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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL ROOSEVELT MCCULLON,

Defendant and Appellant.

B231429

(Los Angeles County Super. Ct.
No. MA042960)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Jeffrey J. Douglas, 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, Mary Sanchez and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Accepting a case disposition calling for dismissal of one count and no action on four prior convictions alleged under the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)(d)),¹ defendant and appellant Randall Roosevelt McCullon entered a plea of no contest to a charge of failing to register after an address change, a violation of section 290, subdivision (b).² Defendant was sentenced to the agreed upon term of two years in state prison.

Defendant filed a timely notice of appeal and requested for a certificate of probable cause, seeking review of his contention that the classification of his offense as a felony constitutes a violation of the equal provisions of the Fourteenth Amendment to the federal Constitution and article I, sections 7 and 24 of the California Constitution. We hold the felony classification of failure to register as a sex offender does not violate equal protection of the law and affirm.

Evidence at the preliminary hearing established that defendant had registered as a sex offender pursuant to section 290 in October 2007 but had not registered thereafter. The registration requirement had been explained to defendant. A June 2008 check of the residence on defendant's registration revealed defendant no longer resided at that address. Defendant had prior felony convictions for rape (§ 261, subd. (a)(2)), sexual penetration (§ 289), and kidnapping (§ 207).

Defendant argues that as a sex offender subject to registration, he is similarly situated to other California defendants subject to registration—narcotics offenders (Health & Saf. Code, § 11594), arsonists (§ 457.1), and gang members (§ 186.30). The latter group of defendants is subject to punishment as a misdemeanor for failure to register. Felony sex offenders, such as defendant, are subject to felony prosecution for failure to register. According to defendant, there is no rational basis for the disparate treatment of sex offenders and narcotics, arson, and gang registrants.

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

² Effective October 13, 2007, failure to inform the appropriate agency of an address change is punishable under section 290.013.

“[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, ‘is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.’ (7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 58, pp. 102–103 [citing, among numerous other authorities], *In re Madera Irrigation District* (1891) 92 Cal. 296, 308; *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 280; *People v. Globe Grain and Mill. Co.* (1930) 211 Cal. 121, 127.)” (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086.)

Defendant’s argument fails at the first step of equal protection analysis. “‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*)). It is true “that in most cases, as the Attorney General contends, persons who commit different crimes are not similarly situated” (*Ibid.*) However, “there is not and cannot be an absolute rule to this effect, because the decision of the Legislature to distinguish between similar criminal acts is itself a decision subject to equal protection scrutiny.” (*Ibid.*, fn. omitted.) Merely identifying different crimes is not an adequate response to a claim of a denial of equal protection, because if that were sufficient, “the state could arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes. (See *Lawrence v. Texas* (2003) 539 U.S. 558, 582 (conc. opn. of O’Connor, J.).)” (*Hofsheier, supra*, at p. 1199.)

Persons convicted of designated sex offenses are subject to a lifetime registration and reporting requirement. (§ 290, subs. (b) and (c).)³ Punishment for violation of the

³ Section 290 provides in pertinent part as follows: “(b) Every person described in subdivision (c), for the rest of his or her life while residing in California, or while attending school or working in California, as described in Sections 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is

registration and reporting requirements differs for misdemeanor and felony sex offenders. A willful violation of the registration requirement by a person required to register “based on a misdemeanor conviction or juvenile adjudication” is punishable as a misdemeanor. (§ 290.018.) Subject to certain exceptions (see § 290.018, subds. (f)-(h)), a person “required to register under the act based on a felony conviction or juvenile adjudication who willfully violated any requirement of the act or who has a prior conviction or juvenile adjudication for the offense of failing to register under the act” is guilty of a felony. (§ 290.018, subd. (b).)

The other three types of offenses requiring registration do not have separate felony and misdemeanor punishment provisions. It is a misdemeanor to fail to register as a

residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides, and shall be required to register thereafter in accordance with the Act. [¶] (c) The following persons shall be required to register: [¶] Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses.”

narcotics offender, arsonist, or gang member. (Health & Saf. Code, § 11594 [narcotics]; § 457.1 [arson]; § 186.33 [gang member].)

