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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE CHRISTOPHER COST,

Defendant and Appellant.

G048222

(Super. Ct. No. 11NF2840)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,  
Nicholas S. Thompson, Judge. Reversed and remanded.

Harry Zimmerman, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and  
Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

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Kyle Christopher Cost appeals from the trial court's order denying his motion under Penal Code section 851.8 for a declaration of factual innocence and the sealing and destruction of his arrest record on a dismissed felony charge of failing to register as a sex offender. (See Pen. Code, §§ 290.011, subd. (d) [renewal required every 30 days for registrants living as transients], 290.018, subd. (b) [felony offense if previously convicted of failing to register]; all further statutory references are to the Penal Code unless noted.) Cost also sought to vacate the two underlying 2011 misdemeanor failure-to-registration convictions on which the felony charge was based. The trial court expressly found Cost credible when he explained he pleaded guilty to misdemeanor indecent exposure in 1994 because the prosecutor agreed he had no duty to register. As the trial court noted, the registration requirement was in flux at that time. (See *People v. King* (1993) 16 Cal.App.4th 567, 576 [finding lifelong registration unconstitutional for misdemeanor offenses].)

Unfortunately, the court records associated with Cost's 1994 conviction, including the plea agreement, had been destroyed. Cost explained that absent those records he pleaded guilty to the 2011 failure-to-register misdemeanor charges because he did not know how to prove his registration exemption. But once the prosecutor filed the felony charge in the present case, Cost explained his predicament in an affidavit and when the trial court found him credible, the district attorney agreed to dismiss the felony charge under section 1385. Cost then obtained a letter from the California Department of Justice (DOJ) acknowledging he was not required to register as a sex offender, and he filed the postdismissal motion leading to the present appeal.

As we explain, the trial court erred in concluding the DOJ letter mooted Cost's request under section 851.8 for a declaration he was factually innocent of the

felony failure to register charge and to seal and destroy his arrest record for that alleged offense. But as we also explain, Cost was caught in a “catch-22” in which he was not entitled to relief under section 851.8 as long as his 2011 misdemeanor failure-to-register convictions remained intact. Below, he mistakenly sought “dismissal” of those convictions under section 1385, which does not afford that remedy.

We therefore remand for the trial court to address Cost’s request to vacate his 2011 convictions. Cost may refile his motion expressly as a habeas corpus or other petition, as appropriate, with corresponding points and authorities and an opportunity for the district attorney to respond. We express no opinion on the proper procedural vehicle for Cost’s claim or the merits of his request to vacate the 2011 convictions. Instead, we simply reverse the trial court’s order concluding the DOJ letter mooted Cost’s motion, and remand for further proceedings consistent with this opinion.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

The parties do not discuss the factual basis of Cost’s 1994 offense, but in the proceedings below Cost suggested he “momentarily” exposed himself in a parking lot in the City of Fullerton. He was arrested and pleaded guilty to misdemeanor indecent exposure (§ 314, subd. (1)). According to Cost, he “specifically bargained for no sex offender registration in exchange for his guilty plea,” his lawyer told him the prosecutor agreed he would not have to register as a sex offender and, upon entering his plea, the trial court did not order him to register as a sex offender.

Cost violated probation in 1996 by throwing an object at a vehicle (Veh. Code, § 23110, subd. (b)), and was sentenced to prison.

According to Cost, to gain parole in 1998, the Department of Corrections and Rehabilitation required him to sign a form acknowledging a duty to register under section 290. Cox feared for his safety from other inmates if prison authorities leaked their belief he should be classified a sex offender, particularly if they returned him to the general prison population if he did not sign the form. He therefore acquiesced and signed, but when his parole officer advised him to register, Cost retrieved and presented a copy of his 1994 plea agreement. Based on this evidence, his parole supervisor did not require him to register and advised him upon his parole discharge that the issue had been “taken care of.” Similarly, when Cost was arrested and twice faced drug charges in 2005, his probation officer did not require him to register as a sex offender; Cost completed his drug treatment program and earned dismissal of those charges.

Cost was arrested and charged with failure to register in 2005 and 2009 in Orange County and in 2010 in Riverside County, but the charges were dismissed each time based on the terms of his 1994 plea agreement.

As noted, however, in 2011 Cost pleaded guilty in Orange County to misdemeanor charges in case numbers 11NM09682 and 11NM05467 for failure to register under section 290. According to Cost, he alerted his lawyer that his 1994 plea agreement established he did not have to register, but he was told the court records had been destroyed. Not knowing how to prove his assertion while in jail and without access to the plea agreement, Cost pleaded guilty to the 2011 charges. According to Cost, he “could not get the paperwork I needed to prove my innocence so I plead[ed] guilty so I could get out of jail to find it.”

