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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DANA BAUCOM,

Petitioner,

v.

THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E060437

(Super.Ct.Nos. WHCSS1100203,  
CIVDS1312971 & MVI27346)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Donald R. Alvarez,  
Judge. Petition denied.

Phyllis K. Morris, Public Defender, Stephan J. Willms, Deputy Public Defender,  
for Petitioner.

No appearance for Respondent.

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

In June of 1991, petitioner Dana Baucom pleaded guilty to misdemeanor indecent exposure. (Pen. Code, § 314.)<sup>1</sup> The record of conviction does not indicate that he was told he would be required to register as a sex offender (§ 290), and he affirmatively denies that he was so informed. He also asserts that if he *had* been so informed, he would not have pleaded guilty.<sup>2</sup>

Petitioner also states that the registration requirement has never previously been enforced as a condition of parole, although he concedes in the petition that he has been in and out of prison ever since the subject conviction. However, when he was most recently paroled in December of 2010 he was informed that he was required to register, and his conditions of parole included the restrictions mandated by statute.<sup>3</sup>

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

<sup>2</sup> There is no declaration supporting the petition. Instead, the record consists of multiple copies of defendant's multiple previous filings (see *infra*) and multiple copies of the exhibits to the multiple filings. This is not satisfactory.

<sup>3</sup> Such as residency restrictions and global positioning satellite (GPS) monitoring.

Petitioner then undertook efforts to invalidate the requirement. In June 2011 he filed a petition for writ of habeas corpus in the Superior Court of San Bernardino County. This was denied on the basis that it was untimely and sought relief not available by habeas corpus. Petitioner promptly filed a substantially identical petition in this court, which summarily denied it without comment.<sup>4</sup> He then petitioned the Supreme Court, which denied the petition with a citation to *People v. Villa* (2009) 45 Cal.4th 1063, 1070-1071.<sup>5</sup>

Petitioner then obtained counsel and filed a petition for writ of mandate in the superior court, seeking the relief of vacating his conviction on the basis of inadequate advisals or directing the removal of his name from the “state sex offender registry.” The People responded both that petitioner had failed to establish that he was not advised of the requirement, and that mandamus was unavailable. After extensive briefing on the issue of timeliness, inter alia, the superior court denied the petition.

Petitioner then returned to this court, which denied his petition after requesting an informal response from the People. The next stop was the Supreme Court again, and this time that court granted review and transferred the matter back to this court with directions to issue an order to show cause, which we have done. This order cited no authority and

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<sup>4</sup> This court’s notes reflect that our view was that neither habeas corpus nor *coram nobis* afforded an avenue for relief.

<sup>5</sup> The cited pages discuss what constitutes “in custody” for habeas corpus purposes, citing *In re Stier* (2007) 152 Cal.App.4th 63, 82-83, which held that the sex offender registration requirement was not “custody.”

gave no clue as to that court's thinking about this case. However, the petition for review argued the registration requirement in light of *In re King* (1984) 157 Cal.App.3d 554 (*King*)—a question first raised by the district attorney opposing the petition filed in this court.

We now address the matter formally on the merits, with our initial attention on *King, supra*, 157 Cal.App.3d 554 and cases following that decision.

## DISCUSSION

### A.

We first consider the issue of remedy. As the Supreme Court's citation to *People v. Villa, supra*, 45 Cal.4th 1063 in denying Baucom's petition acknowledged, habeas corpus does not lie where the petitioner is no longer in actual or constructive custody. Nor is relief available in *coram nobis* for the violation of a constitutional right or a mistake of law. (*People v. Kim* (2009) 45 Cal.4th 1078, 1104-1105 (*Kim*); *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1148.) Indeed, in *Kim* the court flatly rejected the proposition that *coram nobis* should be extended to reach every "erroneous or unjust judgment on the sole ground that no other remedy [at the time of filing] exists." (*Kim, supra*, at p. 1105.)

Tacitly conceding the points, petitioner has framed this petition in terms of mandamus, relying on *People v. Picklesimer* (2010) 48 Cal.4th 330 (*Picklesimer*) as authorizing relief through that remedy.

*Picklesimer* addressed the “problem” created by the decision in *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1206-1207 (*Hofsheier*), partially overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888, which held that mandatory sex offender registration for those convicted of voluntary oral copulation with a 16- or 17-year-old minor violated equal protection because those convicted of voluntary *intercourse* with similarly aged minors were not subject to the registration requirement. *Hofsheier* therefore created a class of persons who might be entitled to relief from the registration requirement, but because that case came up on direct appeal from the judgment, the decision provided no hint as to what avenue for relief might be available to those as to whom the registration requirement had been imposed in judgments final by the time *Hofsheier* was decided.

