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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.

JAMES EDWARD YORK,

Defendant and Appellant.

A142599

(Solano County
Super. Ct. No. M00065)

I.

INTRODUCTION

Appellant James Edward York appeals from an order denying his petition for a certificate of rehabilitation and pardon brought under Penal Code section 4852.01 (petition).¹ Appellant contends that denying him relief under section 4852.01 violates his rights to equal protection and due process under both the Fourteenth Amendment of the federal Constitution and Article 1, section 7 of the California Constitution.

We conclude that the disposition of appellant's claim is controlled by two decisions: *People v. Tirey* (2015) 242 Cal.App.4th 1255, rehearing denied (*Tirey III*), and *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232 (*Western Security Bank*). This authority compels the conclusion that appellant's constitutional rights were not violated by the denial of his petition. Therefore, we affirm the trial court's order.

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

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

On July 24, 2013, appellant filed his petition under section 4852.01, seeking a certificate of rehabilitation and pardon (certificate) relating to his May 1997 conviction under section 288, subdivision (a) for committing a lewd and lascivious act upon a child under the age of 14.²

On December 9, 2013, appellant filed a supplement to his petition in which he argued that finding him ineligible for a certificate under section 4852.01, subdivision (d) would violate equal protection because similarly situated persons convicted of violating section 288.7³ were not made ineligible for a certificate. To support this contention, appellant relied on a then-recent Court of Appeal decision in *People v. Tirey* 2013 Cal.App. LEXIS 922, rehearing granted and depublished (Dec. 11, 2013) (*Tirey I*). The petition was opposed by the Solano County District Attorney. After multiple continuances, a hearing on the merits of the petition was finally held.

On June 2, 2014, when the hearing on appellant's petition took place, two significant events had transpired. First, the court that decided *Tirey I* had granted rehearing and filed a new decision. (*People v. Tirey* 2014 Cal.App. LEXIS 370

² Section 288, subdivision (a) provides: “(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.”

³ Section 288.7 provides:

“(a) Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life.

“(b) Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life.”

(*Tirey II*.) The majority decision in *Tirey II* confirmed that court's prior holding that using section 288, subdivision (a) to find a person statutorily ineligible for a certificate under section 4852.01 violated equal protection. Second, the Legislature had introduced Assembly Bill No. 1438 (2013-2014 Reg. Sess.) (A.B. 1438) to amend section 4852.01, specifically barring someone convicted of a section 288.7 violation from seeking a certificate. (*Tirey II*, at ***2-3.)

At the hearing, appellant argued he was eligible for a certificate under the equal protection principles established in *Tirey I*, and that he was entitled to a certificate because he was rehabilitated. The district attorney again opposed the petition, arguing that the Legislature had manifested its intent that people convicted of violating section 288, subdivision (a) should not be granted a certificate, and that the evidence in this case showed that appellant's conduct was actually more serious than a conviction under section 288, subdivision (a) would indicate.

Ultimately, the superior court denied appellant's petition on two grounds: (1) the probation report contained facts and circumstances about the underlying offense which indicated that good cause was lacking; and (2) the Legislature had taken steps to resolve the equal protection problem which appellant used to justify filing his petition under section 4852.01.

III.

LEGAL DISCUSSION

A. Overview

Because of the importance of the *Tirey* litigation to the disposition of this appeal, as well as legislative action taken in response, we begin our analysis by discussing *Tirey I*, *II*, and *III*, as well as the Legislature's response.

B. The Tirey Trilogy

1. Tirey I

Tirey was convicted after he pled guilty to six counts of violating section 288, subdivision (a), lewd and lascivious conduct with someone under the age of 14; the same

offense underlying appellant's conviction in this case. (*Tirey I*, at ***1-2.)⁴ Tirey was sentenced to six years in state prison and ordered to register as a sex offender under section 290. After he served his sentence and he was discharged from parole, Tirey filed a petition for a certificate. His petition was denied by the trial court because a section 288, subdivision (a) conviction was specifically excluded from eligibility by sections 4852.01, subdivision (d), and 290.5, subdivision (a)(2). (*Tirey I*, at ***1-2.) Those former statutes provided that persons convicted of violating section 288 were ineligible for a certificate, but did not make any reference to persons convicted of violating section 288.7. (*Tirey I*, at ***1-2.)