A few months later, a warrant issued when Cost again failed to register. After the police arrested Cost, the prosecutor charged him with a felony for failing to

register (§§ 290.011, subd. (d); 290.018, subd. (b)), based on the two earlier 2011 convictions. Cost filed a motion for the trial court to consider four alternatives: enforce the 1994 plea agreement; vacate the 1994 conviction because Cost's conduct did not satisfy the elements of indecent exposure and because his trial waivers could not be considered knowing and intelligent if the plea agreement was not enforced; vacate the conviction because the court records, including his plea agreement, had been destroyed; or allow him to withdraw his guilty plea.<sup>1</sup> Cost also filed a proposed order to have the DOJ remove his name from the list of persons required to register as a sex offender.

The trial court expressly found Cost credible when he claimed the terms of his original plea agreement did not require registration, and noted his assertion was bolstered by the absence of registration cases against him until the court's records were destroyed and by "the fact that he was never violated" on probation or parole for failure to register. The trial court, however, believed it lacked authority to enforce the plea agreement because the law had changed since Cost entered his plea. Specifically, the statutory provision requiring registration for misdemeanor sex offenses was no longer unconstitutional. (See *In re Alva* (2004) 33 Cal.4th 254, 282 [registration deemed not to be punishment, so bar on disproportional punishment does not apply].) The trial court also concluded Cost's guilty plea in the 2011 misdemeanor cases operated as an estoppel to preclude him from withdrawing his 1994 plea or attempting to vacate the 1994 conviction on which his duty to register was based.

Cost sought a writ of mandate or prohibition in this court to overturn the trial court's ruling. In an informal response, the district attorney conceded the writ

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<sup>1</sup> Cost noted in his motion that "Government Code section 68152 now requires that court records be preserved for 75 years after conviction on all cases that implicate section 290 registration," but that before 2006, "the section required the court to keep the records for not more than 10 years."

petition should be granted. The district attorney acknowledged in his informal response: “In light of the superior court’s finding that there was . . . an agreement [that Cost would not be required to register under section 290], the People **concede** the petition should be granted . . . .” (Original emphasis.) The district attorney offered to file a request for dismissal in the trial court under “section 1385 — which the People intend to [do] upon remand.” The concession having mooted the writ petition, a panel of this court dismissed it, and the trial court in turn granted the prosecutor’s motion to dismiss the felony failure-to-register charge against Cost.

Cost then filed two postdismissal motions that have led to the present appeal. In the first motion, Cost sought to vacate his 2011 misdemeanor convictions for failure to register “because he is factually innocent. (Penal Code section 1385.)” He added, “If the court does not vacate the convictions, defendant alternatively requests the court terminate his probation on both matters. (Penal Code section 1203.3.)” Cost then filed another motion three weeks later under section 851.8 in which he sought a finding of factual innocence on the felony charge for failure to register as a sex offender.<sup>2</sup> Cost also requested that the court order “the necessary relief provided for in section 851.8,”

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<sup>2</sup> Section 851.8, subdivision (c) provides: “In any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made.”

which includes among other remedies an order requiring the sealing and eventual destruction of any records of the arrest.<sup>3</sup>

In the meantime, the public defender obtained on Cost's behalf and submitted to the trial court a letter from the DOJ stating: "Registration No Longer Required." (Original underlining.) The letter explained in pertinent part, "After reviewing the documentation provided with your letter concerning your client, Cost, Kyle Christopher; 7/29/1962, the DOJ has determined that he is no longer required to register as a sex offender in the State of California. We have updated our records, to include removing his name from the California Sex Offender Registry."

At the hearing on Cost's motions, the trial court denied as moot his request for an order to have the DOJ remove him from its registry. The trial court also denied without explanation his "motion for [a] factual finding of innocence." The trial court did not at the hearing or in its oral ruling or the minute order specifically address Cost's request to vacate his 2011 misdemeanor convictions or to terminate his probation on those matters. Cost now appeals.

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<sup>3</sup> Section 851.8, subdivision (b) provides: "If the court finds the arrestee to be factually innocent of the charges for which the arrest was made, then the court shall order the law enforcement agency having jurisdiction over the offense, the Department of Justice, and any law enforcement agency which arrested the petitioner or participated in the arrest of the petitioner for an offense for which the petitioner has been found factually innocent under this section *to seal their records of the arrest . . . for three years from the date of the arrest and thereafter to destroy their records of the arrest . . . .* The court shall also order the law enforcement agency having jurisdiction over the offense and the Department of Justice to request the destruction of any records of the arrest which they have given to any local, state, or federal agency, person or entity." (Italics added.)

