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MAR - 4 1980
JOHN J. CO..., ..., County Clerk
BY E. WALLIN, DEPUTY

CERTIFIED FOR PUBLICATION

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT JAMES VIGNER, Defendant and Appellant.	Superior Court No. CR A 16400 Municipal Court of the Long Beach Judicial District No. M 14914 OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, W. H. Winston, Judge.

Judgment reversed and case remanded with directions.

For Appellant - Coleman & Kelber by Thomas F. Coleman

For Respondent - John A. Vander Lans, City Prosecutor
By Gerry L. Ensley, Deputy City Prosecutor

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Appellant was convicted of violating Penal Code section 647, subdivision (a) (committing a lewd act in public) after the court denied his motion for an acquittal under Penal Code section 1118.1. The arresting officer, Officer Titus, testified that he and his partner were working as vice officers on December 31, 1977. They arrived at a beach area, reputed to be a "pick up" spot, at 1:15 a.m. A number of men were observed entering and leaving the men's and women's restrooms. Officer Titus entered the women's restroom

and appellant followed him in. The area was unlit because the lights had been knocked out. As Titus leaned against the wall and smoked a cigarette, appellant peered into each stall and then approached the officer. He reached out his hand and touched Titus in the groin area for less than a second. Officer Titus suggested that they go out to the parking lot and appellant followed him. Appellant was then placed under arrest for lewd conduct.

The jury was instructed that the terms "lewd" and "dissolute" were synonymous and meant "lustful, lascivious, unchaste, wanton, or loose in morals and conduct." (CALJIC No. 16.402) This definition was held to be unconstitutionally vague in Pryor v. Municipal Court [1979] 25 Cal.3d 238 and the People properly concede reversible error on this basis.

Appellant further claims that the evidence was insufficient to convict him under the definition of "lewd" set forth by the Pryor court and that the trial court should be directed to enter an acquittal on this basis. The holding in Pryor is retroactively applicable (25 Cal.3d at pp. 257-258). Although this rule would not necessarily bar retrial, if it is established that the evidence at the first trial was insufficient to support conviction, the double jeopardy clause precludes further prosecution. Burks v. United States [1978] 437 U.S. 1.

The Burks holding was analyzed by the California Supreme Court in People v. Pierce [1979] 24 Cal.3d 199. In that case, a murder conviction was reversed for juror misconduct. The court went on to consider Pierce's claim of insufficient evidence, holding that retrial would be improper if the claim were meritorious.

(24 Cal.3d at pp. 209-210) In the present case, the evidence must be reviewed under the retroactive standard established in Pryor v. Municipal Court, supra, 25 Cal.3d 238. (See United States v. United States Gypsum Co. [1979] 600 F.2d 414.)

For purposes of Penal Code section 647, subdivision (a), Pryor v. Municipal Court states the following definition:

> "The terms 'lewd' and 'dissolute' in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view."

(25 Cal.3d 238, at pp. 256-257)

The opinion notes that this subdivision "serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct." (25 Cal.3d 238, at p. 255) It adds that the subdivision "prohibits only the solicitation or commission of a sexual touching, done with specific intent when persons may be offended by the act." (25 Cal.3d 238, at p. 257)

Under the Pryor holding, the evidence in the present case is insufficient to establish the presence of anyone who was or might have been offended by the act committed. No sexual words were spoken. Officer Titus testified that he was not sexually aroused by the act. He did not check to see if anyone else were present in the restroom. He did not testify that he was offended or that there was anyone else present who might have been offended. Since there was no evidence that anyone was or might have been offended by the act committed, the evidence was insufficient to support a conviction of violating Penal Code section 647,

subdivision (a) as defined by Pryor.

The judgment is reversed. The case is remanded and the trial court is directed to enter a judgment of acquittal.

CERTIFIED FOR PUBLICATION.

