exceeded the statutory maximum in this case because it could not be imposed without court findings beyond the elements of the offenses to which Hass pled guilty. We address this latter issue first.

A. *Statutory Maximum*

The statutory maximum is the maximum punishment a judge may impose based solely on facts reflected in the jury verdict or admitted by the defendant. (*Blakely, supra*, 542 U.S. at p. 303.) A defendant is entitled to receive no more than the maximum penalty authorized by the verdict alone, and cannot properly be subjected to a higher punishment for the offense based on facts found solely by the trial judge. (*Id.* at p. 309.) When determining the statutory maximum, the key consideration is whether the statute *forbids* the trial court from increasing the punishment without judicial findings beyond the jury's verdict or defendant's admission. (*People v. Black* (2007) 41 Cal.4th 799, 812.)

The trial court cannot impose the discretionary registration requirement unless it finds the offense was committed due to sexual compulsion or for sexual gratification. If these findings are not encompassed within the elements of the offense, the discretionary registration requirement is based on findings beyond the jury's verdict or defendant's

admission to the offense, and hence it exceeds the maximum statutory consequence for the offense.³

Here, the elements of the offenses to which defendant pled guilty (criminal threats, stalking and harassment) do not involve inherently sexual motivation or behavior. Accordingly, the discretionary registration requirement imposed in this case is based on court findings beyond defendant's admission, and exceeds the statutory maximum.

B. *Punishment for the Offense*

To determine whether a legislative enactment imposes a punitive consequence on a defendant, the courts examine "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos, supra*, 21 Cal.4th at p. 795.) Relevant factors include whether the provision imposes what has been viewed traditionally as punishment; creates an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to the nonpunitive purpose. (*Smith v. Doe* (2003) 538 U.S. 84, 97.)

It is well established that the requirement that sex offenders register with the authorities is *not* a punitive consequence imposed on the offenders. (*People v. Castellanos, supra*, 21 Cal.4th at pp. 788, 795-796 [no ex post facto violation due to

³ In contrast, the *mandatory* registration requirement for the statutorily-specified offenses requires no findings by the trial court beyond the jury's verdict or defendant's admission, and thus it is not a consequence that exceeds the statutory maximum.

nonpunitive nature of registration requirement]; *In re Alva* (2004) 33 Cal.4th 254, 260-262 [no cruel and unusual punishment for misdemeanor sex offense due to nonpunitive nature of registration requirement]; *People v. Presley, supra*, 156 Cal.App.4th at pp. 1033-1035 [no *Apprendi* violation due to nonpunitive nature of registration requirement]; accord *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Garcia* (2008) 161 Cal.App.4th 475, 485-486⁴; see *People v. Picklesimer, supra*, 48 Cal.4th at pp. 343-344; *Smith v. Doe, supra*, 538 U.S. at p. 102 [no ex post facto violation due to nonpunitive nature of Alaska sex offender registration statute].) In *Castellanos*, the court reasoned that the intent of the registration requirement is regulatory in nature; i.e., to control crime and prevent recidivism by making sex offenders readily available for police surveillance. (*Castellanos, supra*, 21 Cal.4th at p. 796.) Further, the registration requirement is not so punitive in effect as to compel a punitive characterization because, although it imposes a substantial burden, the burden is "no more onerous than necessary to achieve the purpose of the statute." (*Ibid.*)

After the 2006 enactment of the residency restriction for sex offender registrants, the California Supreme Court evaluated an ex post facto challenge to imposition of the residency restriction *as a statutory condition of parole* upon offenders who were convicted before enactment of the residency restriction but released from prison after its enactment. (*E.J., supra*, 47 Cal.4th at pp. 1263-1264.) The *E.J.* court concluded there was no ex post facto violation because the residency restriction was not imposed

⁴ Disapproved on other grounds in *People v. Picklesimer, supra*, 48 Cal.4th at page 338, footnote 4.