Tirey appealed the denial of his petition, arguing that because certain other crimes, including the more serious section 288.7 offense, were not similarly excepted from eligibility, he was denied equal protection under the law, under both the federal and state constitutions. (*Tirey I*, at ***2.) Relying on the equal protection principles enunciated in *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), a unanimous panel concluded that Tirey's disparate treatment, when compared to those who commit more serious sexual offenses, such as a violation of section 288.7, violated the equal protection guarantees under the law. (*Tirey I*, at ***2-3.) Ultimately, the *Tirey I* court decided that the best remedy for this constitutional violation was to delete section 288, subdivision (a) from the list of offenses excluded from eligibility, and afford Tirey a second opportunity to file a petition for a certificate under section 4852.01. (*Tirey I*, at ***12.)

Finally, the *Tirey I* court made a suggestion in light of the constitutional infirmity the case exposed in section 4852.01. The court suggested that the Legislature might choose to amend that statute and section 290.5, subdivision (a)(2), "to treat section 288(a) offenders and section 288.7 offenders equally for these purposes, and to ensure the overall certificate of rehabilitation and relief from sex offender registration scheme reflects the public policy objectives it was intended to accomplish." (*Tirey I*, at ***13.)

⁴ Although both *Tirey I* and *Tirey II* are no longer published in the Official Reports, we refer to those prior unpublished decisions as background to *Tirey III*, and not for any precedential value. (Cal. Rules of Court, rule 8.1115(b)(1).)

2. *Tirey II*

After granting a petition for rehearing, the *Tirey* court filed *Tirey II, supra*, 2014 Cal.App. LEXIS 370.⁵ The court reiterated much of its analysis from *Tirey I*, concluding that there was no rational basis to distinguish a person convicted of violating section 288, subdivision (a), from one convicted of a section 288.7 offense, and thus, the two persons are similarly situated for equal protection analysis. For that reason, making someone convicted of the former offense ineligible to apply for a certificate while a conviction for the latter offense does not create ineligibility violates equal protection. (*Tirey II*, at ***12.)

However, the court went on to consider the Attorney General's previously unaddressed contention pertaining to another clause in section 4852.01, subdivision (d), not quoted in *Tirey I*, which excluded from eligibility "persons serving a mandatory life parole." In other words, persons excepted from the relief afforded by section 4852.01 included those who suffered convictions of any of the enumerated crimes in subdivision (d), and also anyone who had committed a crime for which they must serve a mandatory period of parole for life.

When *Tirey II* was decided, section 3000.1, subdivision (a)(2) stated: " 'Notwithstanding any other provision of law, in the case of any inmate sentenced to a life term under subdivision (b) of Section 209, if that offense was committed with the intent to commit a specified sexual offense, Sections 269 and 288.7, subdivision (c) of Section 667.51, Section 667.71 in which one or more of the victims of the offense was a child under 14 years of age, or subdivision (j), (l), or (m) of Section 667.61, the period of parole, if parole is granted, shall be the remainder of the inmate's life.' (Italics added.)" (*Tirey II, supra*, 2014 Cal.App. LEXIS 370 at ***13-14, italics omitted.)

Therefore, the unanswered question in *Tirey I* was whether inclusion of section 288.7 in section 3000.1 as a crime for which a person must serve mandatory parole for

⁵ The opinion in *Tirey II* was modified by the intermediate appellate court twice before rehearing was granted.

life thereby excepted persons convicted of violations of section 288.7 from the relief afforded under section 4852.01. If so, no viable equal protection argument could be made because then the parties would not be treated differently as to their entitlement to seek a certificate.

The *Tirey II* majority concluded that the plain meaning of section 3000.1, subdivision (a)(2) was that only persons convicted of *both* sections 269 and 288.7 were subject to mandatory lifetime parole, and were thus ineligible for a section 4852.01 certificate. (*Tirey II, supra*, 2014 Cal.App. LEXIS 370 at ***14-18.) It reasoned that had the Legislature intended to make a person convicted of either crime ineligible, it would have used the connector “or” in section 3000.1, citing to other statutes where that body has done so, and cases that have applied the same reasoning. Therefore, *Tirey* was still denied equal protection under the law because someone convicted only of a violation of section 288.7 was entitled to seek a certificate. (*Tirey II*, at ***14-18.)

The *Tirey II* majority acknowledged that after *Tirey I* was decided, A.B. 1438 had been introduced in the Legislature to amend section 4852.01 to specifically bar someone convicted of a section 288.7 violation from seeking a certificate. (*Tirey II, supra*, 2014 Cal.App. LEXIS 370 at ***3.) But, the introduction of that proposed amendment, which had not yet been acted upon by the Legislature, did not affect the court’s analysis.