Judge

We concur:

Acting Presiding Judge

Judge

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT JAMES VIGNER, Defendant and Appellant.	Superior Court No. CR A 18321 Municipal Court of the Long Beach Judicial District No. 141 914 OPINION AND JUDGMENT

Appeal by defendant from Order of the Municipal Court, W. H. Winston, Jr., Judge

Order Reversed.

For Appellant - Thomas F. Coleman
Jay M. Kohorn

For Respondent - John A. Van Der Lans, City Prosecutor
Robert R. Recknagel, Ass't. City Prosecutor
William Hulsy, Deputy City Prosecutor
Gerry L. Ensley, Dpty. City Prosecutor

-oOo-

This court has previously decided an appeal of the instant case, in an unpublished opinion issued on March 4, 1980, in appeal number CR A 16400. In that opinion, we held that there was insufficient evidence to sustain

defendant's conviction of violating Penal Code section 647, subdivision (a) (lewd conduct in a public place), because no evidence had been presented at trial that defendant knew or should have known of the presence of persons who might be offended by the conduct with which he was charged, and thus, one element of the offense had not been proved. (Pryor v. Municipal Court (1979) 25 Cal.3d 238.) Because the evidence was not sufficient to support the verdict, retrial was barred. (People v. Pierce (1979) 24 Cal.3d 199, 210.) We remanded the case to the municipal court with directions to enter a judgment of acquittal. This was done.

Subsequently, defendant moved that his record be sealed pursuant to Penal Code section 851.8. The motion was summarily denied, the court stating only, "The court has fully complied with the directions of the Superior Court." Defendant appeals from the order denying the motion.

Section 851.8, subdivision (e) says that, "Whenever any person is acquitted of a charge and it appears to the judge presiding at the trial wherein such acquittal occurred that the defendant was factually innocent of such charge, the judge may grant the relief provided in subdivision (b)."

The People contend that the "judgment of acquittal" which was entered in the municipal court record upon this court's direction to enter a judgment of acquittal was not, in actuality, an acquittal. They offer no authority for this proposition, and we regard the point as waived. (Witkin, California Procedure, 2d ed., Appeal, Section 425.)

The People also argue that defendant is not "factually innocent" within the meaning of section 851.8. In support of this position, they cite a recent decision which states that "[e]ven an acquittal on the merits, which 'is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused'...does not suffice" to justify sealing. (People v. Glimps (1979) 92 Cal.App.3d 315, 321.)

While the foregoing statement is correct, it is not dispositive of the case before us, where there has been a factual determination as a matter of law that there was a total absence of evidence of an essential element of the offense. The court in People v. Glimps, supra, 92 Cal.App.3d 315, is careful to point out that there was "no basis even to assume that insufficiency of the evidence was involved" and that the judge who made the purported finding of factual innocence "had no competent evidence before him upon which to make such finding." People v. Glimps, supra, at page 325.

We believe that the reference to "competent evidence" in the case cited is the key to the determination of "factual innocence" in the present case. Incompetent evidence (inadmissible hearsay) such as police reports or probation reports cannot be considered by the trial judge in making the essential finding. Affidavits containing competent declarations of percipient witnesses may be considered (Code of Civil Procedure section 2009; Penal Code section 1201.5),

as well as competent evidence presented orally, either at the time of trial or on hearing of any motion, including the motion under Penal Code section 851.8.[1/]

In the present case, the only competent evidence before the trial judge when the Penal Code section 851.8 motion was called for hearing was the judgment of acquittal previously entered and our previous ruling in this case (CR A 16400) that the evidence presented at the trial constituted a total failure to establish an element of the crime as a matter of law. No affidavits were presented to the contrary, nor did the prosecution offer any witness or other competent evidence at the hearing. Under these circumstances the "factual innocence" of the defendant on the charge was established as a matter of law and the trial judge abused his discretion in denying the motion.

