

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DOUGLAS OLSEN,

Defendant and Appellant.

E063755

(Super.Ct.No. RIC1502459)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Michael Douglas Olsen filed a petition for certificate of rehabilitation (Pen. Code, § 4852.01¹), involving his 2000 conviction for violating section 288, subdivision (a), commission of a lewd act on a child under 14 years old (section 288(a).) The trial court denied the petition because section 4852.01 explicitly makes section 288 offenders ineligible for a certificate of rehabilitation. On appeal, defendant raises an equal protection constitutional challenge, which we reject because we hold there is a rational basis for the statutory distinction between defendant's crime and the crimes of other sex offenders against children under 14.

II

FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 2000, defendant pleaded guilty to the offense of committing a lewd act on a child under 14 years old in violation of section 288(a). The facts relating to defendant's conviction are not part of the record and are not relevant to this appeal.

On February 26, 2015, defendant filed a petition for certificate of rehabilitation and pardon. The district attorney opposed the petition, particularly on the grounds of statutory ineligibility. The trial court denied the petition on those grounds.

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

III

EQUAL PROTECTION

Section 4852.01 governs the procedure to obtain a certificate of rehabilitation, which is available to convicted felons who have successfully completed their sentences, and who have undergone an additional and sustained period of rehabilitation in California. (*People v. Ansell* (2001) 25 Cal.4th 868, 874-875.) The certificate is an intermediate step to a potential full pardon from the Governor. (*Id.* at p. 876.)

Not all convicted felons are eligible for a certificate of rehabilitation. (*People v. Ansell, supra*, 25 Cal.4th at pp. 877-878.) Section 4852.01, subdivision (c), (section 4852.01(c)) excludes persons convicted of a violation of section 288.

Defendant argues that section 4852.01 violates equal protection because it allows harshly disparate treatment among similarly situated sexual offenders. In *Tirey I* and *Tirey II*, the Fourth District Court of Appeal, Division Three, held in successive cases that it was a violation of equal protection to treat sex offenders differently under sections 288(a) and 288.7.² (*People v. Tirey* (2015) 242 Cal.App.4th 1255, 1259 (*Tirey III*)). The California Supreme Court granted review of *Tirey II* and ordered reconsideration in light of the due process analysis in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. (*Tirey III*, at p. 1259.) In the meantime, the Legislature amended section 4852.01 to add section 288.7, as an excluded offense. Therefore, the equal protection issue was never conclusively decided in the three *Tirey* cases. (*Tirey III*, at pp. 1262-1263.)

² Section 288.7 proscribes sex crimes against children who are 10 or younger.

Now, however, defendant again raises the equal protection argument, comparing the treatment of sex offenders under section 288 and under sections 286, subdivision (d)(2),³ and 288a, subdivision (d)(2)⁴ (sections 286(d)(2) and 288a(d)(2).) In particular, defendant argues that section 4852.01, subdivision (c) (§ 4852.01(c)), which excludes section 288 offenses (lewd or lascivious acts), does not similarly exclude convictions for forcible sodomy or forcible oral copulation of a child under age 14, committed in concert with another person. (§§ 286(d)(2), and 288a(d)(2).) Because of that disparity in treatment, defendant maintains the statute is constitutionally invalid.

Usually, “[t]he decision whether to grant or deny a petition for a rehabilitation certificate rests in the sound discretion of the trial court, and the court’s ruling will not be disturbed on appeal unless there is a clear showing of abuse of discretion.” (*People v. Failla* (2006) 140 Cal.App.4th 1514, 1519.) We review de novo a purely constitutional equal protection question. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632.)

³ Section 286(d)(2) provides: “Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of sodomy upon a victim who is under 14 years of age, when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 10, 12, or 14 years.”

⁴ Section 288a(d)(2) provides: “Any person who, while voluntarily acting in concert with another person, either personally or aiding and abetting that other person, commits an act of oral copulation upon a victim who is under 14 years of age, when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 10, 12, or 14 years.”

To assert a valid equal protection claim, defendant must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 877.) If the court determines that the distinct classes are not similarly situated, it need go no further in the inquiry. (*People v. Johnson* (2004) 32 Cal.4th 260, 268.) Next, defendant must show that the challenged classification bears no rational relationship to a legitimate state purpose. (*Johnson*, at p. 878.)

