

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 02 2009

ALAN CARLSON, Clerk of the Court,
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CERTIFIED FOR PUBLICATION

IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE,
APPELLATE DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,
v.
DONALD WILLIAM HONAN,
Defendant and Appellant.

CASE NO. 30-2008-00098483
(TRIAL COURT: 08SM01189)

OPINION

APPEAL from a judgment of the Orange County Superior Court, Harbor Justice Center, Thomas J. Rees, Commissioner. Affirmed in part; reversed and remanded with directions in part.

Bruce W. Nickerson for Defendant and Appellant.

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

In this appeal we are asked to determine: (1) whether the evidence was sufficient to sustain appellant's conviction of a violation of Penal Code section 314(1) and; (2) whether imposition of mandatory sex offender registration pursuant to Penal Code section 290(c) for a misdemeanor violation of Penal Code section 314(1) denies appellant equal protection of the law, where a person convicted of a violation of Penal Code section 647(a) based on similar conduct is not subject to such mandatory registration. We conclude that the evidence was sufficient to support the verdict, and affirm the judgment of conviction. However, under the facts of this case, we conclude that imposition of mandatory registration violates appellant's right to equal protection under the law. We therefore reverse the portion of the judgment directing mandatory registration, and remand with instructions for the trial court to exercise its discretion in determining whether imposition of sex offender registration pursuant to Penal Code section 290.006 is appropriate.¹

I. Facts

Jose Martinez-Gutierrez testified that on February 17, 2008, he went into the sauna at a 24-Hour Fitness in San Juan Capistrano. He described the sauna as having two levels, where someone could sit on the higher wooden bench seat, or the bench seat on the lower level. Martinez-Gutierrez was on his cell phone, sitting on the lower

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

level. Appellant Honan entered shortly after Martinez-Gutierrez entered, and sat across from him on the higher level. When Martinez-Gutierrez looked up, he saw appellant "staring right at him" with his erect penis in his hand, out of his shorts. Appellant was "smiling at" Martinez-Gutierrez as he was stroking his penis in an up and down motion "like masturbation." Uncomfortable, Martinez-Gutierrez got up and left the sauna.

Martinez-Gutierrez stated that because he has a son who goes to the same gym, and because he was mad that he had to leave, he went back in to the sauna. Again, after a short time, he noticed appellant stroking his penis in his hand while looking at Martinez-Gutierrez. This time, Martinez-Gutierrez confronted appellant saying, "what the fuck?" Appellant replied, "what?" Martinez-Gutierrez told the manager of the 24-Hour Fitness, and called 911.

II. Procedure.

The People filed a misdemeanor complaint charging appellant with a single count of violation of Penal Code section 647(a), disorderly conduct. On the day of trial, the complaint was amended to add a charge of violation of Penal Code section 314(1), lewd or obscene conduct/indecent exposure. The jury found appellant guilty on both counts. The court placed appellant on three years of informal probation with terms and conditions including lifetime registration as a sex offender pursuant to Penal Code section 290(c). Appellant opposed the registration requirement citing *People v.*

Hofsheier (2006) 37 Cal.4th 1185. Citing *People v. Noriega* (2004) 124 Cal.App.4th 1334, the trial court believed it had no discretion and had to impose mandatory registration. However, the court stated, on the record, that if it had discretion, it would not have ordered the registration.

III. Discussion

A. Penal Code Section 290

Penal Code section 290(c) imposes mandatory lifetime registration as a sex offender on persons convicted of certain specifically enumerated sex-related crimes.² The mandatory duty to register upon conviction of the specified offenses cannot be avoided through a plea bargain or exercise of judicial discretion. (*In re Stier* (2007) 152 Cal.App.4th 63, 78.)

Penal Code section 290.006, on the other hand, gives the court discretion to impose lifetime sex offender registration upon conviction of a non-specified offense, if the court finds the person committed the non-specified offense "as a result of sexual

² The current version of the statute provides that the following persons are required to register: "Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266j, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses."

compulsion or for purposes of sexual gratification.”³ To impose discretionary registration, the court must first determine that the offense was committed as a result of sexual compulsion or for sexual gratification, stating its reasons for this finding on the record and then, must state the reasons for requiring the registration. (*People v. Hofsheier, supra*, 37 Cal.4th 1185, 1197.)

