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MAR - 4 1980

JOHN J. COUGHLIN, County Clerk

*E. Wallin*

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,	) Superior Court No. CR A 16400
Plaintiff and Respondent,	) Municipal Court of the
vs.	) Long Beach Judicial District
ROBERT JAMES VIGNER,	) No. M 14914
Defendant and Appellant.	) 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

-oOo-

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

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

9 The jury was instructed that the terms "lewd" and  
10 "dissolute" were synonymous and meant "lustful, lascivious,  
11 unchaste, wanton, or loose in morals and conduct." (CALJIC No.  
12 16.402) This definition was held to be unconstitutionally vague  
13 in Pryor v. Municipal Court [1979] 25 Cal.3d 238 and the People  
14 properly concede reversible error on this basis.

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

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

1 (24 Cal.3d at pp. 209-210) In the present case, the evidence  
2 must be reviewed under the retroactive standard established in  
3 Pryor v. Municipal Court, supra, 25 Cal.3d 238. (See United States  
4 v. United States Gypsum Co. [1979] 600 F.2d 414.)

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

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

16 (25 Cal.3d 238, at pp. 256-257)

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

23 Under the Pryor holding, the evidence in the present case  
24 is insufficient to establish the presence of anyone who was or  
25 might have been offended by the act committed. No sexual words  
26 were spoken. Officer Titus testified that he was not sexually  
27 aroused by the act. He did not check to see if anyone else were  
28 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,

1 subdivision (a) as defined by Pryor.

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

4 CERTIFIED FOR PUBLICATION.

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*Leeta*  
\_\_\_\_\_  
Judge

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We concur: *Bisclow*  
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Acting Presiding Judge

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*Fainer*  
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Judge

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FILED

APR 15 1981

JOHN J. CONCORAN, County Clerk

*E. Wallin*  
BY E. WALLIN, DEPUTY

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

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

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

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

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

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

1           The People also argue that defendant is not  
2 "factually innocent" within the meaning of section 851.8.  
3 In support of this position, they cite a recent decision  
4 which states that "[e]ven an acquittal on the merits, which 'is  
5 merely an adjudication that the proof at the prior  
6 proceeding was not sufficient to overcome all reasonable  
7 doubt of the guilt of the accused'...does not suffice"  
8 to justify sealing. (People v. Glimps (1979) 92 Cal.App.3d  
9 315, 321.)

10           While the foregoing statement is correct, it is  
11 not dispositive of the case before us, where there has been  
12 a factual determination as a matter of law that there was a  
13 total absence of evidence of an essential element of the  
14 offense. The court in People v. Glimps, supra, 92 Cal.App.3d  
15 315, is careful to point out that there was "no basis  
16 even to assume that insufficiency of the evidence was involved"  
17 and that the judge who made the purported finding of  
18 factual innocence "had no competent evidence before him upon  
19 which to make such finding." People v. Glimps, supra, at  
20 page 325.

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

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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.<sup>1/</sup>

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."

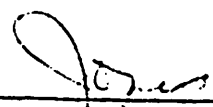
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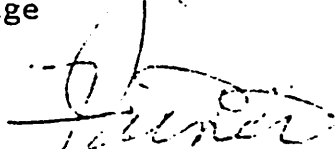



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order the record sealed.

We concur.

  
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Judge

  
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Presiding Judge

  
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Judge

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**FILED**

MAY 14 1981

John I. Corcoran, County Clerk

By AB Hardy  
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
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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).

1 This Appellate Department had previously reversed  
2 defendant's conviction of violating Penal Code section 647(a)  
3 (lewd conduct in a public place) because no evidence had been  
4 presented at trial that defendant knew or should have known  
5 of the presence of persons who might be offended by the  
6 conduct with which he was charged, and thus, one element of  
7 the offense had not been proved. Pryor v. Municipal Court  
8 (1979) 25 Cal.3d 238. Because the evidence was not sufficient  
9 to support the verdict, we held that retrial was barred and  
10 ordered the lower court to enter a judgment of acquittal on  
11 remand. This was done. People v. Vigner, CR A 16400 (copy  
12 attached).

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

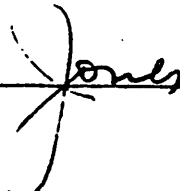
22 Since filing the present decision requiring that  
23 defendant's record be sealed, the case of People v. McConville,  
24 2d Crim. No. 39105, filed April 14, 1981 (81 Daily Journal  
25 D.A.R. 1109) has come to our attention. That case holds that  
26 a person who openly engages in lewd conduct in a public rest-  
27 room may be convicted under Penal Code section 647(a) where  
28 it is likely that members of the public may enter the restroom,

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

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

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I concur.

  
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Judge

  
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Presiding Judge



1 suggestion.

2 Under the Pryor holding, the evidence in the  
3 present case is insufficient to establish that  
4 appellant knew or should have known of the pre-  
5 sence of anyone who might have been offended  
6 by the act committed. A reasonable person  
7 would not expect that a male loitering in an  
8 unlit women's restroom in a known "pick-up"  
9 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 viola-  
tion of Penal Code section 647, subdivision (a)  
as defined in Pryor.

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

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

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I concur:

Bugelow  
Acting Presiding Judge  
Fairer  
Judge

1 SAETA, J. CONCURRING:

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

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Judge

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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, 1980, opinion and judgment filed and certified for publication. Judges: Saeta, Bigelow and Fainer.

March 21, 1980, an order was made by this 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)  
) (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.



RECEIVED MAY 22 1980

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

SUPREME COURT

FILED

MAY 22 1980

G. E. BISHEL, Clerk

Deputy

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