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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FROILAN VILLARREAL, JR., Defendant and Appellant.	B232109 (Los Angeles County Super. Ct. No. YA078060)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lauren Weis Birnstein, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Froilan Villarreal, Jr., appeals the judgment (order granting probation) entered following his conviction by jury of going to an arranged meeting with a minor for lewd purposes, a felony. (Pen. Code, § 288.4, subd. (b).)[1] As a result of Villarreal's conviction, he is required to register as a sex offender. (§ 290, subd. (c).)

At issue here is The Sexual Predator Punishment and Control Act (Jessica's Law) which was enacted by the voters on November 7, 2006, as Proposition 83. Jessica's Law amended section 3003.5, a statute that restricts where parolees required to register as sex offenders are allowed to reside, by adding subdivision (b) which provides: "Notwithstanding any other provision of law, it is unlawful for *any* person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b), italics added.)

On appeal, Villarreal contends the residency restrictions of Jessica's Law constitute cruel and unusual punishment in every case. We reject Villarreal's facial challenge to Jessica's Law and affirm the judgment without prejudice to Villarreal's right to seek relief in the trial court by way of petition for writ of habeas corpus alleging the law is unconstitutional as applied in his case.

FACTS AND PROCEDURAL BACKGROUND

The evidence adduced at trial established that, commencing in February of 2010, 25-year-old Villarreal began an online relationship with Torrance Police Detective Dennis Brady who was posing as a 14-year-old female. Villarreal contacted Brady on a regular basis via the internet and cell phone text messages. Villarreal's messages included sexual innuendo and explicit sexual comments. On March 25, 2010, Villareal sent a picture of his penis to Brady. On April 16, 2010, Villareal made plans to meet the child at a Taco Bell in Torrance. When Villareal arrived at the restaurant, Brady arrested him.

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[1] Subsequent unspecified statutory references are to the Penal Code.

Villareal waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694], and told Brady he knew it was illegal for an adult to have sex with a 14 year old and he intended to have sex with the 14-year-old victim.

At sentencing, the trial court indicated it was inclined to grant Villarreal probation with 180 days in the county jail. Before imposing the terms and conditions of probation, the trial court indicated it recalled there had been trial testimony about a school near Villarreal's home. Defense counsel indicated there was a school one block from the residence where Villarreal lived with his parents and Villarreal could not afford to move. The trial court indicated a school one block from Villarreal's residence would not violate the conditions of probation the trial court intended to impose but Villarreal would have to discuss the residency restrictions of Jessica's Law with the probation officer.

The trial court granted Villarreal probation and ordered Villarreal, inter alia, to complete a sex offender counseling program, maintain a residence as approved by the probation officer, register as a sex offender, and not to reside, visit, or be within 100 yards of places minors congregate unless approved by the probation officer and supervised by an approved chaperone. Villarreal indicated he understood the conditions of probation and agreed to abide by them.

CONTENTIONS

Villarreal contends the residency restrictions of Jessica's Law constitute cruel and unusual punishment in every case. (U.S. Const. 8th Amend.; Cal. Const., art. I, § 17.)

DISCUSSION

1. *Villarreal's challenge to Jessica's Law, notwithstanding his claim it is a facial challenge, constitutes an as applied challenge which must be raised in the trial court.*

Villareal seeks to raise a facial challenge to the residency restrictions of Jessica's Law as constituting cruel and/or unusual punishment. Villarreal cites publications which suggest sex offenders cannot live anywhere in the three

largest cities in the state. (See, e.g., Jennifer Dacey, *Sex Offender Residency Restrictions: California's Failure to Learn from Iowa's Mistakes*, 28 J. Juv. L. 11, 19-21 (2007).) He asserts the effect of the law is banishment and improper restriction of his right to travel which amounts to cruel and unusual punishment.

However, "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.] ' "To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) Thus, in order to prevail on a facial challenge to Jessica's Law, Villarreal "must establish that no set of circumstances exists under which the [law] would be valid." (*United States v. Salerno* (1987) 481 U.S. 739, 745 [95 L.Ed.2d 697].) The fact that an act "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" under a facial challenge. (*Ibid.*)

"An as applied challenge, in contrast, may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application

deprived the individual to whom it was applied of a protected right. [Citations.]" (*Tobe v. City of Santa Ana, supra,* 9 Cal.4th at p. 1084.)

Here, on its face, Jessica's Law does not constitute cruel and unusual punishment as there are circumstances in which it could be applied without violating constitutional principles. Thus, Villarreal's challenge to the law is an as applied challenge which must be raised in the trial court.

This point is illustrated by *In re E.J.* (2010) 47 Cal.4th 1258. In that case, four parolees, each from a different jurisdiction, challenged the residency restrictions of Jessica's Law. The petitioners claimed the law retroactively increased the legal consequences attributable to their convictions of registerable sex offenses suffered prior to the effective date of the statute, violated federal and state ex post facto principles, and was "an unreasonable, vague, and overbroad parole condition that infringes on various federal and state constitutional rights, including their privacy rights, property rights, right to interstate travel, and substantive due process rights under the federal Constitution." (*Id.* at pp. 1264.) Each petitioner claimed to be unable to find compliant housing and each declared he had been advised or formally notified that his current residence did not comply with the residency restriction. (*Id.* at pp. 1267-1270.)