Whether mandatorily imposed under 290(c) or discretionarily under 290.006, lifetime sex offender registration serves the dual purpose of permitting law enforcement authorities to keep track of offenders the Legislature has deemed likely to reoffend and to notify the public of the existence and location of offenders so that they, the public, can take protective measures. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1196.)

B. The Statutes at Issue Here: 314.1 and 647(a)

Penal Code section 314(1), indecent exposure, provides that every person is guilty of a misdemeanor who “willfully and lewdly,” “exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby.” “Generally, a conviction for indecent exposure requires proof of two elements: (1) the defendant must willfully and lewdly

³ The mandatory registration requirement of section 290(c) was formerly codified in Penal Code section 290(a)(1)(A), while the discretionary provision was contained in section 290(a)(2)(E). The former version was in effect at the time of the decision in *People v. Hofsheier, supra*, 37 Cal.4th 1185, on which appellant relies. Thus, the *Hofsheier* opinion refers to the former section, but the statutes remain the same in effect.

knows or should know of the presence of persons who may be offended by his conduct." (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256.)

To prove a defendant is guilty of a violation of section 647(a), the People must prove that (1) the defendant willfully engaged in the touching of his or her own, or another person's genitals, buttocks, or female breast; (2) that he or she did so with the intent to sexually arouse or gratify himself or herself, or another person, or to annoy or offend another person; (3) that at the time the defendant engaged in the conduct, he or she was in a "public place or a place open to the public or to public view;" (4) that at the time defendant engaged in the conduct, someone else who might have been offended was present and; (5) that defendant knew or reasonably should have known that another person who might have been offended by his or her conduct was present. (CALCRIM 1161.)

Registration is mandatory for a violation of Penal Code section 314(1), indecent exposure, under section 290(c). It is not for a violation of Penal Code section 647(a), disorderly conduct. Appellant contends that under the circumstances of his conviction, this violates equal protection. We agree.

C. Equal Protection Analysis

1. The Applicable Law

Both the state and federal constitutions guarantee all persons equal protection of the laws. This guarantee provides that "no person or class of persons shall be denied

the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.” (*People v. Romo* (1975) 14 Cal.3d 189, 196.) Thus, equal protection requires that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” (Id.) It does not, however, require “absolute equality.” (Id.)

“The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more, *similarly situated* groups in an unequal manner.” (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) When a party meets that burden, the court must then determine whether the classification withstands the appropriate level of scrutiny. Statutory distinctions that touch on suspect classifications or fundamental interests are subject to strict scrutiny and will be upheld only if they are necessary to achieve a compelling state interest. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1200.) Classifications based on gender are subject to an intermediate level of review. Other types of statutory distinctions are subject to “rational basis” scrutiny and will be upheld if the challenged classification bears a “rational relationship” to a “legitimate state purpose.” (Id.)⁴

⁴ The parties agree that if the class of offenders under 314.1 and 647(a) are similarly situated for purposes of equal protection analysis, “rational basis” scrutiny is to be applied.

2. Persons Convicted of a Violation of Section 314(1) are “Similarly Situated” to Persons Convicted of a Violation of Section 647(a) for Equal Protection Purposes

Under an equal protection analysis, the court does not inquire “whether persons are similarly situated for all purposes, but instead ‘whether they are similarly situated for purposes of the law challenged.’ ” (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1199-1200 (internal citations omitted).) In this case, appellant relies on *Hofsheier, supra*, to support his argument that persons convicted of a violation of 314.1, indecent exposure, and persons convicted of a violation of 647(a), disorderly conduct, are similarly situated for purposes of lifetime sex offender registration requirements. And, since one requires mandatory registration and the other does not, the imposition of it in his case violates the equal protection clauses of both the state and federal constitutions.

In *Hofsheier*, the 22-year-old defendant pled guilty to felony oral copulation with a 16-year-old girl, in violation of Penal Code section 288a(b)(1). The defendant’s sentence included mandatory registration. On appeal, the defendant contended mandatory registration for that offense denied him equal protection, because a person convicted of “voluntary” sexual intercourse with a 16-year-old girl in violation of

Penal Code section 261.5(c) is not subject to mandatory registration.⁵ The Supreme Court agreed with Hofsheier.