A vigorous dissent was filed by one of the panelists (the author of *Tirey I*), who opined that the use of the connector “and” in the then-existing version of section 3000.1 did not mean that persons were ineligible only in instances where they had suffered convictions for *both* section 269 and 288.7 violations. (*Tirey II, supra*, 2014 Cal.App. LEXIS 370 at ***23.) The dissenter pointed out that each crime is subject to a mandatory life parole period under section 3000.1, and it would lead to absurd results to read the statute in such a way that an applicant for a certificate is disqualified only if that individual is convicted of two such crimes. (*Tirey II*, at ***23-25.) In the final analysis, the dissent concluded that the inclusion of the word “and” was a drafting error “which must be disregarded, and treated as a comma or an ‘or,’ in order to harmonize the various

parts and effectuate the purposes of the statute, and to avoid absurd results.” (*Id.* at ***38.)

As a “Final Thought[],” the dissent reiterated that the Legislature was then considering amendments to sections 4852.01 and 290.5 that would eliminate the ambiguity that appeared in section 3000.1: “Finally, I note the Legislature is currently considering amendments to section 4852.01 and section 290.5, which would solidify the conclusion that section 288 and 288.7 offenders are to be treated equally for certificate of rehabilitation and relief from sex offender registration purposes. Specifically, Assembly Bill No. 1438 (2013–2014 Reg. Sess.) would add section 288.7 to the list of expressly excluded offenses set forth in sections 4852.01, subdivision (d) and 290.5, subdivision (a)(2). If adopted, this bill would provide that a person who violates section 288.7 would not be entitled to obtain a certificate of rehabilitation or to obtain relief from his or her duty to register as a sex offender, all to ensure the overall scheme reflects the public policy objectives it was intended to accomplish. [Fn. omitted.]” (*Tirey II, supra*, 2014 Cal.App. LEXIS 370 at ***44-45.)

Thereafter, the Supreme Court granted review of *Tirey II*, pending the high court’s resolution of a case then currently before the court raising a related issue, *Johnson v. Department of Justice* (2015) 60 Cal.4th 871 (*Johnson*). (*People v. Tirey* 2014 Cal. LEXIS 9394 (Aug. 20, 2014, S219050).)

3. *Johnson*

On January 29, 2015, the Supreme Court filed its opinion in *Johnson, supra*, 60 Cal.4th 871. In that case, the defendant pled guilty to a charge of nonforcible oral copulation, in violation of section 288a, subdivision (b)(2). As a result, the defendant was required to register as a sex offender under section 290 as part of his sentence. (*Johnson*, at p. 876.) Relying on a prior Supreme Court decision in *Hofsheier, supra*, 37 Cal.4th 1185, *Johnson* filed a petition seeking to eliminate his registration requirement, contending that it was a violation of his equal protection rights to subject him to mandatory registration for a violation of section 288a, subdivision (b)(1) (nonforcible

oral copulation), while persons convicted of a violation of other, more serious sex crimes were subjected only to discretionary registration. (*Johnson*, at p. 876.)

The high court denied Johnson's petition and, in doing so, the court overruled *Hofsheier*, concluding that its equal protection analysis was "fundamentally flawed and deserve[d] to be overruled." (*Johnson, supra*, 60 Cal.4th at p. 879.) In *Hofsheier*, the court had determined that there existed no rational basis to conclude that the crime of oral copulation (§ 288a) justified mandatory sex offender registration, while the crime of unlawful intercourse (§ 261.5) did not, and that offenders of those two classes of crimes were "similarly situated" for equal protection analysis. (*Hofsheier, supra*, 37 Cal.4th at pp. 1199-1200, 1206-1207.) The *Johnson* court rejected this rationale, finding there was a rational basis for making registration mandatory in the former class of crimes while discretionary in the latter: "Rather than perpetuate a flawed constitutional analysis that denies significant effect to section 290, we acknowledge that *Hofsheier* was wrong. Actual and plausible legislative concerns regarding recidivism, teen pregnancy, and the support of children conceived as a result of intercourse provide a rational basis for the difference in registration consequences as between those convicted of unlawful intercourse and those convicted of nonforcible oral copulation. While this court will not condone unconstitutional variances in the statutory consequences of our criminal laws, rational basis review requires that we respect a statutory disparity supported by a reasonably conceivable state of facts." (*Johnson, supra*, at p. 889.)

On May 20, 2015, the Supreme Court transferred *Tirey II* back to the Court of Appeal for reconsideration in light of *Johnson*. (*Tirey II* 2015 Cal. LEXIS 3706.)