On the first point, defendant cannot establish there are distinct classes similarly situated. Section 288(a) offenders like defendant are excluded from relief under section 4852.01(c) but those convicted of violating sections 286(d)(2) or 288a(d)(2) are not excluded from relief. Defendant understandably argues that he should not be denied relief when the offense of lewd act with a child under 14 is compared with the crimes of forcible sodomy or forcible oral copulation of a child under 14 in concert with others. The People argue that a crime committed by persons acting in concert is different than defendant's solo crime. The People also note that a person who acts alone and forcibly to copulate a child orally (§ 288a, subd. (c)) or acts alone forcibly to sodomize a child (§ 286, subd. (c)) is also precluded from obtaining a certificate of rehabilitation under section 4852.01(c). Therefore, because defendant's crime did not require him to act in concert with another person, he is not similarly situated to sections 286(d)(2) and 288a(d)(2) offenders. Instead, defendant is similarly situated to those who violate sections 288a(c) or 286(c), who are treated the same as defendant under section 4852.01(c), and are excluded from relief.

Furthermore, defendant's argument also fails because there is a rational basis for the Legislature's disparate treatment of section 288(a) offenders and other offenders: "Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, 'equal protection of the law is denied only where there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose."'" (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 881.) The standard of rationality does not depend upon whether lawmakers ever actually articulated their purpose or substantiated it empirically. Indeed, a court may indulge in imaginative "rational speculation" to justify the legislative choice without any foundation in the record. Defendant must negate every conceivable basis that might support the disputed statutory disparity. If there exists a plausible basis for the disparity, courts may not second-guess its wisdom, fairness, or logic. (*Ibid.*) "At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses." (*Id.* at p. 887.) In *Johnson*, the court surprisingly held: "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." (*Id.* at p. 889.)

Based on the foregoing, we hold that, as in *Johnson*, equal protection is not violated if the rationale for different treatment of offenders is somewhat plausible (*Johnson v. Department of Justice, supra*, 60 Cal.4th at pp. 884-889) even if disturbingly anachronistic. (*Id.* at pp. 890, 902-907.) As the People creatively try to explain, there is

a rational basis for disqualifying solo child sexual abusers from obtaining a certificate of rehabilitation while allowing that possibility for those who act in concert to commit child sex crimes. For example, under sections 288a(d)(2) and 286(d)(2), a person can be convicted for merely aiding and abetting forcible oral copulation or forcible sodomy of a child under 14. (§§ 286(d)(2), 288a(d)(2).) The Legislature could have rationally determined that such aiders and abettors may be less morally (though not criminally) culpable, less likely to reoffend, and more amenable to rehabilitation.

“Finally, ‘[w]hen conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made.’ [Citation.] ‘A classification is not arbitrary or irrational simply because there is an “imperfect fit between means and ends” [citation], or ‘because it may be “to some extent both underinclusive and overinclusive.” [Citations.]’ (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 887.) People may do things acting together that they would not do alone. Consequently, the Legislature could have rationally concluded that a person convicted of a crime, where he acted in concert with another, may be more likely to truly rehabilitate and less likely to reoffend than someone who commits a similar crime acting alone. According to the author of the bill that added the list of ineligible crimes to section 4852.01(c): “[i]t is wishful thinking to assume that a sex offender, simply by obeying the terms of [his] probation, has been rehabilitated and no longer poses a threat to society [and] [t]he high recidivism rate for these type of criminals is ample evidence of the need for this bill.” (Assem. Com. On Public Safety, Analysis of Assem. Bill No. 729

(1997-1998 Reg. Sess.) Apr. 22, 1997; *People v. Mgebrov* (2008) 166 Cal.App.4th 579, 592-593.)

Therefore, because defendant cannot negate every conceivable basis that might support the Legislature's decision to bar section 288(a) offenders but not section 288a(d)(2) or section 286(d)(2) offenders from obtaining a certificate of rehabilitation, his equal protection claim fails.

IV

DISPOSITION

Section 4852.01 does not violate equal protection. We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

MILLER

J.