In comparing the varying Penal Code sections pertaining to oral copulation and unlawful intercourse with minors, the court noted that both impose greater punishment on offenses involving younger victims. But, apart from the mandatory registration requirement, sentencing for these two voluntary sexual acts between a 22-year-old and 16-year-old are treated identically, and both can be prosecuted as either a felony or a misdemeanor. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1195-1196.) The court further pointed out that both offenses concern sexual conduct with minors, and the only difference between the two offenses is the nature of the sexual act. (*Id.* at 1200.) Thus, the high court concluded that the two groups of offenders were sufficiently "similarly situated" to merit application of "rational relationship" scrutiny to "determine whether distinctions between the two groups justify the unequal treatment." (*Id.* at 1200.)

We are not aware of any published opinion applying the *Hofsheier* analysis to persons convicted of indecent exposure in violation of Penal Code section 314(1), as compared to persons convicted of disorderly conduct in violation of Penal Code

⁵ The *Hofsheier* court used the term "voluntary" "in a special and restricted sense to indicate both that the minor victim willingly participated in the act and to the absence of various statutory aggravating circumstances: the perpetrator's use of 'force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person' (§ 288a, subd. (c)(2)); the perpetrator's 'threatening to retaliate in the future against the victim or any other person' (§ 288a, subd. (c)(3)); and the commission of the act while the victim is unconscious (§ 288a, subd. (f)) or intoxicated (§ 288a, subd. (i))." (*People v. Hofsheier, supra*, 37 Cal4th at p. 1193, fn. 2.)

section 647(a) based on similar circumstances.⁶ We are persuaded, however, that the same analysis applies.

Here, section 314(1) and section 647(a) both involve sexually-related conduct committed in the presence of others, for the purpose of, or intent to, sexually gratify or arouse oneself or another person, or to offend or annoy another person. Indecent exposure, in violation of section 314(1), requires “exposure” of one’s “person” or the “private parts” thereof. Disorderly conduct, in violation of section 647(a), requires “touching” of one’s own body or the body of another person. It is not limited to touching of the genitals, but includes touching of the buttocks or female breast. (*Pryor v. Municipal Court, supra*, 25 Cal.3d at p. 256.) As in *Hofsheier*, both statutes here involved sexually related conduct, the primary difference between the two being the nature of the sexual act committed. (*People v. Hofsheier, supra*; 37 Cal.4th at p. 1200.) Accordingly, we conclude that for purposes of the application of Penal Code 290, persons committing the two acts are similarly situated.

⁶ The decision in *Hofsheier* has been applied to strike down mandatory registration for persons convicted of voluntary oral copulation of a minor under 16 years of age by a person 21 or older, where sexual intercourse between persons of the same age was not subject to mandatory registration. (*People v. Garcia* (2008) 161 Cal.App.4th 475.) The court in *People v. Hernandez* (2008) 166 Cal.App.4th 641 applied the *Hofsheier* analysis to void the mandatory registration requirement for persons convicted of voluntary oral copulation of a 14-year-old minor. Most recently, *People v. Ranscht* (2009) 173 Cal.App.4th 1369 held mandatory registration for persons convicted of sexual penetration of a 13-year-old, in violation of section 289(h), violated equal protection for the same reason, namely that persons convicted of sexual intercourse with a minor of the same age would not face mandatory registration.

290. As such, our next step is to determine whether any "rational basis" exists to require mandatory registration for a 314(1) violation but not a 647(a) violation.

3. No Rational Basis Exists to Require Mandatory Registration for a Violation of Section 314(1) but not 647(a)

In cases such as this, where a statutory classification neither proceeds along suspect lines nor infringes fundamental constitutional rights, courts apply rational basis scrutiny to determine whether that classification withstands an equal protection challenge. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.) Such a classification "must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.*" (Id. citing, *inter alia*, *FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, internal citations omitted, emphasis original) "The rationale must be 'plausible' [citation] and the factual basis for that rationale must be *reasonably* conceivable." (Id. at p. 1201, internal citation omitted, emphasis original.) "And 'even in the ordinary equal protection case calling for the most deferential of standards, [courts must ascertain] the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause.'" (Id.) Where there are "plausible reasons" for the classification, "our inquiry is at an end." (Id. at pp. 1200-1201) The

party attacking the rationality of the legislative classification bears the burden to “negative every conceivable basis which might support it.” (Id. at p. 1201.)