## II

### DISCUSSION

The trial court's rationale in denying Cost's motion for a finding of factual innocence is not clear, but to the extent the trial court concluded the motion was mooted by the DOJ's letter, the trial court erred. "A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief." (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) But as Cost observes, removal of his name from the sex offender registry differed substantially from the relief he requested under section 851.8 to purge law enforcement records arising from his December 2011 arrest on the felony charge of failing to register.

For example, relief under section 851.8 includes a written declaration "that the arrestee is factually innocent of the charges for which the person was arrested and that the arrestee is thereby exonerated. Thereafter, the arrest shall be deemed not to have occurred and the person may answer accordingly any question relating to its occurrence." (§ 851.8, subd. (f).) It also provides for physical destruction of the arrest record or, if the arrest record is embedded in other records, the "[d]estruction . . . shall be accomplished by permanent obliteration of all entries or notations upon the records pertaining to the arrest, and the record shall be prepared again so that it appears that the arrest never occurred." (§ 851.8, subd. (j).) And subdivision (h) of section 851.8 provides that any reference in investigative police reports to the destroyed arrest records "shall bear the notation 'Exonerated' whenever reference is made to the arrestee. The arrestee shall be notified in writing by the law enforcement agency having jurisdiction over the offense of the sealing and destruction of the arrest records pursuant to this section."

Consequently, the trial court erred in failing to rule on Cost's request to vacate his 2011 misdemeanor convictions because that determination was essential to deciding whether Cost was entitled to relief under section 851.8. True, Cost mistakenly relied on section 851.8 to vacate the 2011 misdemeanor convictions though that statute only provides for a declaration of innocence concerning an arrest and for the sealing and destruction of arrest records. Its terms furnish no statutory basis to collaterally attack earlier convictions. And Cost also mistakenly relied on section 1385 to vacate the 2011 convictions, but that section provides only a means to strike an unresolved *pending* action or allegation. It says nothing about vacating a conviction.

Nevertheless, Cost's claim he was factually innocent of the 2011 misdemeanor violations because his 1994 plea agreement precluded any registration duty implicates his right to due process. In essence, Cost claimed he should not be subject to ongoing criminal repercussions or interference with his liberty based on unfounded misdemeanor failure-to-register convictions. Presented with this due process claim, the trial court was entitled to treat Cost's motion as a challenge collaterally attacking the basis for those convictions. (See *Thomas v. Department of Motor Vehicles* (1970) 3 Cal.3d 335, 338 ["Since the attack upon petitioner's 1966 conviction is upon constitutional grounds, he could have sought to have the rendering court set the conviction aside at any time"].)

We remand for the trial court to consider and rule upon Cost's motion to vacate those convictions because, absent that determination, the trial court could not meaningfully review Cost's section 851.8 claim. Specifically, section 851.8 provides that before a court may order a defendant's arrest records purged, the defendant must show "that no reasonable cause exists to believe that the arrestee committed the offense for

which the arrest was made.” (§ 851.8, subd. (b).) Cost therefore moved to have both 2011 misdemeanor convictions vacated to support his section 851.8 claim. (See § 290.018, subd. (b) [authorizing felony charge after one prior misdemeanor failure to register].) So long as one of those convictions remained valid, an objectively reasonable basis would remain to believe Cost unlawfully failed to register at the time of his arrest in December 2012 because the DOJ had not yet removed his name from the sex offender registry. The DOJ did not in its letter specify Cost *never* had a duty to register, but only that he no longer did so going forward. It was therefore imperative for Cost to have both convictions vacated to show there was no basis for the felony charge, and consequently the trial court must address on remand Cost’s challenge to those convictions.

In his appellate briefing, Cost makes additional requests for the first time on appeal. Acknowledging it was “not requested below,” he “further requests that this Court make factual innocence findings in all of Cost’s dismissed failure to register cases dating from the 1994 plea, including but not limited to Orange County Superior Court case numbers 05NMI0350, 09NM05596 and Riverside Superior Court case number RIFI0002210.” Because of the factual findings necessary to grant relief under section 851.8, it would be inappropriate to reach these new issues and we therefore leave them for Cost to raise in the trial court on remand.

III

DISPOSITION

The postjudgment order is reversed and the matter is remanded for the trial court to consider and rule upon Cost's motion to vacate his 2011 misdemeanor convictions, and only then to rule upon his section 851.8 motion for a declaration of factual innocence on his felony arrest and to seal and destroy any record of that arrest.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.