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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARK WILLIAM JONES, Defendant and Appellant.	H040289 (Santa Cruz County Super. Ct. No. CRP-13-100)

Mark William Jones appeals from the trial court's denial of his petition for a certificate of rehabilitation related to his conviction under Penal Code section 288, subdivision (a).[1] Defendant argues that Penal Code section 4852.01, subdivision (d) violates equal protection because it prohibits him from seeking the certificate while others similarly situated are not precluded from the application process.

The California Supreme Court recently granted review of the equal protection issue advanced by defendant. (*People v. Tirey*, review granted Aug. 20, 2014, S219050.) Although this appeal presents an issue pending before the California Supreme Court, recent legislation amending subdivision (d) has rendered defendant's equal protection challenge moot. Accordingly, we will affirm the denial of defendant's application for a certification of rehabilitation.

[1] All statutory references are to the Penal Code. Unspecified subdivision references are to section 4852.01.

I. TRIAL COURT PROCEEDINGS

In 1994 defendant pleaded no contest to one count of lewd or lascivious acts on a minor under the age of 14, in violation of section 288, subdivision (a). Defendant was placed on three years formal probation, which included a condition that he serve one year in county jail.

On April 1, 2013, defendant filed a petition for certificate of rehabilitation and pardon in the trial court under section 4852.01.[2] In addition to submitting documents to support a showing of rehabilitation, defendant included with his petition a copy of *People v. Tuck* (2012) 204 Cal.App.4th 724 (*Tuck*). *Tuck* rejected an equal protection challenge to section 290 which requires mandatory lifetime sex offender registration for persons, such as defendant, convicted under section 288. The concurring opinion of Justice Pollak encouraged the defendant there to seek a certificate of rehabilitation. In dicta Justice Pollak suggested that subdivision (d)'s then current prohibition against persons convicted under section 288, subdivision (a) from applying for a certificate of rehabilitation violated equal protection because persons convicted under section 288.7 of more

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[2] Section 4852.01 now provides in relevant part: "(b) [A]ny person convicted of a felony who [after May 13, 1943] … is committed to a state prison or other institution or agency may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of this chapter. [¶] (c) Any person convicted of a felony … , the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in any prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading and is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years residence in this state prior to the filing of the petition. [¶] (d) This chapter shall not apply to persons serving a mandatory life parole, persons committed under death sentences, persons convicted of a violation of Section 269, subdivision (c) of Section 286, Section 288, subdivision (c) of Section 288a, Section 288.5, Section 288.7, or subdivision (j) of Section 289, or persons in military service."

aggravated sex offenses against children at that time were not barred from seeking the rehabilitation certificate. (*Tuck*, at pp. 739-742 (conc. opn. of Pollak, J.).)

Opposing defendant's petition, the People contended that defendant was statutorily ineligible to obtain a certificate of rehabilitation under both subdivisions (c) and (d). Defendant then retained an attorney and argued in reply that he was eligible for a certificate of rehabilitation under subdivision (a) (as opposed to subdivision (c)) because he had been sentenced to prison and was ineligible for a section 1203.4 dismissal.[3] The trial court agreed with the People and denied the petition because, by failing to obtain a dismissal under section 1203.4, defendant failed to comply with subdivision (c). The trial court also rejected defendant's equal protection argument and denied his petition under subdivision (d).

II. DISCUSSION

We recognize that the California Supreme Court granted review in *People v. Tirey* (S219050) on August 20, 2014 to address the subdivision (d) equal protection argument defendant advances here.[4] Five days later, however, on August 25, 2014, Assembly Bill No. 1438 was enacted effective January 1, 2015, adding section 288.7 to the list of

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[3] Subdivision (a) applies to persons discharged from state prison before 1943. Although defendant argued below that he was eligible to seek a certification of rehabilitation under subdivision (a), we understand him as having intended to invoke subdivision (b), which applies to persons convicted of a felony and committed to state prison after May 13, 1943. However, neither applies to defendant because, as we note *infra*, he confirms on appeal that he successfully completed probation and was not sentenced to prison.

[4] In *Tirey*, the Fourth District Court of Appeal, agreeing with Justice Pollak's concurrence in *Tuck*, held that subdivision (d) violates equal protection to the extent it precludes persons convicted under section 288, subdivision (a) from petitioning for a certificate of rehabilitation. (*People v. Tirey* (2014) 225 Cal.App.4th 1150 at pp. 1152, 1156–1157, review granted Aug. 20, 2014, S219050.) The defendant in *Tirey* served six years in state prison for his section 288, subdivision (a) conviction. (*Id*. at p. 1153.) As a former state prisoner, his certificate of rehabilitation is governed by subdivision (b).

subdivision (d) excluded offenses, resulting in persons convicted under section 288, subdivision (a) being treated the same as those convicted under section 288.7. (Stats. 2014, Vol. 2, Ch. 280, § 3, p. 2569.)[5] Defendant's equal protection challenge is therefore mooted by the addition of section 288.7 as an excluded offense under subdivision (d). (*Kremens v. Bartley* (1977) 431 U.S. 119, 129 [reviewing court applies current law, not law when judgment entered below].)

Section 4852.01 provides for certificates of rehabilitation for two classes of felons. Subdivisions (a) and (b) apply to former state prisoners, and subdivision (c) applies to former probationers. (*People v. Jones* (1985) 176 Cal.App.3d 120, 130-131.) In his opening brief on appeal, defendant corrects the misstatement of fact made in his reply brief to the trial court: He now confirms he was not committed to state prison in this case but rather was placed on three years' probation which included one year in county jail. As a former probationer, defendant's application is governed by subdivision (c). That subdivision authorizes defendant to petition for a certificate of rehabilitation only after dismissal of his conviction under section 1203.4. It is of no consequence that defendant's section 288, subdivision (a) conviction renders him ineligible to obtain the prerequisite dismissal under section 1203.4.[6] Even if defendant had been able to obtain a section

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[5] The Supreme Court deferred action in *Tirey* pending consideration of *Johnson v. Department of Justice*, S209167. That opinion, issued on January 29, 2015, rejected an equal protection challenge to *mandatory* sex offender registration for persons convicted of oral copulation with a minor (§§ 288a, 290, subd. (c)) even though persons convicted of unlawful sexual intercourse with a minor are subject to *discretionary* sex offender registration (§§261.5, 290.006), overruling *People v. Hofsheier* (2006) 37 Cal.4th 1185. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871.)

[6] Similar to the excludable offenses found in section 4852.01, subdivision (d), the Legislature has excluded persons convicted of sex offenses with minors, including convictions under section 286, subdivision (c), section 288, section 288a, subdivision (c), section 288.5, and section 289, subdivision (j), from obtaining a section 1203.4 dismissal. (§ 1203.4, subd. (b).) As with former section 4852.01, subdivision (d) (Stats. 1997, Vol. 1, Ch. 61, § 2, p. 406), section 288.7 is not among the excluded offenses in section 1203.4, subdivision (b). Although he does not do so in this appeal, we recognize that the

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1203.4 dismissal to support a petition under subdivision (c), he still would be barred by subdivision (d) from obtaining a certificate of rehabilitation.

We affirm the trial court's order because defendant is statutorily ineligible to obtain the relief he seeks based on the plain language of section 4852.01, subdivision (d). Defendant's equal protection challenge to that statute has been rendered moot by legislative changes effective January 1, 2015.

III. DISPOSITION

The order is affirmed.

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same equal protection challenge defendant makes to subdivision (d) could be made to the eligibility requirements for a section 1203.4 dismissal.

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Márquez, J.