Once again, Appellant relies on *Hofsheier* in arguing that there is no rational basis for mandating a person convicted of a violation of section 314.1 to register as a sex offender but not mandating it for a person convicted of a violation of section 647(a). In *Hofsheier*, after finding that the persons convicted of the two statutes in that case were “similarly situated” the court concluded no sufficient rational relationship existed for the difference in treatment of the offenders under Penal Code section 290.

In reaching that conclusion, the *Hofsheier* court observed that the two-fold purpose of the registration requirement is to “assure that persons convicted of the crimes enumerated (in section 290) shall be readily available for police surveillance at all times” because of the Legislative determination that such offenders are likely to commit similar offenses in the future, and to notify the public “of the existence and location of sex offenders so they can take protective measures.” (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1196.) The court rejected, as lacking evidence, the argument that adults who engage in oral copulation with minors are more likely to repeat that activity than adults who engage in sexual intercourse with minors, and concluded the registration requirement could not rest on the “speculative possibility” that members of the former group are more likely to reoffend than the latter. (Id. at pp. 1203-1204.)

To sustain the distinction, the *Hofsheier* court said there must be some “plausible reason, based on reasonably conceivable facts,” why judicial discretion is a sufficient safeguard to protect against repeat offenders engaging in sexual intercourse but not oral copulation. (*People v. Hofsheier, supra*, 37 Cal.4th at p. 1204.) The court observed that “no doubt” there are some persons convicted of oral copulation with 16- or 17-year-old minors for whom lifetime registration is appropriate because their conduct and history suggest a high risk of recidivism, but the same can be said of persons who engage in sexual intercourse with minors of the same age group. The existence of such potential recidivists, the court said, “argues for discretionary registration depending on the facts of the case rather than mandatory registration for all persons convicted under section 288a(b)(1).” (Id.)

The *Hofsheier* court concluded it could “perceive no reason” why the Legislature would conclude persons convicted of voluntary oral copulation with 16- and-17-year olds, as opposed to those convicted of voluntary intercourse with persons of the same age, “constitute a class of particularly incorrigible offenders” who require lifetime surveillance as sex offenders. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1206-1207.) It therefore held that the mandatory registration requirement for persons convicted of voluntary oral copulation with a minor, but not voluntary intercourse with a minor, violates the equal protection clauses of the state and federal Constitutions. (Id.)

Under the facts presented here, we too can think of no rational reason why the Legislature would impose mandatory registration for a conviction based on a violation of section 314(1), while leaving to the trial court's discretion imposition of registration for a violation of section 647(a). The sexual conduct proscribed by both statutes differs only in the manner it is committed. There is no reason, this court can perceive of, why the Legislature would conclude that persons convicted of "exposing" their "private parts" in a public or private place "in the presence of another person or persons who might be offended or annoyed," as opposed to those convicted of "touching" their "private" or other specified body parts in a public place, "constitute a class of particularly incorrigible offenders" who require mandatory lifetime surveillance as sex offenders. (*People v. Hofsheier, supra*, 37 Cal.4th at pp. 1206-1207.)

We find no reason to presume that persons who "expose" or "direct attention to" their genitals are more likely to reoffend than those who "touch" the specified body parts, or are more dangerous to the public. Moreover, this court can find no "plausible reason, based on reasonably conceivable facts, why judicial discretion is a sufficient safeguard to protect against repeat offenders who" touch their body/private parts in public but not those who expose their genitals either in a public place or private place in the presence of others. (*People v. Hofsheter, supra*, 37 Cal.4th at p. 1204.)