The order denying the motion to seal records is reversed, and the case is remanded with instructions to

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1. We recognize that our discussion of the test for determining "factual innocence" under the provisions of Penal Code section 851.8 as it read when this motion was filed (July, 1980) is of little value beyond the present case. The section was repealed and superseded by an extensive revision in September, 1980, which provides specifically for consideration of "declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable." (1980 California Statutes, Ch. 1172 (b)). The provisions of the new law, however, merely enhances our belief that the former provision is correctly construed in this decision in respect to the evidence admissible for determining "factual innocence."

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order the record sealed.

Judge

We concur.

Presiding Judge

Judge

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MAY 14 1981

John L. Corcoran, County Clerk

By A B Hardley Deputy

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. R. J. V., Defendant and Appellant.	Superior Court No. CR A 18321 Municipal Court of the Long Beach Judicial District No. 141914 ORDER CERTIFYING CASE TO COURT OF APPEAL

On People's motion, pursuant to Rule 63, California Rules of Court, we certify that the transfer of the above-entitled case to the Court of Appeal appears necessary to secure uniformity of decision. Specifically, our decision in the above-entitled case ordered sealing of defendant's record pursuant to Penal Code section 851.8 on the ground that the total absence of evidence of an essential element of the offense established that defendant was "factually innocent" as a matter of law within the meaning of Penal Code section 851.8 (as it existed prior to amendment in 1980).

This Appellate Department had previously reversed defendant's conviction of violating Penal Code section 647(a) (lewd conduct in a public place) because no evidence had been presented at trial that defendant knew or should have known of the presence of persons who might be offended by the conduct with which he was charged, and thus, one element of the offense had not been proved. Pryor v. Municipal Court (1979) 25 Cal.3d 238. Because the evidence was not sufficient to support the verdict, we held that retrial was barred and ordered the lower court to enter a judgment of acquittal on remand. This was done. People v. Vigner, CR A 16400 (copy attached).

As our prior opinion in this case illustrates, the uncontradicted evidence at trial showed defendant's conduct occurred in an unlit public women's restroom at 1:15 a.m., a place reputed to be a male homosexual gathering place. There was no one else shown to be present at the time and no sexual words were spoken when the officer was touched briefly in the groin area by defendant. The officer then suggested that they go out to the parking lot; appellant followed him and was arrested.

Since filing the present decision requiring that defendant's record be sealed, the case of People v. McConville, 2d Crim. No. 39105, filed April 14, 1981 (81 Daily Journal D.A.R. 1109) has come to our attention. That case holds that a person who openly engages in lewd conduct in a public restroom may be convicted under Penal Code section 647(a) where it is likely that members of the public may enter the restroom,

even though the only witness in the restroom at the time of the conduct acts as if he is not offended.

The foregoing ruling in McConville appears to be contrary to the basis for our ruling in the present case; hence this certification.

Judge

I concur.

Presiding Judge

sd

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MAR 21 1980

John J. Corcoran, County Clerk

By A B Hardey Deputy

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CRIM. NO. 37424 DIV 2

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ROBERT JAMES VIGNER, Defendant and Appellant.	Superior Court No. CR A 16400 Municipal Court of the Long Beach Judicial District No. M 14914 ORDER CERTIFYING CAUSE TO THE COURT OF APPEAL

Upon the motion of this court and pursuant to rule 63(c), California Rules of Court, the above-entitled case is hereby certified to the Court of Appeal.

We have received a letter from the Los Angeles City Attorney Office, a non-party to the appeal, advising us that our opinion, certified for publication, misconstrues the holding of Pryor v. Municipal Court [1979] 25 Cal.3d 238. Since the letter from the City Attorney's Office was not considered until the opinion had become final and since we agree that the opinion in its present form inadvertently misstates the law, we certify to correct the error.

The City Attorney has suggested that the language found at page 3, line 19 through page 4, line 1 in the slip opinion be replaced by the language stated below. We agree with the

suggestion.