retroactively *as additional punishment for the sex offense*, but only prospectively in response to the offenders' conduct *during the parole period*. (*E.J.*, *supra*, 47 Cal.4th at pp. 1278-1280.)⁵ *E.J.* did not resolve the question before us; i.e., whether a residency restriction is punitive when it attaches *at the time of sentencing* due to imposition of the lifetime registration requirement, and hence could potentially *last a lifetime*. In a decision subsequent to *E.J.*, the California Supreme Court recognized that the punitive nature of the residency restriction operative at the time of sentencing was unresolved, but it did not decide the issue because it was not necessary to do so given the posture of the case before it. (*People v. Picklesimer*, *supra*, 48 Cal.4th at pp. 343-344.)⁶

⁵ The *E.J.* court reasoned that in the context of a parole condition, the residency restrictions applied to "events occurring *after* their effective date—petitioners' acts of taking up residency in noncompliant housing upon their release from custody on parole after the statute's effective date." (*E.J.*, *supra*, 47 Cal.4th at p. 1280.)

⁶ In *Picklesimer*, the trial court had imposed the mandatory sex offender registration requirement, which was later determined in another case to violate equal protection for the defendant's particular offense. (*Picklesimer*, *supra*, 48 Cal.4th at p. 335.) The *Picklesimer* court held the defendant could seek relief from the registration requirement by filing a petition for writ of mandate in the trial court, and that at the mandamus proceedings the trial court could consider whether to impose the discretionary sex offender requirement. (*Id.* at pp. 335, 342-344.) The high court rejected the defendant's assertion that at sentencing on remand the trial court could not impose the discretionary registration requirement because the residency restriction was punitive and hence barred under *Apprendi*. (*Id.* at pp. 343-344.) The court reasoned that regardless of the viability of the residency restriction, the trial court could exercise its discretion to decide whether to impose the discretionary registration requirement. (*Ibid.*) The court noted that the residency restriction may or may not be punishment for the crimes, stating that if the restriction was not punishment there was no *Apprendi* problem, and if the restriction was punishment it was barred in any event under *ex post facto* principles because the crimes were committed before the enactment of the residency restriction law. (*Ibid.*)

Several appellate courts have reached conflicting results on the issue of whether the residency restriction attached at sentencing constitutes punishment for *Apprendi* purposes, and the issue is currently pending before the California Supreme Court. (*People v. Mosley* (2010) 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965 [residency restriction is punitive and subject to *Apprendi* rule]; accord, *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted March 2, 2011, S189721; *In re S.W.*, review granted Jan. 26, 2011, S189721 [residency restriction is not punitive and hence not subject to *Apprendi* rule].) In the pending *Mosley* case, the court has requested briefing concerning whether the residency restriction statute creates a misdemeanor offense regardless of parole status, and if not, whether it operates as a condition of the registration requirement.⁷

Pending further guidance from our high court, we conclude that *if* the residency restriction attached at sentencing is tied in duration to the registration requirement so as to last *a lifetime* rather than merely during the parole period, it is a punitive consequence. Although section 3003.5 is located in the Penal Code chapter addressing parole, there is nothing in section 3003.5, subdivision (b) which expressly restricts the residency

⁷ When evaluating the residency restriction in the context of parole conditions in *E.J.*, the California Supreme Court noted that it was not faced with the question of whether the residency restriction statute creates a new misdemeanor offense applicable to all registered sex offenders regardless of parole status. (*E.J.*, *supra*, 47 Cal.4th at p. 1271, fn. 5.) The *E.J.* court stated that it was clear the residency restriction was intended to apply as a condition of parole, noting that the provision was located in the Penal Code chapter addressing parole, and the Legislative Analyst had told voters that a violation of the provision would constitute both a parole violation and a misdemeanor offense. (*Id.* at p. 1271.)

restriction to the parole period. In contrast, section 3003.5, subdivision (a) (which prohibits sex offender registrants from residing with other nonrelative sex offender registrants) explicitly states that the restriction applies "during the period of parole." Absent such language in section 3003.5, subdivision (b), we will assume for purposes of our *Apprendi* analysis (without deciding the issue) that the duration of the residency restriction is coextensive with the lifetime duration of the registration requirement.