4. *Tirey III*

By the time the *Tirey* case returned to the Court of Appeal, the Legislature passed A.B. 1438. The newly enacted amendments to sections 4852.01, 290.5, and 3000.1 clarified that, just as a person convicted of a violation of section 288, subdivision (a) was ineligible for a certificate, unequivocally so too was one convicted of a violation of section 288.7. The legislative history pertaining to A.B. 1438 clearly reflects that the amendments were in specific response to *Tirey I*, and were intended to clarify that the

statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.” [Citation.]’ [Citation.]” (*Id.* at pp. 243-244, fn. omitted.) Ultimately, the court concluded that the Legislature’s amendments to the foreclosure laws were simply a clarification of what the law was before the intermediate court of appeal’s first opinion; it did not change the legal effect of past actions, and therefore the amendments applied retrospectively. (*Id.* at p. 252.)

The *Tirey III* court found the high court’s analysis in *Western Security Bank* equally applicable to the Legislative amendments to sections 4852.01, 290.5, and 3000.1: “Given this court’s calls for legislative attention in *Tirey I* and the majority opinion in *Tirey II*, the language of the statutory amendments enacted via Assembly Bill No. 1438, and the intent to clarify existing law as set forth in the legislative history, we must conclude Assembly Bill No. 1438 was explicitly intended to abrogate the holdings of *Tirey I* and *Tirey II*, and to clarify the state of the law before our earlier decisions. To paraphrase the Supreme Court in *Western Security* . . . the Legislature’s manifest intent was that Assembly Bill No. 1438 would apply to all persons, including persons convicted of violating section 288.7, convicted of forcible sex crimes committed against the most vulnerable members of our society. We therefore conclude Assembly Bill No. 1438 constituted a clarification of the state of the law before our decisions in *Tirey I* and *Tirey II*. Assembly Bill No. 1438 ‘has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.’ [Citation.]” (*Tirey III, supra*, 242 Cal.App.4th at p. 1263.)⁶

⁶ In light of this conclusion, the court determined there was no need to address *Tirey*’s equal protection argument in the context of *Johnson*. (*Tirey III, supra*, 242 Cal.App.4th at p. 1263.)

C. Application of Tirey III and Western Security Bank To This Case

When the appeal was filed in this case, appellant claimed that the superior court abused its discretion by basing its decision on an assumption that the Legislature would amend section 4852.01 in a way which would eliminate appellant's equal protection claim that he was eligible to apply for a certificate for the reasons outlined in *Tirey I* and *Tirey II*.

Before this appeal was fully briefed, the Legislature amended section 4852.01, subdivision (d), and our Supreme Court granted review in *Tirey II*. (*People v. Tirey [Tirey II]* (Aug. 20, 2014, S219050).) In light of these events, appellant took the position that his appeal should not be decided until the *Tirey* case was finally resolved. We agreed to wait. As explained above, in the meantime intervening action was taken by our Supreme Court in deciding *Johnson, supra*, 60 Cal.4th 871; *Tirey II* was remanded for reconsideration in light of *Johnson*, and the appellate court filed its decision in *Tirey III, supra*, 242 Cal.App.4th 1255.⁷

Tirey III compels the conclusion that appellant was not eligible to apply for a certificate under section 4852.01 when he filed his petition in 2013.⁸ *Tirey III* is factually and legally indistinguishable from our case, and we find its analysis, including the retroactive application exception enunciated in *Western Security Bank*, to apply here. It was the intent of the Legislature that persons who violated section 288.7, like appellant

⁷ Throughout his appeals, Mr. Tirey was represented by the same attorney who serves as counsel for appellant in this case. In fact, in response to this court's letter to counsel dated April 30, 2015, requesting the parties address the applicability of the then-recently filed Supreme Court opinion in *Johnson, supra*, 60 Cal.4th 871, appellant's counsel specifically suggested that we await resolution of *Tirey* before deciding this case. We followed that suggestion, and after the filing of *Tirey III*, we requested supplemental letter briefs addressing the applicability of that decision in this case on November 18, 2015, which have now been received from both sides.

