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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT PETER HOFSHEIER,

Defendant and Appellant.

_____/

H026217

(Santa Cruz County Superior Court No. F07121)

Defendant, a 22-year-old man, engaged in a consensual act of oral copulation with a 16-year-old girl. He pleaded guilty to felony oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)) and was granted probation. Defendant asserted that Penal Code section 290's requirement that he register as a sex offender violated equal protection because those convicted of sexual intercourse with a minor were not required to register. The trial court and the prosecutor agreed with defendant that the distinction drawn by Penal Code section 290 was "out of whack," but they felt compelled to comply with Penal Code section 290.[1]

[1] The court suggested that the registration requirement could be eliminated by reducing the offense to a misdemeanor in one year if defendant performed well on probation. This suggestion was inaccurate. Penal Code section 290 requires lifetime registration regardless of whether the oral copulation with a minor offense was a felony or a misdemeanor.

Defendant appeals and challenges the registration requirement as a violation of his right to equal protection. The Attorney General relies on the majority opinion in this court's decision in *People v. Jones* (2002) 101 Cal.App.4th 220 to support the validity of the registration requirement. We disagree with the majority opinion in *Jones* and find the registration requirement invalid in this case. We therefore strike the registration requirement.

I. Analysis

Penal Code section 290 requires every person convicted of oral copulation with a minor to register as a sex offender for the rest of his or her life. (Pen. Code, § 290, subds. (a)(1)(A), (a)(2)(A).) Penal Code section 290 does not require a person convicted of sexual intercourse with a minor (Pen. Code, § 261.5) to register as a sex offender. (Pen. Code, § 290, subd. (a)(2)(A).) Defendant claims that this distinction violates his right to equal protection.

"The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. It is often stated that [t]he 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. The use of the term 'similarly situated' in this context refers only to the fact that [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups. Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic. The 'similarly situated' prerequisite simply means that an

equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714, citations and quotation marks omitted.)

In *Jones*, both the majority opinion and the dissenting opinion concluded that the offenses of oral copulation with a minor and sexual intercourse with a minor are sufficiently similar with respect to the purpose of Penal Code section 290 that some level of equal protection scrutiny is necessary to determine whether Penal Code section 290's distinction between these two sexual offenses is justified. (*Jones* at pp. 228, 235.) The Attorney General does not contend otherwise here. Nor is there any disagreement about the appropriate standard of review applicable to this distinction. Defendant agrees with the Attorney General that the appropriate standard of review in this case is whether the distinction is supported by a rational basis.

The majority opinion in *Jones* relied heavily on *People v. Mills* (1978) 81 Cal.App.3d 171, and the Attorney General echoes that reliance here. Their reliance on *Mills* is misplaced. Mills raped a seven-year-old girl and was ordered to register as a sex offender after he was convicted of lewd conduct on a child under the age of 14 (Pen. Code, § 288). (*Mills* at p. 180.) On appeal, he leveled a multi-pronged attack on Penal Code section 290 that included a claim that Penal Code section 290's registration requirement denied him equal protection. Instead of identifying a specific "suspect classification," Mills simply argued generally that requiring some sex offenders to register while not requiring other sex offenders to register violated his equal protection rights. (*Mills* at p. 180.) He asserted that his offense, which he characterized as "heterosexual pedophilia," had "one of the lowest recidivist rates of all sexual crimes." (*Mills* at p. 180.)

The *Mills* court quite properly rejected Mills's unspecific attack on Penal Code section 290's registration requirement. "The fact there are some types of classes of sex offenses which are not made subject to registration does not per se require the finding there is a denial of equal protection. This may be based upon the legislative determination a particular type of offender does not recidivate or recidivates less; some offenses, although touching upon sexual acts, are not so directly concerned or related to the type of conduct which is repetitive, recidivist, in nature. . . . The fact all persons who in any way touch upon a violation of sexual mores or behavior are not included would indicate inferentially a legislative distinction is drawn. Mills does not carry his burden to establish the lack of rational relationship *at least as to people who violate Penal Code section 288* and are thereby required to register." (*Mills* at p. 181, emphasis added.)