To determine whether a lifetime residency restriction is punitive, we evaluate whether the enactors of the provision intended it to be punitive, and if not, whether the provision must be deemed punitive in effect due to such factors as whether it imposes what has been traditionally viewed as punishment, creates an affirmative restraint, or is excessive in relation to its nonpunitive purpose. (*Smith v. Doe, supra*, 538 U.S. at p. 97; *People v. Castellanos, supra*, 21 Cal.4th at p. 795.) We will assume the intent of the lifetime residency restriction is regulatory rather than punitive; i.e., its purpose is to create predator-free zones around schools and parks. (See *E.J., supra*, 47 Cal.4th at pp. 1266, 1271.) However, we conclude it is overwhelmingly punitive in effect if it is imposed as a lifetime restriction. The residency restriction, which excludes the offender from large areas of the community, is akin to the traditional punishment of banishment. (See *Commonwealth v. Baker* (Ky. 2009) 295 S.W.3d 437, 444-447 [holding comparable sex offender residency restriction is punitive for ex post facto purposes].) The restriction creates a high-level affirmative restraint by prohibiting the offender from residing within certain areas, which could disrupt long-established residences; uproot or separate families; impact access to schools, employment, transportation, and medical care; and

carry a constant threat of eviction if a school or park opens nearby. (*Id.* at p. 445; contrast, *Smith v. Doe, supra*, 538 U.S. at p. 101 [registration statute did not create affirmative restraint because offenders are free to move and live where they wish].) Further, the restriction goes beyond the regulatory purpose of creating predator-free zones because it is imposed equally on all registered sex offenders — even if their offenses were not predatory in nature — which makes it "far more like retribution for past offenses than a regulation intended to prevent future ones." (*Commonwealth v. Baker, supra*, 295 S.W.3d at p. 444.)⁸

Unlike a lifetime registration requirement, a lifetime residency restriction punishes the defendant by imposing a residential banishment. The expansive nature of the restriction — applying for an indefinite duration, to multiple geographic areas in a community, and indiscriminately to all registered sex offenders regardless of the nature of their sex offense — exceeds mere regulation and imposes a punishment.

C. *Additional Contentions Raised by the Attorney General*

The Attorney General raises two additional contentions to refute Hass's *Apprendi* challenge: (1) the discretionary registration requirement and the residency restriction are akin to a sentencing choice like consecutive sentences, which the United States Supreme

⁸ By way of comparison, a sex offender residency restriction statute that required an individualized determination of high risk, and that included an exemption for preexisting property owners, was found to be nonpunitive. (*Weems v. Little Rock Police Dept.* (8th Cir. 2006) 453 F.3d 1010, 1012-1014, 1017; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 363-369; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1173-1177 [civil commitment of sexually violent predators is nonpunitive because statute imposes confinement upon narrow class of individuals based on individualized showing of danger to public from mental abnormality].)

Court has found to be outside the scope of *Apprendi*, and (2) the *Apprendi* challenge to the residency restriction is premature. We reject these contentions.

1. *Scope of Apprendi*

In *Oregon v. Ice* (2009) 555 U.S. 160, 163, 167-168 (*Ice*), the United States Supreme Court concluded that the *Apprendi* rule, which is designed to prevent legislative encroachment on the jury's traditional domain, extended only to decisions concerning the "discrete sentencing prescriptions" applicable to each specific offense, not to sentencing decisions concerning multiple offenses. In *People v. Black, supra*, 41 Cal.4th at pages 821-823, the California Supreme Court reached the same conclusion, reasoning that a consecutive sentence does not equate with a lengthened sentence for an offense premised on facts that are the functional equivalent of elements of the offense.

In contrast, a decision to impose the sex offender registration requirement constitutes a consequence for a discrete offense, and turns on the facts associated with that particular offense (i.e., the sexual nature of the offense). This is the type of offense-specific fact finding traditionally reserved for the jury, and is not comparable to the consecutive sentence choice applicable to punishment for multiple offenses.

To support its position, the Attorney General points to the statement in *Ice* that *Apprendi* does not extend to sentencing determinations apart from the length of incarceration that concern the nature of the offense or the character of the defendant, such as "the length of supervised release following service of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution." (*Ice, supra*, 555 U.S.

at p. 171.) However, if the duration of the residency restriction is tied to the lifetime registration requirement, the sentencing court is making a determination that equates with a type of banishment. Although the court's determination does not result in the sex offender being "locked up" through incarceration, it does result in the sex offender being permanently "locked out" from living in significant portions of the community. Given the far-reaching consequences of a lifetime residency restriction, it cannot be deemed comparable to such matters as the length of parole, drug rehabilitation attendance, or imposition of fines.