In re E.J. determined the retroactivity and ex post facto claims could be addressed through a facial challenge to the statute and rejected both arguments. (*In re E.J., supra,* 47 Cal.4th at pp. 1278-1280.) *In re E.J.* did not reach the petitioners' "considerably more complex 'as applied' challenges" to the enforcement of the residency restrictions, finding these issues properly were resolved in the respective jurisdictions to which each petitioner had been paroled. (*Id.* at p. 1264.) *In re E.J.* noted: "Petitioners are not all similarly situated with regard to their paroles. They have been paroled to different cities and counties within the state, and the extent of housing in compliance with section 3003.5(b) available to them during their terms of parole—a matter critical to deciding the merits of their 'as applied' constitutional challenges—is not factually established

on the declarations and materials appended to their petition and traverse. With regard to petitioners' remaining constitutional claims, evidentiary hearings will therefore have to be conducted to establish the relevant facts necessary to decide each claim." (*In re E.J., supra,* at p. 1265.)

In re E.J. indicated the "relevant facts necessary to decide the remaining claims" included "establishing each petitioner's current parole status; the precise location of each petitioner's current residence and its proximity to the nearest 'public or private school, or park where children regularly gather' (§ 3003.5(b)); a factual assessment of the compliant housing available to petitioners and similarly situated registered sex offenders in the respective counties and communities to which they have been paroled; an assessment of the way in which the mandatory parole residency restrictions are currently being enforced in those particular jurisdictions; and a complete record of the protocol CDCR [California Department of Corrections and Rehabilitation] is currently following to enforce section 3003.5(b) in those jurisdictions consistent with its statutory obligation to 'assist parolees in the transition between imprisonment and discharge.' (§§ 3000, subd. (a)(1), 3074.)" (*In re E.J., supra,* 47 Cal.4th at p. 1265.)

If *In re E.J.* refused to reach the constitutional challenges of parolees who had shown they were subject to the provisions of Jessica's Law, it is clear Villareal's claim the statute imposes cruel and unusual punishment in all cases similarly is inappropriate for resolution in a facial challenge to the law. Although Villarreal, a probationer, represented at the sentencing hearing that he lives within 2000 feet of a school, he failed to demonstrate he is being subjected to the residency restrictions, how the restrictions have affected him, or any of the other relevant factors noted in *In re E.J.* (Cf. *In re Taylor* (2012) 209 Cal.App.4th 210) [affirming an order, issued after extensive factual findings in the trial court, that prohibited blanket enforcement of the residency restrictions without consideration of each individual parolee]; *In re Pham* (2011)

195 Cal.App.4th 681 [reversing an order, issued after extensive trial court proceedings, staying enforcement of the residency restrictions as to all registered sex offenders on active parole in Los Angeles County].)

We therefore reject Villarreal's facial challenge to Jessica's Law without prejudice to his right to file a petition for writ of habeas corpus in the trial court raising an as applied challenge to the law.[2]

2. *Issues raised by Villarreal in a perfunctory manner not addressed.*

Villarreal's brief asserts "the mandatory registration residency requirements" imposed on him constitute cruel and unusual punishment. Although Villarreal includes *registration* in the heading and conclusion of his contention, the opening brief fails to address the registration requirement. We do not consider assertions that are unsupported by authority and reasoned argument. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19, overruled on other grounds by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

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[2] In passing, we note several appellate courts have reached conflicting results as to whether residency restrictions imposed under Jessica's Law as the result of a *discretionary* order to register as a sex offender constitutes punishment within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and thus requires a jury determination of the facts supporting the trial court's imposition of the registration requirement. The issue is pending before the California Supreme Court in *People v. Mosley* (2010) 188 Cal.App.4th 1090, 116 Cal.Rptr.3d 321, review granted Jan. 26, 2011, S187965 [residency restriction is punitive and subject to *Apprendi* rule]; accord, *In re J.L.* (2010) 190 Cal.App.4th 1394, 119 Cal.Rptr.3d 40, review granted March 2, 2011, S189721; *In re S.W.*, review granted Jan. 26, 2011, S187897 [residency restriction is not punitive and hence not subject to *Apprendi* rule].)

Here, Villarreal was convicted by jury of an offense as to which section 290, subdivision (c), *mandates* registration. Because no *Apprendi* issue is presented, we have no occasion to address whether the residency restrictions constitute punishment. (See *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 168-169 [9 L.Ed.2d 644].)

In any event, the *registration* requirement has been upheld by our Supreme Court. (*In re Alva* (2004) 33 Cal.4th 254, 262 [a requirement of mere registration by one convicted of a sex-related crime, despite the inconvenience it imposes, cannot be considered a form of punishment regulated by federal or state constitutional proscriptions against cruel and unusual punishment]; *People v. Castellanos* (1999) 21 Cal.4th 785, 796 [the sex offender registration requirement imposed by section 290 does not constitute punishment for purposes of ex post facto analysis].) We are not at liberty to reach a different result. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Also, in the concluding sentence of the opening brief, Villarreal asserts "the special 100-yard residency/travel/visitation/restrictions violate the federal and state prohibitions against cruel and unusual punishment . . . ." However, Villarreal's opening brief does not take issue with the condition of probation imposed by the trial court that directs Villarreal not to reside, visit, or be within 100 yards of places minors congregate. It therefore appears Villarreal intended to reference the 2000 foot residency restriction of Jessica's Law. To whatever extent Villarreal intended to include the condition of probation within the ambit of his cruel and unusual punishment contention, the contention is not supported by argument or citation to legal authority. We therefore decline to address the propriety of the condition of probation. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *People v. Turner*, *supra*, 8 Cal.4th at p. 214, fn. 19.)

DISPOSITION

The judgment (order granting probation) is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.