The People rely on *People v. Tolliver* (1980) 108 Cal.App.3d 171, in support of their contention that there is a rational basis for mandating those convicted violation of section 314(1) but not those convicted of violating section 647(a). *Tolliver* is not, however, dispositive. The issue in *Tolliver* was whether the trial court erred in failing to instruct, *sua sponte*, on the offense of lewd and disorderly conduct in violation of section 647(a) as a necessarily lesser included offense to indecent exposure in violation of section 314(1). (*People v. Tolliver, supra*, 108 Cal.App.3d at p. 173.) The question before the court was whether commission of the offense of indecent exposure "necessarily" includes commission of the offense of lewd and disorderly conduct. (*Id.*) In concluding that it did not, the *Tolliver* court noted that "by inclusion of any place where there are persons who may be offended or annoyed by the perpetrator's indecent exposure the Legislature has made a logical and rational distinction between disorderly conduct and indecent exposure." (*Id.* at p. 174.) The *Tolliver* court did not, however, go on to consider whether that distinction between the two statutes rests on a rational basis because equal protection was not the issue before the court. It is well settled that cases are not authority for propositions not considered therein. (*People v. Banks* (1959) 53 Cal.2d 370, 379; *People v. Ceballos* (1974) 12 Cal.3d 481.)⁷

⁷ The People additionally contend the Legislature could believe legitimately that indecent exposure "constituted a greater problem or deserved greater punishment" than other forms of lewd conduct, based on the requirement that the perpetrator of a violation of section 314 "direct public attention" to the act. The People offer no evidentiary basis to support this contention and we do not find it persuasive. Both offenses require willful conduct in the presence of others, for the purpose of sexual arousal, gratification or affront. No evidence before this court indicates that persons who "direct

indicates that even where the trial court finds a non-enumerated offense was committed “as a result of sexual compulsion or for purposes of sexual gratification,” the court need not automatically impose registration but may “weigh the reasons for and against registration in each particular case.” (Id.) Conversely, under the scheme at issue here, the court has no discretion and must impose mandatory registration for a violation of section 314(1), even if the violation is committed in a “public place” and no more “inherently dangerous” than a violation of section 647(a).

We additionally observe that the facts of this case are far outside the parameters of most other offenses for which registration is mandatory.⁹ “The registerable crimes listed in section 290, subdivision (c) may be characterized generally as sexual offenses committed by means of force or violence, violent offenses committed for sexual purposes, sexual offenses committed against minors, or offenses that involve the sexual exploitation of minors.” (*Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 78.) The misdemeanor violation of section 314(1) presented here, a non-violent offense involving indecent exposure in the presence of another adult in a “public” place, stands apart from the remaining offenses for which registration is mandatory.

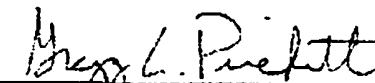
⁹ We note with interest the recently published case of *People v. Thompson* (2009) __ Cal.App.4th __ (2009 DJDAR 14309) where the appellate court found the mandatory registration requirement imposed on a 36-year-old male who was convicted of unlawful sexual intercourse and sodomy with a 17-year-old victim violated equal protection. In *Thompson*, the Attorney General conceded that application of the mandatory registration statute to that offense would violate both the federal and state constitutional rights to equal protection. Id. at 14309.

which may reasonably be deduced from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-578; *People v. Henderson* (1949) 34 Cal.2d 340, 346-347.) The evidence that defendant exposed and stroked his erect penis in the presence of the alleged victim, while staring and smiling at the victim, was sufficient to permit the jury to find appellant acted with the requisite intent to direct attention to his genitals for purposes of sexual gratification or arousal.

IV. Disposition

The judgment of conviction is affirmed. The portion of the trial court's judgment directing mandatory registration is reversed. The matter is remanded to the trial court to exercise its discretion to determine whether appellant should be required to register pursuant to Penal Code section 290.006. In exercising its discretion, the trial court should consider the statutory goals of providing for police surveillance of repeat offenders, and protection of the public.

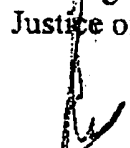
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GREGG L. PRICKETT,

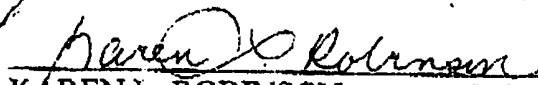
Acting Presiding Judge*

*Sitting by assignment of the Chief Justice of the California Supreme Court



GREGORY H. LEWIS,

Judge



KAREN L. ROBINSON,

Judge