We conclude the lifetime residency restriction that accompanies the discretionary registration requirement falls within the scope of the *Apprendi* rule.

2. *Ripeness*

The Attorney General argues that even if the residency restriction is punitive and hence subject to the *Apprendi* requirements, it is not ripe for resolution because Hass is still incarcerated and when he is released he "may choose to live at a residence that does not violate the residence restriction." We are not persuaded. Hass's sentence imposes a lifetime registration requirement on him, and pursuant to that registration requirement, he is forbidden from residing in certain areas, potentially for a lifetime. Thus, once Hass is released from prison, he will not be able to lawfully reside in the restricted areas. The fact that he ultimately may not violate the residency restriction does not alter the fact that he is subject to a lifetime residency restriction.

To support its claim that Hass's claim is premature, the Attorney General cites the holding in *E.J.* that to resolve the defendants' claims that the residency restrictions were

constitutionally overbroad or unreasonable as applied to them, evidentiary hearings were required to examine such factual matters as the location of the defendants' current residences, the availability of compliant housing, and the manner in which the restrictions were being enforced. (*E.J.*, *supra*, 47 Cal.4th at pp. 1264-1265, 1281-1284.) The defendants in *E.J.* were subject to the residency restrictions as parole conditions, and there was no contention that the residency restrictions were imposed in violation of their *Apprendi* rights. The question of constitutional overbreadth or unreasonableness based on an application of the residency restriction is distinct from the question of whether the residency restriction was unconstitutionally imposed for a lifetime at sentencing via unauthorized factual determinations by the court.

D. *Remedy*

We conclude that, based on *Apprendi* principles, a lifetime residency restriction cannot constitutionally be imposed on Hass because there was no jury finding, and no admission by Hass, concerning the sexual impetus for his offenses. However, the sex offender registration requirement imposed on Hass need not be stricken.

Under well-established precedent, the discretionary sex offender registration requirement, standing on its own, does not give rise to an *Apprendi* violation because it does not impose a punitive consequence. (*People v. Castellanos*, *supra*, 21 Cal.4th at pp. 795-796; *People v. Garcia*, *supra*, 161 Cal.App.4th at p. 486; *People v. Presley*, *supra*, 156 Cal.App.4th at pp. 1033-1035; *People v. Marchand*, *supra*, 98 Cal.App.4th at p. 1061.) Further, imposition of the sex offender registration requirement under section

290.006 is readily severable from imposition of the residency restriction under section 3003.5, subdivision (b).

In *Picklesimer*, the California Supreme Court recognized this severability, stating that regardless of whether the residency restriction could constitutionally be imposed, there "is no constitutional bar to having a judge exercise his or her discretion to determine whether [the defendant] should . . . be subject to registration." (*People v. Picklesimer*, *supra*, 48 Cal.4th at p. 344; see fn. 6, *ante*; see *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330-331 [severance of unconstitutional portion of statute is proper where language is mechanically severable; remainder is complete in itself; and legislative body would have enacted the latter had it foreseen partial invalidity of statute]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 535; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1047-1048 [appropriate remedy is to disallow only unconstitutional application of statute].) The registration requirement and residency restriction were enacted at different times and in different statutes; the two statutes impose distinct duties on the offender; and compliance with the registration duty can be achieved independently of compliance with the residency restriction. Further, it is clear that the intent behind the sex offender registration law is served by requiring registration, even if a lifetime residency restriction cannot lawfully be imposed as part of the sentencing decision because of an *Apprendi* violation.

We conclude the proper remedy is to amend the judgment to remove defendant from the ambit of a lifetime residency restriction as part of the court's sentencing

decision, while retaining the sex offender registration requirement. Our holding does not apply to imposition of the residency restriction as a statutory condition of parole.

DISPOSITION

The judgment is modified to include a provision stating that defendant is *not* subject to a section 3003.5, subdivision (b) lifetime residency restriction pursuant to the trial court's sentencing decision. This modification does not alter his duty to register as a sex offender under section 290.006, and has no bearing on the residency restriction as a statutory condition of parole. As so modified, the judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.