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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JAMES RICHARD JOHNSON,

Petitioner and Appellant,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest and
Respondent.

E055194

(Super.Ct.No. CIVDS1105422)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.

Reversed with directions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael A. Ramos, District Attorney, and Brent J. Schultze, Deputy District Attorney, for Real Party in Interest and Respondents.

I

INTRODUCTION

Petitioner James Richard Johnson seeks to be relieved of the requirement to register as a sex offender under Penal Code section 290 et seq.¹ We agree that the trial court erred in denying his petition for writ of mandate. Accordingly, we reverse the judgment and direct the trial court to conduct a new hearing to determine whether the discretionary registration requirement should be applied to him.

II

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Johnson pleaded guilty to a violation of section 288a, subdivision (b)(2), oral copulation of a person under 16 years of age by a person over the age of 21.²

In 2011, Johnson filed a petition for writ of mandate based on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), contending that the mandatory registration requirement for the section 288a, subdivision (b)(2), conviction violates equal protection. He further argued that the court should not require discretionary registration in his case. He asserted that he “has not, in the twenty years since his conviction in 1990, committed any offenses that would otherwise require him to register as a sex offender.”

The trial court noted a conflict in the Courts of Appeal about whether *Hofsheier* applies to section 288a, subdivision (b)(2), convictions. The trial court believed the

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

² The offense was committed between September and December 1988. Defendant was born in April 1961, making him 27 years old when the crime occurred.

decision in *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*) was controlling and denied the petition for mandate.

III

DISCUSSION

In *Hofsheier, supra*, 37 Cal.4th 1185, the California Supreme Court held that imposition of mandatory lifetime sex registration on a defendant convicted of a violation of section 288a, subdivision (b)(1), for voluntary oral copulation with a 16- or 17-year-old minor violated equal protection because a defendant convicted of engaging in sexual intercourse with such a minor under section 261.5 was not subject to the mandatory requirement. (*Hofsheier*, at pp. 1206-1207.) The Supreme Court explained that persons convicted of the two offenses were similarly situated, and there were no rational grounds for treating them differently. (See *People v. Garcia* (2008) 161 Cal.App.4th 475, 481 (*Garcia*), overruled on another ground by *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4 (*Picklesimer*).) In determining the appropriate remedy, the court rejected the option of declaring the mandatory lifetime registration provisions invalid. It also refused the other option of extending the mandatory requirement to persons convicted of unlawful intercourse under section 261.5. The *Garcia* court concluded that “where mandatory registration violates the equal protection clause, the proper remedy is to hold a hearing to determine whether the defendant should be subject to discretionary registration as a sex offender under former subdivision (a)(2)(E) of section 290. [Citation.]” (*Garcia*, at pp. 478-479; see also *Hofsheier*, at pp. 1208-1209.)

Hofsheier has been applied to convictions for other crimes subject to mandatory registration, including convictions under section 288a, subdivision (b)(2). (*Garcia, supra*, 161 Cal.App.4th 475.) The court in *Manchel, supra*, 163 Cal.App.4th 1108, came to a contrary result where, as here, the defendant was 10 years older than the victim who was under age 16. The court noted that the defendant could have been prosecuted under section 288, subdivision (c), and, therefore, subject to mandatory registration whether he engaged in oral copulation or sexual intercourse with the victim. The court reasoned that because the defendant's sexual conduct fell within statutes that provide for mandatory registration, he could not establish that he was similarly situated to another group of offenders who were not subject to mandatory sex offender registration. (*Manchel*, at p. 1115.) Thus, the order requiring him to register as a sex offender did not violate the equal protection clause. (*Ibid.*)

Subsequent case law criticizes *Manchel* for improperly basing its decision on the fact that the defendant could have been convicted of a section 288, subdivision (c)(1), crime (lewd acts involving a child 14 or 15 years old), when the defendant actually pled guilty to violating section 288a, subdivision (b)(2). (*People v. Luansing* (2009) 176 Cal.App.4th 676; *People v. Ranscht* (2009) 173 Cal.App.4th 1369.) We agree with that criticism. *Manchel* “would have us completely ignore the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant *could have* been convicted based on his conduct. This holding overlooks *Hofsheier*'s plain language, which focused on ‘persons who are *convicted* of voluntary oral copulation . . . , as opposed to those who are *convicted* of voluntary intercourse with adolescents in [the]

same age group.’ [Citation.] [¶] Consistent with *Hofsheier*, we think the more appropriate course is to focus on the offense of which the defendant was *convicted*, as opposed to a hypothetical offense of which the defendant *could have* been convicted based on the conduct underlying the charge. ‘This approach jibes with the mandatory registration statutes themselves, which are triggered by certain convictions . . . , and not by the underlying conduct of those offenses per se.’ [Citations.]” (*Ranscht*, at pp. 1374-1375.)

For these reasons, we reject the reasoning of *Manchel* and conclude that subjecting defendant to mandatory sex offender registration violated his equal protection rights. This court’s opinion in *People v. Alvarado* (2010) 187 Cal.App.4th 72, 76-79 [Fourth Dist., Div. Two], is distinguishable because it involves a conviction under section 288, not section 288a, a distinction other courts have recognized. (See *People v. Tuck* (2012) 204 Cal.App.4th 724, 738-739.)

While petitioner is not subject to the mandatory registration requirement, he has not established a right to relief from registration as a matter of law because he may be subject to discretionary registration under section 290.006. The trial court must reconsider this matter and conduct a new hearing to determine whether the defendant must continue to register as a sex offender. (*Picklesimer, supra*, 48 Cal.4th at pp. 336-341, 343; see also *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70, 77-78.) To require registration under this statute, “the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it

must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*Hofsheier, supra*, 37 Cal.4th at p. 1197.) In exercising its discretion, the trial court’s focus is to determine based on all relevant information whether petitioner is likely to commit such offenses in the future. (*Lewis v. Superior Court, supra*, 169 Cal.App.4th at pp. 78-79.)

III

DISPOSITION

We reverse the judgment of the superior court denying defendant’s petition for writ of mandate and we remand for the court to conduct a new hearing to determine whether petitioner is subject to the registration requirement under section 290.006.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

KING

J.