*Picklesimer* held that individuals affected by *Hofsheier* but who were no longer in custody could seek a writ of mandate, although the decision in that case simply terminated the current proceeding without prejudice to the filing by the defendant of an appropriate petition in the trial court. (*Picklesimer, supra*, 48 Cal.4th at pp. 336, 346.)<sup>6</sup>

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<sup>6</sup> *Picklesimer* had filed a *motion* in the trial court seeking to be removed from the state sex offender registry and to be relieved of his duty to register. The Supreme Court agreed with the Court of Appeal that the trial court had had no jurisdiction to consider such a freestanding motion and that the denial of such a motion was not appealable. Because the record did not make it possible to determine whether *Picklesimer*, although not subject to *mandatory* registration, might be subject to a *discretionary* order for registration under section 290.006, the Supreme Court declined to treat the appeal as a petition for writ of mandate. Hence, the judgment of the Court of Appeal was affirmed without prejudice to the filing of a petition for writ of mandate in the superior court.

To so hold, the court was obligated to, and did, find that placement on, or removal from, the state sex offender registry was merely a “ministerial act” dependent solely on whether the person had suffered a qualifying conviction, and therefore removal could appropriately be compelled by mandamus within the framework of Code of Civil Procedure sections 1085 and 1086.<sup>7</sup> (*Picklesimer*, at pp. 339-340.)

We do not read *Picklesimer* as approving mandamus as a “catch-all” to challenge convictions, or anything relating to convictions long since final and which cannot be reached by the established remedies of habeas corpus or *coram nobis*.<sup>8</sup> Rather, we interpret the decision as *sui generis*, prompted by the effect of *Hofsheier* on a substantial number of defendants who had no legal basis for challenging the sex offender registration requirement until after all recognized remedies had become unavailable.<sup>9</sup> Here, by

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<sup>7</sup> *Picklesimer*’s motion also sought to have him relieved of the obligation to register. As the court itself noted, the registration requirement is not part of a sentence, but is “a separate consequence of . . . conviction automatically imposed as a matter of law.” (*Picklesimer*, *supra*, 48 Cal.4th at p. 338.) A writ of mandate would not appear to reach such a request, although declaratory relief would at least provide an appropriate framework. (See *Abbott v. Los Angeles* (1960) 53 Cal.2d 674, 678 [on the use of injunctive and declaratory relief to prevent enforcement of an unconstitutional statute].)

<sup>8</sup> The petition seeks to vacate Baucom’s conviction or grant any other relief this court considers “appropriate.”

<sup>9</sup> *Hofsheier* disapproved *People v. Jones* (2002) 101 Cal.App.4th 220, which had rejected the same constitutional challenge accepted in the former case. Thus, for a period of several years the law was “clear” that applying the registration requirement to those convicted of voluntary oral copulation with 16- or 17-year-old minors was lawful.

contrast, petitioner makes an individualized attack on a specific conviction. We are not persuaded that *Picklesimer* requires that we entertain a petition for writ of mandate.<sup>10</sup>

However, the point is moot and we need not decide it, because if we reach the merits, we conclude that Baucom is not entitled to relief. We will accept that he was not advised of the duty to register. But not only does the docket *not* show that he was ordered to register, the law at the time *forbade* such an order.

## B.

At all pertinent times, “indecent exposure” has been a listed registrable offense under sections 290 et seq. However, in 1984—seven years before petitioner entered his plea of guilty to violating section 314—*King, supra*, 157 Cal.App.3d 554 noted that sex offender registration was “punishment” for constitutional purposes, citing *In re Reed* (1983) 33 Cal.3d 914, 922. It then held that the registration requirement constituted cruel and unusual punishment violating the Sixth Amendment for those individuals convicted of misdemeanor violations of section 314. (*King*, at p. 558.) Thus, at the time of petitioner’s conviction, the trial court was bound by *King* under the principles of stare decisis. Indeed, a failure to follow *King* would have been in excess of the court’s jurisdiction. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454-455.)

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<sup>10</sup> We also note that a defendant may raise certain constitutional challenges to prior convictions despite their finality when they are raised as affecting a subsequent criminal proceeding. (*People v. Sumstine* (1984) 36 Cal.3d 909.)