> Under the Pryor holding, the evidence in the present case is insufficient to establish that appellant knew or should have known of the presence of anyone who might have been offended by the act committed. A reasonable person would not expect that a male loitering in an unlit women's restroom in a known "pick-up" spot at 1:15 a.m. would be offended by a brief sexual touching. There is no evidence that anyone other than Officer Titus was present who might have been offended. The evidence was insufficient to support a conviction of violation of Penal Code section 647, subdivision (a) as defined in Pryor.

The mental state element of knowledge of the actor is to be judged by the facts observable to a reasonable person at the time and place in question. Such facts are objective; that is, conduct or spoken words, which are reasonably apparent to the actor. The subjective, secretly held feelings of the other person, are not relevant to the determination of this mental state of the actor.

A person, including a "decoy" vice officer, who places himself in such a situation and who acts objectively as if to encourage lewd conduct, can not thereafter testify that secretly he was offended by the lewd act to thereby establish the required mental state element of knowledge of the actor. Our published opinion does not make this clear and may create confusion as to the meaning of the Pryor holding.

Bigelow
Acting Presiding Judge

I concur:

Taines
Judge

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SAETA, J. CONCURRING:

I concur in the certification but I feel that the officer's testimony that he was not aroused and his failure to testify that he was offended constitute material circumstantial evidence which the trier of fact could consider in determining defendant's knowledge and expectations of whether anyone was or would be offended by his acts.

Saeta

Judge

April 21, 1980

Honorable Rose Elizabeth Bird
Chief Justice of California
4250 State Building
455 Golden Gate Avenue
San Francisco, CA 94102

Dear Chief Justice:

Re: People v. Vigner - CR A 16400

This is a request for an order that an opinion of this court now at Bancroft-Whitney printers but not yet sent to West Publications, not be published. The reason for the request is that there is language in the opinion which is awkward and may be misleading. An attempt was made to correct the language of the opinion but time limitations prevented it as the following chronology shows:

March 4, 1880, opinion and judgment filed and certified for publication. Judges: Saeta, Bigelow and Fainer.

March 21, 1980, an order was made bytthis court certifying the cause to the Court of Appeal with suggestion that certain changes be made in the text (to correct the language).

April 10, 1980, the Court of Appeal, 2nd Appellate District, Division 2, citing the opinion and judgment certified for publication and the Order Certifying Cause to the Court of Appeal, made an order not accepting the transfer.

Copies of the opinion and the two orders mentioned are enclosed.

Judges Bigelow and Fainer request that the certification for Publication be withdrawn and the Reporter of Decisions be directed that the opinion not be published. Judge Saeta opposes this request.

Very truly yours,

_____
Judge

_____
Presiding Judge

_____
Judge

RAI:sd
Encs.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, v. R. J. V., Defendant & Appellant.	2 Crim. 40211 (LASC No. CR A 18321) (LBMC No. 141914) ORDER

THE COURT:

This court denied transfer of the above-entitled case on April 8, 1980. The Supreme Court of the State of California directed the reporter of decisions not to publish the opinion in an order dated May 22, 1980. There is no provision in the law for this purported "re-certification" to this court. This court determines that it has no jurisdiction over the matter.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, v. R. J. V., Defendant & Appellant.	2 Crim 40211 (LASC No. CR A 18321) (LAMC No. 141914) MEMORANDUM

THE COURT:

The order previously filed by this court in the above-entitled matter on May 27, 1981 is vacated.

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was certified to this court by the Superior Court and the record filed here May 18, 1981 and this court examined the record within 20 days of the filing here and determined that transfer was not necessary.

Appellate Department,
Superior Court of
Los Angeles County No. CR A 16400

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

VIGNER

On recommendation of the Appellate Department of the Los Angeles County Superior Court, the Reporter of Decisions is directed not to publish in the official reports the Appellate Department opinion in People v. Vigner, Superior Court No. CR. A 16400 filed March 4, 1980.

Bird

Chief Justice