Defendant's contention is premised on the fact that registration in all four types of offenses serves the same purpose. Registration of sex offenders is intended to assure that persons convicted of the designated offenses are readily available to police surveillance because they are likely to commit similar offenses. (*People v. Castellanos* (1999) 21 Cal.4th 785, 796; *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.) "Similar registration requirements are imposed, under other statutes, upon persons convicted of certain drug offenses (Health & Saf. Code, § 11590 et seq.), arson (Pen. Code, § 457.1), and gang-related crimes (*id.*, § 186.30 et seq.). These statutes, like section 290 as applicable to sex offenders, are concerned with assisting law enforcement to prevent and detect repeat crimes of kinds deemed highly susceptible to recidivism. (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 982–983 [narcotics offender registration]; *People v. Adams* (1990) 224 Cal.App.3d 705, 710 [compulsive arsonist registration].)" (*In re Alva* (2004) 33 Cal.4th 254, 265, fn. 5.)

While it cannot be disputed that the four categories of offenders are required to register for the same purpose, defendant fails to explain how the conduct of sex offenders is similar to that of narcotics offenders, arsonists, or gang members. This is not a case in which similar conduct is punished in disparate ways, as in *Hofsheier, supra*, 37 Cal.4th 1185. Our Supreme Court in *Hofsheier* held that different registration rules for persons convicted of nonviolent felony oral copulation with a minor and unlawful sexual intercourse violated equal protection, because the crimes both concerned sexual conduct with minors and were sufficiently similar to warrant some level of scrutiny to justify the unequal treatment. (*Id.* at p. 1200.) Defendant fails to identify any similarity between the conduct involved in felony sexual offenses and the three other categories of crime subject to registration.

The Legislature has made clear that sex offenses are among the most heinous crimes in California, and has accordingly enacted particular statutes to deal with the unique issues pertaining to offenders. These enactments demonstrate the Legislature's

determination sex offenders are different from all others and require special consideration. For example, sex offenders are subject to a five-year enhancement for prior sex offenses and a ten-year enhancement if the offender has served two or more prior prison terms. (§ 667.6, subds. (a)-(b).) Full consecutive terms for designated sex offenses may be imposed for crimes committed upon the same victim on the same occasions, as an exception to the general sentencing scheme. (*Id.*, subd. (c).) Full, separate, consecutive sentences must be imposed for designated sex offenses if the crimes involves separate victims or the same victim on separate occasions. (*Id.*, subd. (d).) The “one strike law” provides for a term of either 15 or 25 years to life for sex offenses committed under various circumstances. (§ 667.61.) A person determined to be a sexually violent predator may be civilly committed for treatment and confinement for an indeterminate term. (§ 6604.) Felony punishment for felony sex offenders who fail to register is yet another example of the Legislature’s recognition of the seriousness of sex offenses. Taken together, these statutes demonstrate the special care taken by the Legislature to protect the public from the unique seriousness of sex offenses, as compared to others who must register but whose conduct does not justify the harshness of a felony conviction.

Assuming those required to register under all four categories were similarly situated, defendant’s equal protection claim would fail at the second step of the equal protection analysis. Once a court finds that parties are similarly situated, the next task of the court is to determine if there is a rational basis for the classification scheme. (*Hofsheier, supra*, 37 Cal.4th at p. 1200.) A rational basis exists where the court can identify a purpose that is reasonably conceivable for disparate treatment. (*Id.* at pp. 1200-1201.)

The Legislature could rationally conclude that the unique physical and emotional injuries which result from sex offenses, combined with the tendency of an unusually large number of sex offenders to reoffend, justifies felony, rather than misdemeanor, punishment for failure to register. The Legislature could also reasonably conclude that failure to register as a narcotics offender, arsonist, or gang member, while serious

conduct, does not pose the same dangers as sex offenders who fail to register, and misdemeanor punishment for the former group is an adequate remedy. There is also a rational basis for believing that potential felony punishment for failure to register as a sex offender provides a greater incentive for compliance by this unique group. There is nothing irrational about the sequential approach taken by the Legislature in assessing punishment for these dissimilar offenses.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.