Unlike the defendant in *Jones* and defendant herein, Mills failed to identify *any other sex offense that was similar to his offense but did* ***not*** *trigger* Penal Code section 290's registration requirement. As the *Mills* court correctly noted, the mere fact that Penal Code section 290 does not apply to every conceivable sexual offense does not itself establish an equal protection violation. Because the purpose of Penal Code section 290's registration requirement is the prevention of recidivism (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 825), *Mills* recognized that the Legislature could properly require registration for one type of sexual offense and not for another type of sexual offense if the offense for which registration was mandated was more likely to be repeated by the offender than the offense for which registration was not required. Because Mills failed to identify any type of sexual offense not subject to the registration requirement that was similar to his offense and had a higher risk of repetition, his equal protection contention could not succeed.

Here, as in *Jones*, the sole question is whether the legislative distinction between oral copulation with a minor and sexual intercourse with a minor "bear[s]

some rational relationship" to the purpose of Penal Code section 290—the prevention of repetition of the sexual offense. (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784.)

It is true, as the Attorney General contends, that "the burden of demonstrating the invalidity of a classification under [the rational basis] standard rests squarely upon the party who assails it." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17.) Nevertheless, we cannot conclude that defendant failed to meet his burden in this case because, when he challenged the classification below, both the prosecutor and the trial court agreed with him that the classification was irrational. His failure to produce evidence (such as statistics on the level of recidivism for each crime) can hardly be held against him when the issue was conceded below.

The Attorney General does not assert that there is any evidence that the recidivism rate for oral copulation with a minor exceeds the recidivism rate for sexual intercourse with a minor. The Attorney General merely speculates that the Legislature could have concluded that oral copulation with a minor was a "more common" offense than sexual intercourse with a minor due to the absence of risk of pregnancy and the reduced risk of acquisition of sexually transmitted disease.[2] It is irrelevant whether oral copulation with a minor is a more common offense than sexual intercourse with a minor. The only relevant consideration is whether those who commit this offense are more likely to repeat their offense than those who commit sexual intercourse with a minor. Because defendant's assertion that there was no rational basis for the distinction was conceded below, and no evidence to the contrary has been produced, we must conclude in this case that the legislative classification lacked a rational basis.

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[2] The Attorney General "[a]lternatively" contends that "sexual diseases might be transmitted *more* readily through oral copulation than through intercourse." (Original emphasis.) He concedes that this argument is "speculative," but he claims that, "[b]ecause there is no evidence to the contrary in the record, there is no reason to conclude our discussion is irrational."

It follows that requiring defendant to register as a sex offender in this case was a violation of his right to equal protection.

We note that this issue has now reached this court three times, but no one has yet produced any statistics regarding the relative rates of recidivism. We publish this case to encourage the final resolution of this issue in some future case by the production of such statistical evidence in the trial court.

II. Disposition

The trial court's order granting probation is hereby modified to eliminate the registration requirement. As modified, the order is affirmed.

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Mihara, J.

I CONCUR:

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Wunderlich, J.

BAMATTRE-MANOUKIAN, J., DISSENTING

The majority concludes that Penal Code section 290[1] violates defendant's right to equal protection of the laws because it requires sex offender registration for persons convicted of committing oral copulation with a person under 18 years of age (§ 288a, subd. (b)(1)) while not requiring sex offender registration for persons convicted of committing unlawful sexual intercourse with a person under 18 years of age (§ 261.5).

I respectfully dissent.

In *People v. Jones* (2002) 101 Cal.App.4th 220 (*Jones*), we considered this exact issue. The majority opinion in *Jones* concluded that section 290 does not violate the right to equal protection on the basis that it requires registration of persons convicted of committing oral copulation with a person under 18 years of age (§ 288a, subd. (b)(1)) but not persons convicted of committing unlawful sexual intercourse with a person under 18 years of age (§ 261.5). In *Jones,* we observed that the constitutional guarantee of equal protection of the laws applies when persons are similarly situated. (*Id.* at p. 227.) Although cases have recognized that " ' "Persons convicted of *different* crimes are not similarly situated for equal protection purposes" [citations]' " (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565), in *Jones* we assumed that persons convicted of oral copulation with a person under 18 years of age and persons convicted of unlawful sexual intercourse with a person under 18 years of age were " 'sufficiently similar to merit application of some level of scrutiny to determine whether distinctions

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

between the two groups justify the unequal treatment.' (*People v. Nguyen* [(1997)] 54 Cal.App.4th [705,] 715.)" (*Jones, supra,* 101 Cal.App.4th at p. 228.)