It is true that after *King*, but before petitioner entered his plea, other courts adopted an expressly “as applied” or “case by case” approach for convictions for annoying or molesting a child under section 647.6 and its predecessor, former section 647a. (See *People v. DeBeque* (1989) 212 Cal.App.3d 241 (*DeBeque*); *People v. Monroe* (1985) 168 Cal.App.3d 1205 (*Monroe*.) *King*, however, remained the only directly on point authority.<sup>11</sup>

At the point in time petitioner entered his plea, *In re Reed, supra*, 33 Cal.3d 914 had determined on a facial analysis that the 290 registration requirement was unconstitutional as it relates to individuals convicted of lewd or dissolute conduct under section 647, subdivision (a). Going through the same facial analysis, the court in *King, supra*, 157 Cal.App.3d 554 came to the same conclusion as to individuals convicted of violating section 314.1. Thus, at the time of the petitioner’s plea, the law of the state was that petitioner was not required to register under section 290.<sup>12</sup>

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<sup>11</sup> After Baucom’s conviction, a second “King” case involving far more aggravated conduct (and a different defendant) took the approach that the “case by case” approach was also appropriate for indecent exposure. (*People v. King* (1993) 16 Cal.App.4th 567, 575-576.) Nevertheless, at the time of his plea the first *King* case was controlling and, as we have explained, no rational court could have found the registration requirement appropriate for petitioner when it was not in *King*.

<sup>12</sup> We do not agree with petitioner that *DeBeque, supra*, 212 Cal.App.3d 241 and *Monroe, supra*, 168 Cal.App.3d 1205), created a “conflict” in the law. *DeBeque* and *Monroe* dealt with violations of Penal Code section 647.6, a successor statute to section 647a. As noted by the court in *DeBeque*, “ ‘[t]he offenses which constitute a violation of Penal Code section 647a [the predecessor to section 647.6], are more offensive than violations of section 647, subdivision (a), and section 314, subdivision (1).’ ” (*DeBeque*, at p. 250.)

Furthermore, even if we agree with petitioner that cases like *DeBeque* created a “conflict” in the law, it is impossible to conceive of a less egregious offense than that committed by petitioner. He was parked on a dirt road in an unincorporated area near Victorville in the early evening, masturbating to pornographic magazines with his pants down, when a deputy sheriff stopped to investigate the vehicle. Petitioner told the officer that his wife did not like him to look at the magazines at home, so he had gone out in search of privacy. Although he was parked about two-tenths of a mile from a school, there is no indication in the record that any children were present in the area. In *King, supra*, 157 Cal.App.3d 554, the defendant exposed his flaccid penis to two teen-aged girls in a parking lot. Although he did not speak to or approach them, his conduct was clearly more suggestive of a deviant nature than that of petitioner.

Thus, even if the court which accepted Baucom’s plea thought it had some discretion to impose a registration requirement, no rational court could have found the requirement lawful for petitioner after *King*. And as we have noted, the record reflects no such requirement. In this respect we acknowledge that as the court noted in *Picklesimer* (see fn. 9, *supra*), the registration requirement of section 290 is not part of a sentence and the statute is self-executing. (See *People v. Kennedy* (2011) 194 Cal.App.4th 1484, 1491; *In re Watford* (2010) 186 Cal.App.4th 684, 693.) However, we are also aware that trial courts commonly inform a convicted defendant of the requirement if the court believes it applies. In any event, the fact remains that the requirement *could not have been validly applied to Baucom when he entered his plea*. Hence, there was no duty on the part of the

court to advise him about the registration requirement, and his plea was knowing, intelligent and voluntary in the constitutional sense.<sup>13</sup>

Of course, as the parties agree, times have changed, and neither *King* nor *Reed* upon which it relied are good law. The Supreme Court overruled *Reed* on the “punishment” point in *In re Alva* (2004) 33 Cal.4th 254, 292 (*Alva*), and the court which decided the first *King* case reversed its position on the authority of *Alva* in *People v. Noriega* (2004) 124 Cal.App.4th 1334, 1338, 1342. Presumably it was this change in the law that prompted the authorities to determine that Baucom is, in fact, required to register.

It thus becomes apparent that petitioner’s issue is not with the trial court and its advisals, but with the appellate courts. We agree that his position is unfortunate, but he is essentially in the same position as any defendant who is convicted (by plea or otherwise) of an offense which, years later, is added to section 290. It is well-established that such a defendant *is* subject to the requirement and there is no ex post facto violation. (See *People v. Castellano* (1999) 21 Cal.4th 785, 799 [offense added after commission of crime but before conviction]; *Hatton v. Bonner* (9th Cir. 2003) 356 F.3d 955, 964.)<sup>14</sup>

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<sup>13</sup> We reject any contention that trial courts have a pre-plea duty to advise defendants of potential changes in the law which might affect them. Such a duty would be impossible to define or limit.

<sup>14</sup> We do note that *Hatton v. Bonner*, *supra*, 356 F.3d 955 was decided prior to the adoption of “Jessica’s Law” in 2006, which added the strict residency restrictions to section 3003.5.

DISPOSITION

Accordingly, for all the reasons set forth above, the petition for writ of mandate is denied.

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KING  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.