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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON JAMES GALLARDO,

Defendant and Appellant.

2d Crim. No. B253506
(Super. Ct. No. 2013009478)
(Ventura County)

Pursuant to a plea agreement, appellant pled guilty to oral copulation of a person under 18 (Pen. Code, § 288a, subd. (b)(1))¹ and possession of child pornography (§ 311.11, subd. (a)). The trial court dismissed two additional counts of oral copulation with a person under 18. Imposition of sentence was suspended and appellant was granted three years probation with terms and conditions including 90 days in jail and, as required by section 290, lifetime sex offender registration.

Appellant contends that mandatory sex offender registration for his offenses violates equal protection because the trial court has discretion whether to impose sex offender registration on similarly-aged defendants convicted of unlawful sexual

¹ All further statutory references are to the Penal Code.

intercourse with similarly-aged victims. The trial court granted a certificate of probable cause.² We affirm.

FACTS

Appellant's phone was seized as evidence during a narcotics-related arrest. Police discovered video footage he had taken on the phone depicting his 16-year-old girlfriend orally copulating him on three separate occasions when he was 22 years old.

DISCUSSION

Appellant relies on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*), which "conclude[d] that the statutory distinction in section 290 requiring mandatory lifetime registration of all persons who, like defendant here, were convicted of voluntary oral copulation with a minor of the age of 16 or 17, but not of someone convicted of voluntary sexual intercourse with a minor of the same age, violates the equal protection clauses of the federal and state Constitutions. [Fn. omitted.]" (*Id.* at p. 1207.) *Hofsheier* is no longer good law.

In *Johnson v. Department of Justice* (2015) 60 Cal.4th 871 (*Johnson*), the Supreme Court overruled *Hofsheier*. *Johnson* recognized that there are rational reasons the Legislature, when determining if the trial court should have discretion to impose sex offender registration, would distinguish between sexual intercourse and other consensual sexual offenses involving a 16- or 17-year-old victim. Among these reasons, only sexual intercourse can result in pregnancy. It may not be in the best interests of the mother and child to require the defendant to register as a sex offender, thereby impairing his job prospects and his ability to support the child. (*Id.* at pp. 884-886.) *Johnson* thus forecloses appellant's contention that mandatory sex offender registration violates equal protection. He is not similarly situated to persons convicted of sexual intercourse.

² Respondent moves to dismiss this appeal on the ground that appellant waived his right to appeal in the plea agreement. Because we can readily resolve this matter in respondent's favor by reaching the merits, we do so and deny respondent's motion to dismiss as moot. (See *Gordon J. v. Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530, 532.)

DISPOSITION

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Kevin J. McGee, Judge
Superior Court County of Ventura

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon,
under appointment by the Court of Appeal, for Defendant and Appellant.

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