As we explained in *Jones*, it is defendant's burden to show that the Legislature has no rational basis for requiring sex offender registration for persons convicted of committing oral copulation with a person under 18 years of age, while not requiring registration of persons convicted of committing unlawful sexual intercourse with a person under 18 years of age. (*Jones, supra,* 101 Cal.App.4th at p. 229; see *People v. Mills* (1978) 81 Cal.App.3d 171, 176 [section 290 is presumed to be constitutionally valid]; see gen. *Lawrence v. Texas* (2003) __ U.S. __, 123 S.Ct. 2472, 2484 [conc. opn. of O'Connor, J.] [under rational basis standard of review, " 'legislation is presumed to be valid' "].) " ' "[A]ll presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." ' [Citation.]" (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780.) "[T]he wisdom of [the Legislature's] choice is not subject to judicial review, so long as it is rational." (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1330.)

The purpose of section 290 is " ' "to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." [Citations.]' [Citation.]" (*People v. Castellanos* (1999) 21 Cal.4th 785, 790.) By requiring sex offender registration for persons convicted of violating section 288a, subdivision (b)(1), the Legislature has deemed that persons who commit oral copulation with a person under 18 years of age are likely to recidivate. (See *People v. Mills, supra,* 81 Cal.App.3d at p. 181.) Thus, "defendant has the burden of showing that there is no rational basis for the legislative determination that persons who violate section 288a, subdivision (b)(1) are likely to be recidivists and should be required to

register as sex offenders under section 290." (*Jones, supra,* 101 Cal.App.4th at p. 229.)

On the record in this case, defendant fails to meet his burden of showing that persons who violate section 288a, subdivision (b)(1) are not likely to be recidivists and therefore should not be required to register pursuant to section 290. The record contains nothing to indicate that persons who commit oral copulation with a person under 18 years of age are no more likely to recidivate than persons who commit unlawful sexual intercourse with a person under 18 years of age. Thus, we must presume that the Legislature had a rational basis for requiring sex offender registration for persons convicted of violating section 288a, subdivision (b)(1). (*Jones, supra*, 101 Cal.App.4th at p. 229; *People v. Mills, supra,* 81 Cal.App.3d at p. 176.)

The majority here notes that "this issue has now reached this court three times." (Maj. opn., p. 6.) As explained above, the majority opinion in *Jones, supra,* 101 Cal.App.4th 220 upheld section 290 against the same arguments defendant presents here. The California Supreme Court denied review of *Jones* on October 30, 2002.[2] Prior to *Jones*, this same panel had considered the issue in *People v. Felarca* (Aug. 6, 1999, H018080, review den. and opn. ordered nonpub. Nov. 10, 1999, S082145), previously published at 74 Cal.App.4th 972. As in the present case, the *Felarca* majority held that section 290 violated the defendant's right to equal protection. I dissented. The California Supreme Court ordered *Felarca* depublished on November 10, 1999. I continue to adhere to the views expressed in the majority opinion in *Jones* and in my dissent in *Felarca.*

Furthermore, I agree with the observation of the court in *People v. Mills, supra,* 81 Cal.App.3d at page 181: "The fact there are some types of classes of sex offenses which are not made subject to registration does not per se require the finding there is a

[2] Justices Kennard and Moreno voted to grant the petition for review.

denial of equal protection. This may be based upon the legislative determination a particular type of offender does not recidivate or recidivates less; some offenses, although touching upon sexual acts, are not so directly concerned or related to the type of conduct which is repetitive, recidivist, in nature. In this final analysis, these are matters for consideration for the Legislature and should be addressed to that body."

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BAMATTRE-MANOUKIAN, ACTING P.J.

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People v. Hofsheier

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