⁸ Because we conclude that appellant's ineligibility to file a section 4852.01 petition does not violate his equal protection rights, we need not, and do not, consider whether it was error for the court alternatively to deny his Petition on the merits. In addition, like the court in *Tirey III*, our holding renders it unnecessary to determine to what extent *Johnson* is applicable here.

who violated section 288, subdivision (a), would be ineligible for a certificate because section 3000.1 made ineligible persons serving lifetime mandatory parole. The recent amendments enacted in A.B. 1438 did not change the law in this regard, but only clarified what that body had heretofore intended the law to provide. It clarified the statutes in response to *Tirey I* and *Tirey II*, which exposed the consequences of the Legislature's "oversight" in not making sections 4852.01 and 3000.1 more explicit. By correcting the ambiguity in section 3000.1 and making explicit that section 288.7 was an excepted crime in sections 4852.01 and 290.5, any continuing contrary interpretation of these statutes was avoided, and the intention of the Legislature fulfilled.

In reaching our disposition of this case, we reject the arguments advanced by appellant in his counsel's supplemental brief filed on December 15, 2015. Ironically, one of the principal assertions now made by counsel is that we should apply the law as it existed when appellant first filed his petition in 2013, and not be influenced by subsequent legislative or judicial decisions. But, as we have observed above, it was at the urging of appellant's counsel last May, when we asked for supplemental briefs addressing *Johnson*, that we agreed to "hold over" this case until *Tirey III* was decided.

Appellant also contends that using *Tirey III* and the legislative clarifications to sections 4852.01 and 3000.1 as the bases for denying his equal protection claim constitutes a denial of due process because we are "changing the rules in the middle of the game." The legal authority advanced for this novel proposition is inapposite. For example, the above-quoted phrase taken from *Black v. Romano* (1985) 471 U.S. 606 relates to the United States Supreme Court's assessment that there must be valid grounds for a court to revoke a defendant's probation, and that a court cannot do so simply because it concluded that the original decision to grant probation was wrong. (*Id.* at pp. 621-622.) No other more convincing authority to support appellant's position is provided.

Moreover, appellant filed his petition in July 2013. At that time, *as to him*, appellant was not entitled to a certificate because his conviction for committing a lewd and lascivious act on a child under 14 (§ 288, subd. (a)) was a disqualifying crime under

section 4852.01. In fact, a section 288 violation was added to subdivision (d) of section 4852.01 in 1997 (Stats. 1997, ch. 61, § 2), the year appellant was convicted of the underlying crime. In light of this, even if statutory law changed subsequently to “add” a section 288.7 conviction as a disqualifying prior conviction, that event, which had the effect of eliminating an equal protection argument, did not violate appellant’s due process rights.

Appellant asserts that A.B. 1438 does not eliminate his equal protection claim because that clarification of the meaning of section 3000.1 can only extend back to 2010, when the general lifetime parole provision was first added to that section, and because section 288.7 was enacted in 2006, appellant was treated disparately from people who were convicted under section 288.7 from 2006 to 2010. Therefore, appellant contends that his equal protection rights were violated during that time period. Unsurprisingly, no legal authority is cited for this proposition. It does not matter at all that at some time in the past persons convicted for a violation of section 288 were punished differently from those convicted of a section 288.7 violation. What is important is that when appellant filed his petition in 2013, the statutory scheme barred both classes of defendants from obtaining a certificate.

Lastly, appellant argues that *People v. Noyan* (2014) 232 Cal.App.4th 657 (*Noyan*) commands us to reject the *Tirey III* analysis. In that case, one of the offenses to which the defendant pled no contest was a violation of section 4573.5 (bringing paraphernalia for consuming drugs other than controlled substances into jail). When he was sentenced, defendant was ordered to serve a concurrent upper term of three years in state prison for the section 4573.5 offense. (*Noyan*, at p. 661.) However, as part of the 2011 realignment legislation addressing public safety, a related offense, section 4573 (bringing paraphernalia for consuming controlled substances into jail), was punished less severely by allowing those convicted to serve their in-custody time in the county jail and not in state prison. (*Noyan*, at p. 665.) Under those circumstances, the *Noyan* court accepted the defendant’s claim that the disparity in punishments violated his equal protection rights since there was no rational basis for the difference in punishments. In so holding,

the court noted that it appeared the difference in punishment was the result of a legislative oversight, and not because the Legislature intended the distinction to be rationally based. (*Id.* at p. 671.)

Except for the fact that *Noyan* involved a claim for equal protection, that decision has no bearing on this case. In *Noyan*, there was no attempt to amend the involved statutes to correct the anomaly, nor was there any need for a retroactivity analysis under *Western Security Bank*, both of which are central to this case and to *Tirey III*.

For all these reasons, we affirm the lower court's order denying appellant's petition.

IV. DISPOSITION

The lower court's decision to deny appellant's petition is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A142599, *People v. York*