

FILED

AUG 20 1980

JOHN J. CORCORAN, County Clerk

*Wallin*  
BY G. WALLIN, DEPUTY

APPELLATE DEPARTMENT OF THE SUPERIOR COURT  
OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

9	PEOPLE OF THE STATE OF CALIFORNIA,	) Superior Court No. CR A 16440
10	Plaintiff and Respondent	) Municipal Court of the
11	vs.	) Los Angeles Judicial District
12	JAY RIPLEY,	) No. 725286
13	Defendant and Appellant	) OPINION AND JUDGMENT

15 Appeal by defendant from judgment and order of the Municipal Court,  
16 Richard G. Kolostian, Temporary Judge.

17 Judgment affirmed. Order reversed. Case remanded with instruction

18 For Appellant - Thomas F. Coleman

19 For Respondent - Burt Pines, City Attorney  
Jack L. Brown, Deputy City Attorney  
20 Acting Supervisor, Appellate Section  
By Peter W. Mason, Deputy City Attorney

21 -oOo-

22 Briefing of this case was stayed by our order of July 13, 1979,  
23 pending the California Supreme Court's decision of Pryor v. Municip  
24 Court (1979) 25 Cal.3d 238. Now, following the rendering of the  
25 Pryor decision, which we do not believe dispositive of the instant  
26 case, we proceed to decide this matter.

27 We note at the outset that the defendant does not challenge  
28 his conviction. We mention also that the defendant has requested

1 that we take judicial notice of certain material. We decline to  
2 do so for the reason that the disposition we make of this appeal  
3 will enable the defendant to present to the trial judge all  
4 evidence considered by him to be supportive of his contentions.

5 Subsequent to entry of a nolo contendere plea to violation of  
6 Penal Code section 647 subdivision (a) but prior to imposition of  
7 sentence and requisite order to register as an habitual sex offender  
8 under Penal Code section 290,<sup>1/</sup> defendant requested the court to  
9 hold a hearing on the constitutional validity of section 290 as  
10 applied to section 647 subdivision (a) misdemeanants. He  
11 indicated that he wished to attack the constitutionality of the  
12 statute on due process, equal protection and cruel and unusual  
13 punishment grounds.

14 The trial judge refused to consider or rule on these issues.  
15 The judge indicated that the proper forum for hearing of constitu-  
16 tional defenses is the legislature or Supreme Court, and that  
17 "as much as [he] might agree with some of [defense counsel's]  
18 suggestions, [he was] bound by the law as it is now . . ., until  
19 [he was] ordered by a higher court."

20 Because no hearing was held on these defenses, the record on  
21 appeal is barren of factual findings essential to determination of  
22 defendant's contextual constitutional contentions. "Due process  
23 requires that a party sought to be affected by a proceeding shall  
24 have the right to raise such issues or set up any defense which he  
25 may have in the cause . . . A hearing which does not give the right  
26 to interpose reasonable and legitimate defenses cannot constitute  
27 due process of law . . ." 16A Am.Jur. 2d section 843.

28

---

1. All references to code sections are to the Penal Code unless otherwise indicated.

1           The judge's denial of a hearing at which evidence could be  
2 received and argument heard regarding the constitutional validity  
3 of section 290 as applied to defendant's particular case was error.  
4 These issues are best considered in a factual context which should  
5 be presented in the trial court. People v. Mills (1978) 81 Cal.  
6 App.3d. 171. Defendant's request for a hearing was timely, because  
7 the question of section 290's constitutional validity is premature  
8 if raised by a defendant who has not yet been found guilty of an  
9 offense which triggers the section 290 operation. Pryor v.  
10 Municipal Court (1979) 25 Cal.3d 238, 257 Fn.14. Refusal by the  
11 trial court to consider the defense based upon constitutional  
12 grounds was error. (See People v. Kiihoa (1960) 53 Cal.2d 748,  
13 753; People v. Sarazzawski (1945) 27 Cal.2d 7, 11; Witkin,  
14 California Criminal Procedure page 733 et seq.)

15           Absent a factual record to assist this court in evaluating  
16 defendant's contentions regarding the invalidity of the statute,  
17 this court is unable to comment intelligently on their merit,  
18 beyond stating that these contentions are at least deserving of  
19 airing and consideration. (See People v. Mills, supra, at 179,  
20 Fn.1 and 180.) In this case failure to consider the issues was  
21 not only prejudicial, because defendant has no other defenses, but  
22 it was a denial of due process.

23 ////

24 ////

25 ////

26 ////

27 ////

28 ////

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

The judgment of conviction is affirmed. The order to register under section 290 is reversed. The case is remanded for an evidentiary hearing on the constitutional validity of section 290.

*Booney*  
Presiding Judge

We concur.

*Acton*  
Judge

*Faines*  
Judge